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n150. See Stanley v. Georgia, 394 U.S. 557, 566-67 (1969) ("The State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

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

[*1358] The United States Court of Appeals for the Seventh Circuit rejected a similar argument in American Booksellers Ass'n v. Hudnut. n151 In Hudnut, the Seventh Circuit struck down an ordinance that prohibited the trafficking of nonobscene materials that depicted the graphic, sexually explicit subordination of women. n152 The city defended the statute, claiming that it was necessary to eliminate the male tendency "to view women as sexual objects;" the city alleged that this created unacceptable attitudes, discrimination, and violence towards women. n153 Even after accepting this premise, the Seventh Circuit declared the law to be aimed at "thought control" and, therefore, inconsistent with the First Amendment. n154 Even if the exposure to computer-generated child pornography leads viewers to act out against children, the government should punish the harmful conduct and not the ideas or expressive materials that lead up to the behavior. n155

- - - - -Footnotes- - - - -

n151. 771 F.2d 323 (7th Cir. 1985).

n152. See Hudnut, 771 F.2d at 324, 332. The statute defined trafficking as the "production, sale, exhibition or distribution of pornography" and defined pornography as sexually explicit material, encompassing much more material than the Miller standard of obscenity. Id. Furthermore, victims of physical assaults precipitated by the attacker having previously viewed pornography had a cause of action against the seller, exhibitor, or distributor of the material. See id. at 325.

n153. See id. at 325.

n154. See id. at 328, 329, 332.

n155. See Stanley, 394 U.S. at 566-67 ("In the context of private consumption of ideas and information we should adhere to the view that "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law") (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)).

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

Somewhat more persuasively, Congress has explained that the purpose behind its ban on computer-generated child pornography is to prevent pedophiles from using child pornography to seduce children into performing sexual acts or posing for child pornography. n156 [*1359] Senator Hatch further explained that, because computer technology will soon be able to generate visual images that are indistinguishable from photographs of live events, computer-generated child pornography will be just as effective at luring children as real photographic images. n157

- - - - -Footnotes- - - - -

n156. See S. Rep. No. 104-358, at 13-14 (1996). Relying on testimony given by a few child pornography experts, Senator Hatch reasoned:

A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity. Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers.

Id.; see also Clinton, supra note 7, at 132-33 (describing the process by which pedophiles use child pornography to entice children into performing sexual acts); Liz Kelly, Pornography and Child Sexual Abuse, in Pornography: Women, Violence and Civil Liberties 119 (Catherine Itzin ed., 1992) (explaining that pedophiles use child pornography to sexually arouse their child victims and to persuade them that they will enjoy participating in the requested sexual activities).

n157. See S. Rep. No. 104-358, at 16 (1996).

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

In dicta, the Osborne Court intimated that prohibiting the possession of child pornography benefited society because evidence suggested that pedophiles use child pornography to entice children into performing harmful sexual acts. n158 The Osborne court accepted this proposition based on the Attorney General's Final Report on Pornography, which merely stated that "child pornography is often used as part of a method of seducing child victims." n159 This report did not contain any empirical evidence to support such a finding, but rather, was based on general assertions regarding the behavioral patterns of pedophiles. n160

- - - - -Footnotes- - - - -

n158. See Osborne v. Ohio, 495 U.S. 103, 111 (1990).

n159. See Attorney Gen. Comm. on Pornography, U.S. Dep't of Justice, Final Report 649 (1986).

n160. See id.

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

Of course, it may be true that many pedophiles possess some form of child pornographic material and may even use such material to seduce their victims. n161 It does not follow, however, that all possessors of sexually explicit depictions of children are pedophiles who use the material to seduce children into performing sexual acts. n162 Although Congress may have good intentions - protecting children from being subjected to molestation and other forms of sexual abuse - this objective should not be furthered at the expense of infringing on others' First Amendment rights. Computer-generated child

pornography is speech and expression in its purest form; therefore, the government's interest in prohibiting that expression must be compelling and the means chosen must be the least restrictive. n163 Even though protecting children from sexual abuse is a compelling governmental interest, prohibiting the creation and possession of computer-generated child pornography is not the least restrictive means of achieving that objective.

-Footnotes-

n161. See Adam W. Smith, Casenote, Taking Ferber a Step Further: Stanley Loses in the Battle Against Child Pornography, 14 Ohio N.U. L. Rev. 157, 166 n.74 (1987) (citing Goldstein, supra note 2, at 135-38).

n162. But see Josephine R. Potuto, Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession, 76 Ky. L.J. 15, 55 (1988) (arguing that very few possessors of child pornography have it merely to possess and view).

n163. Pure speech, as opposed to symbolic speech, is fully protected by the First Amendment. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (holding that even the exhibition of a play that "mixes speech with live action or conduct" does not justify the use of a less stringent standard of review). Government suppression of symbolic speech, which the Court has defined as nonverbal conduct that contains some expressive elements, is subject to an intermediate level of First Amendment scrutiny. See Texas v. Johnson, 491 U.S. 397, 406-07 (1989) (flag burning); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (draft card burning). Expression such as writing, drawing, or creating visual images via computer are types of pure speech that may only be restricted if the regulation survives strict scrutiny. See Johnson, 491 U.S. at 406.

-End Footnotes-

To satisfy such a burden, Congress, at a minimum, must provide some substantial, empirical evidence to demonstrate that the prohibited material's only purpose is to seduce children into participating in sexual activity. n164 In addition, the possession of purely communicative, nonobscene material is granted full First Amendment protection even though it could be used unlawfully or to achieve illegal ends. n165 Although mere possession of materials may be proscribed in limited instances, the government must demonstrate in those cases that the material has no other purpose. n166 These computer-generated images are produced without harming, abusing, or sexually exploiting children in any way. The material's potential for illegal use alone should not remove it from the protective shield of the First Amendment. n167

-Footnotes-

n164. There is no evidence to show that pedophiles only or mainly use child pornography to seduce children. Many pedophiles use other materials to entice their victims such as adult pornography, money, candy, and other types of gifts. See Potuto, supra note 162, at 28; see also S. Rep. No. 95-438, at 9 (1977), reprinted in 1978 U.S.C.C.A.N. 46 ("An offer of money, food, or shelter, or even a few friendly words or a show of concern can lead [children], unquestioning, into the hands of exploiters for purposes of pornography or prostitution.").

n165. See Quigley, supra note 28, at 363-64 (stating that the government does not have the power to prohibit the possession of every material that might be used for an illegal purpose, especially where the material consists of purely speech).

n166. See id.

n167. See United States v. Villard, 700 F. Supp. 803, 812 (D.N.J. 1988) ("When a picture does not constitute child pornography, ...it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it.").

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

Moreover, the government has other less restrictive ways of protecting children without prohibiting the possession and creation of computer-generated sexual material. Coercing a child to perform sexual acts or to pose in sexually explicit ways is prohibited in every state and by federal law. n168 In addition, most states have criminalized the distribution of sexually explicit materials to minors. n169 Also, if the [*1361] computer-generated images are sufficiently graphic, state and federal obscenity laws will prohibit the images altogether. These alternative means are equally effective at protecting children from sexual abuse without infringing the First Amendment right to possess sexually explicit images of children that are created without harming an actual child. n170 In order to protect children and the Constitution, Congress should be more concerned with punishing those who actually sexually abuse children rather than those who merely possess computer-generated child pornography. n171

- - - - -Footnotes- - - - -

n168. See 18 U.S.C. 2251 (West Supp. III 1986).

n169. See Ginsberg v. New York, 390 U.S. 629, 639 (1968) (holding that the First Amendment does not prohibit the government from outlawing the distribution of sexually explicit materials to minors). Some states have specifically criminalized the dissemination, by computer, of information about or to a minor that is intended to solicit sexual conduct with a minor or solicit visual depictions of such sexual conduct. See, e.g., Fla. Stat. Ann. 847.0135(2)(d) (West 1994). In addition, Congress has passed the Communications Decency Act, which prohibits a person from knowingly using the Internet to provide a child with sexually explicit material. See 47 U.S.C.A. 223(d) (West Supp. 1998). Although the Court struck this Act down as unconstitutional in Reno v. ACLU, 117 S. Ct. 2329, 2350 (1997), the decision rested on the vagueness of the term "indecent material" and the burdensome effect it would have on adults' rights to access these protected materials. See Reno, 117 S. Ct. at 2346, 2350. The decision clearly does not prevent Congress from prohibiting the distribution of sexually explicit materials to minors through the Internet.

n170. See Potuto, supra note 162, at 27 ("A focus on potentially causative harmful impact is simply insufficient justification to override the Stanley first amendment concerns.").

n171. See Quigley, supra note 28, at 365.

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

The Hatch Amendment goes beyond its stated purpose because it hinders art as well as pedophiles. Many serious artistic, scientific, and educational materials involve and contain sexually explicit depictions of children. n172 The child pornography statute proscribes nonobscene and obscene images; thus, serious works may fall within the prohibitions of child pornography if they are deemed to be "sexually explicit," a very amorphous term. n173

-Footnotes-

n172. See Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong. 46, 47-48 (1996) (statement of Judith F. Krug, Director of the American Library Association's Office for Intellectual Freedom (ALA-OIF)) (stating that many critically acclaimed movies such as Romeo and Juliet and The Last Picture Show and many famous visual works from artists such as Picasso and Leonardo would be illegal under the new changes to the child pornography statute).

n173. See, e.g., United States v. Knox, 32 F.3d 733, 745 (3d Cir. 1994) (holding that the term "sexually explicit" means lewd or lascivious and does not require the child in the material to be fully or even partially nude).

-End Footnotes-

In Ferber, the Court stated that, if the portrayal of a child in a sexually explicit manner was necessary for a serious artistic, scientific, or educational work, a person over the statutory age or some other simulation could be utilized to achieve that effect. n174 The use of an [*1362] adult model, even one who appears to be a minor, has been recognized as a legal alternative to the use of a child for the production of sexually explicit material. n175 In X-Citement Video, the Court concluded that the subject's age was an essential element of the offense. n176 Therefore, if the subject of the visual depiction is determined to be over the age of majority, the nonobscene material retains full First Amendment protection. n177

-Footnotes-

n174. See New York v. Ferber, 458 U.S. 747, 762-63 (1982).

n175. See id.

n176. See United States v. X-Citement Video, Inc., 513 U.S. 64, 72-73 (1994).

n177. See id. at 72.

-End Footnotes-

The new changes to the federal child pornography statute have now made this alternative unavailable. Child pornography is now defined as a visual depiction that is, or appears to be, of a minor. n178 A strict reading of this statute would even prohibit the use of an adult to portray realistically a minor in sexually explicit material. n179 Congress attempted to create an exception for such material in 18 U.S.C. 2252A by specifically exempting from coverage visual images that are created by using an actual adult to portray a minor. n180 This

provision, however, prohibits the creator of such images from presenting the material in any manner that conveys the impression that it contains a depiction of a minor engaging in sexually explicit conduct. n181

-Footnotes-

n178. See 18 U.S.C.A. 2256(8)(B) (West Supp. 1998).

n179. For instance, the movie Lolita, based on a famous book, opened in Europe in 1997, but was not released in any American theaters presumably because the story is about a man who is sexually obsessed with an underage girl. See Joan E. Bertin, Pornography Law Goes Too Far, L.A. Times, Oct. 17, 1997, at B9. Although this film has been artistically acclaimed, many believe that the film has not been exhibited in America due to fears of prosecution under the new federal child pornography statute, even though an adult plays the minor child in the film. See id. (voicing the belief that the mere viewing of child pornography does not cause the sexual abuse and exploitation of children).

n180. See 18 U.S.C.A. 2252A (West 1998). The statute states:

(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that -

- (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
- (2) each such person was an adult at the time the material was produced; and
- (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id.

n181. See id.

-End Footnotes-

This exception effectively swallows up the availability of the exemption. An artist can use an adult to portray a child engaging in [*1363] sexually explicit conduct, but the material cannot be presented in a realistic way so that the viewer would think that a child is being depicted. n182 The effect of these changes will inevitably cause artists and other image creators to censor themselves and avoid using previously acceptable methods of depicting minors in sexually explicit materials. n183

-Footnotes-

n182. Pursuant to the Court's holding in X-Citement Video, it is unlikely that this portion of the Hatch Amendment would withstand constitutional scrutiny. Cf. X-Citement Video, 513 U.S. at 72. In X-Citement Video, the Court explicitly stated that "sexually explicit conduct involving persons over the age of 17 are protected by the First Amendment." Id. The clear implication to draw

from the Court's holding is that sexually explicit materials produced using adult participants is constitutionally protected regardless of whether they were intended to give the impression that a child was being depicted.

n183. See Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong. 46, 50 (1996) (statement of Judith F. Krug, Director of ALA-OIF) (arguing that the new changes would effectively cause libraries to suppress certain works that depict children, even if adults are used to portray them). For example, in June 1997, an Oklahoma state judge deemed the Oscar-winning film Tin-Drum, which eludes to a sexual encounter between two minors, illegal under the new child pornography laws and ordered police to remove copies of the film from local video stores. See Joe Holleman, Webster Series Picks up Controversial "Tin-Drum": Oscar-Winner in "79 Faced Recent Pornography Protest, St. Louis Post-Dispatch, Oct. 16, 1997, at 3G. Pursuant to a lawsuit filed by the ACLU, a federal judge issued an injunction mandating the police to return the seized copies of the film. See Judge Rules Oklahoma Video Seizure Unconstitutional, ACLU News Wire (Dec. 29, 1997) <<http://www.aclu.org/news/w122997a.html>>. Although the judge did not rule on the constitutionality of the new child pornography statute, the court held that the police's ex parte seizure violated the First Amendment. See id.

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

Conclusion

By prohibiting computer-generated images that appear to be of a child, Congress is attempting to do more than just protect the children victimized by participation in the child pornography industry. Through such a prohibition, Congress has sought to protect society from the evils believed to be inherent in the possession and future use of these computer-generated sexually explicit materials. Congress's sole and primary purpose in passing statutes banning child pornography is, and should be, to prevent children from suffering the harms linked to their participation in child pornography - not to protect society as a whole. n184 Although this desire to [*1364] protect society is no doubt genuine, the resulting censorship is impermissible.

- - - - -Footnotes- - - - -

n184. Federal courts have consistently held that the purpose of the child pornography statutes is to protect children from victimization and not to protect society as a whole. For instance, in both United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) and United States v. Kirkland, No. 96-9152, 1997 WL 76211, at *3 (6th Cir. Feb. 20, 1997), the United States Court of Appeals for the Third and Sixth Circuits considered the United States Sentencing Guidelines and how they should be applied to convictions under the federal child pornography statutes. See Kirkland, 1997 WL 76211, at *3; Ketcham, 80 F.3d at 793. The defendants in these cases unsuccessfully argued that society was the primary intended victim to be protected by 18 U.S.C. 2252. See Kirkland, 1997 WL 76211, at *3; Ketcham, 80 F.3d at 792, 793. In rejecting the argument, both courts determined that for sentencing purposes, the primary objective behind 18 U.S.C. 2252 was not to protect society but "to protect children from the exploitation by producers of child pornography." Ketcham, 80 F.3d at 793; see also Kirkland, 1997 WL 76211, at *3. In addition, these courts implied that if the articles of child pornography were images of the same child victim, grouping offenses for sentencing would then have been appropriate. See Kirkland, 1997

WL 76211, at *2; Ketcham, 80 F.3d at 792.

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

What this Note attempts to demonstrate with respect to computer-generated child pornography is the likelihood that, under the new changes to the federal child pornography statutes, mere creators and possessors of inherently harmless, expressive material will be subject to criminal punishment. Moreover, the lasting effect of such a prohibition will deter artists and other image creators from producing serious works that portray minors in sexually explicit ways. This type of governmental suppression, and correlative self censorship, is precisely what the First Amendment should prevent. Therefore, unless there is some strong, empirical proof that the existence of computer-generated child pornography is directly injurious to the overall well being of our youth, there is no satisfactory justification for such a clear infringement of our constitutional guarantees.

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ARTICLE: GENERALLY APPLICABLE LAWS AND THE FIRST AMENDMENT

David Bogen*

* B.A. 1962, LL.B. 1965 Harvard University, LL.M. 1967 N.Y.U. Law School. Professor of Law University of Maryland School of Law. I would like to thank my research assistant, Susan Winchurch, University of Maryland School of Law '96. I would also like to thank my Maryland colleague Greg Young, and my colleagues during a visit at California Western, Michael Belknap and Marilyn Ireland, for their helpful comments. My thanks does not suggest that they concur in any portion of my analysis.

SUMMARY:

... The Justices agree that the First Amendment protects expression and religious exercise from impairment by laws that are not generally applicable. ... Where the Court finds a law to be both neutral and generally applicable, it will not apply strict scrutiny to the law's impact on religious exercise. ... It is only where the generally applicable law regulates conduct regardless of the ideas expressed that the issue of the impact on free speech becomes analogous to that of free exercise. ... But Cowles went beyond those cases to validate, without further analysis, a generally applicable law that resulted in a direct impact on speech. ... The pressure to equalize standards for free speech and free exercise may direct the Court to a position that inquires only as to the law's neutrality and general applicability. ... Thus far, this article has argued that the Court should have a similar standard for generally applicable laws under both the Free Exercise and Free Speech Clauses of the First Amendment, and that an exemption from heightened scrutiny for those laws that are "neutral" will under-protect both religion and speech even if the constitutional guarantees are understood to be directed to the purpose of the law. ...

TEXT:
[*201]

I. Introduction

The First Amendment analysis of generally applicable laws is a new battleground for the Supreme Court. The Justices agree that the First Amendment protects expression and religious exercise from impairment by laws that are not generally applicable. The Court will carefully scrutinize laws that apply only to activities involving speech, press or the exercise of religion, e.g., parade permits, loudspeaker volume regulations, broadcast regulation, and political leaflet regulation. Similarly, the Court will invoke First Amendment

standards when a law applies to behavior that is engaged in exclusively for religious or expressive purposes, such as prohibiting the slaughter of animals for religious reasons. n2 The standards for a generally applicable law are in [*202] conflict, however, revealing an inconsistency that marks a process of change.

- - - - -Footnotes- - - - -

n1. See McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (anonymous political leaflets); Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) [hereinafter Turner] ("must carry" rules for cable); Saia v. New York, 334 U.S. 558 (1948) (loudspeakers); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (parade permit).

n2. See Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) [hereinafter Lukumi].

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

This article focuses on the generally applicable law that is also content-neutral, n3 i.e. where the regulated behavior is usually engaged in for reasons other than expression or religious exercise, and the religious or expressive content of the behavior is irrelevant to the application of the law. For instance, a law prohibiting the sale or use of alcohol deals with behavior that usually is engaged in to achieve pleasurable sensations. Although alcohol use may be important in some religious ceremonies, any impact on religion or expression from a general prohibition on alcohol use is probably incidental. The issue is whether that impact should trigger an analysis under First Amendment standards.

- - - - -Footnotes- - - - -

n3. Although the content of a law may be influenced by the enacting body's religious values, the law is "content-neutral" in the sense used here when the religious or communicative aspects of the regulated behavior are irrelevant. The content-based law turns on the content of the communication. Content-based laws are subject to "strict scrutiny." See Turner, 114 S. Ct. at 2477. "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." Id. at 2458. The specific test applied, however, is very sensitive to context - e.g., whether the speech is injurious to reputation, arouses sexual thoughts, insults the listener, sells a product, etc.

Content-neutral laws that regulate expressive behavior are subject to intermediate scrutiny "because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." Id. at 2459. That risk is even less from a content-neutral law that is also generally applicable.

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

From one perspective, the concept of equality before the law is violated by exemptions from generally applicable laws, and the Constitution should not be interpreted to require such inequality. Thus, neither religious belief nor

communicative intent should provide its holder with a privilege to engage in conduct that would be illegal if it was engaged in by another. n4 An [*203] opposite perspective would stress the disparate impact resulting from the application of some laws to persons who act for religious or communicative reasons. Proponents of this latter perspective would argue that the constitutional concern for free exercise of religion and freedom of speech justifies some degree of protection from generally applicable laws. n5

-Footnotes-

n4. See Reynolds v. United States, 98 U.S. 145, 166-67 (1878). "Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Id.

n5. This latter perspective reflects Anatole France's sarcasm concerning "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets or to steal their bread." Anatole France, The Red Lily 75 (Modern Library trans., 1st ed. 1894).

-End Footnotes-

Where the free exercise of religion is at issue, a majority of the Justices in recent decisions have indicated that neutral, generally applicable laws do not violate the First Amendment. n6 In 1993, Congress passed "The Religious Freedom Restoration Act" n7 to restore the compelling interest test espoused by the minority in these cases. n8 The statute does not direct the Court to change its interpretation of the First Amendment, but establishes a new statutory right. Future litigants claiming a burden on the free exercise of their religion are likely to rely on the statute, and thus the Court may have few occasions to reconsider its interpretation of the free exercise clause. The Court's position on generally applicable laws under the Free Exercise Clause, however, ultimately may affect its resolution of the issue with respect to freedom of speech.

-Footnotes-

n6. See, e.g., Lukumi, 508 U.S. at 531; Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872, 878-80 (1990) [hereinafter Smith].

n7. 42 U.S.C. 2000bb-1 to 2000bb-4 (1994).

n8. The compelling interest test was set forth in Sherbert v. Verner, 376 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).

-End Footnotes-

The Court has sent mixed signals about the application of the guarantee of free speech to generally applicable laws. Sometimes it applies the test from United States v. O'Brien, n9 which [*204] requires a law regulating expressive behavior to be justified by an important or substantial state interest that is unrelated to the suppression of expression and insists that the restriction on free expression be no greater than is essential to further that interest. n10 On the other hand, the Court has stated that the incidental effects of a generally applicable law do not violate the First Amendment. n11

Further, the Free Exercise Clause decisions on generally applicable laws have cited free speech cases as parallels. n12 The current recognition of a conflict between the O'Brien test and the lack of scrutiny for generally applicable laws n13 suggests that the Court soon may resolve the differences and make its free speech decisions consistent with its free exercise jurisprudence. The O'Brien standard is under attack.

- - - - -Footnotes- - - - -

n9. 391 U.S. 367 (1968) [hereinafter O'Brien].

n10. Id. at 377; See also Barnes v. Glen Theater, Inc., 501 U.S. 560, 567 (1991) (applying the O'Brien test).

n11. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

n12. Lukumi, 508 U.S. at 543; Smith, 494 U.S. at 878, 886 n.3.

n13. Turner, 114 S. Ct. at 2458.

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

A determination that content-neutral generally applicable laws are not subject to heightened scrutiny under the First Amendment might be justified on the grounds that the Amendment is concerned with the purpose of the law rather than its effect on the individual. Even if a purpose-centered vision of the First Amendment is appropriate the Court should not lose its balance and endanger both speech and religion by engaging in the direct search for purpose. Too often, even when an improper purpose exists, it cannot be proved. Justice Scalia's "objective" approach to determining legislative purpose n14 increases the difficulties of such proof and is therefore totally unsuitable for evaluating constitutionality under the First Amendment. But the purpose inquiry will be underinclusive even if the Court considers the subjective statements of legislators, as it does when deter- [*205] mining whether a facially neutral classification with a discriminatory impact has a forbidden purpose under the Equal Protection Clause. A First Amendment test that relies on findings of purpose to invalidate laws permits unnecessary injury to speech and religion.

