

**Argument Selection in Constitutional Law:  
Choosing and Reconstructing Conceptual Systems  
(forthcoming, 18 SO. CAL. REV. OF LAW AND SOC. J. 209  
(2009))**

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**USC Legal Studies Research Paper No. 09-17**



**LEGAL STUDIES  
RESEARCH PAPER SERIES**

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# ARGUMENT SELECTION IN CONSTITUTIONAL LAW: CHOOSING AND RECONSTRUCTING CONCEPTUAL SYSTEMS

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## ABSTRACT

In some cases, it is clear that more than one constitutional argument will fairly lead to the same adjudicatory outcome. For the most part, courts choose exactly one of them, although in some cases they cumulate the converging arguments. When courts select just one, or at least fewer than all, on what basis do they, and should they, choose? Put tersely, what are the criteria for choosing among arguments that meet at the same outcome?

The virtue of formulating this question by imposing the same-outcome constraint is that it requires us to look closely at exactly what distinguishes one argument from another. In particular, we have to determine their comparative suitability for being chosen as the operational argument that drives or explains the adjudicatory outcome. What are the criteria of such quality in arguments—for a given court or court level, for a given jurisdiction, for a given kind of problem—and so on? How to select legal arguments generally is a fairly standard jurisprudential issue, but the approach here is to adjust our focus for greater clarity by removing an often dazzling difference among arguments—their results. The reason for focusing on arguments in the first place is that, as I argue, the expression and operational

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meaning of a constitutional value *is* the argument that implements it—loosely, the argument is the value is the argument . . . .

Because this Article's chief vehicle for analysis is constitutional adjudication, most of the discussion is tied to U.S. Supreme Court cases. After explaining what is meant by certain key concepts, such as "the same adjudicatory outcome" and "fairly/plausibly reaching" the same adjudicatory outcome, I suggest a set of criteria, set at a midlevel theoretical plane, for selecting among converging arguments in constitutional adjudication. These criteria include the presentation, ratification, reinforcement, and implementation of constitutional values in ways that match the hierarchic value system embedded in the Constitution; the anticipation of "revenge effects" of adopting a given argument structure that is transplanted to a neighboring constitutional region; and the rational obstruction of dangerous insights by masking certain conflicts among basic values.

Of course, the failure to select an argument structure in a given case, or even over a range of cases, is not necessarily a "rejection" of the values and frameworks embedded in the nonselected argument. The decisions not to adopt or even "list" the converging arguments rest on complex factors (including those affecting collegial courts), but here I address what I see as primary jurisprudential considerations—considerations that take account of our understandings (such as they are) of various aspects of human decision making.

This Article deals with several objections to pursuing its topic, and then presents a series of examples: *Police Department of Chicago v. Mosley*,<sup>1</sup> where I ask why the Equal Protection Clause was needed to vindicate the equality values ruled to be embedded within the First Amendment "on its own," compare First Amendment with equal protection approaches, and thus press the more general examination of the entanglement of equality and liberty; *Rochin v. California*,<sup>2</sup> where Justice Frankfurter's version of due process competed with Justice Black's and Justice Douglas's approach favoring use of the constitutional protection against self-incrimination; the case of the Francophobic Assassin, in which a political assassination is defended by the assassin as First Amendment expression; a collection of equal protection problems involving searches for suspects, race wars in prison, school segregation, medical measures, and race and affirmative action in education and labor; the Civil Rights Act of 1964 and its rival Commerce Clause and Fourteenth Amendment, § 5 rationales; and

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<sup>1</sup> 408 U.S. 92 (1972).

<sup>2</sup> 342 U.S. 165 (1952).

*City of Renton v. Playtime Theatres, Inc.*,<sup>3</sup> concerning the location of sex-oriented movie theatres.

In keeping with the idea that constitutional values are implemented in part by the presentation of arguments, I ask to what extent courts should be explicit in addressing how they choose among converging arguments, and contrast this question with asking whether the convergence of “higher theories” on a given argument similarly requires extended attention. For the former, I suggest that explicitness is what is presumptively required by the very existence of constitutional values that are meant to be implemented. For the latter, I suggest that ordinarily there is no need for devolving to higher theory or “foundations.”

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<sup>3</sup> 475 U.S. 41 (1986).

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The Constitution embeds values within its text, but they are implemented through specific argument structures. They are of course also implemented through remedies, but the arguments, even standing alone, are a critical aspect of making the values operational; they help form the American constitutional identity through their use in constitutional adjudication and legislative deliberation, and, to some extent, in public and private debate. Examining how the arguments are configured and how they differ from each other is, therefore, critical to understanding constitutional values, how they are realized, and how they fit within a coherent constitutional order (if they do). We can say, in a loose but instructive reduction, that the values *are* the arguments. Arguments matter; they aren't empty contrivances.

In saying this, I am not putting any carts before any horses. Obviously, there are accompanying questions about which values are fixed within the Constitution, whether they reflect a normative hierarchy or order, and how we know any of this. But these questions are locked together with those of formulation, selection and use of arguments. Indeed, formulating and comparing arguments to see how they fare is a way of testing claims about what the Constitution contains. In any case, logical priority aside, the constitutional value order functions primarily through argument formation and application. It would be over the top to say "Our arguments 'R' us," but if our arguments reflect these values—and their collisions and concurrences—then sound constitutional analysis requires close attention to and comparison among those arguments.

One way to further this comparative enterprise is to pursue the exercise set up in this Article: examining the process of choosing among arguments when they all arrive at the same adjudicatory outcome. Although converging arguments are alike in leading a good faith decisionmaker to the same specific outcome, they may not be entirely "equal" as means for reaching it: they vary in sense-meaning,<sup>4</sup> and thus in cogency, salience, efficiency, consistency with precedent, coherence with arguments in related fields, clarity, value reinforcement, explanatory value, and learning effects generally. Indeed, if they didn't, they would hardly be different arguments. The selection process and its outcome may, therefore, reveal important characteristics of the decisionmakers, including their values and beliefs, the norms they find in (or project into) a legal text, and the various political, social, and economic contexts in which they function.

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<sup>4</sup> That is, "connotation," "designation," or "sense," rather than "denotation"; the latter consists of the entities or things the symbolic formulations in question actually refer to. For a note on extensional equivalence, see *infra* notes 10, 36 and accompanying text.



To these ends, Part I will spell out the basic question about converging arguments and explain its constituent terms. Part II will identify criteria for comparing and selecting among such arguments and describe some issues about the logical/normative status of these criteria in constitutional jurisprudence. Part III will pause to consider whether the game is worth the candle by reviewing a series of complaints about further pursuit of the topic. Part IV will review a series of situations requiring selection from among converging arguments. These situations include both real and hypothetical cases and raise some abstract questions of constitutional argument formulation.

Readers will rightly wonder about the more abstract argument structures we use to discern constitutional values in the first place—the very values to be implemented by the arguments we craft—and where these structures come from. I do not directly address these foundational questions although they would be part of a more complete analysis.