- - - - -Footnotes- - - - -

n14. See Lukumi, 508 U.S. at 558.

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

The compelling interest test as applied to generally applicable laws, satisfies the claims of freedom of speech and the free exercise of religion, but, applied uncritically, could hamper the government's ability to act for legitimate purposes. The Court should instead apply the O'Brien test because it assures both the government's ability to accomplish its legitimate functions and the protection of speech and religion from unnecessary restriction.

II. The Inapplicability of the First Amendment

The majority of the Court has said that the incidental impact on religious exercise of a generally applicable law does not require a compelling governmental interest to justify it. n15 Such statements led Justice O'Connor to accuse the majority of giving generally applicable laws a "talismatic" immunity from scrutiny under the First Amendment's Free Exercise Clause. n16 This immunity may also extend to generally applicable laws affecting expression, since the Court has stated that its free exercise principles are closely related to those invoked for generally applicable laws that have an incidental impact on expression. n17

-Footnotes-

n15. Lukumi, 508 U.S. at 531; Smith, 494 U.S. at 878.

n16. Smith, 494 U.S. at 901 (O'Connor, J., concurring).

n17. Id. at 878, 886 n.3; Lukumi, 508 U.S. at 543.

-End Footnotes-

A. The Free Exercise Inquiry

The Court's current position on the free exercise of religion is complicated. The Court repudiated a "compelling interest" First Amendment standard when scrutinizing a neutral, generally applicable law, but it retained several anomalous exceptions. The rejection of the "compelling governmental interest" test does not necessarily foreclose the application of a lesser standard, but the Court has not suggested one. The majority is divided over the proper approach for determining whether a law is neutral, and the Court has not established a standard for determining whether a law is generally applicable. Finally, the enactment of the Religious Freedom Restoration Act may have the perverse result of freezing judicial interpretation of the free exercise of religion in its current confused condition. n18

-Footnotes-

n18. Marci Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 Cardozo L. Rev. 357, 381 (1994); Daniel O. Conkle, The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute, 56 Mont. L. Rev. 39, 76-77 (1995).

-End Footnotes-

1. Laws Targeted at Religious Exercise

The Court will invalidate laws that target religious beliefs, including laws that punish behavior only when engaged in for religious reasons. n19 There are two identifiable harms that result from some religious beliefs. First, the beliefs themselves may be deeply offensive to persons who disagree with them, and second, they may prompt the believer to engage in socially harmful conduct. Prevention of the first injury is not a proper state interest under our philosophy. The second may be dealt with by legislating against the harmful conduct rather than the belief. In Employment Division Department of Human Resources v. Smith, n20 Justice Scalia's majority opinion began its discussion

of the First Amendment in absolute terms:

-Footnotes-

n19. See Lukumi, 508 U.S. at 535-40.

n20. 494 U.S. 872 (1990).

-End Footnotes-

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. n21

-Footnotes-

n21. Id. at 877 (citations omitted).

-End Footnotes-

Conduct conforming to religious beliefs, however, may threaten interests that society legitimately can protect. The Court has long recognized the dichotomy between abstract belief and religiously based actions. n22 But the dichotomy may also be misleading. A law that prohibits an action only when that action is engaged in for religious reasons targets belief rather than behavior. Such a classification is supported only by the illegitimate interest in suppressing belief.

-Footnotes-

n22. See Reynolds v. United States, 98 U.S. 145, 166 (1878).

-End Footnotes-

It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. n23

-Footnotes-

n23. Smith, 494 U.S. at 877. The attempt to protect persons from acts of racial or religious discrimination has not been regarded as posing serious First Amendment problems, unless the act itself was the utterance of words. See

Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993). The perpetrator's beliefs are relevant to the protection of the victim from harmful acts and they are proscribed only when manifested by such acts.

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

A few years after Justice Scalia wrote these words, the hypothetical became reality. In Church of the Lukumi Babalu Aye v. Hialeah n24 the Justices agreed that a city's ordinances forbidding animal sacrifices were directed unconstitutionally at behavior only when the behavior was engaged in for religious reasons, specifically the exercise of the Santeria religion of the Church of [*208] Lukumi Babalu Aye. n25 The ordinances failed the strict scrutiny test. n26

- - - - -Footnotes- - - - -

n24. 508 U.S. 520 (1993).

n25. Id. at 545.

n26. Id. at 546.

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

The Court unanimously held that Hialeah's ordinances were not neutral and generally applicable, but the Justices did not produce a unanimous opinion. n27 They disagreed over whether laws that target religion are per se invalid, on the proper method to ascertain whether legislation is neutral and generally applicable, and on the proper test to be applied to neutral, generally applicable laws.

- - - - -Footnotes- - - - -

n27. Id. at 546, 531.

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

2. Neutrality and General Applicability

Justice Kennedy's opinion for the Court in Lukumi referred to a "requirement" of neutrality and general applicability. He noted that "neutrality and general applicability are interrelated." n28 Neutrality is determined by the object of the law. n29 General applicability involves categories of selection. n30 Any law affecting religion must use the proper means ("general applicability" [*209] bility") to achieve a proper end ("neutrality"). Neutrality analysis often invokes overbreadth - where the burden on religious exercise is not necessary to satisfy legitimate government interests, the overbreadth reveals that the law's object is to burden religion. n31 General applicability analysis invokes underinclusiveness - where religious exercise is burdened while non-religious behavior threatening similar legitimate interests of government is not. n32 The category used by the underinclusive law is too narrow, even if a legitimate interest of government is satisfied. Of course, the narrow categorization also indicates that the object of the law was to burden religion.

-Footnotes-

n28. Id. at 531.

n29. Justice Scalia defined "neutrality" as governed by the face of the statute while "general applicability" dealt with the object of the statute:

In my view, the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion ... ; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.

Id. at 557 (Scalia, J., concurring) (citations omitted). Justice Souter argued that neutrality was not limited to the object of the law, but applied to its effect as well:

Our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws.

Id. at 561-62 (Souter, J., concurring).

n30. Id. at 542.

n31. See id. at 538-39.

n32. See id. at 543-45.

-End Footnotes-

Neutrality and general applicability are requirements for the validity of laws under the Free Exercise Clause because there is no legitimate state interest that justifies violating them. Restriction of religion is not a legitimate object of any law. While the law may deal with harm caused by religion, such harm is unlikely to be unique to religion. Thus, a classification limited to religion carries on its face the indicia of illegitimate purpose. Justices O'Connor and Blackmun said "regulation that targets religion in this way, ipso facto, fails strict scrutiny." n33 Justice Kennedy's majority opinion avoided a per se rule, but it will be difficult for any such law to satisfy his requirement that it be narrowly tailored to advance a compelling government interest. n34

-Footnotes-

n33. Id. at 579.

n34. See id. at 531-32.

-End Footnotes-

a. Neutrality

Justice Kennedy stated in Lukumi that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." n35 Some laws are invalid on their face, but facially neutral laws also may have an improper object. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." n36

-Footnotes-

n35. Id. at 533.

n36. Id. at 534.

-End Footnotes-

Justice Kennedy focused on the text of a resolution passed simultaneously with the ordinances, the discriminatory impact of the ordinances, and their overbreadth to unmask their hostility to the Santeria religion. n37 This portion of his opinion received no objections. n38 Justice Kennedy's next step, however, provoked disagreement. Citing the analysis of neutrality in equal protection cases, Justice Kennedy used the statements made by members of the decisionmaking body during the hearings to show that the object of the law was to burden religion. n39

-Footnotes-

n37. Id. at 526-29, 535-40. The overbreadth and underinclusiveness analysis applied to only three of the ordinances. Id. at 535-40. The Court struck down a fourth ordinance that was passed the same day as the others and also effectively prohibited Santeria practices. Id. at 540. The Court said that all four ordinances might be treated as a group for neutrality purposes, because "it would be implausible to suggest" that only the first three ordinances "had as their object the suppression of religion." Id.

n38. This part of the opinion was joined by Justices Stevens, Scalia, Rehnquist, and Thomas. Justice Blackmun's concurrence, in which Justice O'Connor joined, did not discuss the evidence for finding the ordinances were not neutral but did find the law discriminated against religion as such. Id. at 579. Justice Souter's concurrence also stated that prohibiting religion was "the object of the laws" without further pursuing the analysis. Id. at 559. Justice White did not write separately, but refused to join this portion of the opinion. It seems unlikely that Justice White objected to the analysis of the evidence, and more likely that it was the separation of the categories of neutrality and laws of

general applicability that drew his objection.

n39. Id. at 541-42.

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

Justice Scalia and Chief Justice Rehnquist protested this use of statements made in the course of the political process. They [*211] distinguished between the object of the laws and the subjective motivation of the lawmakers, stating "the First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted This does not put us in the business of invalidating laws by reason of the evil motives of their authors." n40

- - - - -Footnotes- - - - -

n40. Id. at 558.

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

b. General Applicability

Justice Kennedy's discussion of the general applicability of the laws avoided consideration of legislative motive. He said that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." n41 Justice Kennedy did not define the standard for general applicability, but noted that the ordinances in question fell well below the minimum standard. n42 This portion of his opinion was controversial only because it suggested that a neutral, generally applicable law needed no further scrutiny. The Justices agreed that the ordinances were not generally applicable laws in view of their text and their failure to reach non-religious behavior that posed similar secular problems for society. n43

- - - - -Footnotes- - - - -

n41. Id. at 543.

n42. Id. Justice Souter commented that "general applicability is, for the most part, self-explanatory." Id. at 561 (Souter, J., concurring).

n43. See id. at 545-46.

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

3. The Exemption from First Amendment Scrutiny for Neutral, Generally Applicable Laws

The law targeting religion stands at one extreme. The law forbidding murder is at another. The neutrality of a law is evidence that it responds to legitimate concerns and that injury to religion is not its object. The general applicability of the law confirms this. For Justice O'Connor, the neutrality and general [*212] applicability of the law are merely evidence of a legitimate state interest, not reasons to change the standard for evaluating that interest. For her, the First Amendment requires the interest to be compelling to sustain a state law that restricts religious exercise. n44

-Footnotes-

n44. This is, of course, a gross simplification. See, e.g., Lyng v. Northwest Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1985) (no heightened scrutiny where planned government road on public land would disrupt religious use of land by Indian tribes since no one was coerced into violating their beliefs nor penalized by denial of any right or benefit enjoyed by others).

-End Footnotes-

The majority of the Court has been troubled over where to draw the line if it exempts religious conduct from generally applicable laws. Weighing the values at stake in particular cases tends to become arbitrary in practice and provides little guidance to lower courts. The more stringent the free exercise test, the more situations where government (here the Court) compels a disparity of treatment favoring religious believers. This raises concerns from another section of the First Amendment - the Establishment Clause. n45 The Court responded to these problems by jettisoning the "compelling interest" test.

-Footnotes-

n45. See William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 320 (1991).

-End Footnotes-

Where the Court finds a law to be both neutral and generally applicable, it will not apply strict scrutiny to the law's impact on religious exercise. For example, Justice Kennedy's plurality opinion in Lukumi cited Smith for the proposition that:

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. n46

-Footnotes-

n46. Lukumi, 508 U.S. at 531.

-End Footnotes-

The statement left open the possibility that the First Amendment requires neutral laws of general applicability to meet some [*213] intermediate test, such as serving an important or substantial government interest, to justify imposing such a burden on religious exercise.

It is very unlikely that Justice Kennedy intended his opinion to support an intermediate standard. Justice Souter, in his Lukumi concurrence, attacked

Justice Kennedy for failing to repudiate Smith. The Smith opinion, written by Justice Scalia, received the support of Chief Justice Rehnquist and Justices Kennedy, Stevens, and White. Justice Scalia's majority opinion in Smith did not simply negate the compelling government interest test, but suggested that neutrality and general applicability insulated the law from First Amendment challenge. "If prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." n47

-Footnotes-

n47. Smith, 494 U.S. at 878.

-End Footnotes-

The Court must examine laws affecting religious exercise to determine whether they are generally applicable and whether the object of the law is neutral. According to Justice Scalia, however, satisfaction of those tests is sufficient. n48 A neutral, generally applicable law that burdens the exercise of religion is not subject to First Amendment scrutiny. n49

-Footnotes-

n48. Justice Scalia observed that the Court has held "that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion." Barnes v. Glen Theater, Inc., 501 U.S. 560, 579 (1991) (Scalia J., concurring) (citing Smith, 494 U.S. at 885).

n49. Justice Souter's Lukumi concurrence characterized Smith as stating that "if prohibiting the exercise of religion results from enforcing a 'neutral, generally applicable' law, the Free Exercise Clause has not been offended." Lukumi, 508 U.S. at 559. (Souter, J., concurring).

-End Footnotes-

Although Justice Souter urged the Court in his Lukumi concurrence to reexamine Smith, the current Court, while differing [*214] over criteria for determining neutrality, appears to support Smith's holding. n50 If neutrality and general applicability insulate a statute regardless of its impact on the particular exercise of religion, the Court must be focusing on the government's behavior rather than that of the religious practitioner. Thus, Smith assumes that the First Amendment Free Exercise Clause protects only against government action with the forbidden object of harming religion.

-Footnotes-

n50. Justices Kennedy, Rehnquist, Scalia, Stevens, and White joined in Smith. Smith, 494 U.S. at 873. Justices Blackmun, Brennan, Marshall, and O'Connor took a different view of the proper rule. Id. at 891. In Lukumi, Justices Blackmun and O'Connor reaffirmed their disagreement with Smith and Justice Souter appeared ready to join them. Lukumi, 508 U.S. at 577-80, 559-77. Justice Thomas, who replaced Justice Marshall on the bench, joined in the sections of Justice Kennedy's Lukumi opinion that spoke approvingly of Smith. Id. at 522.

Thus, even if Justices Breyer and Ginsburg oppose the rule of Smith, five votes remain in support - Justices Kennedy, Rehnquist, Scalia, Stevens, and Thomas.

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

4. Free Exercise Anomalies

Justice Souter joined the chorus of commentators who find the Smith rationale at war with decisions it purportedly distinguished, stating "we are left with a free-exercise jurisprudence in tension with itself." n51 Justice Scalia attempted in Smith to distinguish cases like Sherbert v. Verner. n52 Sherbert and its successors held that the state could not deny unemployment compensation to individuals who lost their jobs because their religious beliefs conflicted with their job requirements. n53 The Smith opinion found the Sherbert line of cases applicable only to laws where there is in place a system of individualized exemptions, n54 but Smith, like Sherbert, was an unemployment compen- [*215] sation case. Further, the distinction itself is problematic. n55 Almost every rule of law creates individualized exemptions at some level of abstraction. For example, the prohibition against murder seems to be a law of general application, but the general prohibition against taking another's life doesn't apply to self-defense, military necessity, or even to accidents not amounting to criminal negligence. This may be described as the definition of a law of general applicability whose application to religious murder raises no First Amendment problems, or it may equally well be described as a system of individualized exemptions whose failure to include actions taken for religious reasons requires a showing of a compelling governmental interest. There is no objective basis offered to distinguish which laws fit into which category. The underlying question remains why the particular law sanctions the behavior when it is religiously motivated.

- - - - -Footnotes- - - - -

n51. Lukumi, 508 U.S. at 564.

n52. 374 U.S. 398 (1963).

n53. See id. at 410.

n54. Smith, 494 U.S. at 884.

n55. See John Delaney, Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith, 25 Ind. L. Rev. 71, 74 (1991) (arguing that the Smith Court incorrectly distinguished "between types of cases in which the Court must weigh the competing interests of the individual and the government.").

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

Justice Scalia's claim that other decisions supporting free exercise claims against general criminal laws, like Wisconsin v. Yoder, n56 mixed another constitutional right with the free exercise claim is not reflected in the language of those opinions. As Justice Souter suggested in Lukumi, the peyote users in Smith also might claim free expression or privacy rights, so Smith is not distinguishable. n57

-Footnotes-

n56. 406 U.S. 205 (1972).

n57. Lukumi, 508 U.S. at 567 (Souter, J., concurring).

-End Footnotes-

The weaknesses of the distinctions do not mean that the Court will overrule either Smith or those cases that point in another direction. In Lukumi, Justice Kennedy used the "individualized exemptions from a generalized requirement" analysis as part of the rationale for invalidating the Florida ordinance that [*216] forbade "unnecessary" killing of animals. n58 Assuming the constitutional issue comes before it again, the Court will choose the line of cases which it finds most appropriate. One way it may reconcile the cases is to find that certain exemptions raise issues over the law's purpose and thus suggest that the law is not generally applicable. n59

-Footnotes-

n58. Id. at 537.

n59. See infra Part II.C for an attempt to explain the decisions in terms of the likely purpose of the law.

-End Footnotes-

5. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act may avert the re-examination of Smith that Souter called for in Lukumi. n60 That would be ironic because one purpose of the Act (which sharply criticizes Smith) is to "restore the compelling interest test." n61 Even more perverse, as a result of the Act, the next test of the Smith doctrine in the Court may find Congress implicitly supporting it.

-Footnotes-

n60. 42 U.S.C. 2000bb (1994). See also Douglas Laycock, The Religious Freedom Restoration Act, BYU L. Rev. 221, 254-55 (1993).

n61. 42 U.S.C. 2000bb provides in pertinent part:

(a) Findings

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are -

[sp'(a)+'n](1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.

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

In the future, any person whose religious exercise is substantially burdened by state government will claim it is a violation of the Religious Freedom Restoration Act. Even if the plaintiff also raises a constitutional claim, the Court could give [*217] relief under the statute without reaching the plaintiff's constitutional objection.

The Court will examine the Act's constitutionality. n62 The statute makes no attempt to tie its operation to effects on commerce but apparently relied on Congressional power under Section 5 of the Fourteenth Amendment to enforce that Amendment. n63 The scope of that power remains controversial. n64 Several scholars have questioned whether Section 5 is sufficient to support the Religious Freedom Restoration Act, n65 and several others have asserted that it is not. n66 Nevertheless, the current Court may well uphold the Act.

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n62. Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), reh'g denied, 83 F.3d 421 (5th Cir. 1996), cert. granted, 117 S. Ct. 293 (Oct. 15, 1996) (No. 95-2074).

n63. See United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that an activity must "substantially affect" interstate commerce to be within Congress's power to regulate it under the Commerce Clause). See also Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that "section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees.") Id. at 642.

n64. Hamilton, supra note 18, at 389. See also Oregon v. Mitchell, 400 U.S. 112 (1970) (limiting the scope of 5).

n65. "The constitutionality of this legislation ... raises a number of questions involving the extent of Congress's powers under Section 5 of the Fourteenth Amendment." Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994). See Ira Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 52-66 (1993); Scott C. Idleman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 Tex. L. Rev. 247, 285-322 (1994).

n66. The precedents have involved the prevention of race discrimination, the core of the Fourteenth and Fifteenth Amendments. The Court might not give Congress as much leeway with respect to enforcing the incorporation of the Bill of Rights. See Jay S. Bybee, Taking Liberties with the First Amendment:

Congress, Section 5, and the Religious Freedom Restoration Act, 48 Vand. L. Rev. 1539, 1624-33 (1995) (First Amendment is disability on Congress creating implied immunity in states from congressional regulation, and Section 5 does not affirmatively empower Congress to change the relationship); Conkle, supra note 18, at 61-78 (arguing that the Act frustrates the primary function of the Court as interpreter); Christopher Eisgruber and Lawrence Sager, Why The Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 460-69 (1994) (arguing that the Act conflicts with the Court's substantive judgment of constitutional value); and Hamilton, supra note 18, at 387-96 (arguing that Congress is an inappropriate body to enforce First Amendment incorporation against states because the constitutional provision indicates suspicion of Congress).

Further, a congressional mandate of religious "accommodation" unless a compelling interest is shown arguably violates the command of the First Amendment that Congress shall make no law respecting an establishment of religion. See Idleman, supra note 65, at 285-302 (suggesting this is an open question); Eisgruber and Sager, supra note 66, at 452-60 (arguing that the Act violates the Establishment Clause).

- - - - -End Footnotes- - - - -
[*218]

Justices O'Connor and Souter, opponents of the Smith standard, should have no difficulty in sustaining the statute as simply providing procedures to vindicate the Constitutional right of free exercise of religion against state interference. Justices Breyer and Ginsburg might well agree. If so, only one more vote from among the supporters of Smith would be necessary to uphold the Act.

Smith's supporters may find the statute constitutional without changing their views or acknowledging any superior power of constitutional interpretation in Congress. Just as Congress was permitted to ban the use of literacy tests in elections because they could be used to discriminate against racial and ethnic groups, n67 it may ban laws that substantially burden religious exercise without showing a compelling interest because such burdens could be imposed for the impermissible object of harming religion. Given the difficulties of determining the object of a law, some overbreadth is necessary to assure that no law with the improper objective of suppressing religious exercise is enacted. Thus, the statute enforces the command of the Fourteenth Amendment (incorporating the First) that government not abridge the free exercise of religion, even though the statute reaches government action that is not itself violative of the Amendment. If the Court follows this reasoning, it could uphold [*219] the Religious Freedom Restoration Act without reconsidering its opinion in Smith.
n68

- - - - -Footnotes- - - - -

n67. See Katzenbach v. Morgan, 384 U.S. 641 (1966).

n68. See Bonnie Robin-Vergeer, Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act, 69 S. Cal. L. Rev. 589 (1996); Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 897 (1994); Douglas Laycock, The Religious Freedom Restoration Act, BYU L. Rev. 221, 254-55 (1993); Rex E. Lee, The Religious Freedom Restoration

Act: Legislative Choice and Judicial Review, *BYU L. Rev.* 73, 90-94 (1993); and Matt Pawa, Comment: When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment, 141 *U. Pa. L. Rev.* 1029 (1993).

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

The Act may even ironically support Smith. It states that it applies to federal legislation, including subsequent enactments, unless they explicitly refer to the Act and exclude application. n69 Since one Congress cannot disable its successor from passing a law, this provision should be understood as a guide to interpretation. Courts should construe federal statutes to contain, in effect, an accommodation clause, i.e. federal laws do not apply where their application would substantially burden a person's exercise of religion unless the application furthers a compelling governmental interest. n70 If a federal statute expressly negates any accommodation clause, the Court would have to reach the constitutional issue. n71 Under those circumstances, the implicit [*220] position of Congress would support the rule in Smith, if necessary to uphold its statute.

- - - - -Footnotes- - - - -

n69. 42 U.S.C. 2000bb-3 (a) (1994).

n70. A court may find that the legislature intended a subsequently enacted statute to apply to a religious exercise despite the absence of explicit reference to the Religious Freedom Restoration Act. See Gordon Young, *Some Reflections on Gramm-Rudman-Hollings*, 45 *Md. L. Rev.* 1 (1986); Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 *Hastings Const. L.Q.* 185 (1986). Explicit exclusion of the Act is tantamount to an admission that Congress believes its statute imposes a substantial burden on religion that is not justified by a compelling interest. Rather than make such an admission, Congress might specify that a particular statute should apply to all persons "regardless of any impact on the religious exercise of any individual." This is particularly likely if the Court construed an earlier version of the statute to be inapplicable to a religious exercise because of the Religious Freedom Restoration Act.

n71. It is possible, but unlikely, that the Court could duck the issue. Even if the Court previously construed a similar statute to be inapplicable to religious exercise because of the Religious Freedom Restoration Act, the Court might find the reenactment with an express negation of any religious exemption corrects the Court's construction and provides evidence that the government interest is compelling. Thus, the new statute may be sustained as satisfying a compelling interest without forcing the court to reassess whether an interest of lesser magnitude would be sufficient under the Constitution.