## I. ASSESSING DIFFERENCES IN CONSTITUTIONAL ARGUMENTS BY EXAMINING HOW WE CHOOSE AMONG THOSE REACHING THE SAME ADJUDICATORY OUTCOME

### A. WHAT THE QUESTION CONCERNS: CONVERGING ARGUMENTS, DOCTRINAL RECONSTRUCTION, AND THE REWRITING OF OPINIONS<sup>5</sup>

#### 1. In general

Courts choose arguments in constitutional adjudication, and the choice doesn't just "happen to happen."<sup>6</sup> Moreover, in presenting these arguments, courts aren't always engaged in dishonest or ill-considered rationalizations for whatever they feel like doing. Even if the presentations were universally deceitful, courts would still need to know how to choose among different deceptions.

The expected result in a case at hand, and in relevantly similar cases, is obviously a prime criterion for picking one argument from among several candidates, but it is not the only one. To get a better grip on what else drives our selection of arguments and conceptual systems,<sup>7</sup> we can work

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<sup>5</sup> *E.g.*, as in "What the Court Should Have Said in *Potter v. Voldemort*."

<sup>6</sup> This nice formulation (the actual words are "happened to happen") is from THEODOR SEUSS GEISEL (DR. SEUSS), *THE 500 HATS OF BARTHOLOMEW CUBBINS* (1938) (unpaginated last page of text).

<sup>7</sup> I use several terms as roughly interchangeable in the present context, although they are not synonymous: "conceptual systems," "arguments," "argument structures" (the latter for arguments at

with the following assumption: when there are several legal arguments, each of which can plausibly yield the same adjudicatory outcome, how do we and should we choose among them? Answering this question requires us to find and consider constitutionally relevant differences among the arguments—that is, to pursue their comparative evaluation.<sup>8</sup>

There are obvious accompanying questions, as well as several objections to pursuing the topic. If these arguments all lead to the same result, what does it matter which one(s) we choose?<sup>9</sup> And why choose at all? Why not simply use *all* the arguments concurrently? What do “the same adjudicatory outcome” and “plausibly yield” mean?<sup>10</sup> How do we even identify a single discrete legal argument for analysis and comparison with others? At what planes of abstraction are we working? Perhaps the answer to the selection question is easy: with converging arguments, selection within this abundance of riches is primarily about results in cases other than the case at hand and relevantly similar cases—that is, in other constitutional neighborhoods. The argument chosen for *this* case, however well it works here, may eventually yield unwanted outcomes in other more-or-less related lines of cases. Strict scrutiny for racial classifications, for example, works quite well in some cases (say, segregation of public facilities) but, as many believe, less well in others (“affirmative action”).

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high levels of abstraction), “frameworks,” and “reasons.” I also use “theories,” “models,” “perspectives,” “approaches,” “tracks,” and “standpoints,” mostly to avoid wearing out the other terms. The differences among these ideas may be critical in some contexts but not here. One might say, loosely, that arguments reflect conceptual systems in propositional form.

<sup>8</sup> See Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 345 n.73 (1990).

<sup>9</sup> “We” includes courts, counsel, legislators, executive officials, citizens, and other interested parties. Of course, the exact roles of these quite different sets of deciders/analysts are contested. The main emphasis is on judicial opinions and lawyers’ arguments.

<sup>10</sup> The ideas of “the same adjudicatory/dispositional outcome” and other key notions required for this topic will be discussed as we proceed. “Outcome” and “result” are used interchangeably. The working assumption is that the arguments in question would fairly lead to that same outcome in all relevantly similar cases. Determining which cases constitute “all relevantly similar cases” is of course a phrase that captures a huge portion of the daily stuff of law. Relevant similarity is in turn a function of what doctrinal argument structures are in force. When different arguments, bearing different meanings, converge on an identical outcome, I call them “extensionally equivalent.”

Although I raise the question of what constitutes a true “alternative” argument, see *infra* Part I.D, I disregard the fact that there are technically an indefinitely large number of “different” arguments that can lead to a given conclusion. The exact terms of an argument (or any other text) can be altered in many ways (such as adding redundancies or switching from active to passive voice) without *seriously* changing its sense-meaning. Within a given doctrinal area, only a relatively small number of true alternative arguments are “jurisprudentially available”—and why this is so is part of any inquiry into why we choose some arguments over others.

The choice-among-converging-alternative-arguments issue is often apparent as a major factor in judicial opinions, especially when there are concurrences.<sup>11</sup> It is also a more-or-less explicit theme in academic writing, even if not so labeled: many papers argue for a reconstruction or explication<sup>12</sup> of legal doctrine, even if few—or no—outcomes are changed in the cases to which the doctrine is applied. Whether in scholarship or adjudication, every such effort to clarify or better understand doctrines and their underlying theories involves, at some point, a review of converging arguments that might express desired insights, or enshroud disfavored ones.<sup>13</sup> If the dominating theme of a constitutional critique is doctrinal reconstruction with no call for or strong expectation of producing significantly different outcomes, the exploration of converging arguments is an intrinsic aspect of the revision process.<sup>14</sup> True, some denials that a proposed doctrinal

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<sup>11</sup> Of course, dissents may also generate consideration of alternative converging arguments by the majority. The publication of more than one opinion is to some extent culturally and temporally specific. See generally Antonin Scalia, *The Nineteenth Annual Lecture: Dissenting Opinions*, 1994 J. SUP. CT. HIST. 33 [hereinafter Scalia, *Nineteenth*]. Whether separate opinions are published or not, however, the frequent availability of alternative argument structures seems characteristic of any modern, complex rule of law system. The problem of deciding which of several converging arguments to rest on within a single opinion thus remains within any such system. In this Article, I do not explore the relative merits of courts being required to issue exactly one opinion, nor do I discuss how a single opinion option might produce opinions quite different from majority or plurality opinions as we now know them. The converging arguments that were *not* selected—and nonconverging arguments as well—have to be reviewed because they may reflect important perspectives and values, which do not cease to exist because they were not used or were embedded in a losing argument. See BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980* 73–74 (Cambridge Univ. Press 1981) (observing that the obligation “that outweighs has greater stringency, but the one that is outweighed also possesses some stringency . . .”). Put loosely, the point is that the losing values persist as values and cannot simply be seen as having been discarded as used up.

<sup>12</sup> The meaning of “reconstruction” and various cognates (e.g., “explication”) is discussed later. See *infra* text accompanying notes 14.

<sup>13</sup> See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 558 (2004) (raising the question: “[A]ssuming that the outcome, if not the precise analysis, of most equal protection cases would remain static [if the current tiered system were replaced by her single standard], what value does the test bring as a new analytic tool?”); see also *infra* text accompanying note 116, noting that much legal scholarship and advocacy centers on comparing argument structures to improve the foundations of doctrinal areas, without calling for changed outcomes as a major reason for such renovations. Cf. Scalia, *Nineteenth*, *supra* note 11, at 41 (stating that “[t]he most important effect of a system permitting dissents and concurrences is to improve the majority opinion”).