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

B. The Free Speech Inquiry

There is a close relationship between the Free Exercise of Religion Clause and the Free Speech Clause in the First Amendment. Smith cited cases on freedom of the press to support the proposition that the First Amendment is not offended by the incidental effect of an otherwise valid law of general application. n72

Similarly, in Lukumi, Justice Kennedy said, "The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence." n73

-----Footnotes-----

n72. Smith, 494 U.S. at 878, 886 n.3 (citing Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) for the proposition that "generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment.").

n73. Lukumi, 508 U.S. at 543. In support of this statement, he cited cases on freedom of speech and establishment of religion.

With respect to the requirement of general applicability, Justice Kennedy wrote for six members of the Court, including Justices Rehnquist, Scalia, Stevens, Thomas and White. A neutral law that burdens religious exercise is usually a law of general application. There are few legitimate state interests (other than the prevention of discrimination against religion) that require a law that operates only in the area of religion. That is particularly true because the establishment clause protects against state support of religion just as the free exercise clause protects against burdening it. Thus, there has been little need to develop the notion of the "generally applicable" law in free exercise jurisprudence separate from analysis of the "neutrality" of the law.

On the other hand, content-neutral laws affecting free speech may be limited to categories of expression. The Federal Communications Commission regulates cable and broadcast media; local and state laws regulate time, place and manner for speech in public forums. Such laws may be content-neutral, but they are not of general applicability. The Court rarely receives a challenge based on a free speech claim to a neutral law of general applicability.

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

[*221]

There are significant differences in the problems posed by speech and religion. Unlike the situation with respect to the free exercise of religion, the lack of general applicability for a regulation affecting speech does not demonstrate the absence of legitimate state interests. There are many reasons to regulate communication apart from the message being communicated, including concern over volume and conflicts with other uses of space. Valid content-neutral laws that are not generally applicable are common. Nevertheless, a content-neutral regulation that applies only to means of expression invites scrutiny. "Laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' ... and so are always subject to at least some degree of heightened First Amendment scrutiny." n74 They still may pose significant dangers to expression, and may either be manipulated or be designed to hinder groups with particular views or to exclude particular topics from public debate.

-----Footnotes-----

n74. Turner, 114 S. Ct. at 2458.

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

The general applicability of a law provides some assurance that the law is not designed to harm the expression of ideas, but general applicability alone does not protect against content discrimination to the extent it protects religious beliefs. Normally, generally applicable laws that affect free exercise are regulations of conduct enforced without regard to the content of the beliefs of individuals engaging in that conduct. Thus, the application of the law to conduct engaged in for religious reasons does not raise suspicions of hostility to religion.

In speech cases, however, the impairment often occurs because the state claims that the content of the speech comes within the statutory scope of a generally applicable law, e.g. breach of the peace, obstruction of the draft, intentional infliction of emotional harm. Thus, such laws are not ultimately content-neutral, and their application to speech raises a suspicion of animus toward the ideas expressed. n75 It is only where the generally applicable law regulates conduct regardless of the ideas expressed that the issue of the impact on free speech becomes analogous to that of free exercise.

- - - - -Footnotes- - - - -

n75. Words are often used as an essential part of a course of conduct that is punishable, e.g. fraud, intimidation, blackmail, copyright violation. Libel, obscenity, and fighting words are punishable by laws that would be hard to call "content-neutral." The Court gives careful scrutiny to these laws and has created a variety of tests dependant upon context to deal with laws affecting speech that are not content neutral, but such laws may be sustained.

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

The question is whether the Court will give heightened scrutiny to neutral and generally applicable laws that impact expressive conduct. The Court may be in the process of transition on this issue, moving from an intermediate level of scrutiny toward the absence of scrutiny adopted in its free exercise decisions.

1. The Conflict in the Cases

In Turner, Justice Kennedy underscored the Court's confusion: "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment." n76 Cohen v. Cowles Media n77 and Barnes v. Glen Theater, Inc., n78 decided in the same term, upheld laws that applied to expressive activity on the same basis as laws that applied to non-expressive activities. Like ships passing in the night, the two decisions took no notice of each other as they approached the issue of generally applicable laws under the First Amendment from opposite directions.

- - - - -Footnotes- - - - -

n76. Turner, 114 S. Ct. at 2458 (comparing Cohen v. Cowles Media Co., 501 U.S. 663, 670, (1991) with Barnes v. Glen Theater, Inc., 501 U.S. 560, 566-67 (1991)).

n77. 501 U.S. 663 (1991).

n78. 501 U.S. 560 (1991).

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[*223]

a. Barnes v. Glen Theater - The O'Brien Test

In Barnes, the plaintiffs sued to enjoin the application of Indiana's public indecency statute to nude dancing. The statute forbade nudity in public. On its face, the prohibition applied regardless of any expressive intent on the part of the nude individual - whether dancing, walking, standing, or sleeping. The State argued that regulation of public nudity was a permissible "time, place or manner" regulation of expression. n79

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n79. Id. at 566.

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The Court began its analysis by determining that the conduct in question, nude dancing, was protected expression. n80 It then looked to the level of protection to be afforded such expression. The Court found the appropriate standard for laws regulating expressive conduct in O'Brien, which upheld the application to a war protestor of a statute punishing the burning of a draft card. n81 O'Brien stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." n82 The O'Brien test sustains a regulation that is otherwise within the scope of government power if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." n83

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n80. Id. at 565-66.

n81. 391 U.S. 367 (1968).

n82. Barnes, 501 U.S. at 567 (citing O'Brien, 391 U.S. at 376).

n83. O'Brien, 391 U.S. at 377.

- - - - -End Footnotes- - - - -
[*224]

O'Brien applies not only to time, place, or manner regulations of speech, n84 but also to laws of general applicability - after all, the prohibition on burning a draft card applied regardless of any expressive motivation. Portions

of the O'Brien test overlap the neutrality tests used by Justice Kennedy in Lukumi. If a law cannot be justified by any interest unrelated to suppression or if its impact on expression is not necessary to further any legitimate interest, the Court may find that its object is not speech-neutral. n85 Unlike Justice Kennedy's neutrality test, however, O'Brien rejected any inquiry into the actual motives of the legislators. In this respect, it is consonant with the views of Justices Scalia and Rehnquist. On the other hand, O'Brien does not exempt the narrowly tailored, facially neutral law from further First Amendment scrutiny, since it requires that a challenged law further an important or substantial governmental interest. n86

-Footnotes-

n84. Barnes, 501 U.S. at 566 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)).

n85. Lukumi, 508 U.S. at 531-32.

n86. O'Brien, 501 U.S. at 376-77.

-End Footnotes-

In Barnes, eight Justices divided evenly on the outcome of the case under the standards of O'Brien. n87 Justice Scalia, who [*225] cast the deciding vote, repudiated O'Brien. He supported the Indiana public indecency law because, "as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." n88 Further, "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as the First Amendment guarantees are concerned." n89 Distinguishing expressive conduct from speech, Justice Scalia argued that the First Amendment does not apply to laws that affect expressive conduct unless their purpose is to suppress communication. n90

-Footnotes-

n87. Justice Rehnquist found that the statute furthered a substantial government interest in protecting order and morality, that the interest was unrelated to the suppression of free expression, and that the statute was narrowly tailored to that end. Barnes, 501 U.S. at 560-61. Justice Souter's concurrence found the statute furthered the ends of combating the secondary effects of adult entertainment establishments, such as prostitution, sexual assault, and other criminal activity. Id. at 582 (Souter, J., concurring). The four dissenting Justices noted the lack of enforcement against nudity in theatrical productions, and contended that the selectivity of enforcement showed the state's interest was in suppressing the mode of expression. Id. at 590 (White, J., dissenting). They argued that the interest of the general public nudity statute was to protect the public from offense, but that rationale was inapplicable to performances before a consenting audience. Id. at 595. They concluded that the statute was not narrowly drawn to satisfy the legitimate state interests. The dissent analyzed the case to show that it failed the O'Brien test used by Justices Rehnquist and Souter, and also the test for neutrality urged by Justice Scalia, but they did not independently set forth their own analytic framework. Justice White did conclude that "our cases

require us to affirm absent a compelling state interest supporting the statute." Id. at 595.

n88. Id. at 572 (Scalia, J., concurring).

n89. Id. at 578 (Scalia, J., concurring). Justice Scalia was quoting from his own dissenting opinion in Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd, 468 U.S. 288 (1984).

n90. According to Justice Scalia, any law that restricts "speech," even for a reason unrelated to suppression of communication, must meet a high standard to be justified under the First Amendment. He pointed out, however, that the language of the First Amendment protects "speech" and "press" and does not explicitly include "expression" that is neither written nor oral. Barnes, 501 U.S. at 576. Thus, he concluded that the First Amendment standards applicable to speech and press did not apply to expressive conduct. Id. He recognized, however, an implicit guarantee of freedom of expression that protected against laws whose purpose was to suppress the communicative content of conduct. Justice Scalia referred to the "more generalized guarantee of freedom of expression" which "makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription." Id. at 578 (emphasis in original).

This linguistic argument should not be pressed too far. Justice Scalia stated that the Court had already adopted his approach to regulations of conduct in free exercise cases. Id. at 579 (Scalia, J., concurring) (citing Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990)). But Smith undermines any argument that First Amendment standards vary according to a distinction between explicit and implicit guarantees. The Court used the purpose-centered inquiry in Smith as the standard for determining the violation of an explicit guarantee. The First Amendment forbids any law that prohibits the free exercise of religion. It does not distinguish between religious belief and religious conduct, and thus provides no justification for using different levels of scrutiny. Justice Scalia himself noted, "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." Smith, 494 U.S. at 877. The purpose-centered inquiry for laws affecting religious or expressive conduct, therefore, is more policy oriented than derived from language.

Conduct poses greater problems to society than belief, so the state more easily can justify regulations that affect religious conduct. However, the greater likelihood that conduct regulations will meet a constitutional standard does not justify reducing the level of constitutional scrutiny.

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[*226]

Virtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose - if only expressive of the fact that the actor disagrees with the prohibition It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even ... that it be justified by an "important or substantial" government interest. n91

-Footnotes-

n91. Barnes, 501 U.S. at 576-77.

-End Footnotes-

Justice Rehnquist's plurality opinion acknowledged that almost limitless types of conduct may be expressive, but he responded that the Court rejected this expansive notion of expressive conduct. He found that nude dancing is expressive conduct protected by the First Amendment, but his opinion offered no criteria for determining when an expressive activity is protected by the First Amendment. n92 None of the members of the Court directly critiqued Justice Scalia's distinction between expressive conduct and speech in this case, or his contention that the generally applicable law that incidentally affects expressive conduct is not subject to the First Amendment. They simply applied O'Brien.

-Footnotes-

n92. The issue is an important and difficult one. All behavior may be said in some way to express the nature of the individual. Our choices of clothes, housing, jobs, and toothpaste communicate something about our identity to others. We may speak of those choices as "expressions" of our personality. Nevertheless, communication of ideas is not the purpose of those actions. The First Amendment will be invoked only when the communication of ideas is a substantial basis for engaging in that behavior.

-End Footnotes-

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b. Cohen v. Cowles Media

While Barnes appears to demonstrate that the Court will apply the O'Brien tests to a law of general application that affects expressive conduct, Cowles n93 supports the proposition that the First Amendment does not apply to such a law. Cohen sought damages against a newspaper for breach of its promise not to reveal his identity as an informant. n94 The Court held that his promissory estoppel action was not barred by the First Amendment. n95 Justice White's majority opinion referred to the "well established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." n96 Justice White seemed to view Cowles as an attempt by the media to gain an exemption from laws applicable to others, citing the line of cases that denied the media special treatment. But Justice Blackmun's dissent pointed out that Cowles' claim was based on the content of the speech and not the identity of the speaker. n97

-Footnotes-

n93. 501 U.S. 663 (1991).

n94. Id. at 666.

n95. Id. at 670.

n96. Id. at 669. The Court cited a series of cases in which it refused to grant the press greater rights than individuals under the First Amendment. Id. (citations omitted). Justice White made the point that a newspaper publisher "has no special immunity from the application of general laws." Id. at 670 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)). Thus, Justice White said, "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." Id. The importance of Cowles does not lie in its invocation of caselaw but in its suggestion that laws regulating conduct without regard to whether such conduct is expressive do not violate the First Amendment.

n97. Id. at 673.

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The dissenters distinguished the decisions Justice White cited: "this case does not fall within the line of authority holding the press to laws of general applicability where commercial ac- [*228] tivities and relationships, not the content of publication, are at issue." n98 Although the law of promissory estoppel is content-neutral (the state does not determine the content of the forbidden behavior: the individual does so by her promise) and is of general application (most of its specific applications are to conduct other than speech), its effect in this case made the press liable for damages for publishing specific information. Where the law operates to forbid a specific statement, the dissenters insisted that it is subject to First Amendment scrutiny. Quoting from Justice O'Connor's concurring opinion in Smith, the dissenters said "there is nothing talismanic about neutral laws of general applicability." n99

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n98. Id. at 676-77 (Souter, J., dissenting).

n99. Id. at 677 (Souter, J., dissenting).

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Rather than weighing the interests of society against the speech interests impaired, the Justices in the majority did seem to find a talisman in the general applicability of the law. They characterized the law's inhibition on truthful reporting of a source's identity as the "incidental, and constitutionally insignificant, consequence" of a generally applicable law. n100

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n100. Id. at 672.

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There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, in so far as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press. n101

-Footnotes-

n101. Id. at 670.

-End Footnotes-

The distinction that Justice Scalia drew in Barnes between speech and expressive conduct vanished in this opinion - naming a source in writing appears to be protected by the express language of the First Amendment, yet Justice Scalia joined Justice White's opinion in finding the impact on the press "constitutionally insignificant." n102 The crucial factor seemed to be that the law was content-neutral in the sense that its application to the content of Cowles' speech was a product of Cowles' independent action. This made it analogous for the majority to the media exemption claim cases. n103

-Footnotes-

n102. Id. at 672. In Smith, Justice Scalia treated a general tax that fell on the press just as he treated regulations of expressive conduct in Barnes. He wrote in Smith that "if prohibiting the exercise of religion (or burdening the activity of printing) is not the object ... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Smith, 494 U.S. at 878.

n103. See Cowles, 501 U.S. at 669.

-End Footnotes-

The Court in Barnes applied the "important and substantial governmental interest" test of O'Brien as the appropriate standard for a law affecting expressive conduct, while the Court did not attempt to evaluate the government interest in Cowles. None of the judges in Cowles even mentioned the O'Brien line of cases. The distinction in the cases between expressive conduct and expression cut against the way in which they were decided. One would think the Court would be embarrassed to give nude dancing more scrutiny than it gave the press, yet it did so.

The Cowles Court did not mention Barnes or attempt to distinguish that case. As the Cowles dissent pointed out, the majority's precedents denied media an exemption from general business laws whose only impact on speech or press was that they impose the same costs of doing business on the media as were imposed on all other businesses. n104 The incident to which the law attached in those cases was not expressive conduct, but normal business practices such as receiving revenue n105 or employing workers. n106 But Cowles went beyond those cases to vali- [*230] date, without further analysis, a generally

applicable law that resulted in a direct impact on speech.

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n104. Id. at 676-77 (Souter, J., dissenting).

n105. See Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) (applicability of corporate tax rates to bookstores).

n106. See Associated Press v. NLRB, 301 U.S. 103 (1937) (application of labor laws to news service).

-End Footnotes-

Perhaps the best explanation for the decision in Cowles was offered by Srikanth Srinivasan in a perceptive article on incidental restrictions of speech. n107 Srinivasan argued that whether generally applicable laws that incidentally restrict speech are subject to First Amendment standards depends "on the likelihood of a speech-suppressive administrative motivation." n108 This theory reconciles the majority opinions in Barnes, Cowles, and the line of decisions that relied on Cowles. Where the law is triggered by conduct that has a significant expressive element (like the nude dancing in Barnes), there is a danger that the law was motivated by a desire to suppress expression. There is a significant chance that enforcement decisions will also be affected by the concern to suppress. Srinivasan contended that the threat of a speech restrictive motive underlies the statement in Arcara v. Cloud Books n109 that general laws that do not target expression raise First Amendment problems only "where it was conduct with a significant expressive element that drew the legal remedy in the first place, ... or where [the law] has the inevitable effect of singling out those engaged in expressive activity." n110 In Cowles, however, there was no First Amendment problem because the decision to invoke the generally applicable law was not made by the government but by a private individual. n111 Thus, Srinivasan [*231] said, "the unstated underpinning of the Court's decision may well be the impossibility of an illicit administrative motive." n112 That is why Cowles may appropriately be treated like the press cases it cites in which the law is unlikely to have any speech-suppressive motive because the activity that invokes its operation is not itself expressive.

-Footnotes-

n107. Srikanth Srinivasan, Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence, 12 Const. Commentary 401 (1995).

n108. Id. at 420.

n109. 478 U.S. 697 (1986).

n110. Id. at 706-07.

n111. There are several other differences that make Cowles less likely than Barnes to be a product of a desire to restrict speech. First, the restriction in Cowles applied only to the newspaper and did not prevent others from identifying Cohen as the source, but the restriction in Barnes precluded the specific form of expression for everyone. Second, the public indecency statute may have had

a closer nexus to conduct associated with expression than the doctrine of promissory estoppel, i.e. individuals are more likely to engage in public nudity as a means of expression than to violate their representations as a means of expression. Third, expression restricted by promissory estoppel may take many forms, but the expression limited by the public indecency statute is primarily of a sexual nature. Thus, the possibility that the object of the Indiana law was repression of sexual expression was greater than the likelihood that the doctrine of promissory estoppel was designed to stop publication of the names of sources. Fourth, the Indiana statute criminalized the behavior, while promissory estoppel simply results in liability for damages.

n112. Srinivansan, supra note 107, at 420.

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

Srinivasan's article explains the decisions, but the principle it avows was not stated as a standard for decision. First Amendment questions are raised whenever a law has a negative impact on some expression. Whether a particular law is susceptible to speech-suppressive motivation often is not an easy judgment. Does a law like promissory estoppel become particularly attractive because it may be used to suppress information? If the government can predict which private individuals are likely to use the law and which situations are likely to be most common, it might adopt a privately enforced law of general applicability for a speech-suppressive reason.

Assuming that concern with the possibility of speech-suppressive motivation is at the base of the Court's decisions, the Court might prefer to use standards of decision that focus on identifying the purpose of the law. According to Srinivasan's analysis, laws triggered by expressive conduct should almost always be subject to heightened First Amendment scrutiny. n113 But [*232] Srinivasan did not apply the analysis to free exercise cases, and it is inconsistent with Smith where there was no heightened scrutiny for a law that regulated a religious ritual. The Court has not expressly adopted Srinivasan's principle, and it may instead follow Justice Scalia's lead to a purpose based standard which reconciles its free speech cases with its free exercise decisions.

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n113. Id. at 401.

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Cowles might be justified on the grounds that the content-neutrality of the restrictions at issue in the earlier media cases were what insulated those generally applicable laws from First Amendment scrutiny. This view of Cowles raises the possibility that the Court may now exempt content-neutral generally applicable laws from further scrutiny. O'Brien's standard may be eliminated from the expressive conduct arena of its birth as it is transformed into the standard for regulations of time, place, and manner of speech. Justice Kennedy highlighted that possibility with his suggestion that Barnes (the expressive conduct case relying on O'Brien) and Cowles (generally applicable law not subject to scrutiny) are inconsistent. n114 His casual comment in Turner that generally applicable laws "may or may not be subject to heightened scrutiny" may be the death knell to O'Brien. n115

-Footnotes-

n114. Turner, 114 S. Ct. at 2458.

n115. Id.

-End Footnotes-

2. The Pressure to Equalize the Standards

Justice Scalia has argued that the principle of Smith is even more important for scrutinizing expressive conduct under the First Amendment. "Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression." n116 In effect, the same concerns that drove the Court's [*233] decision in Smith, the concerns about balancing as a judicial technique together with an unease about treating people unequally as a result of their subjective intentions, are also in free expression cases.

-Footnotes-

n116. Barnes, 501 U.S. at 579 (Scalia, J., concurring). But one can posit a religious belief in natural law that scorns manmade laws and makes the violation of law a religious exercise. We have not lacked for unusual religious beliefs.

-End Footnotes-

It is anomalous to give more protection to expressive conduct than to conduct engaged in for religious reasons. Religious exercise often involves expression protected by the Free Speech Clause, but sometimes it is a private act with no communicative aspects. Regulation of those private religious acts has more serious consequences for the free exercise of religion than regulation of expressive conduct has for free expression. Regulation of expressive conduct does not foreclose the expression of the idea, although it may diminish the audience and result in the loss of some precision or force in the expression. For example, if flag burning is prohibited, the individual can still say why the flag should be burned and can even conjure up the image of the flag burning. Regulation of religious conduct, on the other hand, may result in totally banning a religious exercise. For example, prohibiting alcohol consumption makes it illegal for a worshipper to partake of the blood of Christ. The substitution of grape juice is likely to destroy the significance of the rite for believers in transubstantiation. Thus, since religious exercise actually needs more protection from generally applicable laws regulating conduct than does free speech, it is wrongheaded to give it less protection.

Ultimately, the Court will realize that free exercise is entitled to the same protections as free expression. The issue is whether parity requires that the protection for the exercise of religion be raised to the level afforded expression, or whether the level of protection afforded expression should be reduced to the level given the exercise of religion.

The pressure to equalize standards for free speech and free exercise may direct the Court to a position that inquires only as [*234] to the law's neutrality and general applicability. n117 The proposition that the incidental

effect of a generally applicable law on religion is constitutionally insignificant depends on a view of the First Amendment centered on the purpose of the law rather than the effect on the speaker. That view may have force with respect to the Free Speech Clause as well.

-Footnotes-

n117. In this scenario, the five votes in support of Smith - Justices Kennedy, Rehnquist, Scalia, Stevens, and Thomas - would be crucial. Justice Scalia is committed to abandoning O'Brien. Justice Thomas generally has indicated a judicial philosophy in line with Justice Scalia although he has not passed on this specific question in a free speech case. Justice Kennedy joined the majority in Cowles and is the author of the suggestion in Turner that indicates the potential change in First Amendment doctrine. See supra note 111 and accompanying text. Justices Rehnquist and Stevens joined in the Cowles opinion. Although Justice Stevens dissented in Barnes, applying the O'Brien test, the dissent in which he joined focused on the lack of generality of the law and its purpose to suppress expression - in other words, it was not in his view a content-neutral law. Barnes, 501 U.S. at 587. The ambiguity ("may or may not be subject to heightened scrutiny") in Justice Kennedy's comment on neutral generally applicable laws in Turner may have reflected his need to keep Justices Blackmun and Souter with him in that case. Turner, 114 S. Ct. at 2458. That he left the sentence in the opinion suggests controversy within the Court.