<sup>14</sup> Rational reconstruction in this sense (*i.e.*, explication) is only one of the main towers of legal scholarship. Another one concerns something quite different from (however close to) the idea of explication: the specification of true alternative arguments that provide *different* (if overlapping) reasons for a given outcome—reasons that sound in different basic values, or different aspects of such values, or sharply different interpretations of them. “The two towers” has a certain ring to it, but there is (at least) a third scholarship tower: doctrinal revision with a view toward changing adjudicatory outcomes from what they would otherwise be. Of course, this is far from an exhaustive catalogue; there is a great deal of “foundational” exploration that merits separate headings, for example. As for how many towers there are altogether—it depends on what counts as a “tower.”

revision is oriented toward changed results are not credible, but this doesn't alter the point of this Article's thought experiment, and that experiment remains anchored in fact: for any given adjudicatory outcome, there may well be more than one plausible argumentational path.<sup>15</sup> If we think one of the converging arguments fails us under our selection criteria, there may be another that works, or at least fails us less.

Why should we devote efforts to changing the argumentational path to an unchanged outcome? If the question concerned the best road to take to Rome, we would know what to think about: distance, road quality, scenery, the frequency of official rest stops, and so on. With legal arguments, it's rather less obvious, but far from ineffable; most of us think that, in many spheres of decision, results aren't the only things that matter—indeed, we wouldn't need *arguments*, or at least presented arguments, if “only” results mattered.<sup>16</sup> The task is to specify as precisely as we can what matters in choice of argument and why. If we are driven to revise doctrine, doing so requires us to identify an argument with properties superior to whatever is currently in place, and to explain why it is superior.<sup>17</sup> (This holds whether arguments are viewed as “causes” or “explanations” of outcomes, a matter I do not discuss further.)

I note briefly, and without authoritative support, that the task of selecting among converging legal arguments and their constituent concepts has structural parallels across much of human thought, though the differences are often substantial.<sup>18</sup> Deciding which mode of transportation to use, which of several solutions to invoke for a mathematical problem (as in

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<sup>15</sup> I offer no empirical estimates of the incidence of having to choose among plausible converging arguments in constitutional cases, or any other field.

<sup>16</sup> Of course, we would generally need arguments—even loose or inchoate ones—to explain and justify why we value some outcomes and not others. Until we reach the limits of rational argumentation, an unchallenged sense of repugnance won't do.

<sup>17</sup> Although the phrase “analogical crisis” may not characterize all situations involving choice-of-converging arguments, it does pick out some instances of having to make a selection among arguments where highly charged descriptive and conceptual analogies compete. That phrase was used in Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297, 313 (1992). Beyond this, I do not think it marks out any special subset of problems in working with competing abstractions. Professor Sullivan notes an example involving choice of constitutional standards of review: “A set of cases comes along that just can't be steered readily onto the strict scrutiny or the rationality track. Consider the wrenches that gender discrimination and racial preferences threw into the two-track machinery of equal protection law in the 1970s.” *Id.* at 297.

<sup>18</sup> I am taking the idea of “structural parallels” very broadly here. Think, for example, of asking why we come to identify a perceptual illusion one way rather than another, when the objective structure of the stimulus remains the same, as with familiar optical illusions such as the Necker cube. The structural similarity is that there is an enduring entity (the Necker cube, the adjudicatory outcome) that is linked to quite different constructs (our varying perceptions of the cube, the varying arguments leading to the same outcome).

combinatorial analysis), which of several concurrent characterizations of an action or situation to accept (as studied in theories of description and human action), which of Monet's views of the Cathedral at Rouen is best, which "take" on a perceptual illusion is the most interesting (is the image before us two profiles or a vase?)—all are examples.<sup>19</sup> Each of the multiple aspects of a situation—assuming we have some handle on what counts as an "aspect"—may be the node of an argument in which it bears some greater or lesser measure of importance. Different arguments place different features of an issue in italics. Where the italics *ought* to be placed is part of the argument selection task. The "ought" of course depends heavily on one's goal—being right, being persuasive or convincing, and so on.

For purposes of selection among constitutional approaches, the most instructive analogies concern finding reasons and explanations in various spheres of thought and decision making—as in: "Why are you doing this?" "I'm doing it for (Reason X) (Reason Y) (several independent, concurrent reasons)." Finding reasons and explanations of course takes on very different forms depending on what is to be rationalized or explained, and on what is to count as a reason or explanation.<sup>20</sup> To be sure, in some instances, we can choose not to choose but to accept everything (or nothing—an option not always available, especially in law): perhaps all of Monet's views of the Cathedral are equally satisfying (though we can't vet them simultaneously), in somewhat different ways; different interpretations of the same piece of music by different artists may all be highly commendable, and variations on a single theme reveal and express its concurrent aspects; all views of a perceptual illusion may be equally salient or plausible; all descriptions may be perfectly accurate (the glass is both half full and half empty); and so on. But if we have only so much room on the wall for paintings; or too little money to buy them; or a pressing case that must be decided, with primary decisive reasons given—then choices must be made (even if, improbably, we could see all the views from everywhere and use all arguments simultaneously<sup>21</sup>).

<sup>19</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1128 (1972) (noting the limits of sticking with particular frameworks, any of which "can be mistaken for the total view of phenomena," and offering their own model, which "may be applied in many different areas of the law. We think its application facilitated perceiving and defining an additional resolution of the problem of pollution."). The analysis, of course, is not tied to maintaining similar adjudicatory results.

<sup>20</sup> The domain of rationalization/explanation also overlaps—in some cases is identical to—that of causation.

<sup>21</sup> See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 6–7 (Oxford Univ. Press 1986).

The ambition to get outside of ourselves has obvious limits . . . . We rightly think that the pursuit of detachment from our initial standpoint is an indispensable method of advancing our understanding of the world and of ourselves . . . . But since we are who we are, we can't get

At some point in the analysis of how we select among converging arguments, we need to ask *why our converging arguments indeed converge*, and this requires consideration of the very nature of the conceptual links between them. We may have to inspect what seem to be independent concepts to assure that our understanding of the target concept—indeed, all the concepts—is not seriously incomplete. I do not press the comparison very far, but one thinks of the various “unifications” in physics—of time and space, matter and energy. To be sure, it may be hard to say whether a set of concepts is really “all one thing” with “multiple aspects” or whether it contains definitionally (or otherwise) linked ideas, but the issue arises in striking forms in constitutional law. Was the anti-miscegenation law struck in *Loving v. Virginia*<sup>22</sup> more an impairment of equality or of personal liberty? Or is there some overarching conception that embeds both, or explains their entanglement?

The more immediate question, however, is whether we should seek such conceptual connections (or identities) to attain more complete understandings in law generally, and in adjudication in particular. *Loving* suggests that, in some contexts at least, we cannot have soundly developed ideas of liberty and equality without seeing that in some situations each is an aspect of the other.<sup>23</sup> Perhaps we cannot fully understand current standards of presumptive invalidity of racial classifications without knowing of its main predecessor—a required showing of harm to the particular claimants or groups.<sup>24</sup> When do we have to search for such “field unifications”<sup>25</sup> in law—and to express adjudicatory results that way?

I am not suggesting that courts, across the board, must explicitly present the full converging set of arguments, explain the convergence, and justify the final selection, although these may often be good jurisprudential moves. (Explaining this convergence does not, by the way, require a plunge into “theory,” whether of constitutional interpretation or anything else; nothing I say here suggests that courts need to be more heavily theo-

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outside of ourselves completely. . . . Objectivity itself leads to the recognition that its own capacities are probably limited, since in us it is a human faculty and we are conspicuously finite beings.

*Id.*

<sup>22</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>23</sup> See, e.g., Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1448 (2004).

<sup>24</sup> See *infra* text accompanying note 55.

<sup>25</sup> That is, a “single” conceptual description that (at least sometimes) displaces separate accounts already in place.

retical in reaching a decision or in explaining it in an opinion.)<sup>26</sup> But even when a court is bent on crafting a one argument/one outcome opinion, its understanding of a given case and its governing doctrine—and thus its very ability to use that doctrine—may rest on knowing of submerged crosscurrents within the situation that pull for different pathways to the outcome (or even for a different outcome). The arguments and frameworks that are edged out are still “there,” lying in wait to influence future applications of the chosen doctrine and the course of its evolution.<sup>27</sup> Some of those underlying arguments and perspectives would have led to the same adjudicatory outcome, but they were rejected—they are to remain unrecognized and unexpressed in the court’s public rationale—because . . . because what?

That is part of the question addressed here. Were the rejects rejected because they were doctrinally inapt, though they would have enabled the court to reach the same outcome? Or because they presented and reinforced the wrong constitutional or moral values? Or because they might be applied, to ill effect, in other constitutional regions? Or because they didn’t cohere with other doctrinal areas and their foundations? Or because they were too opaque—or not opaque enough? Or too hard to use? What, exactly (or even approximately) are *the terms of comparison* among the available frameworks? The answer to “If different spins don’t change who wins, why bother with them?” is that *addressing the terms of comparison* among arguments means *addressing central values* within our constitutional system.<sup>28</sup>

Of course, the vetting of converging arguments is sometimes done or at least suggested explicitly; recall the reference to concurring opinions—which, for purposes of identifying superior arguments, are a form of “dissent,” as Justice Scalia has noted.<sup>29</sup> Here is an example set up by Justice

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<sup>26</sup> Cf. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 10 (1998) (“The rise of constitutional theory has less to do with any utility that such theory might have for judges than, as I suggested at the outset, with the growing academification of legal scholarship.”).

<sup>27</sup> One thinks of the voters and voting perspectives that are shut out under an electoral “unit rule” where all the electoral votes of the state go to one presidential candidate; the losing voters and their views are not eradicated, and, no doubt, many share the attitude, “Wait ’til next time.”

<sup>28</sup> This may be one particular benefit of exploring Rawls’s idea of “overlapping consensus.” See JOHN RAWLS, *POLITICAL LIBERALISM* 133–72 (Columbia Univ. Press 1993). He explains: “All those who affirm the political conception [a result, for our purposes] start from within their own comprehensive view [argument structures, for our purposes] and draw on the religious, philosophical, and moral grounds it provides.” *Id.* at 147.

<sup>29</sup> Scalia, *Nineteenth*, *supra* note 11, at 33.

In speaking of dissenting opinions, I mean to address opinions that disagree with the Court’s reasoning. Some such opinions, when they happen to reach the same disposition as the majority (that is, affirmance or reversal of the judgment below) are technically concurrences rather than dissents. To my mind, there is little difference between the two, insofar as the desirability of a separate opinion is concerned. Legal opinions are important, after all, for the reasons they

Thomas—who perhaps has a special fondness for doctrinal revision (or, in some eyes, for its flat demolition and replacement). In his concurrence in *Van Orden v. Perry*,<sup>30</sup> which upheld a display of the Ten Commandments at the Texas State Capitol, he proposes criteria for what he believes is a superior constitutional argument structure that yields the same result in the case before him, and yields sound results in many other cases.<sup>31</sup> (He is, after all, *concurring*.)

To be sure, he clearly expects and wants his proposed conceptual regime to produce results different from the Court's in all or most of those cases in which he dissented, and to produce similar outcomes in future cases. Because of Justice Thomas's preference for changing outcomes in other Establishment Clause cases, his *Van Orden* concurrence is far from the purest illustration of calling for doctrinal reconstruction independent of outcome change, but it is instructive nonetheless to consider his call for revising the path to the outcome he preferred:

Much, if not all, of [the “unintelligibility” of Establishment Clause doctrine] would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. . . . While the Court correctly rejects the challenge to the Ten Commandments monument on the Texas Capitol grounds, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order.<sup>32</sup>

This is an open call by Justice Thomas for relying on what he views as a different and better argument structure, informed by a different and better conceptual system than any offered by his colleagues or adversaries, or by precedent—to reach the very same result.<sup>33</sup> As I said before, I do not argue

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give, not the results they announce; results can be announced in judgment orders without opinion. An opinion that gets the *reasons* wrong gets *everything* wrong which it is the function of an opinion to produce.

*Id.* (emphasis in original). Scalia also notes:

But though I include in my topic concurrences, I include only *genuine* concurrences, by which I mean separate writings that disagree with the grounds upon which the court has rested its decision, or that disagree with the court's omission of a ground which the concurring judge considers central. I do not refer to and I do not approve of, separate concurrences that are written only to say the same thing better than the court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue before the court. I regard such separate opinions as an abuse, and their existence as one of the arguments against allowing any separate opinions at all.

*Id.* (emphasis in original).

<sup>30</sup> 545 U.S. 677 (2005).

<sup>31</sup> *Id.* at 692 (Scalia, J., concurring).

<sup>32</sup> *Id.* at 697–98 (Thomas, J., concurring).

<sup>33</sup> To be sure, counsel, and the Court itself, are likely to underplay the innovativeness of the conceptual systems argued for. In everyday law, to call an argument “innovative” rather than “a straightforward derivation from established precedent” may be the kiss of death.



in this Article that a court should aspire to any given level of explicitness in explaining a choice among converging arguments. Sometimes, however, an argument—and an overall opinion—may be better understood if some account is given about the selection process, particularly if the presence of converging arguments is obvious.<sup>34</sup> Even more importantly, such explicitness may be called for by the very value of the constitutional value: high-ranking values demand vindication, and this is usually, if not always, accomplished by open explanation. Moreover, unearthing several converging argument structures may offer places of haven for judges of differing dispositions but who favor the same outcome; “overdetermination” of outcome in this sense may be a salutary feature of a region of law.