-End Footnotes-

III. The Problems of Purpose

The First Amendment is more than a drafting exercise. No Justice believes that the state constitutionally can use generally applicable regulations of conduct for the purpose of suppressing religion. That is why the Court has insisted that laws must be content-neutral as well as generally applicable to avoid heightened scrutiny. n118 The same reasoning should also be true with respect to regulations of expression. But the nature of the inquiry, according to Justice Scalia, is "whether the purpose of the law is to suppress communication." n119

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n118. Lukumi, 508 U.S. at 531-32; Smith, 494 U.S. at 878-79.

n119. Barnes, 501 U.S. at 578 (Scalia, J., concurring).

-End Footnotes-

Any attempt to base a constitutional test on a determination of the purpose of a legislative act will fail to sufficiently protect [*235] the interests of the First Amendment. Justice Scalia's insistence on an objective test that ignores subjective legislative motivation is inadequate to determine whether the legislation has a forbidden objective. Even the more expansive equal protection inquiry proposed by Justice Kennedy in Lukumi ultimately will allow speech suppression that should be barred. The Court should continue to use prophylactic tests that invalidate some laws with a proper objective in order to reduce the possibility that laws with an improper purpose will survive.

A. Legislative Purpose v. Legislative Motivation

Justice Scalia has criticized the Court's use of a standard that requires a determination of legislative purpose, at least when "legislative purpose" means the "actual motives of those responsible for the challenged action" as in the context of the "secular purpose" portion of the Lemon test for establishment of religion.

For while it is possible to discern the objective "purpose" of a statute (i.e. the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth ..., discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. n120

-Footnotes-

n120. Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

-End Footnotes-

On this basis, Justice Scalia argued that the subjective intent of government decisionmakers should be sought only if the Constitutional provision commands the Court to do so. n121 Thus, in Barnes when he called for an investigation into purpose, "the threshold inquiry of whether the purpose of the law is to suppress communication," n122 he was referring to the "objective purpose," "the public good at which its provisions appear to be [*236] directed." n123 This concept was based on the provisions of the statute and some common sense about the world in which the statute operates, not an inquiry into the "subjective motivation of those enacting the statute." n124

-Footnotes-

n121. Id. at 639.

n122. 501 U.S. 560, 578 (1991) (Scalia, J., concurring).

n123. Edwards, 482 U.S. at 636.

n124. Id. (Scalia, J., dissenting).

-End Footnotes-

Justice Scalia uses different methods of interpretation for statute and Constitution - eschewing legislative history in statutory interpretation and seeking it out for the interpretation of clauses of the Constitution. n125 His criticism of the use of legislative history in statutory interpretation has been widely noted. n126 However, here the aim of the inquiry into purpose is not to interpret the language to determine its application but to determine whether a

facially neutral statute has an unneutral end. That is a very different issue.

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n125. See generally Arthur Stock, Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses, 1990 Duke L. J. 160.

n126. See, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990).

-End Footnotes-

Any discussion of the purpose of a law runs into the quandary that statutes are the products of multimember bodies whose members may have both different motives (why they want the statute enacted) and different goals (how they want the statute to apply) for the same vote. Justice Scalia escapes the quagmire by refusing to look at the legislators and focusing on the legislation. As an interpretive methodology, the "objective" approach has several virtues: It avoids the difficulties of determining motivation, it sets forth an intelligible standard for Congress to follow in accomplishing its purposes, and it pressures Congress to accomplish its aims through the statutory language rather than by means of insertions of speeches into the record. The cost of errors in statutory interpretation is checked because Congress can revise the law if it dislikes the decision. [*237]

When the Court upholds a law that restrains a person from expression, especially the expression of unpopular views, the legislature is under no pressure to revise it. The essential question is whether facially neutral criteria are being used as a proxy for the suspect criteria of speech or religious exercise. Ignoring evidence of illicit motivation simplifies the case, but it increases the possibility of upholding speech suppression that was not incidental at all.

Justice Scalia purported to admire O'Brien for eschewing an inquiry into illicit motivation, but that decision avoided the inquiry by substituting a balancing test that evaluated the importance of the government interest and available alternatives to accomplish it. In Barnes, Justice Scalia specifically repudiated the O'Brien test: "I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the 'importance' of government interests." n127

-Footnotes-

n127. Barnes, 501 U.S. at 580 (Scalia, J., concurring).

-End Footnotes-

Finding the "object" of legislation through careful analysis of the text and context of the law may yield clear and determinate results as it did in Lukumi. However, the resulting unanimity in that case should not obscure the difficulty of the task. If a statute restricts religion or expression, the effect is plain. If it does so while purporting to be neutral, it is possible to examine whether any other conduct is in fact affected. If the statute affects additional unprotected conduct, the additional scope of the statute raises questions

regarding its "object." The weakness of the state's interest in regulating the additional conduct may suggest that it is no more than protective coloration for a statute, the object of which is to suppress expression or religious exercise. Unless those interests are in some way weighed, the judge may validate a law that was enacted solely to suppress expression. Furthermore, the judgment on the "object" of the law may [*238] be a close one where a weak but legitimate basis for the law can be identified. In those instances, it should be relevant that a substantial body of legislators avowedly acted to harm religion or expression.

Justice Scalia's objective test would ignore statements made during the course of legislative debate that a statute is aimed at destroying a religion and the impact on others is simply an unfortunate cost of making the law generally applicable. Where such statements are not in the text of the statute and no overbreadth or underinclusiveness can be shown, Justice Scalia's doctrine would lead him to uphold the statute despite the insignificance of the governmental interest it purports to vindicate.

If Justice Scalia refuses to assess the importance of the government interest in legislation and ignores legislative motives, he is likely to uphold some generally applicable laws that exist solely because they harm some disfavored speech or religion. This methodology is an open invitation to the intolerant to use generally applicable laws as a tool to suppress ideas. Such laws are not the most convenient tools - rather like using a two-by-four instead of a hammer to pound nails - but they may do the job.

B. Equal Protection Analysis of the Neutrality of Generally Applicable Laws

An inquiry into legislative intent has been the hallmark, not of First Amendment jurisprudence, but of equal protection doctrine. A race-neutral law challenged under the Equal Protection Clause on the grounds that it has the effect of disproportionately disadvantaging a particular racial group will be struck down only if the person attacking its validity can show that the law was racially motivated. n128 Thus, Justice Kennedy wrote in *Lukumi*: "in determining whether the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases." n129 Justice Kennedy then examined the transcripts of the city council meeting where the ordinance in question was adopted as evidence that the object of the ordinance was to discriminate against the Santeria religion. n130 This acceptance of evidence of subjective motivation in assessing the neutrality of a statute is an advance over Justice Scalia's position. It remains, however, a step short of the protection needed for expression. The Court's decision to require a racial "intent" in equal protection jurisprudence was the product of a variety of considerations that do not apply to free speech. Furthermore, the Court has departed from a rigid intent requirement within its equal protection analysis.

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n128. *Washington v. Davis*, 426 U.S. 229 (1976).

n129. *Lukumi*, 508 U.S. at 540.

n130. Id. at 540-41.

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The words "equal protection of the laws" invoke issues of classification or comparison. They do not on their face indicate which classifications are forbidden. n131 The Fourteenth Amendment was designed to prohibit racial discrimination. n132 Governmental entities that wished to engage in racial discrimination learned to disguise their behavior by using non-racial language. From the use of the grandfather clause in voting rights n133 to the gerrymandered boundaries of Tuskegee, n134 the Court recognized and struck down the use of facially neutral classifications as [*240] proxies for race. The early statutes were crude. The intentional discrimination was identified easily, and the laws were struck down. However, experience gave governmental actors greater sophistication, and they have adopted more subtle measures. Today it is infinitely more difficult to ferret out illegitimate motivation in statutes that use non-racial criteria that result in a disproportionate racial effect. When persons challenging a facially neutral statute have the burden of proving it was racially motivated, they often will fail. The more difficult the requirements of proof, the more likely that illegitimate motivation will escape judicial sanction.

- - - - -Footnotes- - - - -

n131. See Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

n132. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872); See generally H. Hyman and W. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875* (1982).

n133. See, e.g., *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915).

n134. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

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The Court might have adopted a balancing test - weighing the importance of the non-racial interest the criteria arguably serves against the harm of the racially disproportionate impact - to assure that race was not a factor in the classification. n135 The Court offered two reasons in *Washington v. Davis* n136 for its rejection of such an approach - precedent and the institutional role of the court. n137 The Court also might have noted that a balancing test could injure some members of the group allegedly discriminated against. These reasons, however, do not apply to the use of balancing tests under the First Amendment for facially content-neutral laws that have an impact on speech or religious exercise.

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n135. See George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297 (1987).

n136. 426 U.S. 229 (1976).

n137. Id. at 239-41.

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1. Reasons for the Purpose Test in Equal Protection

The Davis Court had little trouble identifying a series of cases in jury selection, voting, and education that contained statements that the racial impact of laws did not constitute a constitutional violation without a showing of a purpose to discriminate. n138

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n138. Id. at 239-40 (citing Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973); Wright v. Rockefeller, 376 U.S. 52 (1964); Akins v. Texas, 325 U.S. 398, 403-04 (1945)).

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One reason for the precedents is the fear that a balancing test triggered by racial disproportionality would lead to judicial intervention on the wisdom of most existing laws. n139 All laws classify. In view of the racial differences in our society, most classifications in laws have differential racial impacts. Residential segregation, however caused, means that geographical classifications have a racial impact. Because African-Americans are represented disproportionately in the lower economic class, virtually all statutes with a financial aspect will have a disproportionate impact leaving every law open to challenge.

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n139. "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Davis, 426 U.S. at 248.

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If an equal protection effects test applied only where a historically disadvantaged group was burdened, the doctrine would pressure all laws to favor that group. Even if the result were just, it would be politically impossible to maintain a democratic society with such a bias against the majority. If the effects test applied regardless of which racial group was adversely affected, then all laws would require judicial approval.

In short, an effects test strains the judicial capacity of the Court because it would render almost every law prima facie invalid. If such a test required a justification above the present rational basis standard, it would immerse the judiciary in second guessing the legislature on the wisdom of virtually all of its measures. It is not surprising that the Court avoided such a result.

[*242]

Another reason the Court has resisted the use of a balancing test for equal protection is its effect on members of the class intended to be protected. Where race is not the classifying device, some members of the disfavored race are likely to receive the law's benefits. For example, a capital gains tax reduction disproportionately favors whites, but wealthy blacks also would have their taxes reduced. Thus, a doctrine requiring more than a rational basis to sustain laws with disproportionate racial effects would harm some members of the very class the Court sought to protect. An equal protection balancing test is all or nothing - the law will either be valid or invalid. The laws cannot be redrafted to focus on disfavored groups and then allow them to opt out. The Court cannot eliminate the law's racial impact without preventing the legislature from pursuing the interest that led it to enact the law - e.g. it cannot invalidate the capital gains tax deduction for whites because of its racially disproportionate effect but allow blacks to take it.

Thus, a combination of factors prevents the Court from adopting an effects test for equal protection violations and leads it to retain the "invidious purpose" inquiry. Balancing in equal protection makes every law a federal case and the sole remedy the drastic one of total invalidation. If racial effect is the only interest that explains a classification, the law will be struck down for its invidious purpose. However, if the law serves or might serve a legitimate interest the balancing test threatens to prevent the government from pursuing that interest even though it benefits some members of the group on whose behalf the Court would act.

2. Sub Rosa Balancing in Equal Protection

Although the balancing test for the First Amendment has been contrasted with the search for invidious purpose in equal protection cases, Justice O'Connor claimed in Smith that "appli- [*243] cation of our established free exercise doctrine to this case" would not "necessarily be incompatible with our equal protection cases." n140

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n140. Smith, 494 U.S. at 901 (O'Connor, J., concurring) (citing Rogers v. Lodge, 458 U.S. 613, 618 (1982); Castaneda v. Partida, 430 U.S. 482, 492-95 (1977)).

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Daniel R. Ortiz has noted that the Court announces in equal protection cases that its inquiry is into the intent of the government body, but that its practice uses more objective factors. n141 In particular, the Court requires less evidence to prove intent in voting and jury selection cases than in housing and employment cases. n142

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n141. Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105 (1989).

n142. Id. at 1107.

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Some problems of balancing in equal protection cases are reduced by limitations on that doctrine's scope. The greater the injury to the structure of government from racial disparities, the greater the incentive to lower the standard of proof necessary to show that the disparity is the object of the classification. Acceptable proof determines the degree to which discriminating parties escape detection and also the number of innocent parties disadvantaged. However, under any standard of proof for discriminatory purpose, some discriminating parties escape detection.

3. The Inappropriateness of Equal Protection Standards in First Amendment Cases

The language of the Equal Protection Clause is language of classification. Thus, the search for purpose as a mechanism to determine the true basis for classification is tied to the language of the Constitutional provision, and supported by numerous precedents. Freedom of speech and the free exercise of religion do not on their face appear limited to laws classifying on speech or religious grounds. Lower scrutiny has few free speech precedents to support its methodology, and the free exercise precedents for low scrutiny of generally applicable rules of conduct had been ignored for three decades.

In Smith, Justice Scalia put forth a parade of horrors that would result from a balancing test under the First Amendment, arguing that almost every activity could be engaged in for expressive purposes and thus every law could become an object of scrutiny. n143 However, the issue would not be the classifications made by the law (and thus whether the law can be applied at all) but the law's validity as applied to the activity when it is engaged in for expressive purposes. In fact, few laws would be subject to challenge as applied. Although a limitless number of actions "could" be expressive, they rarely are. Furthermore, requiring the state to show a compelling reason for the application of a general law to expressive conduct or speech would not favor any particular group or speech. Thus, applying a higher level of scrutiny to the incidental impairment of expression or religious exercise would not pose extraordinary difficulties for the Court.

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n143. Smith, 494 U.S. at 888-89.

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Scrutinizing the application of the law in a specific instance with a balancing test does not threaten the law's general validity. The group benefited by the invalidation consists of those persons who engage in expression, and that group is coextensive with the reach of the decision that strikes down the law as applied. The benefits of the law still are obtained with respect to all of its other applications.

Since the main reasons for rejecting balancing under the Equal Protection Clause for facially neutral laws do not apply to balancing under the First Amendment, and the potential danger of pretextual classifications is just as great, a balancing test would be preferable to the direct inquiry into purpose as a [*245] means of assuring that neutral laws of general application do not have the improper purpose of impairing free expression.

C. Prophylactic Precedent

Although the suggestion that neutral, generally applicable laws impairing speech should receive no heightened scrutiny appears to assume that the purpose of the law is crucial to its validity, the Court has never openly adopted a purpose-centered vision of the First Amendment. Indeed, the Court has invalidated laws restricting speech or press while indicating that the law's purpose was legitimate. n144 The nearest approach to a purpose-centered inquiry is Justice Scalia's argument that such an inquiry is supported by the Court's holdings with respect to laws that do not directly or indirectly impede speech. n145 But Justice Scalia also has said that a law restricting speech must meet a high standard of justification even if the purpose of the restriction has nothing to do with the suppression of communication. n146 Thus, precedent seems to discourage any attempt to assert a purpose-centered standard for determining abridgments of freedom of speech or of the press.

-Footnotes-

n144. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939) (striking down ban on leafletting despite anti-littering justification).

n145. *Barnes*, 501 U.S. at 578 (Scalia, J., concurring).

n146. *Id.* at 576.

-End Footnotes-

On the other hand, the free speech decisions of the Supreme Court are consistent with a purpose-centered view of the First Amendment. n147 The "high standard" often simply guards against use of the law to suppress communication. For example, in *Saia v. New York*, n148 the Court said that the lack of standards for a loudspeaker permit posed too great a danger that [*246] the authorities would base their discretion on the content of the speech. n149 A law prohibiting leafletting on public streets might be enacted because leafletting in public places is a major vehicle of communication for government critics outside the mainstream. Most, if not all, of the Court's precedents can be characterized as standards to insure the forbidden purpose is not involved in laws impairing speech. But such a prophylactic approach to purpose is more speech protective than the limited inquiry into the object of the law that Justice Scalia urges for free exercise and expressive conduct cases.

-Footnotes-

n147. See generally David S. Bogen, *Bulwark of Liberty* (1984); Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996).

n148. 334 U.S. 558 (1948).

n149. Id. at 562.

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In free speech cases, the Court uses objective tests that put the burden on the government to demonstrate that its actions had a legitimate basis and that it could not satisfy those legitimate interests as well by other means that impose a lesser burden on speech. If the law affects speech and the state justifies the law with an unimportant or insubstantial interest, then there is a strong possibility that the speech-impairing effect is the real reason for the law. If the interest is significant, but it could be satisfied as well by other means that have less impact on expression, then the choice of the means or the scope of the statute may have been influenced by illegitimate concerns. Thus, the various tests used by the Court in free speech cases involving "content-neutral" laws can be derived from the principle that suppression of free expression is not a legitimate purpose of government.

The religion cases also may be reconciled with a purpose-centered inquiry. n150 Indeed, Justice Scalia attempted to do so. [*247] His distinction of Sherbert and Yoder, however, as outside this standard made his enterprise questionable. Both the Sherbert and Yoder lines may be reconciled with the basic notion of forbidden purpose by using the analysis just applied to the free speech cases. In unemployment compensation cases, the statute withholds benefits if the claimant refuses available work, but excuses the claimant when there are compelling personal reasons, such as dangers to health, for refusing the job. A determination that refusal to work for religious reasons is not an acceptable reason for unemployment could be a product of hostility to such religious beliefs. Given the trivial impact on the fund from all such claims, the state's interest in protecting the fund from such claims seems insignificant, and the possibility that an illegitimate concern influenced the denial of benefits is too great. The Yoder balancing may also be explained as an attempt to be sure that the scope of the mandatory school law did not include overriding religious beliefs because of antipathy to those beliefs.

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n150. The history of the Free Exercise Clause may be read in a narrow framework. The framers were concerned that individuals be free to reject the majority religion. They understood that religious belief and prevailing religious worship caused no harm except to the sensibility of those who had different views, and that the accident of different views should not result in punishment. However, there is little evidence that the authors of the Constitution considered behavior protected when it affected others. See William Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 Case W. Res. L. Rev. 357, 376-79 (1989-90). There is instead substantial support for the proposition that the framers understood that religious belief was not grounds to exempt an individual from a generally applicable statute. Ellis West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 623-33 (1990).

In the end, however, history can be pressed into service for other positions. If the framers did not anticipate exempting religious worship from generally applicable laws, they may have focused only on laws serving

important or substantial government interests. They were concerned with protecting religious worship, and Madison, for example, supported exemptions for conscientious objection to military service. 1 Annals of Cong. 434 (Joseph Gales ed., 1789). By stressing their concern for both speech and religion and noting the changes within our society that have resulted in pervasive government regulation, a plausible argument may be made that the purposes the First Amendment was designed to serve require protection even from generally applicable regulations of conduct.

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IV. The Limits of the Compelling Interest Standard

Thus far, this article has argued that the Court should have a similar standard for generally applicable laws under both the Free Exercise and Free Speech Clauses of the First Amendment, and that an exemption from heightened scrutiny for those laws that are "neutral" will under-protect both religion and speech even if the constitutional guarantees are understood to be directed to the purpose of the law. Prophylactic standards are more appropriate to preclude the possibility of illegitimate purpose. On the other hand, it is unrealistic and unwise for the Court to use its most stringent test to review the incidental restrictions on speech and religion imposed by neutral, generally applicable laws.

A "compelling interest" standard would afford the greatest protection to speech and religion, but the standard is not workable. It cannot apply to all neutral, generally applicable laws, it is difficult to distinguish any subset of such laws to which it might be applied, and its application there would dilute its effectiveness where it currently applies.

The Court cannot practically require the highest standard to justify minimal impacts on speech or religion. Because government's interest in particular laws can rarely be characterized as anything more than substantial, a compelling interest test would exempt individuals from most laws which negatively affect their speech or religion. Privileging religion or speech from the most trivial impairment would be intolerable. Even the Religious Freedom Restoration Act requires a substantial impairment to trigger the compelling interest test. n151 Thus, the compelling interest standard is unsuitable for evaluating all incidental restrictions on speech.

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n151. 42 U.S.C. 2000bb-1 (1994).

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[*249]

The Court will have difficulty identifying an appropriate subset of neutral, generally applicable laws for heightened scrutiny. The Court has not yet adequately defined such a class despite the suggestions of scholars. n152 Professor Michael C. Dorf has argued that heightened scrutiny for generally applicable laws should depend on the substantiality of the impairment of

rights. n153 Substantiality, however, is a matter of degree. As an on-off switch for heightened scrutiny, it is arbitrary. It is both underprotective and overprotective unless the "substantiality" of the impairment is contextual - i.e. varies with the strength of the state's interest and the availability of non-restrictive alternatives that would satisfy that interest. If those factors are considered, the scrutiny takes place before the "determination" of the level of scrutiny. The real test would be balancing, and it would apply to all laws impacting speech or religion.

-Footnotes-

n152. Srinivasan suggested a test based on the likelihood of speech-suppressive administrative motivation. However, rather than urging a compelling interest test, he distinguished cases subject to O'Brien and those receiving no review. Srinivasan, supra note 107.

n153. Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1210 (1996).

-End Footnotes-

Further, even if the Court could distinguish among neutral, generally applicable laws, a compelling interest is not the appropriate heightened scrutiny. The Court can manipulate almost any test in application. As a result, the use of a compelling interest test with respect to laws incidentally impacting speech or religion would undermine its strength in evaluating racially discriminatory laws and those that directly impair speech or religion.

The stringency of a compelling interest test depends on the values of the judges who implement it. The Court is unlikely to preclude government from vindicating legitimate interests by laws with only an incidental impact on religion, regardless of the [*250] test articulated. The Court may find that the government's interest in avoiding administrative problems or difficulties in distinguishing among groups that might seek exemptions is compelling. Thus, the Court upheld the application of the Amish of the social security laws in United States v. Lee, n154 and Justice O'Connor found the compelling interest test satisfied in Smith. n155 Nevertheless, the articulated standard constrains the Court to some degree.

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n154. 455 U.S. 252, 260 (1982). Few laws, looked at individually, can show a compelling interest for their application to expression or religious exercise. On the other hand, the total impact on society from a religious and expressive exemption for most laws could be quite significant. For example, one cost of exemption is the necessity to make a determination whether the particular individual is acting with a religious or expressive purpose. The social cost of time and energy to make this determination under one law may not be significant, but if cumulated for all laws, it could have a large impact. The "compelling interest" in the specific case, then, may be the absence of sufficient grounds to distinguish this requested exemption from exemptions to other laws that cumulatively would have a substantial impact on the operations of government.

n155. 494 U.S. 872, 904-05 (1989) (O'Connor, J., concurring).

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The standard for evaluating neutral, generally applicable laws under the First Amendment should not be as high as the standard for justification of racially discriminatory laws. First, the neutrality and general applicability of a law provide substantial warrant that any impact on speech is incidental. n156 A neu- [*251] tral, generally applicable law may affect an individual's speech, expression or religious exercise, but it is unlikely to have a significant effect on speech or religion in general. As long as the Court prevents laws from being targeted at speech or religion, people who wish to express particular religious convictions or ideas need not curb their activities for fear that the government will persecute them.