In any case, as I suggested, this removal/reconstruction-and-replacement of arguments is at least an implicit agenda item in many constitutional (and other) cases and scholarly offerings.

Of course, there are no clear borders between modest re-wording, explication or reconstruction, and substitution: it may be hard to say whether we have a “new argument,” an “old argument revised,” a “restatement of a previously inchoate argument,” and so on. The dominant theme of a given opinion or article may well be to develop a deeper and more accurate understanding of constitutional truths, come what may for the adjudicatory results. Some doctrinal revisions, however, may alter the doctrine’s “identity,” rather than simply deepening our understanding of it.

## 2. The convergence of addressing converging arguments, doctrinal reconstruction, and rewritten opinions

To call for doctrinal reconstruction without pitching an outcome-altering agenda is, as I said, in effect a call for reviewing converging arguments. The proposed reconstruction—which might include a *nunc pro tunc* revision to specify what a prior case “really (or should have) meant”<sup>35</sup>—

<sup>34</sup> See Sunstein, *Foreword*, *infra* note 51.

<sup>35</sup> Compare *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating Connecticut’s ban on the sale of contraceptives because it violated the right of privacy of married couples), with *Griswold v. Connecticut as read in Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (ruling that “[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible”). Note that the Court held that “by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the two Massachusetts statutory sections in question] violate the Equal Protection Clause.” *Eisenstadt*, 405 U.S. at 454–55. Although I do not discuss *Eisenstadt* directly, the question of reliance on equal protection rather than due process notions is addressed in the discussion of other cases. *E.g.*, *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972). See *infra* Part IV.A. The reconstruction of precedent is noted in Jack M. Balkin, *Preface* to *WHAT ROE v. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION*, at xii (Jack M. Balkin ed., 2005).

requires a review of alternative lines of reasoning and eventual selection of one (or more) of them to displace the current doctrinal formulations. Even recognizing, at the threshold, the very need for doctrinal rethinking and revision presupposes, at some *ur*-level, that we have at least rough ideas of alternative concepts to be embedded within new arguments that lead to the assumed identical outcomes.

Thus, perceiving the need for reconstruction, on the one hand, and exploring converging arguments, on the other, go hand in hand: they are almost extensionally equivalent.<sup>36</sup> True, the two headings—“review of converging arguments” and “doctrinal argument reconstruction”—describe somewhat different enterprises, and it is not clear “which comes first.” But recognizing that doctrinal reconstruction is called for *entails* the ideation of new or revised argument structures to supplant those in place. Simple awareness that there are two or more arguments that yield an anticipated result may get a court, lawyer, or scholar thinking about the need for reconstruction. And any proposed conceptual reconstructions must ultimately be framed in the form of an argument—the reworking of the doctrine will otherwise have no operational significance.<sup>37</sup> The conceptual reconstruction of the doctrine, in its final stage, is implemented through adoption of the substitute argument structures.

We may thus move *from* calls for reconstruction *to* the tendering of converging arguments, or *from* the initial recognition of converging arguments *to* recognizing the need for reconstruction. The main effect—and the main goal—is to change the way we *think* about reaching a case’s non-varying outcome.

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[hereinafter Balkin, ROE] (commenting on the modification of *Roe v. Wade*, 410 U.S. 113 (1973) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

<sup>36</sup> I use “converging” and “extensionally equivalent” interchangeably here. Of course, there will often be doubts about whether we are indeed dealing with converging rather than diverging arguments. “Extensional equivalence” is a term borrowed from formal logic. Terms that are “extensionally equivalent” denote or point to exactly the same entities, but they do so through different meanings—*i.e.*, different “intensions,” “designations,” “connotations,” or “senses.” See Thomas McKay, Denotation, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 219 (Robert Audi ed., 2d ed. 1999) (“A pair of expressions may apply to the same things, *i.e.*, have the same denotation, yet differ in meaning . . .”), available at <http://www.credoreference.com/entry/827155>; see also *Equivalence*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* (Robert Audi ed., 2d ed. 1999), available at <http://www.credoreference.com/entry/827491>.

<sup>37</sup> The extent to which perception and cognition work through stages in which the mind pursues rapid (usually nonconscious) deductive operations is a complex topic I ignore. See generally Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004).

Consider this example: “The State of New York hereby establishes a new Agency for Child Care. This is a call for applications for employment. Persons who have ever had, procured, performed, or aided, abetted or assisted in an abortion need not apply.”

This is obviously a *prima facie* case of a substantive due process violation, as established in *Planned Parenthood v. Casey* and *Roe v. Wade*.<sup>38</sup> There is a heavy burden of justification imposed on government to justify this invasion of a fundamental liberty. But it also is a presumptive denial of equal protection, via the “fundamental rights/interests branch” of that clause’s strict scrutiny jurisprudence. Is this a mildly interesting side point, or does it reflect important insights on abortion rights—say, their connections to gender equality, or equality generally, and not solely to autonomy, justice, or fairness?

Whatever doctrinal canon we adopt, the investigation of both of these converging arguments illuminates larger areas of the abortion arena than consideration of just the traditional substantive due process formulation. Indeed, it illuminates the entire field of fundamental rights and liberty interests because it displays one aspect of the general and intrinsic alliance between (but not a conflation of) due process and equality doctrine; their separate conceptual identities are preserved. Although in the abortion example just given the equal protection line *requires* the substantive due process line to generate strict scrutiny—it is not a fully independent alternative within existing doctrine—it addresses the issues in a different way from “pure” due process analysis. Reviewing these alternative converging arguments may reveal a need for reconstruction that we hadn’t seen before, or at least a need for an added layer of explanation for doctrine that otherwise remains intact. Even if there is no need for reconstruction, the doctrine we have is better understood and possibly more firmly supported for having weathered the review of alternative modes of reasoning.<sup>39</sup> (Recall John Stuart Mill’s defense of the protection of false ideas.)<sup>40</sup> Such argument review may also enlarge our understanding of decision making in the constitutional realm generally—and beyond.

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<sup>38</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). A similar structural point applies in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). See *infra* Part IV.A. There, the Court, proceeding under the Equal Protection Clause, invalidated a content-based restriction on picketing near school grounds. *Id.* at 102.

<sup>39</sup> See Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113, 124–27 (1997) (discussing “Disputes and Perspectives”).

<sup>40</sup> JOHN STUART MILL, *ON LIBERTY* 20 (Longmans, Green, & Co. 1913).

To summarize: The question, “What do we do with alternative converging arguments?” and the adjuration, “We need to rethink this body of doctrine” are conceptually linked: they are concurrent, superposed inquiries within the general process of discerning what courts do and what they ought to do in constitutional adjudication. Either line of inquiry is a lens for viewing the other’s potential status as part of deciding a given case, and perhaps other cases in related fields. Both lines of inquiry facilitate the “untangling of strands” across arguments, and (possibly) their reentanglement in reconstructed but operationally equivalent arguments.<sup>41</sup>

Of course, the idea that several arguments converge on a given outcome covers a lot of territory beyond constitutional adjudication, and indeed beyond law. I stick largely to constitutional law, however, because of space/time limitations, and because I’m somewhat more familiar with it than with most other topics.

Lastly (only for this section—sorry), a “meta-” point: I note that one can apply the general question—how to choose among converging conceptual systems—to the specific question of how *I* chose among the various conceptual systems for looking at “how to choose among converging conceptual systems in law.” Clearly, there is more than one way to construct a conceptual system that explains and/or prescribes our choices among conceptual systems.<sup>42</sup> I will not explore this systematically or start an endless regress; I simply set out, ostensibly, the related questions I will keep asking, which reveal different aspects of and approaches toward this Article’s topic. I have already put the question in general form:

- How and why do we select among arguments that converge on the same adjudicative result?

But we can also ask, from somewhat different vantage points:

- Why did Justices Goldberg, Harlan and White concur separately in *Griswold v. Connecticut*,<sup>43</sup> which invalidated Connecticut’s ban on use of contraceptives as it bore on married couples, given the fact that they each endorsed the adjudicative outcome?

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<sup>41</sup> Cf. Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

<sup>42</sup> The idea of finding criteria for choosing among converging arguments in law is itself a conceptual system, but I am not going to search for converging alternatives to it. For a brief reference to applying this Article’s topic to the Article itself, see the Conclusion *infra* Part V.

<sup>43</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

▪ Why has Justice Ginsburg proposed another conceptual path, sounding at least as much in equality as in liberty, for understanding women's rights of bodily integrity and reproduction?<sup>44</sup>

▪ Why did professors Balkin, Regan, and Henkin (and others) try to identify better ways to have reached the same results in some of the leading cases of the twentieth century—i.e., to “rewrite” them? Why is it important to determine what the Court “should have said” in those cases, or any case?<sup>45</sup> Why should it have said anything differently? What would the differential impact have been—and in what sense of “impact,” on whom or what, and by what causal mechanisms? In what respects might a reconstruction be “better” than an earlier decision?<sup>46</sup> Would another argument reveal (or hide) value issues better, or benefit or impede addressees with different perceptual or learning styles?

In terms and in meanings, these questions about why the justices and authors scanned and chose different conceptual routes are not exactly the

<sup>44</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985).

<sup>45</sup> For a much earlier effort (though well within the ken of academics still among us), see Louis Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); see also Louis J. Virelli, III, *Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 450 (2006) (“The purpose of this analysis is a relatively modest one. It seeks to evaluate current approaches to judging the constitutionality of facially neutral evolution disclaimers and suggest a better alternative.”); Goldberg, *supra* note 13 (asking what value her proposed replacement of the tiered standards of review in equal protection would have if outcomes would not vary); cf. Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991) (discussing how the decision in *Brown* came about, and citing many other historical analyses); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 365 (2000) (“Part I [of the Article] describes the present legal status of the human body, contrasting the ways in which the body is sometimes constructed as a species of property and other times constructed as an interest in privacy.”). See generally Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1571 (1979) (presenting an equal protection argument looking to the “Samaritan law”—duties imposed on some persons to aid others—and stating that his target interests are not privacy or freedom of choice but “non-subordination” and “freedom from physical invasion”); Ginsburg, *supra* note 44, at 386 (“Overall, the Court’s *Roe* position is weakened, I believe, by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”); Justin Reinheimer, Comment, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505 (2008); Balkin, *ROE*, *supra* note 35; WHAT *BROWN v. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2005) [hereinafter Balkin, *BROWN*]. In both works edited by Balkin, contributors could write majority, concurring, or dissenting positions supporting whichever adjudicatory outcome they preferred.

<sup>46</sup> The question of the effects of “changing the language” or otherwise transforming its meaning is noted in Balkin, *ROE*, *supra* note 35, at xii, and in Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in Balkin, *ROE*, *supra* note 35, at 3, 22. More generally, there are portions of judicial opinions that don’t form part of the arguments applied. How this (filler?) material is selected is a connected facet of this Article’s topic, but I do not discuss it.

same: perhaps some questions emphasize facets of argument selection that others raise less clearly. Perhaps in some cases a concurring justice's problem is that if the majority had chosen another argument, it could have picked up another justice's vote too, allowing for a greater majority. Or perhaps she wanted a concept's use expanded to provide greater protections to individuals within a certain group.<sup>47</sup>

But these perfectly appropriate "political" considerations are not the *immediate* target here: the varying constitutional frameworks, whatever their origins, are among the factors that drive the tension among judges. The question is: What is it that scholars, justices and others are doing when they try to revise an existing opinion, or call for others to try it? Do they want to alter the presentation and use of constitutional values? After all, different arguments embed different values in different ways; that is one of their principal points of difference. Is changing results—not in the case at hand and those on all fours with it, but in neighboring constitutional fields—the main point? Or is it about finding argument structures that seem more fitting, less of a reach, more illuminative and more honest in providing a rationale for a result? In modern law, after all, reaching a result generally entails providing a putative reason for it. An argument is not a MacGuffin—it is not simply a device for furthering a narrative, the specifics of which have no independent relevance. The Maltese Falcon could plausibly have been any number of other things without significantly altering the tone of the story; most constitutional arguments aren't like that.

3. The convergence of arguments of varying degrees of abstraction: when "theories," "principles," and "standards" meet

Talking about higher- and lower-order arguments and about theories, principles, and standards may seem a bit off the mark when we are simply trying to select among available, usually well-recognized constitutional arguments in order to complete a constitutional adjudication. But trying to determine why we should select one argument over another generally requires finding reasons for saying one is better than another. So, within limits, if this is a form of "theorizing," it's certainly not off the mark. It also does not seem unreasonable to reflect on the quality of these quality-

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<sup>47</sup> As we saw, Justice Ginsburg evidently favors emphasis on the idea of equality in resolving disputes about the liberty interest in having an abortion. *See, e.g.,* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (stating that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature").

seeking criteria, although we can't go "all the way [up or] down."<sup>48</sup> Finding, interpreting, and selecting arguments reflect the operation of abstractions extending beyond those in any given argument. Part of the point of this Article is to identify the criteria for selecting among "operating" arguments<sup>49</sup>—and this is obviously at least one plane of abstraction "up." Whether an equal protection argument or a due process argument is best in a given case, the criteria for bestness are going to reflect theories, principles and standards of various (and possibly quite different) sorts. If, for example, we decide equal protection is better, it might be because, under the circumstances, it comports more with principles of justice and fairness than due process does. Or, it may be simpler to use or understand, reflecting some "pragmatic" and otherwise minimally theorized moral theory.

Two points about this "vertical" hierarchy—from grand theories through equal protection through standards of review through the workings-out of these standards:

First, at any plane of abstraction, different theories may or may not converge on an operating argument structure (or several converging ones). Thus, a theory of justice and a theory of utility might converge on an equal protection framework. Or, two interpretive approaches might both yield a conclusion that strict scrutiny is applicable for certain kinds of claim. (In turn, for either interpretive approach, a theory of justice and a theory of utility might converge in selecting it.)