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n156. There is a good argument for the compelling interest test if there is evidence that a law of general application was targeted at speech or religion. That would be analogous to mixed motive cases like Mount Healthy v. Doyle, 429 U.S. 274 (1977), where the Court requires the government to prove that it would have acted the same way in the absence of the impermissible motive. Id. at 287. But Mount Healthy's standard applies to administrative decisions against individuals, where invalidating the discharge has a limited impact on the general power of government to address public needs.

A compelling interest standard for mixed motive statutes could disable government from advancing important or substantial legitimate interests. The problems of motive attribution differ from those in administrative decisions. If one legislator's statement of improper reasons triggers a compelling interest requirement, the entire body politic is punished for the sins of one member. If the law is struck down for an illegitimate purpose, legislators might voice only good motives for its reenactment. Unless the state's interest is compelling, however, the Court will suspect the impermissible purpose continues to affect the law. But refusal to uphold the reenactment deprives the legislature of the power to enact an appropriate law.

O'Brien may still be an appropriate standard because it strikes a balance between the ability of government to act for legitimate purposes and the protection of speech. Where the balance is struck depends on the Court's view of the requirement that the state's interest be "important or substantial" and that the impact on speech be no greater than essential to further that interest. Evidence that the law was targeted at speech or religion goes to the significance of the burden and should reduce the deference paid to legislative judgments of importance and necessity.

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Second, the conduct regulated by most generally applicable laws poses the same problem for society, whether or not it is engaged in for religious or expressive reasons. Thus, the justification for applying the law to the protected activity is the same as the justification for the statute itself. Assuming that the law would be valid with respect to these other applications, a religious or expression exemption would disable government from acting to protect its legitimate interests. A "compelling interest" standard could expand significantly the scope of situations where government is powerless to vindicate the legitimate concerns of its constituents.

In theory, a compelling interest requirement could adjust the interest to the constitutional guarantee. If a "compelling interest" means an interest sufficient to compel a rational judge to believe that a legislator acted appropriately in making a classification, it would have a very different bite for equal protection and the First Amendment. Given the harm done historically by [*252] racial discrimination, a legislator cannot appropriately create a racial classification that discriminates against a historically disfavored minority unless there is no rational choice but to do so. That is a very tough standard to meet, but a lesser one would raise the specter of segregation's return.

On the other hand, a non-trivial government interest may be sufficient to compel a judge to believe that a legislator acted appropriately in enacting a law that vindicated that interest against constitutionally protected as well as unprotected activity. Previous uses of "compelling interest" have reflected the differential impact of the test in different settings. In both Smith and Barnes, Justice Scalia's analysis of the caselaw found that the Court always upheld neutral, generally applicable laws under a First Amendment test that purported to afford them higher scrutiny. n157 If in Smith or Cowles or any of the cases analyzed by Justice Scalia, the state were required to show an interest as compelling as that required to justify a racially discriminatory law, few of those laws would have survived the challenge.

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n157. Barnes, 501 U.S. at 576-77 (Scalia, J., concurring). "We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest." Id. at 577. See also Smith, 494 U.S. at 883-85. "We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied." Id. at 883.

-End Footnotes-

The problem with using this compelling interest test for all constitutional guarantees is its instability. Perhaps it is possible to live with a "compelling interest" standard in which an interest is compelling for purposes of one constitutional guarantee and not another, but it would be extremely difficult to do so. Although the Court's past practice demonstrated contextual variation, it never admitted that it was using "compelling" in this way. There were several reasons for its failure to say who was [*253] "compelled" to do what. First, an express articulation that the standard measures whether the Court is compelled to believe that the enactment was for a legitimate purpose could easily collapse into a direct purpose inquiry, which would prove to be an unsatisfactory protection for speech and would substantially undermine protections against racial discrimination as well. Second, different outcomes suggest one right is more protected than another - i.e. equality is more important than freedom of speech - although there is no underlying theoretical basis for the preference. Finally, this would likely lead to pressure to eliminate the differential impact, which would either diminish the strength of the guarantee for Fourteenth Amendment purposes or raise the standard for the First Amendment.

If the compelling interest test will not necessarily be speech protective, and its use for generally applicable laws carries a substantial risk of devaluing the test for use in situations that threaten core constitutional concerns, it would be better to look to an alternative standard for dealing with the issues posed by generally applicable laws.

V. A Balanced Test for First Amendment Purposes

The obvious candidate for a test to evaluate neutral, generally applicable laws is O'Brien. The O'Brien test sustains a content-neutral regulation if "it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." n158 Justice Kennedy's opinion in Turner referred to O'Brien's test as the "intermediate level of scrutiny applicable to content-neutral [*254] restrictions that impose an incidental burden on speech." n159 O'Brien provides the appropriate standard to review generally applicable laws, since they are characterized by the likelihood that any burden they impose on speech is incidental. The standard applies equally well to protect the free exercise of religion. n160

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n158. O'Brien, 391 U.S. at 377.

n159. Turner, 114 S. Ct. at 2469.

n160. See Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Commentary 147, 152 (1987) (arguing that the Court should adopt O'Brien's methodology for free exercise claims). See also Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 Vand. L. Rev. 1335, 1343 n.31 (1995) (arguing that the "free speech methodology typified by O'Brien and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), should be incorporated into the Court's free exercise of religion jurisprudence.").

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The O'Brien test is designed to permit government to enact laws for legitimate purposes while guarding against restrictions directed at speech. "Intermediate" tests, like O'Brien, are open to attack from both sides - for being either too strict or too weak. Its operation depends on the values of the judges, which makes it vulnerable to attack as unprincipled ad hoc decisionmaking. But moderation may be a virtue when core values are protected and principles clash. Balancing reflects the values at stake and is appropriate where confined in scope and done with an understanding of its use. The O'Brien formulation allows balancing, but the Court should consider the factors to be balanced more openly, recognizing the function of the test as a prophylactic means to assure that there is no impermissible purpose.

Although the O'Brien standard is an imperfect mechanism to detect an impermissible purpose, it is the best alternative. Both the "important or substantial interest" and the "no greater than is essential" portions of the

test may invalidate laws that did not have suppression of speech as a purpose. The imperfect fit of O'Brien could tempt the Court to examine the purpose of the statute more directly. However, that would be a mistake. It [*255] would fail to eliminate the possibility that antipathy for that expression or religion produced the lack of an exemption to the generally applicable law. The difficulty of proving a covert purpose enables too many laws to pass a test based on the statute's objective. O'Brien permits the government to accomplish any significant legitimate objective by redrafting the law, but the O'Brien test decreases the likelihood that a law with an impermissible purpose will survive constitutional scrutiny.

A number of critics argue that the O'Brien standard is excessively deferential to the government. n161 It does not require that the regulation be the least restrictive means of achieving the state interest, only that no less restrictive alternative is capable of serving the state's interest as efficiently. n162 Commentators complain that O'Brien does not balance the marginal benefits of the challenged restriction relative to alternative means. n163 That critique is not necessarily true. Like the "compelling interest" test, the substance of the O'Brien test depends heavily on how judges apply it.

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n161. Dorf, supra note 153, at 1208; Keith Werhan, The O'Briening of Free Speech Methodology, 19 Ariz. St. L.J. 635, 641-44 (1987); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1483-86 (1975).

n162. Ward v. Rock Against Racism, 491 U.S. 781, 797-99 (1989); Ely, supra note 161, at 1484-85.

n163. Dorf, supra note 153, at 1208.

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By remanding or reversing decisions that upheld challenged laws, the Court recently invigorated the requirement that the incidental restriction on First Amendment freedoms be "no greater than is essential to the furtherance" of an important or substantial government interest. n164 The laws in question were [*256] not generally applicable, but regulations of commercial speech and cable television. These laws presented a higher risk for suppression of speech than most neutral, generally applicable laws, and the Court appropriately raised the barriers.

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n164. See 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996) (reversing ban on liquor price advertising because more extensive than necessary to serve the state's interest); See also Turner, 114 S. Ct. 2445 (1994) (remanding under O'Brien, the FCC "must carry" rules that required cable operators to carry broadcast stations on cable channels).

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Rhode Island's ban on advertising liquor prices was struck down last term in 44 Liquormart v. Rhode Island. n165 The Court's First Amendment test for

commercial speech required in part that any impact on free speech be "not more extensive than is necessary to serve" a substantial state interest. n166 In Board of Trustees v. Fox, n167 the Court stated that this prong of its commercial speech test was no more rigid than that of O'Brien. n168 In 44 Liquormart, Justice O'Connor's concurring opinion for four Justices cited Fox for the standard that the law must be narrowly tailored and held that Rhode Island's statute was unconstitutional in view of available alternatives. n169 Although some of the alternatives may have served the state's interest in moderation as efficiently as the price advertising ban, they each had drawbacks. n170 Thus, the Court applied scrutiny with some bite.

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n165. 116 S. Ct. 1495 (1996).

n166. Id. at 1506 n.9 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).

n167. 492 U.S. 469 (1989).

n168. Id. at 478.

n169. 116 S. Ct. at 1521 (O'Connor, J., concurring, joined by Rehnquist, C.J., Souter and Breyer, JJ.) (quoting Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)).

n170. Setting minimum prices for alcohol or raising taxes on it would shift purchases to stores in neighboring states. A per capita limit on alcohol purchases would have a similar effect and could be difficult to administer effectively. The effectiveness of an educational campaign on the dangers of alcohol consumption may be questioned and it costs money in a period when state budgets are tight.

-End Footnotes-

In Turner, cable operators appealed a summary judgment which upheld a federal law that required them to carry broadcast stations on cable channels. The Supreme Court agreed with the court below that the requirement was content-neutral, and that O'Brien was the proper level of scrutiny for content-neutral inci- [*257] dental restrictions on speech. n171 Nevertheless, the Court reversed the summary judgment. n172 It remanded the case for more evidence on all aspects of the factors relevant under O'Brien - the need for the legislation, the extent of the impairment on speech interests, and the available alternatives. n173

-Footnotes-

n171. Turner, 114 S. Ct. 2445 at 2469 (1994).

n172. Id. at 2472.

n173. Id. at 2469, 2471-72.

-End Footnotes-

The remand in *Turner* and the concurring opinion in *44 Liquormart* demonstrate that the Court can examine laws closely under *O'Brien*. The closeness of that examination should turn on the law's potential as a vehicle for the suppression of ideas. A Court applying *O'Brien's* tests may consider the impact of the law. The more substantial the burden on speech or religion, the lower the deference to legislative judgments of importance or necessity. This enables the doctrine to serve as a prophylactic test that protects against impermissible purpose while enabling the government to satisfy the legitimate interests of its citizens.

Abstract analysis of the importance of the governmental interest is insufficient, regardless of whether the court applies a standard of "compelling interest" or simply "substantial or important" interest. It is always possible to inflate by abstraction the interest on either side of a statute - the burning of a draft card becomes the interest in the national defense or the societal interest in freedom of speech. The Court should engage in the more particularized inquiry of whether the application of the rule to this religious or expressive activity is necessary to further the social interest. The importance of the government interest can best be evaluated in that incremental inquiry. In the "as applied" challenge, the question is not "why did you pass the law?" but "why is it being applied to this expression or religious exercise?" Since the government may have the power to exempt [*258] "constitutionally protected" activities from the scope of the law, it should justify its failure to do so.

In sum, the *O'Brien* inquiry directs the attention of the Court to more appropriate measures of the validity of the law under the First Amendment. It protects against improper purpose by demanding a government interest unrelated to suppression of free expression, and gives the Court a tool to make it effective by demanding the interest be important or substantial and that the impact on speech (or religion) be no greater than is essential to further that interest. If we are to have the same standards for generally applicable laws in both free exercise and free speech cases, those standards should have some First Amendment bite.

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ARTICLE: Understanding Changed Readings: Fidelity and Theory

Lawrence Lessig *

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* Assistant Professor of Law, University of Chicago. Thanks to Bruce Ackerman, Albert Alschuler, Akhil Reed Amar, Mary Becker, Alexander Blankenagel, Walter Blum, David Currie, Steve Gilles, Craig Goldblatt, Abner Greene, Elena Kagan, Dan Kahan, Alan Meese, Michael McConnell, Anne-Marie Slaughter, David Strauss, Cass Sunstein, and Richard Posner for comments on earlier drafts. I am extremely grateful for research work by Cyrus Amir-Mokri, Bradley Bugdanowitz, and Harold Reeves. The Sarah Scaife Foundation and the Russell Baker Scholars Fund provided support for this research.

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SUMMARY:

... Are these changed readings always changes of infidelity? Everyone, whether originalist or not, agrees that they are not. ... Thus a shift from one uncontested discourse to another allows a changed reading of the statute. ... A common structure links all of the examples above: In each, between two interpretive contexts, what I have called an uncontested discourse changed; this change yielded a shift in what is "ordinary" or "normal" in that context. In one case -- the immigration example -- where the shift was from one uncontested discourse to another, this yielded a changed reading that tracked the substance of the changed discourse. ... Both limits, then -- the constraint of an uncontested discourse and the constraint of the Erie effect -- function as limits of pragmatic necessity on the practice of fidelity engaged in by a court. ... It was instead a shift from an uncontested discourse to one that was now fundamentally contested. ... In this way, then, did the New Deal revolution turn on an Erie-effect shift in a background uncontested discourse. ...

In this article, Professor Lessig proposes a theory to explain how new readings of the Constitution may maintain fidelity with past understandings of the document's meaning and purpose. After defining schematically some terminology for this exercise in "fidelity theory," the author proposes a general typology of four justifications for changed constitutional readings: amendment, synthesis, fact translation, and structural translation. Describing this last justification as so far overlooked, he illustrates, by way of four historical case studies, how structural translation results from a pragmatic institutional response by judges to subtle changes in interpretive context -- changes both in what Professor Lessig calls the "uncontested" or background discourses of the

larger society and, through what he labels the "Erie effect," shifts in law's understanding of its own genesis and nature. In the face of such change, Professor Lessig argues, legal actors maintain interpretive fidelity only by adapting old readings to new social reality. In Part II of the article, Professor Lessig describes the fact and structural translations he argues underlie the signal constitutional change of modern times, the New Deal. He considers and rejects the notions that the New Deal was unconstitutional, that it restored first principles that had been lost, that the New Deal was itself a constitutional "amendment," and that it flowed logically from the collapse of laissez-faire theory. Rather, he argues, the New Deal represents translation, both of fact -- economic discourse -- and of structure -- understandings of the political basis of law. The effects of such contextual changes, Professor Lessig contends, are both unavoidable and consistent with fidelity.

TEXT:
[*396] INTRODUCTION

Readings of the Constitution change. This is the brute fact of constitutional history and constitutional interpretation. At one time, the Constitution is read to say one thing. At another, the same text is read to say something else. No theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes, could be a theory of our Constitution. Change is at its core.

Are these changed readings always changes of infidelity? Everyone, whether originalist or not, agrees that they are not. We all have the intuition that some changes are consistent with ideals of fidelity, even if some also are not. What we lack is not the sense that change is justifiable, but rather any clear sense of just when, or why. n1

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n1 The same point is troubled in Sanford Levinson, Accounting for Constitutional Change, (or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B); 26; (C) >26; (D) All of the Above), 8 CONST. COMMENTARY 409 (1991) (discussing the difference between amendment and interpretation as ways of classifying changed readings).

-End Footnotes-

This is an essay about such change. It is an attempt, within what we could call fidelity theory, n2 to understand just how these changes should count within a practice of interpretive fidelity. It is the claim that many (perhaps most) changed readings are consistent with an account of interpretive fidelity. It is a rejection of the view that changed readings mean that "meanings are fluid," n3 and fidelity is bunk.

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n2 I will develop the principle of fidelity below. Suffice it here to say that fidelity is the aim to preserve meaning, intent, or purpose from a distant interpretive context within our own. Fidelity theory describes the conditions under which that achievement is possible.

n3 Morton J. Horwitz, The Supreme Court, 1992 Term -- Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 HARV. L. REV. 30, 116 (1993) ("The central problem of modern constitutionalism is how to reconcile the idea of fundamental law with the modernist insight that meanings are fluid and historically changing.").

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Begin with some examples to suggest the problem:

1. The Necessary and Proper Clause of Article I gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [*397] the foregoing Powers." n4 Imagine that a court had to give meaning to the phrase "necessary and proper" -- McCulloch v. Maryland, n5 of course, says that no court need give it meaning, but imagine, contra McCulloch, that a court had to decide whether a particular measure was "necessary and proper." How would a court decide?

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n4 U.S. CONST. art.I, @ 8, cl. 18.

n5 17 U.S. (4 Wheat.) 316, 355 (1819) (giving Congress great deference in interpreting "necessary and proper").

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Start with the word "proper": Here's a perfectly ordinary argument for a modern American court to make:

To decide whether a particular measure adopted by the legislature is "proper" within the meaning of the Necessary and Proper Clause, we must recur to the values of the Framers. Their view of propriety -- the collection of values which underlay their understanding of proper government -- must determine whether a measure is proper. It is not for a court to look to the current views of propriety to update the Constitution's meaning. What is "proper" in the sense in which the Constitution speaks is just what was viewed as proper when the Framers used that word.

It is perfectly ordinary for a court to ignore changing values of propriety when applying this old text in this context. So why, then, is the following not equally an accepted argument within current legal discourse?

To decide whether a measure adopted by the legislature is "necessary" within the meaning of the Necessary and Proper Clause, we must recur to the facts as understood by the Framers. Their view of nature -- their collection of opinions about the nature of the world and how the world functions -- must determine a measure's necessity. It is not for a court to invoke modern science to update the Constitution's meaning. What is "necessary" in the constitutional sense is simply what was viewed as necessary when the Framers used that word.

It is perfectly absurd for a court to ignore changing views of necessity when applying this old text in this context. But why, we might ask, must a court recognize changing understandings of the facts but ignore changing understandings of values? n6 Why is a changed reading tracking facts

permitted, but a changed reading tracking values not?

-Footnotes-

n6 Compare Thurman Arnold's similar point: The principles of Washington's farewell address are still sources of wisdom when cures for social ills are sought. The methods of Washington's physician, however, are no longer studied. Political and legal science only look to the past. Other sciences are concerned with the present, and filled with hope and expectation for the future. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 1 (1935).

-End Footnotes-

2. In County of Riverside v. McLaughlin, n7 the Supreme Court revisited the question of how long police could hold a warrantless arrestee without presenting him to a magistrate. Gerstein v. Pugh had decided that the presentation must be made "promptly." n8 The question in Riverside was how "promptly" was prompt enough. Five members of the Court held that forty-eight hours was [*398] presumptively prompt enough. n9 Justice Scalia disagreed. In his view, "no more than 24 hours [was] needed." n10

-Footnotes-

n7 500 U.S. 44 (1991).
n8 420 U.S. 103, 114, 125 (1975).
n9 McLaughlin, 500 U.S. at 55.
n10 Id. at 68 (Scalia, J., dissenting).

-End Footnotes-

What, in Justice Scalia's view, makes forty-eight hours "unreasonable" under a clause of the Constitution proscribing "unreasonable searches and seizures"? n11 To see the point, distinguish between legitimate reasons for a delay and the length of any delay, given legitimate reasons. In Justice Scalia's view, the only legitimate reasons for a delay are those recognized by the common law at the time of the founding. n12 Thus, a delay due to the time it takes to carry an arrestee to a magistrate is a delay for a legitimate reason, while a delay due to the police continuing an investigation of the arrestee is not. n13 The Fourth Amendment, Justice Scalia said, constitutionalized these common law values, and regardless of society's current values, these original values the Court cannot change.

-Footnotes-

n11 U.S. CONST. amend. IV.
n12 McLaughlin, 500 U.S. at 60-62 (Scalia, J., dissenting).
n13 Id. at 61.

-End Footnotes-

But assume a delay is due to legitimate reasons -- assume, say, the delay is due to the time it takes to carry the arrestee from his farm to the magistrate's chambers. How long may that delay be? If it took the constables of the Framers' era six hours to cover the thirty miles (because covering it on horse), does that mean the police today may, consistent with the Constitution, take six hours to cover the same thirty miles?

Obviously (why?) not. While the common law settles "what reasons are legitimate?" current technology determines the length of a legitimate delay. As Justice Scalia said in classically Scalia style,

[H]ow much time, given the functions the officer is permitted to complete beforehand, constitutes "as soon as he reasonably can" . . . is obviously a function not of the common law but of helicopters and telephones. But what those delay-legitimizing functions are -- whether, for example, they include further investigation of the alleged crime[--]is assuredly governed by the common law n14

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n14 Id. at 62 n.1 (quoting 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 276-77 (1837)) (emphasis omitted from BURN).

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

Why is it permissible to change the reading of the Fourth Amendment because of changes in technology, yet not permissible to change the reading of the Fourth Amendment because of changes in what is deemed reasonable? What justifies the difference in treatment?

3. In a remarkable decision just a few Terms ago, the Court considered whether a constitutionally permissible "frisk" under the Court's Terry doctrine could extend to a search for the purposes of discovering contraband on a suspect's person. n15 Said the Court, it cannot. Terry justified a search to determine whether a suspect was carrying a weapon; the intrusion was justified by the [*399] potential harm to the police officer. n16 If contraband was discovered in the course of this justified frisk, it could properly be seized. But once the police conclude that the suspect is carrying no weapon, the justification for the frisk terminates, and contraband later discovered is improperly discovered.

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n15 Minnesota v. Dickerson, 113 S. Ct. 2130 (1993).

n16 Terry v. Ohio, 392 U.S. 1, 29-30 (1968) (finding a police officer's search for weapons reasonable where the officer only patted down the outer garments of the suspect until he felt a gun, which he removed).

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

In a startling concurrence, Justice Scalia confessed that he was not quite sure. Not that he questioned Court's conclusion, given the premise that a Terry frisk was legitimate. Rather, Justice Scalia was unsure whether Terry itself was right. n17 As he said, it is

a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus . . . the Fourth Amendment . . . "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted." . . . The purpose of the provision . . . is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted -- even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable." n18

-Footnotes-

n17 Justice Scalia's concurrence will be startling only to those who mistake him for a knee-jerk conservative. For other "surprising" Scalia opinions, see *Burns v. Reed*, 500 U.S. 478, 496-506 (1991) (Scalia, J., concurring in the judgment and dissenting in part) (arguing for the adoption of the common law tradition of no absolute immunity for officials seeking search warrants); *County of Riverside v. McLaughlin*, 500 U.S. 44, 59-71 (1991) (Scalia J., dissenting); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680-87 (1989) (Scalia, J., dissenting) (arguing that urine testing constituted an invasion of privacy); *Arizona v. Hicks*, 480 U.S. 321 (1986) (Scalia, J.) (holding that officer must have probable cause to believe item is evidence of a crime to justify its seizure under the plain view doctrine).

n18 *Dickerson*, 113 S. Ct. at 2139 (1993) (Scalia, J., concurring) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)) (citations omitted).

-End Footnotes-

It was not clear, Justice Scalia worried, that Terry met this standard, for Terry "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was 'reasonable' by current estimations." n19 While the common law would have permitted a stop, Justice Scalia "frankly doubt[ed] . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity." n20 And because Justice Scalia does not belong to the "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence," n21 he would have "adhere[d] to {this} original meaning" had Terry been properly challenged. n22

-Footnotes-

n19 Id.

n20 Id. at 2140.

n21 Id. at 2141.

n22 Id.

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

But if the Founders would not have suffered "the indignity" of a frisk, would that mean that Terry must be wrong? Said Justice Scalia, no. For it is possible that "it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common -- which might alter the judgment of what is 'reasonable' under the [*400] original standard." n23 Terry did not discuss "technological change," and hence the question remained open for Justice Scalia.

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n23 Id. at 2140.

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

Again, though, why can a court update for technology but not for virtue? Why is it obvious that technology should matter, but that we live in a "less virtuous age [when] all sort of intrusion [is considered] reasonable" should not?

In each example, there is a change in the context of interpretation that many would agree should justify a changed reading, consistent with the demands of interpretive fidelity ("necessity," helicopters and telephones, handguns). In each, there is also a change in the context of interpretation that many would argue could not justify a changed reading, consistent with those same demands ("proper," reasons for a delay, dignity). Fidelity needs to distinguish, but what distinguishes these two types of changes is not clear. We have plenty of intuitions, but no satisfactory account.

This article is an attempt to provide such an account. I begin with a typology of justifications for changed readings. There are four. Three should be quite familiar; the fourth is something new. I use this array to understand a confusion in modern legal thought about the most dramatic set of changed readings in recent constitutional history, the New Deal. Most have assumed that unless one could show either (1) that the readings of the Constitution for the forty years before the New Deal had been wrong, or (2) that some political act sufficed to authorize this judicial transformation, then (3) the changed readings of the New Deal would remain unjustified. Given the choices, a few pick (2), most follow (1), and the balance (conservatives or cynics) choose (3).

Bruce Ackerman's account is the most ambitious example of option (2). n24 In Ackerman's view, (a) the New Deal radically changed the Constitution; (b) change is justified by constitutional amendment; (c) therefore, an amendment must justify the New Deal; and high school history to one side, indeed, (d) there was a constitutional amendment, or the functional equivalent of a constitutional amendment, in the late 1930s sufficient to justify the changes of the New Deal. By understanding the nature of this amendment, Ackerman says, we can understand the New Deal as justified. n25

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n24 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, WE THE PEOPLE]; see Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453 (1989) [hereinafter Ackerman, Politics/Law].

n25 See generally ACKERMAN, WE THE PEOPLE, supra note 24.

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

What lies latent in all three views, I suggest, is one common idea -- the notion that change requires amendment. It is this assumption that I challenge directly in the account below. As I argue, we have long recognized cases where, in the face of changes in context, the proper act of fidelity is a changed reading of the constitutional text -- constitutional change, that is, without constitutional amendment. As others have before, I will call this a justification of translation, and below, I develop this notion to distinguish two very different kinds of justifications from translation. n26

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n26 The idea of using the metaphor of "translation" for understanding the practice of interpretive fidelity was introduced most famously by Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 205 (1980). For an account of its origin and scope, see Lawrence Lessig, Fidelity in Translation, 71 TEX. L. REV. 1165, 1171 n.32 (1993); see also JAMES BOYD WHITE, JUSTICE AS TRANSLATION (1990). For an exhaustive account of translation's closest cousin, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

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

[*401] Once these two aspects of translation are distinguished, I will then argue that the New Deal changes are best understood as the interaction of these two kinds of justification from translation. The more familiar of the two relies on changes in the economic and social structure of the nation, an account relatively common in New Deal lore. n27 The less familiar relies upon changes in the nature of law itself -- in an account modeled upon (odd as this may now sound) Erie R.R. v. Tompkins. n28 Rather than a rediscovery of the Constitution of Chief Justice Marshall, or an amendment of the Constitution of Lochner, n29 or a constitutional putsch, I suggest that we can see the New Deal as justified in just the way Erie may be justified -- both by very old (and I would say unshakable) arguments of constitutional fidelity.

- - - - -Footnotes- - - - -

n27 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 308-15 (2d ed. 1988).

n28 304 U.S. 64 (1938).

n29 Lochner v. New York, 198 U.S. 45 (1905).

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

I should be clear, however, about what this theory is not, and what it cannot be. This is not a theory of stare decisis. The question I want to ask is

what changed readings are consistent with the constraint of fidelity. As I will understand (so as to ignore) stare decisis, stare decisis is a subsequent constraint on the range of possible changed readings, imposed for reasons independent of fidelity -- for example, for stability or judicial prudence or, in some cases, rule of law. n30 So understood, a changed reading may be permissible under a principle of fidelity, but nonetheless impermissible under the constraint of stare decisis. My concern is with the first constraint -- the justified changed readings that stare decisis selects among.

-Footnotes-

n30 On the relationship between stare decisis and the rule of law, see RUTI TEITEL, TRANSITIONAL JUSTICE ch. 2 (forthcoming 1995) (manuscript on file with the Stanford Law Review).

-End Footnotes-

Finally, what this essay cannot be: I offer here a theory for understanding changed readings, as such changes are allowed by changes in context, in particular contexts covering the late nineteenth and early twentieth centuries. To describe these changes in context will require something of an account of history, an account that will of necessity be incomplete. For a richer (read: better) account of the history, you should turn to the history of those whose theories I attack -- Bruce Ackerman, Morton Horwitz, and others. I do not pretend to do the history necessary to sustain this theoretical account. My hope instead is to provide a theory to better explain these other histories.

I. JUSTIFYING CHANGED READINGS

I begin with some terminology. By "interpretive fidelity," I mean any practice aimed at preserving something semiotic from the past, whether one calls that something meaning, or intent, or purpose. n31 For the purposes of what follows, [*402] it does not matter which of these one tracks. I will simply speak about tracking meaning, though I do not purport to say fully just what meaning is. It is enough to say something about how meaning is made, or better, it is enough to offer something of a heuristic to help us think about how meaning is made.

-Footnotes-

n31 I will not attempt to distinguish among these different notions. The argument of this article applies regardless of which of these one selects. I will also not attempt to define "meaning." Instead, use the label "meaning" to stand in for any particular theory of meaning one wants.

-End Footnotes-

In my account, there are four moving parts to a practice of interpretive fidelity. n32 Meaning is one. Think of the balance like this: Meaning is a function of the text read (the second moving part), and the context against which the text is read (the third). By "text," I mean any artifact created at least in part to convey meaning; by "context," I mean just the collection of understandings within which such texts make sense. This essay is a text; the understandings that go with its placement in a law review are part of its context. Honking a horn is a text; the celebration of a local team's victory

could be its context. In each case, text and context together permit a range of meaning; as either text or context changes, so may the product change as well.

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n32 This contextualized understanding of meaning resembles the notion of "pragmatic hermeneutics" discussed in James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 HARV. L. REV. 1332, 1336 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)). As Kloppenberg suggests, pragmatic hermeneutics is grounded in the efforts of scholars such as Quentin Skinner. *Id.* at 1335 (citing QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978)); see also STANLEY FISH, *DOING WHAT COMES NATURALLY* 1-3 (1989) (criticizing the conception of meaning in RUTH KEMPSON, *PRESUPPOSITION AND THE DELIMITATION OF SEMANTICS* 60 (1975)).

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

Text and context make meaning. How does meaning fit with fidelity? Fidelity is the aim to preserve meaning. How depends. In ordinary conversation, one selects a text to convey, in that context, the meaning one wants to convey. If one wants to convey the same meaning in two different contexts, then one may have to select two different texts. If in a room of Germans one wants to say, "thank you," one selects the text, "Ich danke Ihnen"; if one then moves to another room filled with French, one selects the text, "Je vous remercie."

In law, meanings get made through the application of legal texts in individual cases. The cases are the contexts; a statute, for example, is the text. A statute says, "No dogs in the park," and its meaning gets made as it is applied by, for example, a court, to individual cases presented. Unlike ordinary conversation, however, a court cannot select a new legal text in every new context. Instead, the legal texts remain the same across contexts. What changes across contexts is the application, or as I will call it, the reading of the legal text in context. What the lawyer or court does is find a reading a legal text in a new context, so as to preserve the meaning of an earlier reading of the legal text in an earlier context.

A reading, then, is the fourth moving part in this practice of interpretive fidelity. The interpreter of fidelity tracks the meaning of different readings in context. We can represent the point schematically like this.

[*403] [SEE FIGURE A IN ORIGINAL]

As I said above, readings change. But the figure should make plain why this is so. If meaning is a function of text in context, then it should be clear that in at least some cases, a changed reading could be consistent with fidelity. For some changed readings simply accommodate changes in context, by aiming to find a reading in the new context that has the same meaning as a different reading had in a different context.

So again, the interpreter of fidelity tries to preserve meaning across contexts (C[1], C[2]) by selecting a reading (R[1], R[2]) of a legal text (T) that, in context, has the same meaning (M) as an earlier or original reading. If the meaning of these readings across contexts is preserved, or the same, then fidelity has been secured.

Thus, from the fact that a reading has changed, one cannot conclude that meaning has changed (again, the change could be an accommodation). Likewise, from the fact that a reading has not changed, one cannot conclude that meaning has stayed the same (for again, the changed context could change the meaning of the old reading in the new context). To know whether meaning has changed, then, one must track both changes in text and changes in context.

Much more could be said qualifying and defining these initial sketches, but I want to pass over precision just now, to move to examples that illustrate the utility of speaking in this way.

[*404] A. Easy Cases

My objective is to give an account of how changed readings may be justified. If meaning is a function of text and context, then we can describe the possibilities with the following matrix:

FIGURE B

	Unchanged text	Changed text
Unchanged context	[1] No changed reading	[2] Changed readings: amendment and synthesis
Changed context	[3] Changed readings: fact and structural translation	[4] Changed readings: mixed translation and synthesis

As the matrix suggests, from the perspective of fidelity, some cases are easy. Consider first box 1: If meaning is a function of a reading in context, and if a reading depends upon a legal text and its context, and if neither the legal text nor context has changed, n33 then neither may readings change, if meaning is to be preserved. Or at least, neither may readings change because of the demands of interpretive fidelity. For on the account presented here, readings change to accommodate changes in the legal text or context; here no change is justified.

- - - - -Footnotes- - - - -

n33 Of course, "change" is not self-defining (indeed, this is the whole point of this article), but includes only "relevant" change, which itself requires an interpretive judgment. Nothing in the mechanics I present should suggest that this process is at all mechanical. What will be "relevant" is a contextualized, local judgment.

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

Box 2 is a second easy case -- the case of a changed text within an unchanged context. When a legal text changes -- say, because of an amendment -- and the context remains the same, then the meaning of that text in context will, and should, change. And if meaning should change, then a changed reading that tracks the changed text raises few problems of justification. n34 *Brushaber v. Union Pacific R.R.* n35 changed the reading of the taxing power offered in *Pollack v. Farmers' Loan & Trust Co.* n36 It did so because in the years between *Pollack* and *Brushaber*, Congress had proposed, and the states had ratified, the Sixteenth Amendment. If the Sixteenth Amendment was properly ratified, n37

then the changed reading in Brushaber [*405] was legitimate. The legitimacy of the changed reading turns on the pedigree of the change in the constitutional text. n38

-Footnotes-

n34 But few is not none. During the early 19th century, and then again in the late 19th and early 20th centuries, significant debate raged over whether there were limits to the possible legitimate amendments to the Constitution, beyond those specifically articulated in the text itself. See JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 86, 157-82 (1992).

n35 240 U.S. 1 (1916).

n36 157 U.S. 429 (1895).

n37 Ever since its ratification, a persistent number of constitutional lunatics have gone to jail asserting that the 16th Amendment was not properly ratified. See, e.g., Coleman v. Commissioner, 791 F.2d 68, 69 (7th Cir. 1986) (noting that while the government may not punish individuals for their convictions about the illegitimacy of the 16th Amendment, it may punish their consequent failure to pay taxes).

n38 I realize that speaking of a change in text as inducing a "changed reading" is not the traditional way of understanding changed reading. But I speak about it this way more for what this way of speaking suggests about the two other examples of changed readings than out of any need to insist on this definition of "changed reading." When @ 2 of the Sherman Act is changed, we can say either that the text of the Act has changed or that the reading of the Act has changed in response to the textual change. Both statements make sense of what has happened. The intuition that no sharp line separates saying the "Act has changed" and the "reading of the text has changed" comes in part from the complexity of the notion of the statute itself. See, e.g., Richard A. Posner, Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights, 59 U. CHI. L. REV. 433, 435 (1992) (noting that the ability to read a statute presupposes a vast linguistic, cultural, and conceptual apparatus). When the Sherman Act is changed, is a new act created, or is an old act amended? The same ambiguity haunts the question of whether a reading is different when a text has changed.

-End Footnotes-

A third easy case is suggested by some of the cases within box 3 -- changes in context while the text remains the same. (I emphasize "some" since, as I will describe below, there are two importantly different ways in which "context" may change, and whether the case is easy depends on which.) As I have defined it, context is an amalgam of understandings and facts and theory and whatever else may be relevant to the meaning of a particular text. But we can begin with perhaps the simplest change in context: an alteration of the facts of a particular case. Unlike texts, (sometimes) facts change without the plan of anyone. When they so change, the effect on meaning will (ordinarily) n39 be unsought. In such cases, a changed reading could restore the original meaning in spite of these changed facts.

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n39 Guido Calabresi discusses the counterexample, where workers' compensation statutes are enacted with damage amounts that are intended to change in real value over time, because, for example, of inflation. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 40 (1982).

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Here's a simple example. Imagine a statute that requires: "Drivers who speed shall be found negligent." If in one case a driver exceeds the speed limit by ten miles per hour, then the proper reading of this statute in this context is that the driver is speeding and thus negligent. If in a second case the driver drives ten miles per hour under the speed limit, then the proper reading of this statute in this context is that the driver is not speeding and (ceteris paribus) therefore not negligent. Different readings track different facts, or again, readings may change to track differences in facts while preserving the meaning of the text read.

We can expand this category of "facts" beyond facts that apply to a particular case at hand and observe the same point. There was no television when the First Amendment protected "the Press." n40 Nonetheless, a changed reading of the First Amendment that includes television within its scope could be a reading of fidelity. "Disks" are not "papers," yet a changed reading of the Fourth Amendment's "papers" n41 that would cover disks could be a reading of fidelity. In each case, something like the "facts" from an original context change, and readings that ignored these changes could change the meaning of [*406] the text read. Likewise, a reading of the original text to accommodate those changes in facts can be seen as a change of fidelity. n42

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n40 U.S. CONST. amend. I.

n41 U.S. CONST. amend. IV.

n42 See, for example, the discussion of the Mann Act in *United States v. Wolf*, 787 F.2d 1094, 1101 (7th Cir. 1986) (" [I]t was not the intention of the Framers of the Act to freeze the meaning of 'immoral' as of 1910, when the Act was passed."); see also Lessig, *supra* note 26, at 1189-1211 (discussing methods "to preserve original meaning, not just in the original context but as applied in the current context"); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 194 (1986) (discussing the difficulty of deciding whether the Mann Act's term "immoral practice" should refer to the values of the time when the Act was passed); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 381 (discussing how, in certain contexts, failing to reinterpret a statute in light of current realities can frustrate the statute's intent).

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Facts come in many forms, and no simple line divides the facts of a particular case from facts affecting broad classes of cases. n43 For our purposes, however, the difference is not important. Whether conceived broadly

or narrowly, all "facts" are background to the particular text read, and a change in any could in principle constitute a change in the context of the text read. n44 What is important here is not to draw a line between changes that count and changes that don't; instead, what is important is to identify what kinds of argument rely upon changes in context.

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n43 Some define these as adjudicative and legislative facts, but no bright line divides facts in the narrow sense from facts in the broad sense. See e.g., JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 129-277 (2d ed. 1990) (exploring and criticizing the common distinction between legislative and adjudicative facts). For an intriguing discussion about how the Supreme Court should deal with legislative claims requiring a resolution of questions of fact, see Henry Wolf Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARV. L. REV. 6, 23 (1924) (proposing that the Court establish rules to postpone review until the parties can resolve factual disputes extrajudicially).

n44 See Emmet T. Flood, Fact Construction and Judgment in Constitutional Adjudication, 100 YALE L.J. 1795, 1805-08 (1991) (arguing that historical facts are not only objects of interpretation but also conditions of interpretation which constitute the discursive tradition of which the interpreter is necessarily a part).

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In what follows, whenever the interpreter points to a change in the background to justify a changed reading in the foreground, I will say that she relies on an argument of translation. Arguments of translation will fall into two classes. Whenever she relies upon the most narrow class of such background changes -- what we would ordinarily call "the facts" -- I will call it an argument of fact translation. When she points more broadly, to understandings underlying the dispute in a particular case, I will call it an argument of structural translation. The scope of this second class of argument is no doubt yet unclear, but is the focus of Part I.C below.

Why "translation"? A literary translator's practice is to construct a second text in a second (or "target") language to mirror the meaning of a first text in the first (or "source") language -- again, to construct the text, "Je vous remercie," in the context of a room of French speakers to mirror the meaning of, "Ich danke Ihnen," in a room of Germans. This is the practice of the translator in law as well. She constructs a reading in the second context to preserve the meaning of a reading within the first, where, again, the context within which both readings are made includes a legal text and a context background to that text. If we conceive of these different interpretive contexts [*407] as just different languages, then we can link the practice of the legal interpreter to the practice of the translator: Both seek a text in a second interpretive context that preserves the meaning of another text in an original interpretive context. n45

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n45 I develop this point further in Lessig, supra note 26, at 1189-1211.

-End Footnotes-

Amendment (changed text) and fact translation (changed context) are the extreme (hence easy) cases of justified changed readings. Each marks the boundary of two other, middle cases -- what I will call "synthesis" and "structural translation." Consider now the contours of these two middle (and more interesting) cases of justified changed reading, before considering how they connect with the cases represented in box 4 of the matrix above -- cases of mixed synthesis and translation.

B. Justifying Changed Readings: Synthesis

Some amendments change constitutional text directly: The Twenty-First Amendment directly repealed the Eighteenth; the Twelfth Amendment directly changed the method for electing a president described in Article II. But often the effect of an amendment is indirect, felt beyond the text it modifies, imposing, in Dworkin's sense, a "gravitational force" on other parts of the text read. n46 This is the effect tracked by the changed reading I call synthesis. But we must be clear about the source of this indirect effect to understand its significance.

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n46 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1978).

-End Footnotes-

Here is one relatively uncontentious way in which this gravitational pull can matter: All texts are read against a background of interpretive principles, or rules for reading, some of which we can call canons of construction. n47 Some of these canons direct how a particular text is to be read along side other parts of the same text: An interpretive tradition might, for example, have a principle of holism in interpretation. "Holism" means that how one part of a text is read may affect how a second part of the same text is read as well. So too with a canon against redundancy: If a text must be read to avoid a reading that makes any part redundant, then by adding to a text, one might create a different reading in a different part of the same text, to avoid rendering the first part redundant. Any change so justified is a change of synthesis. n48

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n47 See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405 (1989) (discussing different interpretive functions served by the canons of construction).

n48 This is, no doubt, a narrow conception of "synthesis," one focused less on substantive synthesis than on interpretive synthesis. A broader principle of synthesis would examine the interaction of the substance of different constitutional principles, for example, how the ideals of the 14th Amendment should be read against the ideals of the 1st Amendment. See, e.g., Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 151-55 (1992) (arguing that the adoption of the 14th Amendment affected the kinds of speech courts were willing to protect under the 1st Amendment).

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The intuition is simple enough. Consider a somewhat stylized example to isolate some of its moving parts. Imagine a statute entitled the Federal Bank Regulation Act. The first two sections of this statute provide:

[*408] (1) There shall be an agency established for the purpose of advancing regulation of any bank in which the federal government has an interest, within the reach of the federal commerce power.

(2) The President shall appoint five commissioners to this agency, who shall serve at his pleasure.

Anyone reading this text so far would have quite a clear idea of what was being regulated, and at least some idea of the structure of the entity regulating it. Now imagine the following section 3:

(3) For the purpose of coordinating conservation programs, the Administrator of the Environmental Protection Agency shall appoint three subcommissioners to this agency, who shall serve at his pleasure.

Upon reading this section, our reading of the earlier sections begins to change. Suddenly we are left wondering what sort of bank the statute regulates. If we think the statute is regulating financial institutions, we wonder what "conservation" programs are, and what place the head of the EPA has in financial regulation. Imagine that the statute ended with the following section 4:

(4) For purposes of this statute, a "bank" shall not include any land presently regulated by the South Florida Coastal Commission.

The point once made is easily remarked: As the statute is read, if we must find a meaning that is consistent across the statute, n49 then later parts of the statute modify the meaning of earlier parts. Later parts, that is, must be synthesized with earlier parts, and this synthesis can change the reading of what went before.

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n49 See, e.g., Sunstein, supra note 47, at 454 (noting that "the idea that the language of a particular provision will be taken in the context of the statute as a whole and will not be interpreted so as to do violence to the statutory structure" is a central canon of statutory construction).

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The example is a special case that suggests a more general point. For imagine a statute that has been modified over time, with later sections added years after the earlier. In this case, later additions really can change the meaning of earlier texts, as the effect of the later additions, along with then existing canons of construction, yield meanings of the earlier sections that are different from the meanings those sections once had. n50 Here, through synthesis, the later transforms the earlier.

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n50 For an excellent discussion of the phenomenon of modification of canons of construction, see Nancy Eisenhauer, Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986, 59 U. CHI. L. REV. 1183, 1190-94 (1992) (discussing the "context canon").

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Synthesis thus describes how later texts come to affect the meaning of earlier texts. n51 Within a tradition of written constitutions, a question of synthesis gets raised with every amendment. A tradition could choose to ignore this [*409] synthetic effect -- it could choose, that is, to treat each clause of the Constitution as a Constitution on its own. n52 But our constitutional tradition has not so chosen. This idea has been pointed to by a wide range of jurists -- from Justices Stevens and Ginsburg to Judge Posner n53 -- and is best presented by the case of *Bolling v. Sharpe*. n54

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n51 Within law, the notion of synthesis has been most concretely developed in Ronald Dworkin's chain novel. RONALD DWORKIN, *LAW'S EMPIRE* 228-32 (1986). The phenomenon, however, is not limited to law. Consider T.S. Eliot on art: "When a new work of art is created . . . something . . . happens simultaneously to all the works of art which preceded it." T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS* 3, 5 (rev. ed. 1950); see also SABINA LOVIBOND, *REALISM & IMAGINATION IN ETHICS* 142 (1983) (discussing Jorge Luis Borges' comment, "Every writer creates his own precursors. His work modifies our conception of the past, as it will modify the future." JORGE LUIS BORGES, *Kafka and His Precursors*, in *LABYRINTHS* 236, 236 (1981)).

n52 This is the method John Ely calls "clause-bound" interpretivism. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 12 (1980). The term describes well some of the central tensions within our own constitutional tradition, and no doubt an argument is required to show that synthesis should be a practice of our own tradition. Whether it should be depends in part on what practice one conceives the Constitution to constitute. For example, imagine receiving three letters in the mail, each referring to the very same subject. In order to apply interpretive synthesis to all three, we must treat the three as if they were written by the same person. Likewise, in order to maintain the consistency of our political system, we apply the same assumption to our Constitution. To put it another way, the chain-novel product of eight generations -- the Constitution -- as the writings of a single political author -- the American people.

n53 Justice Ginsburg commented on a paper by Michael Perry as follows: There are originalists who treat each alteration in our Constitution as hermetically sealed. But are there not many others prepared to interpret the document in light of its layered history, its sedimentary quality?