Second, I am not going to discuss selection among *high-abstraction* theories that yield a single operational argument.<sup>50</sup> Investigating which argument to select for adjudication and presentation—should we validate a civil rights law under the Commerce Clause or § 5 of the Fourteenth Amendment?—is in many cases *quite* different from investigating alternative higher-order arguments, sounding in more basic value categories, that

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<sup>48</sup> This phrase, taken somewhat out of context, is from ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 225 (1974). I suppose one reason we can't reach the bottom is that there isn't any such site as "all the way *down*." *Id.* (emphasis in the original).

<sup>49</sup> By this, I refer to what the Court identifies as the core doctrinal argument structure that drives the adjudicatory outcome. Exactly what this means and how one finds these arguments is part of classic jurisprudential analysis. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), for example, in striking down a statute that authorized sterilization of one class of habitual criminals but not others, Justice Douglas's majority opinion identified equal protection as implemented by strict scrutiny as his operating argument; Chief Justice Stone concurred, relying exclusively on what he thought was a procedural due process argument; and Justice Jackson, concurring, relied on both arguments, rejecting the rejections of the two other opinions. *Id.* at 543, 544, 546.

<sup>50</sup> If a "theory" seems to lead directly to an outcome, it is probably a well-layered amalgamation of the theory, an operational argument, and the outcome. In any case, I leave "theory" undefined.

yield the common doctrinal result “the Commerce Clause [or § 5] is the way to go.”

The “theory-selection” issue at this level concerns the more abstract criteria for selecting the selection criteria (discussed below) for operational arguments. Although I suggest that courts should often specify the “upper level” rationale of the choice, they don’t always have to work at this higher theoretical level, either in deciding the case or in expressing its rationale in an opinion. Not every free speech case needs a discussion of democratic theory or of the deep nature of legal rights. But showing this requires more attention than I can give to jurisprudential theories of minimalism and, I suppose, maximalism, perfectionism, and optimalism.

For this Article, however, I simply note that various views have been presented in the constitutional theory literature. Professor Sunstein, for example, observes:

[T]here can be much dispute over what is necessary to defend a decision. Maximalists might argue that minimalists consistently say less than necessary precisely because they avoid the full range of relevant theoretical arguments and the full range of hypothetical cases. Minimalists, by contrast, seek to deal only with the closest of precedents and the most obvious of hypotheticals; they avoid dicta; they try to find grounds on which people can converge from diverse theoretical positions.<sup>51</sup>

<sup>51</sup> Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996) [hereinafter Sunstein, *Foreword*]. Sunstein later argues:

Judges who disagree or who are unsure about the foundations of constitutional rights, or about appropriate constitutional method, might well be able to agree on how particular cases should be handled. For example, they might think that whatever they believe about the most complex free speech issues, a state cannot ban people from engaging in acts of political protest unless there is a clear and present danger.

*Id.* at 20–21. But this doesn’t exclude analysis of converging arguments; it’s about converging theories that form arguments at a higher plane of abstraction, leading to a common doctrinal outcome. Sunstein continues:

Thus judges who have different accounts of what the Equal Protection Clause is all about can agree on a wide range of specific cases. There can be little doubt, for example, that the Justices who joined the Court’s opinion in *Romer v. Evans* [517 U.S. 620 (1996)] did so from different theoretical perspectives. Agreements on particulars and on unambitious opinions are the ordinary stuff of constitutional law; it is rare for judges to invoke first principles. Avoidance of such principles helps enable diverse people to live together—thus creating a kind of *modus vivendi*—and also shows a form of reciprocity or mutual respect. . . . All I am suggesting is that when theoretical disagreements are intense and hard to mediate, the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf.

*Id.*

One “minimalist” doctrine is that of constitutional avoidance, which I do not specifically discuss; the emphasis here is on selection among constitutional arguments already fairly presented. *See generally* Harris v. United States, 536 U.S. 545, 555 (2002) (stating that “[u]nder that [constitutional avoidance] doctrine, when ‘a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt



This is quite consistent with recommending that courts should attend to and discuss selection among converging *operational arguments* as opposed to converging *theoretical positions*. When there is no agreement on “theoretical positions,” it seems appropriate, and possibly advisable, to leave the difficulty aside, especially when the diverse theoretical approaches converge on an operational argument—or a set of converging operational arguments. When there is such agreement, the question whether to mention this is more difficult; it is not simply a matter of jurisprudential taste.<sup>52</sup>

To round out this brief account of theory selection, I note that there is no clear border between “operational argument” and “theory.” Indeed, for purposes of constitutional adjudication, *every* “theory” within any plane of abstraction must be in principle expressible within an argument of some sort.<sup>53</sup>

## B. SELECTION OF ARGUMENT STRUCTURES ON THE BASIS OF THEIR VARYING PROPERTIES—PRELIMINARY REMARKS

### 1. Getting from here to there: routes and destinations

Whenever we pursue a goal, in law, travel, or elsewhere, it usually makes sense (though we rarely do it) to ask what difference it makes how we reach it as long as the outcome or destination is the same. In law in particular, the task would be to specify the basis on which we should select, and do select, among the converging arguments. But why is this a sensible task? To put it baldly, why is it even worth noting that in racial segregation, the suspect-classification-yields-strict-scrutiny argument has displaced the *presented* argument, based on educational harm, in *Brown v. Board of Education*?<sup>54</sup> Why is it important to learn that, at least at one time, persons

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the latter” (citing *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909))). This also tends to reduce polarization, although this is not *always* a good thing.

<sup>52</sup> Cf. Sunstein, *Foreword*, *supra* note 51, at 65 (suggesting that “[t]he Court’s silence [in *Romer v. Evans*, about *Bowers v. Hardwick*, 478 U.S. 186 (1986)] probably resulted from the multimember tribunal’s inability to converge on any rationale, a common explanation for minimalism”). But Sunstein also notes: “Would it be possible to criticize the Court for adopting a controversial understanding of the equality principle when a less controversial understanding would have sufficed? . . . [A] deep understanding of a constitutional provision is nothing to lament when diverse Justices can converge on it and when they (and we) have good reason to believe that it is correct.” *Id.* at 77.

<sup>53</sup> Here, “argument” simply means a sequence of propositions, one of which is the conclusion. On argument generally, from a philosophical perspective, see STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* (2003).

<sup>54</sup> 347 U.S. 483 (1954). I am speaking here about the form of the *Brown* argument structure as *articulated*—a structure that said nothing about the global suspectness of all racial classifications

complaining of racial discrimination had to show the court exactly how the classification and its implementation harmed them and their group generally, but no longer have to do so? Why is the suspect classification doctrine that replaced it an advance over the show-us-the-(egalitarian?)-harm-to-you-and-your-group doctrine—or is it an advance?<sup>55</sup> Is it solely the

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(whatever “racial classification” is taken to mean). Obviously, post-*Brown* struggles with argument structure in public facilities segregation played a decisive role in formulating today’s (provisionally?) dominant forms of anticlassification argument. See *infra* note 191. Still, it is overdone and inaccurate to view *Brown* as simply an anticlassification case. There is nothing subtle about this point; whatever underlay *Brown*—vectors of anticlassification, antisubordination values, the equality of citizenship—the opinion didn’t say anything about them directly, and this is a blunt fact that lawyers and commentators must deal with. See generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470–71 (introducing the discussion of “the anticlassification *Brown*”).