. . .

Consider this simple example. The 1868, but not the 1787, Constitution guaranteed equal protection. Would Perry's originalist say that the equal protection guarantee, because it is lodged in the 14th amendment, applies only to the states, not to the federal government? If one reads equal protection into the 5th amendment, so that the document is kept coherent or harmonious, can she no longer be accommodated in the originalist camp?

Ruth Bader Ginsburg, Comments on "'Interpreting' the Constitution," Remarks Before the AEI Conference on "How Does the Constitution Establish Justice?" 4, 5 (Sept. 11-12, 1987) (copy on file with the Stanford Law Review); see also John Paul Stevens, The Bill of Rights: A Century of Progress, 59 U. CHI. L. REV. 13, 21-24 (1992) (arguing that the meaning of prior constitutional amendments is inevitably altered by the adoption of later amendments). Judge Posner expresses the same view. RICHARD A. POSNER, OVERCOMING LAW 227-28 (forthcoming 1995).

n54 347 U.S. 497 (1954).

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Bolling raised the question whether the principle of Brown v. Board of Education n55 would apply in the District of Columbia. Brown rested upon the Equal Protection Clause of the Fourteenth Amendment. By its terms, that clause applies only to states. Thus, when the Supreme Court decided Brown, striking all de jure state segregation, it confronted an embarrassing textual gap: Would Brown extend to de jure segregation in the District of Columbia as well? Bolling held that it did. n56 In a decision that has since been understood to stand for the proposition that there is an "equal protection component to the Due Process Clause," n57 the Court held that the federal government, like the state governments, could not segregate public schools.

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n55 347 U.S. 483 (1954).

n56 Bolling, 347 U.S. at 500 ("In view of our decision that the Constitution prohibits the states from maintaining segregated public schools. It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

n57 Stevens, supra note 53, at 20 (stating that in Bolling, "the Court unanimously found what is now known as the equal protection component of the Due Process Clause embedded in the word 'liberty' as it is used in the Fifth Amendment").

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What is significant about the actual opinion, however, is not that the Court found an "equal protection component" to the Due Process Clause. No such "component" was ever "found." As Justice Souter has explained,

Bolling is so often described as a case which held that due process has an equal protection component. In point of fact, that description of Bolling came later [*410] What the Court did in Bolling was not simply to say, look, all along there was an equal protection component in due process. They said something very different. They went through a kind of fairness analysis and ultimately I have always read Bolling as coming down to this question. We are going to apply to segregation in the Washington, D.C. schools the old kind of . . . substantive due process analysis that even the conservatives accept. We are going to say is there, at the present time, a legitimate governmental object which is being served by this particular restriction, that is, the restriction on total freedom to attend schools in an integrated basis? The most interesting thing about Bolling is that the Court said, no, that is not a legitimate

governmental objective. n58

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n58 Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary, United States Senate, 100th Cong., 2d Sess. 305 (1990) (statement of Judge Souter). The same point is made by Justice Stevens. See Stevens, supra note 53, at 21-23.

-End Footnotes-

But if not some equal protection component to the Due Process Clause, what would explain why it was no longer a "legitimate governmental objective" to segregate on the basis of race? Justice Souter's explanation is an account of synthesis: The pursuit of inequality, we can understand him to be saying, can no longer be understood to be a legitimate federal interest, because the best reading of the Constitution as amended now limits the range of permissible governmental ends. Federal powers can no longer be used to advance interests of racial inequality, since the middle republic, born after the Civil War, has removed these interests from the list of legitimate governmental ends. Before the Fourteenth Amendment, this reading would have been incorrect; and after the Fourteenth Amendment, if it is correct, it is correct not because it follows directly from the changed text, but instead because of the effect I have called synthesis.

One could well argue that this particular application of synthesis is weak, or wrong, or obvious. My aim here is not to defend it. My aim is to describe. And what Bolling describes is a changed reading that cannot turn on a changed text directly, but instead must turn on implications drawn indirectly from a changed text. n59 This is the form of the argument from synthesis.

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n59 For another example of such change, see David Yassky, Eras of the First Amendment, 91 COLUM. L. REV. 1699, 1742-44 (1991) (arguing that the meaning of the 1st Amendment has changed as other parts of the Constitution have changed).

-End Footnotes-

C. Justifying Changed Readings: Structural Translation

I said at the start that we should distinguish four moving parts in this practice of interpretive fidelity: The interpreter of fidelity seeks readings of legal texts in the current interpretive context that preserve the meaning of an earlier reading in an earlier context. I have so far defined reading and text; I have promised not to define meaning. I want now to be a bit more precise about context.

Central to the argument of this essay is a distinction between two aspects of an interpretive context -- a distinction well known outside of law, though nonetheless not easily described. It is the distinction between aspects of an interpretive context that at any one time are contested, or up for grabs, or political, and [*411] aspects that are at the same time taken for granted,

uncontested, given. These are imprecise words, and to some extent, full precision is impossible. But we can begin to understand what these imprecisions aim at in the following account.

In any context, legal or not, within any discourse, whether cultural or scientific or social, some things are argued about; most things are not. Some things are up for grabs; others are taken for granted. We argue about what law applies; we don't argue about what law is. We argue about how a text should be read; we don't argue about whether reading is possible. We argue about whether I should wear a tie; not about whether I should wear a dress. Not that we couldn't argue about these matters -- obviously, we could. Not even that we never argue about (at least some of) these matters -- there are, after all, costume parties. And not that there is not a "we" for whom these matters are up for grabs -- deconstructionists dazzle with the problem of reading. But caveats notwithstanding, in each of these cases -- and more generally, always -- there is the normal against which exceptions get drawn. There is a space within which disagreement occurs, and a border that is not crossed. Disagreeing with someone about abortion makes you an opponent; disagreeing with someone about whether children should be tortured makes you an alien. n60

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n60 It is tempting to think that what distinguishes contested from uncontested discourses is something in the nature of the discourse itself -- that, for example, value discourse is essentially contested, while fact discourse is not. In my view, no such line is possible. Values, no less than facts (indeed, I think far more than facts) are suitable for uncontested discourse, and they function, just as facts do, to constrain contested discourse. For example, discourse about whether one should torture children for sport is a fundamentally uncontested discourse of morality.

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The argument of this article hangs upon being able to speak about this distinction between those things argued about and those taken for granted -- between that part contested and that part uncontested, between what everyone knows or that which we "can't help [but] believ[e]," n61 and what can be doubted or can be thought otherwise. n62 However known, however clear, however [*412] shown, however understood, there is a part of the background of understandings or beliefs or practices not directly challenged in a particular dispute; presuppositions taken for granted by both sides to a dispute, against which any dispute proceeds; a world of uncontested understandings that define what appears natural or necessary or true in any particular context. This uncontested is not simply the "context" of a particular dispute, for some aspects of an interpretive context are plainly contested: Debates about abortion funding, for example, proceed within a context in which abortion itself is contested; both contests, however, proceed within a context in which equality is said to be a constitutional ideal, and in which the Constitution is taken as foundational. This uncontested is instead a part of the context that has a constitutive and constraining effect on any dispute within the context, in ways we need yet to explore.

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n61 Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (Jan. 11, 1929), in 2 HOLMES-LASKI LETTERS 1124, 1124 (Mark DeWolfe Howe ed., 1953).

n62 Cf. LOVIBOND, supra note 51, at 108 (arguing that uncertainty in any field of study "take[s] place against the background of a stable world-picture, or total theory, by reference to which we determine the truth or falsity of what is dubious"). Germans would call this uncontested the stille Selbstverstandlichkeiten, see ALEXANDER BLANKENAGEL, TRADITION UND VERFASSUNG 93-97 (1987) -- understandings by all that go without saying in a particular linguistic exchange. Social or political scientists or theorists would call it "hegemony" -- a term more manageable than stille Selbstverstandlichkeiten, but nonetheless a term perhaps "better left at home." William A. Gamson, David Croteau, William Hoynes & Theodore Sasson, Media Images and the Social Construction of Reality, 18 ANN. REV. SOCIOLOGY 373, 381 (1992). As Gamson et al. describe the uncontested for the purposes of media regulation: We would do better to abandon the term [hegemony] while saving an important distinction between two separate realms of . . . discourse.

One realm is uncontested. The social constructions here rarely appear as such to the reader and may be largely unconscious on the part of the image producer as well. They appear as transparent descriptions of reality, not as interpretations, and are apparently devoid of political content. Journalists feel no need to get different points of view for balance when they deal with images in this realm. When they conflate democracy with capitalism or matter-of-factly state that the United States is attempting to nurture and spread democracy abroad, they express images from this realm. Id. at 382.

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For ease of explication, I will simply name this distinction by saying that within any interpretive context, some discourses are "contested" while others are "uncontested." But I must be quick to offer three qualifications and make one plea.

First, the qualifications. Obviously, to call a discourse "uncontested" is not to say that no one can contest it: "Contestable," as I will use the term, is individual; "contested" is social. An individual may contest what the ordinary person in a community does not: That two plus two equals four is uncontested, even if a child says the sum should be five; that women are equal citizens is uncontested, even though some argue for a more traditional role; that women at one time were not equal citizens is uncontested, even though Mill n63 or Wollstonecraft n64 argued that they were or should be. Something is "uncontested" within a particular interpretive context because of what others in that context believe and do. In particular, it is uncontested when one person's questions about it do not raise questions in the minds of others.

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n63 JOHN STUART MILL, THE SUBJECTION OF WOMEN 1 (New York, D. Appleton and Co. 1869).

n64 MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN, WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS ix (Alfred A. Knopf, Inc. 1992) (1792).

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Second, to call a discourse "uncontested" is not to say that its object is something necessary or natural or fixed, or the product of something other than human agency. I happily grant that the full range of this background reality may be socially constructed, or, in the critics' slogan, that "it's all politics." n65 Social and political structures may all be the product of human agency, which means simply that at some time, under some condition, things that now seem natural could be made to seem otherwise. But this does not mean that everything could be made otherwise just now. The world may be socially constructed, but it is also differentially plastic.

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n65 ROBERTO MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 10 (1987).

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Third, to say that a discourse is "uncontested" is not to say that it is obvious to all that it is uncontested, or even that all recognize it as a discourse. For the most part, that which constitutes the uncontested remains invisible. The effect of an uncontested discourse is felt not so much because it is recognized as an [*413] uncontested discourse and given authority based on that recognition. The effect instead comes from being unnoticed. What is crucially difficult about this whole way of speaking is that it is a discourse about ghosts. To talk about the effect of the uncontested is to talk about something that is nowhere apparent from the debate or its context. Yet it is something, I suggest, that has an extremely important effect on reading texts over time.

Thus, to say that a discourse is uncontested is not to say that no one questions it, or that it is incontestable for everyone, or that it has always been or always will be uncontested, or that it is recognized and acknowledged as uncontested. It is instead simply to pick out an ordinary point of view at a particular time. It is to refer to a fundamentally social understanding n66 that operates to define and constrain discourse within that context.

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n66 The notion of a social understanding is developed in ELLIOT ARONSON, THE SOCIAL ANIMAL 1-13, 415-43 (7th ed. 1995). My definition of a contested concept differs from Gallie's notion of "essentially contested concepts." W.B. Gallie, Essentially Contested Concepts, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956) (arguing that certain concepts will be endlessly contested). In my view, an "essentially contested concept" could become uncontested at a particular time, a distinction Gallie does not address.

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Now obviously, this way of speaking is impossibly difficult. Always, the attempt to characterize certain views as taken for granted or uncontested will be met with the charge of naivete or oversimplification. Always, it will be possible to find people who disagree with what I claim is taken for granted;

always, it will be possible to point to a subtlety that any characterization will miss. But my plea, then, is this: We cannot deny the place of what I have labeled the uncontested. When Justice Bradley writes,

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life, n67

we cannot deny that he is just speaking from a different world. The difference between his world and ours is not explained by saying they were sexists, and we (we?) are not. The difference is more fundamental. What the argument that follows needs is just a way to point to these more fundamental differences, and a way to speak about them changing. I confess that pointing is not explaining, but my point here is not to explain the source or nature of these uncontested discourses: It is to understand their effect. To see this effect, one must pass over these quibbles of qualification.

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n67 Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872).

-End Footnotes-

If we can settle enough to agree to allow the distinction that these labels purport to sketch to proceed, then I can remark what is essential to what will follow. For however difficult the "uncontested" is to define, what is certain is that the uncontested changes. What was uncontested at one time becomes contested at another; what is contested now may become uncontested later. The status -- contested or uncontested -- of these contested or uncontested discourses [*414] changes, and what structural translation asks is how such changes should matter to interpretive fidelity.

That change occurs cannot be denied. n68 How change happens is more complicated -- sometimes quickly, sometimes slowly, sometimes by decree, sometimes by consensus. Think of uncontested discourses as the banks of a river within which contested discourses flow. As the banks shift (as the uncontested shifts), so too will the movement of the water change (so too will the contested discourses shift). These shifts can be dramatic -- a canal, for example -- or evolutionary -- erosion. The question for structural translation is how these shifts will be accommodated within norms of interpretive fidelity.

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n68 Thurman Arnold viewed much of the New Deal legislation as reflecting a change in uncontested reality. ARNOLD, supra note 6, at 105-27 (describing how institutional failure led to partisan debate over what was once taken for granted).

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Ultimately, my argument about structural translation rests upon an empirical claim about what courts or judges actually do in the face of this shift in the invisible, uncontested discourses that stand behind any discourse in law. In

the face of this empirical claim, the role of theory will be to help explain why they do what they do, and to help understand whether what they do can be justified. The argument ultimately, then, will be about an institutional response to these shifts in discourses.

Why should we expect the shifts to matter? Here economics as metaphor may help. We can view this shift in the contours of permissible discourse as a change in the price of various rhetorical moves. As what one questions falls more on the uncontested end of a continuum, the marginal cost of that question increases. At some point, we could say that cost becomes infinite, as what one says functions more to undermine the credibility of the person speaking than it does to advance the argument made. Think about one who begins by arguing that the minimum wage is bad policy and ends by arguing that this is because minimum wages undermine the dominance of the master race; or one who begins by arguing that the jury wrongfully convicted her client and ends by arguing that this is because the jurors, along with the judge, along with the President of the United States, are all in a conspiracy to discredit her; or again, one who begins an argument challenging the jurisdiction of a federal court over a local school board and ends by claiming that the Fourteenth Amendment was not actually ratified. In each case, something recognizable as argument transforms into something else, as it moves from the center of the channel of the contestable to the shores of the incontestable. At some stage, the person commits a form of rhetorical self immolation, when the question finally and clearly grounds itself upon the domain of uncontested discourse.

If there is such a thing as rhetorical self immolation, and if it is a function of what is taken for granted within a particular interpretive context, then as what is taken for granted shifts, a court may have to accommodate this shift, not just to preserve fidelity, but also to preserve its own institutional integrity. n69 Or so the arguments below will suggest.

-Footnotes-

n69 Few cases reveal as explicitly the self-conscious consideration by the Court of precisely this issue than Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814-15 (1991) (joint opinion).

-End Footnotes-

[*415] 1. Changes: homosexuality.

Compare two possible discourses about homosexuality: The first questions whether homosexuality is immoral, and the second whether homosexuality is a pathology. One may argue today about whether homosexuality is "immoral"; one may not argue about whether it is a "pathology." n70 Things have not always been this way. At one time, there was no argument about whether homosexuality was immoral -- it was. And at one time (not the same time), there was no argument about whether homosexuality was a pathology -- it was. Both of these uncontested discourses have changed, and today, rather than two uncontested discourses, there is just one, and this one just the opposite of what it was at one time before. Now, that is, homosexuality is not a psychological pathology. Serious and reasonable people might argue that homosexuality is wrong or immoral, but it would no longer be an "argument" if one tried to prove it was pathology.

-Footnotes-

n70 This is distinct from the question of whether there is some biological basis for homosexuality. There can be a biological basis for something that is not pathology, for example, left-handedness. As will be clearer below, when I say that one cannot argue about whether homosexuality is a pathology, I am not denying that there are those who would so argue. My point is that within medicine, broadly conceived, one could not make such an argument.

-End Footnotes-

Law's perspective on this change in the discourse about homosexuality's pathology is particularly interesting, for it provides a clear, if perhaps too simple, example of the more general phenomenon that I label structural translation. The government's exclusion of homosexuals from entry into the United States will provide a focus for the example -- a precursor, in ways that will become plain, to the current "don't ask, don't tell" exclusion of gays from the military.

Early in this century, Congress statutorily barred homosexuals from entry into the United States, n71 an exclusion based partly on the view that homosexuality was pathological. As described by Judge Aguilar in a decision that will be the focus of this Part,

Homosexuals were first considered to be statutorily excluded from entry . . . by the Immigration Act of 1917, which prohibited the entry of "persons of constitutional psychopathic inferiority" certified by a physician to be "mentally . . . defective." In 1952, the McCarran-Walter Act repealed the Immigration Act of 1917, and homosexuals were excluded from entry as persons with "psychopathic personality." In 1965, the Immigration and Nationality Act was amended to provide for exclusion of homosexuals as persons afflicted with a "sexual deviation." Thus, the current provision of the Immigration and Nationality Act . . . provides: "(a) . . . the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . [a]liens afflicted with a psychopathic personality, or sexual deviation, or a mental defect" n72

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n71 Immigration Act, ch. 29, 39 Stat. 874 (1917), repealed by McCarren-Walter Act, @ 403, 66 Stat. 163, 279 (1952). For a useful history of the exclusion of homosexuals by use of the immigration laws, see Sana Loue, *Homosexuality and Immigration Law: A Reexamination*, 18 J. PSYCHIATRY & L. 109 (1990).

n72 *Lesbian/Gay Freedom Day Cmte., Inc. v. INS*, 541 F. Supp. 569, 571-72 (N.D. Cal. 1982) (citations omitted), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983).

-End Footnotes-

[*416] No doubt intolerance, bigotry, fear, and religion all played some role in these statutory enactments. n73 But for the purposes of the discussion below, it is enough that science too played a critical role. As Judge Aguilar concluded, while Congress specifically intended in enacting the statute to

exclude homosexuals, "the congressional decision . . . [wa]s [also] based upon the premise that homosexuality [wa]s a medical illness." n74 Not because of science (or at least I don't need to claim so here) but aided by science, these other motives were given a sanction to interfere with the lives of those not then within science's favor. n75

-Footnotes-

n73 But see Jorge L. Carro, From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?, 7 YALE L. & POL'Y REV. 201, 219 (1989) ("Congressional intent, however, was premised on existing medical knowledge; nothing indicates that Congress sought to exclude homosexuals on grounds of moral or religious principles.").

n74 Lesbian/Gay Freedom, 541 F. Supp. at 579; see also Boutilier v. INS, 387 U.S. 118, 120 (1967) ("[B]eyond a shadow of a doubt . . . Congress intended the phrase 'psychopathic personality' to include homosexuals.").

n75 Some, however, perceived the scientific characterization as an enlightened advance over the previous, moralistic view. See RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSES 9 (1981) (stating that in the first half of the century, public homosexuals preferred to be considered sick rather than criminal).

-End Footnotes-

The Supreme Court first reviewed the exclusion in 1967, in a challenge brought by Clive Boutilier, a resident alien who self identified as a homosexual when applying for United States citizenship. n76 Based upon this admission, the Public Health Service (PHS), a board of licensed doctors given the authority to determine Boutilier's status, certified that Boutilier had a "psychopathic personality" and that he was a "sexual deviate." n77 As a consequence, the INS denied Boutilier citizenship and instituted deportation proceedings against him. Boutilier challenged the statute on vagueness grounds, claiming that he could not reasonably know that because he was a homosexual, he had a psychopathic personality. n78 In a 6-3 decision, the Court rejected his claim. Jumping beyond the statutory language into the legislative history of the Act, the Court found "beyond the shadow of a doubt" that Congress intended the phrase "psychopathic personality" to include homosexuals. n79 Given this clear intent, the Court reasoned, a vagueness challenge would not lie. n80

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n76 Boutilier, 387 U.S. at 118-20.

n77 Id. at 120.

n78 Id. at 123. For a far more complete and lucid discussion of the statutory interpretive problems raised by this case, see William N. Eskridge, Jr., Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609, 609-12 (1990).

n79 Boutilier, 387 U.S. at 120.

n80 Id.

-End Footnotes-

My interest in this case has nothing to do with the vagueness doctrine per se. Instead, it is to remark the then dominant and uncontested view that homosexuality was a disease. n81 Indeed, the prevalence of the view is captured well [*417] in Justice Douglas' dissent. Justice Douglas argued that the statute should be struck on vagueness grounds, but not because there was something backwards or even questionable about the assumption that homosexuality was a disease. Indeed, Justice Douglas quite willingly embraced, if not relied upon, this "fact." Said Justice Douglas, "[homosexuals] are the products 'of heredity, of glandular dysfunction, [or] of environmental circumstances.' The homosexual is one, who by some freak, is the product of an arrested development" n82 What this, from the Court's most liberal justice, suggests is that in 1967 at least, it went without saying that homosexuality was pathology. n83

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n81 Homosexuality was not always considered pathological. See generally MICHAEL CRAFT, TEN STUDIES INTO PSYCHOPATHIC PERSONALITY 11-13 (1965). But the dominant view within the psychiatric community was that homosexuality was pathological. See, e.g, BAYER, supra note 75, at 30, 38-39; IRVING BIEBER, HARVEY J. DAIN, PAUL R. DINCE, MARVIN G. DIELLICH, HENRY G. GRAND, RALPH H. GUNDLACH, MALVINA W. KREMER, ALFRED H. RIFKIN, CORNELIA B. WILBUR & TOBY B. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY 18 (1962); see also CLIFFORD ALLEN, A TEXTBOOK OF PSYCHOSEXUAL DISORDERS 166 (1962) (assuming that homosexuality is either a psychological disease, a genetic problem, or an endocrine disorder); W. Patterson Brown, The Homosexual Male: Treatment in an Outpatient Clinic, in THE PATHOLOGY AND TREATMENT OF SEXUAL DEVIATION: A METHODOLOGICAL APPROACH 196 (Ismond Rosen ed., 1964). Of course, not everyone shared the dominant view, and many prominent psychologists and scientists argued against it, insisting that homosexuality was a "normal variant of human sexuality." BAYER, supra note 75, at 41. Alfred Kinsey, for example, thought that homosexuality was learned behavior. See id. at 45.

n82 Boutilier, 387 U.S. at 127 (Douglas, J., dissenting) (quoting D.K. Henderson, Psychopathic Constitution and Criminal Behavior, in MENTAL ABNORMALITY AND CRIME 105, 114 (L. Radzinowicz & J.W.C. Turner eds., 1944)).

n83 This, of course, does not prove that no one questioned whether homosexuality was a disease, but merely that the legal system had not yet recognized the dissenters.

-End Footnotes-

Within the scientific community, however, and in particular, within the American Psychiatric Association (APA), this view was soon to change. In 1970, the APA held its annual meeting in San Francisco, and for the first time gay and lesbian activists directed their protests against the organization. n84 By the time of the next annual meeting, the activists' protests began to take effect. n85 In 1972, the APA organized its first open panel on the lifestyles of nonpatient homosexuals. n86 The discussion continued the following year, this time focused on exposing "the extent to which heterosexual biases had colored the work of psychiatrists." n87 In 1973, the board and membership of the APA approved a change in the psychiatric status of homosexuality, thereby ending its classification as a psychopathic condition. n88

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n84 BAYER, supra note 75, at 102 ("Guerrilla theater tactics and more straightforward shouting matches characterized their presence.").

n85 See Robert Lloyd Goldstein, *Clinical Judgment and Value Judgment: Moral Foundations of Psychiatric and Legal Determinations of the Status of Homosexuality*, in *ETHICAL PRACTICE IN PSYCHIATRY AND THE LAW* 293 (Richard A. Posner & Robert Weinstock eds., 1990) (summarizing the APA's transformed position and nomenclature and the ensuing conflict).

n86 Remarkably, the APA did not know of any homosexual psychiatrist who could chair the panel; instead, Dr. Kent Robinson agreed to lead the discussion. BAYER, supra note 75, at 104.

n87 Id. at 112.

n88 Id. at 137; see also Mary Jane G. Gross, *Changing Attitudes Toward Homosexuality -- Or Are They?*, 16 *PERSPS. PSYCHIATRIC CARE* 70, 74 (1978) (offering authority that homosexuality is not a disease).

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As the protests suggest, this question of the status of homosexuality, while at first uncontested, quickly became quite contested n89 and, we could say, political. Not political in the sense that nonmedical considerations were its exclusive guide, n90 but in the sense that the APA made its ultimate judgment under [*418] standards not themselves fully agreed upon. Indeed, as a reflection of this disagreement, the ultimate decision was made by ballot: In December 1973, 58 percent of practicing psychiatrists voted to remove homosexuality from the list of psychopathic conditions. n91 A fundamentally contested discourse resolved itself, at least for the moment, against the uncontested position taken for the past forty years.

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n89 See Loue, supra note 71, at 109 (noting the change in the APA's position); Stephen A. Mitchell, *Psychodynamics, Homosexuality, and the Question of Pathology*, 41 *PSYCHIATRY* 254, 254-55 (1978) (discussing different theories of the origin of homosexuality).

n90 See BAYER, supra note 75, at 189 ("To assert, however, that the decision of December 1973 represented nothing more than a capitulation in the face of force involves a great distortion. Though it is difficult to determine the precise proportion of psychiatrists who have adopted the nonpathological view, it is clear that the numbers are substantial."). But see Goldstein, supra note 85, at 297-98 (noting opponents' "doubts as to the scientific validity" of the APA decision and noting that the profession garnered "a considerable amount of ridicule for attempting to resolve a scientific dispute by recourse to a democratic vote"); Thomas T. Lewis, *The Semantics of Psychiatric Labels*, 35 *ET CETERA* 175, 178 (1978) ("[The APA's] attitudinal change was clearly a product of changing moral views within the larger society, not a result of new research data.").

n91 BAYER, supra note 75, at 148.

-End Footnotes-

Once the APA changed its classification, the discourse about the pathological status of homosexuality soon receded into the background. n92 Soon, a new taken-for-granted view about homosexuality was dominant: the view that homosexuality was not pathological. Following this view, in 1979, the Surgeon General determined that "homosexuality per se will no longer be considered a 'mental disease or defect.'" n93

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n92 The change did not, of course, occur immediately. Some tried to get the decision reversed in the following years. They failed.

n93 Lesbian/Gay Freedom Day Cmte., Inc. v. INS, 541 F. Supp. 569, 572 (N.D. Cal. 1982) (citations omitted), aff'd sub nom. Hill v. INS, 714 F.2d 1470 (9th Cir. 1983). As described by Samuel Silvers, "Surgeon General Julius Richmond . . . gave two reasons for his decision. First, the PHS wished to conform its practices to current medical views . . . such as those of the American Psychiatric Association Second, the Surgeon General noted that homosexuality was not a matter for determination 'through a medical diagnostic procedure.'" Samuel M. Silvers, The Exclusion and Expulsion of Homosexual Aliens, 15 COLUM. HUM. RTS. L. REV. 295, 297 (1984) (quoting 56 INTERPRETER RELEASES 387, 398 (1979)).

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This change by the Surgeon General caused great trouble for the INS. For because of the Surgeon General's determination, the Public Health Service concluded that it could no longer certify homosexuals as "sexual deviates," n94 which meant that the INS no longer had the predicate it needed to exclude homosexuals. In response, the INS simply decided to ignore the issue, and it no longer refused admission to the United States on the grounds of homosexuality alone. n95

-Footnotes-

n94 Silvers, supra note 93, at 297.

n95 Id. at 298.

-End Footnotes-

The (Carter) Justice Department was not satisfied with this decision. Fixed upon the legislative history of the Immigration and Nationality Act, n96 it decided that the INS had a duty to exclude homosexuals, whether or not the PHS would certify them as psychopathic. n97 Under Justice Department guidance, the INS was ordered to adopt the first "don't ask, don't tell" policy: While the INS [*419] would not ask, self-identified homosexuals were to be excluded on the basis of a signed statement alone, without the certification of the PHS. n98

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n96 Pub. L. No. 95-83, @ 307(q), 91 Stat. 383, 394 (1977) (codified as amended in scattered sections of 8 U.S.C.)

n97 See Peter N. Fowler & Leonard Graff, Gay Aliens and Immigration, in HOMOSEXUALITY: DISCRIMINATION, CRIMINOLOGY AND THE LAW 93, 98 (Wayne R. Dynes & Stephen Donaldson eds., 1992) (citing Memorandum from John M. Herman, Assistant Attorney General, to David L. Crossland, Acting Commissioner, INS (Dec. 10, 1979)); Silvers, supra note 93, at 298 (describing how the Justice Department suggested to the INS that it "promulgate a uniform policy for investigating suspected homosexual aliens on a non-medical basis").

n98 As described by Judge Aguilar:

The Guidelines and Procedures provide that an arriving alien will not be asked any questions regarding his or her sexual preference. However, if an alien "makes an unambiguous oral or written admission of homosexuality" . . . the alien may be examined privately by an immigration official, and will be asked to sign a statement to the effect that he or she is a homosexual. . . . The unambiguous admission forms the evidentiary basis for the exclusion hearing.

Lesbian/Gay Freedom Day Cmte., Inc. v. INS, 541 F. Supp. 569, 573 (N.D. Cal. 1982), aff'd sub nom. Hill v. INS, 714 F.2d 1470 (9th Cir. 1983).

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It was this policy that gave rise to Judge Aguilar's decision referred to above. By 1982, an important foundation to the Immigration Act's exclusion had eroded, and importantly for our purposes, this erosion had an effect on the law. No longer could the government trade on the credibility of science to advance its exclusionary policies against gays and lesbians. And as Judge Aguilar read the statute, this shift in science was fatal to the government's policy of exclusion. Finding that the statute incorporated this newly uncontested discourse in science, Judge Aguilar concluded that the statute no longer allowed the exclusion of homosexuals. n99 The INS could no longer exclude homosexuals on the basis of their psychopathic personality; because, in fact, they had no psychopathic personality. As the background discourse in science changed, it constrained law differently. Now if the government was to continue its exclusion, it would have to continue such exclusion grounded on naked preferences alone. n100 Science would no longer support the exclusion of homosexuals.

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n99 Id. at 585.

n100 See generally Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689-90 (1984) (critiquing the theoretical prohibition of naked preferences, defined as "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power," in six clauses of the Constitution: Commerce, Privileges and Immunities, Equal Protection, Due Process, Contract, and Eminent Domain).

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Thus a shift from one uncontested discourse to another allows a changed reading of the statute. And note what should be obvious: Had the same question resolved by Judge Aguilar been raised in 1974, when the discourse about pathology was still fundamentally contested, a court could well have decided the matter differently. It could have reasonably decided that in the face of a contested medical discourse, the law should remain fixed upon the last uncontested medical discourse. The point is just this: that while an uncontested extralegal discourse may constrain a court, a contested extralegal discourse a court may reasonably ignore.

2. Changes: economic theory and due process.

Captured as we are with the notion that law and economics is a relatively new discourse, we are quick to believe that before this century, economics had little to do with law. We are likely, that is, to view law before economics as the formalists would have us view it -- drawing its substance from material wholly [*420] internal to itself. n101 But this view is as much the result of a change in economics as it is the result of historical naivete. For while we see economics as a discipline relatively remote from the ordinary stuff of law, during most of the nineteenth century, as Herbert Hovenkamp argues, the language of economics was very much the language of the lawyer: Because economics had not yet specialized, its lessons were well within the ken of the ordinary lawyer or judge. n102 "Economics" (in this form) had an effect on legal thought.

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n101 See, e.g., HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 173 (1991) (defining formalism as "law without a policy").

n102 Id. at 97 (describing 19th century American judges' exposure to political economics).

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For most of the nineteenth century, the economics that had this effect was a doctrine called "classicism." Classicism described "a unified theory of political economy [with] implications for both public and private law." n103 Central to classicism was the aim to develop "rules for evaluating a legal regime's justness or fairness without regard to how its wealth happened to be distributed." n104 This was not because distribution in some abstract sense was irrelevant, but because in the tradition against which classicism argued, rewards from the state had been given on the basis of political favor, rather than according to the public good. The evil against which classicism argued was favoritism, and a regime of favoritism was certain to weaken "the body politic as a whole" n105 and likely to benefit "the rich and the politically powerful." n106 The aim, then, was to increase aggregate wealth, while ignoring how wealth was to be distributed. Fighting privilege, special charter, or monopoly was the cry of the Progressives, beginning most fervently with Andrew Jackson, and supported "by society's disfavored classes." n107 Thus, though in part a theory of economics, classicism "was not merely an economic philosophy. It was also a model for statecraft" n108

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n103 Id. at 1.

n104 Id. at 3.

n105 Id.

n106 Id. at 4.

n107 Id.

n108 Id. at 2.

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As economics advanced, however, classicism was transformed, and more importantly for our purposes, as classicism was transformed, legal doctrines that rested upon classicism (however implicitly) were transformed as well. n109 Hovenkamp's work focuses on a range of examples where the battle over (what we would call) economic theory had a significant effect on the development of the law. Most revealing among his accounts is the evolution of the law of competition, which Hovenkamp argues responded directly to changing economic theories. n110 In what follows, however, I want to focus on just one example [*421] of how changing economic theory could matter to constitutional law -- in particular, how changing economic theory could matter to a theory of substantive due process.

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n109 For descriptions of the changing economic theory and how it affected intellectual life, see III JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1865-1918 (1949); ELLEN FRANKEL PAUL, MORAL REVOLUTION AND ECONOMIC SCIENCE: THE DEMISE OF LAISSEZ-FAIRE IN NINETEENTH-CENTURY BRITISH POLITICAL ECONOMY 219-79 (1979). For a useful economic history, see PHYLLIS DEANE, THE EVOLUTION OF ECONOMIC IDEAS (1978).

n110 A full account of Hovenkamp's argument is beyond the scope of this article. He makes his argument most completely in HOVENKAMP, supra note 101, at 268-95. For a general account of the effect of the "marginalist revolution," see Herbert Hovenkamp, The Marginalist Revolution in Legal Thought, 46 VAND. L. REV. 305, 346 (1993). Other accounts of the evolution of competition law can be found in WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA (1965); Albert M. Kales, Coercive and Competitive Methods in Trade and Labor Disputes, 8 CORNELL L.Q. 1 (1922); James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 135 U. PA. L. REV. 495 (1987). For a somewhat different account, see William H. Page, Ideological Conflict and the Origins of Antitrust Policy, 66 TUL. L. REV. 1, 40-66 (1991).

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The transformation in the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause, at least as it pertained to economic and social issues, is well known. From the end of the nineteenth century and into the twentieth, courts used both state and federal due process doctrine as a shield against regulatory intervention into the economy. Lochner v. New York, n111

the standard bearer of this position, represented the Court's most extreme resistance to redistributive, progressive, or democratic politics.

-Footnotes-

n111 198 U.S. 45 (1905).

-End Footnotes-

Soon thereafter, however, the Court retreated from its hostility to economic regulation. First in Muller v. Oregon, n112 then in Home Building & Loan Association v. Blaisdell n113 and Nebbia v. New York, n114 the Court abandoned the substantive due process activism it had embraced in Lochner. Finally, in its 1937 West Coast Hotel decision, n115 the Court completed its retreat; the Fourteenth Amendment no longer barred state intervention in economic affairs.

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n112 208 U.S. 412 (1908) (upholding a statute establishing a maximum workday for women).

n113 290 U.S. 398 (1934) (upholding a statute permitting state courts to extend the period of redemption from mortgage foreclosure sales).

n114 291 U.S. 502 (1934) (upholding a statutory minimum for milk prices).

n115 West Coast Hotel Corp. v. Parrish, 300 U.S. 379 (1937) (upholding a minimum wage statute applying to women).

-End Footnotes-

What accounts for the changes in the Court's reading? In Part II, I offer a more complete account of this change. But here we can outline how such a change could hang (in part) on changes in a particular economic theory. Hovenkamp's account of the "wage-fund theory" provides a simple example that suggests the more general point.

One well-known (yet now forgotten) theory that reinforced the dominant antiregulation view at the turn of the century was the wage-fund theory of economics. n116 Growing out of classical economics, the wage-fund theory held that for a given amount of capital, there was a fixed and natural proportion that could be expended on labor. n117 Like the farmer who can eat only a given proportion of the grain that he grows, an economy could feed its labor only a fixed proportion of the capital that it produced. n118 Any attempt to exceed that [*422] amount would reduce not just the income to capital, but also, and importantly, the net income to labor as well. n119

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n116 See Michael Les Benedict, Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 LAW & HIST. REV. 293, 299 (1985); Hovenkamp, supra note 110, at 345-46.

n117 Hovenkamp, supra note 110, at 345.

n118 Wage-fund theory was conceived from "simple agrarian analogies." Id.

n119 HOVENKAMP, supra note 101, at 195 (discussing A.L. PERRY, ELEMENTS OF POLITICAL ECONOMY 122 (New York, Arthur Latham Scribner 1866)).

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Against the background of this theory, how would one evaluate legislation designed to increase wages to labor? According to the wage-fund theory, such legislation would not just be inefficient or bad politics or special interest dealing. Such legislation would be self-defeating.

The implications of the wage-fund doctrine cannot be overstated. Any forced wealth transfer from capitalists to laborers would upset the equilibrium and spell disaster for the laborer. For those who believed in the wage-fund doctrine, labor unions, minimum wage laws, and graduated income taxes were all bad. More important, the true believer could think that they were bad because they were contrary to the laborer's own best interests. n120

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n120 Id. at 195-96.

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Against this background, we can see how the Fourteenth Amendment inquiry into rationality would proceed. The standard test for the constitutionality of economic legislation under substantive due process analysis is whether the challenged regulation is rational. n121 Whether a regulation is rational turns on the facts, and what counts as "the facts" turns on the theory that animates inquiry into the facts. Under the wage-fund theory, it was possible for judges to believe that wage and hours legislation was self-defeating -- that it would not even benefit those who were its sponsors, that it was fundamentally irrational. It is this last implication of the wage-fund theory that explains why "even liberal American political economists were not generally supportive of wage and hour legislation until after the turn of the century." n122

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n121 Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

n122 HOVENKAMP, supra note 101, at 197.

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As neoclassicism took hold, however, and as the marginalism of Alfred Marshall became dominant, the underpinnings to this economic theory were soon eroded. n123 By the turn of the century, most understood that the wage-fund theory was premised upon an economic mistake, the details of which we need not pursue to make the point I want to make here. n124 For the critical point is this: Once the theory began to come apart as theory, its prescriptions could no longer be treated as a neutral and apparently scientific justification for striking economic legislation. Without a firm theoretical foundation in economics, it was no longer a "fact" that economic regulation was

"irrational." Fact had been transformed into just one more theory, and the marginal rhetorical value of mere theory was much less than the marginal rhetorical value of "fact." Contestation within the underlying economic discourse destroyed the role that economics could play in limiting legislative authority. In the constitutional formulation, [*423] if legislation had to be "irrational" to be struck, then as economics changed, it became more and more difficult to demonstrate irrationality.

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n123 See DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 174 (1991) (discussing Marshall's marginalism theory); see also Hovenkamp, supra note 110, at 314 (describing marginalism as "hold[ing] that the rate of wages is a function of the marginal contribution that the laborer makes").

n124 Wage-fund theory presumed that the value of labor or capital was determined by the cost of producing both; marginalism revealed that value is determined by the marginal contribution of the last laborer or last unit of capital entering the market. Hovenkamp, supra note 110, at 314-15.

-End Footnotes-

Justice Holmes perhaps best captures the sense of this change. As a judge, he believed himself bound to uphold progressive legislation; as a political theorist, he thought it idiotic. n125 But his political views rested upon what he thought was just one contested economic theory. Thus, in his words, the Lochner decision rested on "an economic theory which a large part of the country does not entertain." n126 Once society considered these views as mere theory, they became contestable; and once contestable, they belonged in the domain of politics rather than law. We can read constitutional law to respond to this radical shift in theory by backing away from what it had previously relied upon as indisputable, background truth. Once this became contested, the law had no choice but to ignore what before it had relied upon as fact.

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n125 See, e.g., Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 812-14 (1989).

n126 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (overturning a statute setting maximum working hours for bakers). Hovenkamp notes, "Lochner was supported by American classical political economists, although by 1905 classical political economy was rapidly losing ground to institutional economics and marginal utility theory." HOVENKAMP, supra note 101, at 182. Benedict suggests that it is ambiguous whether Justice Holmes' dissent in Lochner was limited to economic legislation, since Justice Holmes invokes Spencer, who argued against violations of laissez-faire based on principles of justice rather than on principles of economics. Benedict, supra note 116, at 304-05. But see note 282 infra.

-End Footnotes-

3. Changes: social science and equal protection.

I turn now to another, perhaps better known, example of changed readings in law tracking changed discourses outside of law. This too is an example drawn from the Fourteenth Amendment -- this time the Supreme Court's changed reading of the Equal Protection Clause in Brown v. Board of Education. n127 It too is an example of a change that tracks changes in a discourse considered scientific, though no example may better reveal the contingency that can hide under such claims of scientific necessity.

-Footnotes-

n127 347 U.S. 483 (1954).

-End Footnotes-

Brown overruled Plessy v. Ferguson's n128 reading of the Equal Protection Clause. Part of the context of Plessy were views about social science which, because of the time and because of views of science, were views that people did not feel free to accept or reject, or more precisely, did not feel entitled to accept or reject, so long as they continued to accept other views about science as well. Instead, tied to the sale of science in general was this set of "scientific" views in particular. n129

-Footnotes-

n128 163 U.S. 537 (1896).

n129 For a useful history of the influence of social science during at least part of the 19th century, see THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE (1977).

-End Footnotes-

These views would matter to how the Fourteenth Amendment would be read, for they would matter in a court's evaluation of what was a possible -- or related to this, to what was a reasonable -- burden for society to bear. As Hovenkamp puts it, "No responsible judge would have believed that the Fourteenth Amendment required the state to do something manifestly unreasonable [*424] or grossly injurious to the public health or welfare." n130 But to understand what would be "manifestly unreasonable" or "grossly injurious" depends on the facts, which in turn depend upon "the use of sophisticated social science." n131

-Footnotes-

n130 Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 DUKE L.J. 624, 664.

n131 Id.

-End Footnotes-

At the time Plessy was decided, science supported the racist status quo. Science, for example, told judges that interracial sex produces degenerate children -- certainly one of the more extreme perversions of science from this period. "If members of a society believe[d this] . . . then they may [have been] willing to sacrifice a great deal to avoid the consequences of

interracial marriages." n132 Early Darwinism was another example: "The genetic determinism that dominated social science in the last part of the nineteenth century created a situation in which strict racial segregation appeared to be socially prudent." n133 By relying upon these beliefs, or upon beliefs supported by such claims, much of the legally enforced segregation of the late nineteenth century could, in the eyes of nineteenth century judges, be justified.

-Footnotes-

n132 Id.

n133 Id.; see also id. at 653 ("The immediate effect of Darwin's work was . . . to confirm and strengthen long-established ideas about black inferiority.").

-End Footnotes-

Eventually, science turned against these racist views, and by the turn of the century, emerging arguments slowly drew these earlier and uncontested views into contest. Genetic determinism became contested by an emerging perspective called "environmentalism," the notion that social differences were products of society, not genetic difference. As environmentalism grew, the support genetic determinism could give to law and to law's support of racial segregation began to wane. n134 The marginal cost of racist speech in science increased, and the marginal value of science to racist law declined.

-Footnotes-

n134 Id. at 627-28.

-End Footnotes-

These changing prices of theoretical rhetoric mattered to the Constitution of the time. Not that science drove legal racism; rather, science supported, and was supported by, legal racism. The causation ran in both directions. Science made legal racism reasonable; law made scientific racism respectable. n135 But once scientific racism was contested, the support that it could lend to the law disappeared. The more views of scientific racism became open to doubt, the less courts could rely upon them, whether implicitly or explicitly, in supporting practices of segregation.

-Footnotes-

n135 Id. at 625.

-End Footnotes-

By the time the Court decided Brown, then, the ground underlying this racist science had been broken, and the Court had to confront the resulting gap. In his argument to the Court, Thurgood Marshall put it in the following way:

[T]he only way that this Court can decide this case [against us] is that there must be some reason which gives the states the right to make a classification [in regard to Negroes] that they can make in regard to nothing else . . . and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings. Nobody will stand in the

Court and urge that . . . [. But then there would have to be some reason] why, of all [*425] the multitudinous groups of people in this country, you have to single out Negroes and give them this separate treatment.

It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery. . . . It can't be color because there are Negroes as white as the drifted snow The only thing [it] can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible. n136

Marshall asks the Court what kind of reason the Court could give for upholding segregation, and no question could have better captured the background shift that Hovenkamp remarks. For in 1952, the question was embarrassing in a way that it would not have been in 1895. Had the same question been asked of the justices in Plessy, it would have had a fundamentally different meaning. In Plessy, and through much of the first third of this century, the justices, in enforcing segregation, would themselves be saying little. Instead, they would be reflecting what was taken for granted (at least by all like them). But by Brown, these views about nature's segregation were no longer natural, and as Marshall's question made plain, if the Court were to continue segregation, it would be constructing the inequality that Marshall complained of, not simply reflecting what was taken to be nature's own inequalities. If social science no longer uncontestedly supported segregation, then there was nothing except blind adherence to precedent that would support affirming the implications of Plessy. Stripped of science, Plessy could stand for nothing more than the "social meaning of . . . inferiority." n137

-Footnotes-

n136 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 522-23 (Philip B. Kurland & Gerhard Casper eds., 1975).

n137 Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421, 427 (1960).

-End Footnotes-

A changing discourse in social science, then, had an effect on a parallel discourse in law. n138 But how does it have this effect? So far, it sounds like law is just epiphenomenal upon science's reality, as if it had no autonomy from science.

-Footnotes-

n138 Hovenkamp, supra note 130, at 627.

-End Footnotes-

The argument is not that law simply tracks science. My point instead is that law is vulnerable to changes in science. When a discourse in science becomes contested, when no view can be said to be dominant, or when no view is treated as dominant, then science is no longer useful in law. What before could function within law as taken for granted now becomes political. Courts are,