<sup>55</sup> I will mention the contrast between a harm-based approach and the suspect classification formula again below. See *infra* text accompanying notes 57, 115. The suspect classification formula, which entails strict scrutiny, is of course built on notions of harm inflicted on groups—particularly discrete and insular minorities. The very classification itself, however, is viewed as imposing or embedding a kind of egalitarian harm. This is *not* the same show-the-harm standard reflected in *Plessy* and some other pre-*Brown* cases. Thus, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Court, per Justice O’Connor, stated: “The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” *Id.* at 229–30. That injury, however characterized, does not represent a required showing of an independent harm-in-fact. Justice O’Connor also quoted Justice Stevens’s dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 534–35 (1980), which asserted that because racial classifications “are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.” *Id.* Here too, there is no requirement of a specific showing of concrete harm. One component (among others) of this harm is the expressive harm of openly classifying on the basis of race. Recall, for example, the remark in *Strauder v. West Virginia*, 100 U.S. 303 (1879): “The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.” *Id.* at 308. (The Court, however, did not at that time announce a suspect classification doctrine or anything resembling it.) The notion of expressive harm, however, shows the blurriness of the distinction between abstract dignitary violations of equality and justice principles, on the one hand, and “concrete” harms (such as impaired education, loss of income, and reactive psychic and physiological harms), on the other. On expressive harms from racial and other classifications, see Balkin & Siegel, *infra* note 56. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533 (2000) (arguing that equal protection doctrine “opposes laws that, by giving too much weight to suspect classifications, express a divisive conception of citizens”).

Perhaps it seems odd that the Court didn’t say, “We are abandoning the show-the-particular-harm approach in *Brown*, *Plessy*, and those ilk.” Its reluctance to say this (while officially substituting the suspect classification doctrine) is vividly illustrated in the post-*Brown* public facilities cases. Of course, that was then, and this is now. I leave the matter dangling.

To be sure, assuming that there is an abstractly theorized harm arising from classification, claimants would have to establish individual constitutional standing, but with suspect classifications, this is done by showing that they are members of the affected group, and thus within the range of expressive

prospect of different results in discrimination cases other than those involving segregation? (A show-the-harm requirement might yield pretty much the same results, however.) And if no suspect classification is presented but harm arguably exists and continues because of social-hierarchical “subordination,” what then?<sup>56</sup> Are all subordination harms simply wedged into how we interpret—and classify—classification?<sup>57</sup>

We regularly ask such questions, of ourselves and others, when pursuing the sprawling, fuzzy enterprise of judging the connections between means and ends.<sup>58</sup> This includes examining our reliance on the reasons expressed through one argument or another as the “means” for reaching adjudicatory ends.<sup>59</sup> Some arguments that reach a common outcome may be better than others, on given measures of betterness: they *say* different things (or at least people may hear different things). This may or may not be important; sometimes argument choice may be a matter of indifference.

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harms and of the harms justifying the suspect classification/strict scrutiny doctrine itself. This is exemplified in *Brown* itself. See also *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (in upholding an equal protection claim that a voting district was racially gerrymandered, the Court said that “a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district”); cf. *Connecticut v. Teal*, 457 U.S. 440 (1982) (holding in an employment case that Title VII guarantees individuals the right to compete equally with others under non-racially discriminatory conditions).

<sup>56</sup> “Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.” Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003).

<sup>57</sup> To say that the *Brown/Plessy* argument structure is gone is not to say that antisubordination considerations are out the window. It *is* to say that showing an equal protection violation does not *require* a showing of some form of group or individual harm. Whether such a showing is ever constitutionally sufficient or even relevant is another question. The upholding of some forms of affirmative action might be taken to reveal the judicial effect of antisubordination notions. See Siegel, *supra* note 54, at 1538 (“The *Grutter* opinion demonstrates the central role that antisubordination values continue to play in equal protection case law, even as it poignantly illustrates the great lengths to which the Court will go to disguise and to limit antisubordination values in interpreting the Constitution.”). Arguments that sound in “antisubordination” might be taken as a form of show-the-harm (to the group? the individual claimants?) argument. On the other hand, such considerations may already be packed into the suspect classification and underlying-purposeful-discrimination cases.

<sup>58</sup> I am not referring specifically to the means-end analysis called for under constitutional standards of review, from enhanced rational basis tests through strict scrutiny. On the rational basis test “with bite,” see Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12, 21–24 (1972).

<sup>59</sup> Reasons are a kind of means to an end consisting of an outcome. However, I am not touting purely “result-oriented” theories of adjudication. All I am saying is that an adjudicatory outcome within the American rule of law system requires reasons to justify it (or “explain” it). Because of this requirement of justification/explanation, an argument, with its embedded reasons, is a means of satisfying this constraint on generating adjudicatory outcomes. At its most abstract level, this Article concerns choice of means to ends or outcomes.

But the fact that different things are said through different arguments in turn suggests that the long-term impacts of identical outcomes may differ because they were reached through different conceptual mechanisms that “speak” in different ways. Indeed, that very prospect may affect our choice of argument. Action taken for one reason may be something quite different thing from “the same action” taken for a different reason, but it is a challenge to state just how the actions differ. The Civil Rights Act of 1964 does what it does whether it rests on the Commerce Clause or § 5 of the Fourteenth Amendment, right?<sup>60</sup> Whether long-term differential effects of “the same outcome” reached by different arguments can ever be confirmed is unclear, but the possibilities for very different impacts on attitudes and behavior are there nonetheless. Some observers feared that a Commerce Clause foundation could “commodify” persons, or at least cause offense, while a § 5 theory founded on individual rights was far less likely to do so. In this light, outcome and process may all but merge, erasing the supposed sameness of the outcome, and displaying the possibility of separate causal tracks emerging from different decisional paths.

But in fact outcome and process remain severable in principle, and they track different decisional stances, at least when stated hyperbolically: “All I care about is the bottom line” reflects a pure result orientation, and “I don’t care what the result is—these are our doctrines and what will be will be”—reflects the “Let justice be done though the heavens fall” approach. Neither, standing alone, is an adequate moral or legal guide; we still have to sort paths and processes and judge them at least in part by outcomes. Constitutional discourse is chosen not only for results, but, in many cases, to embrace reasoning that accurately reflects valuations and points toward other situations in which the constitutional value might outweigh opposing claims.

Several illustrations of choice-of-argument arenas of constitutional law are introduced below (Part IV). Many of the examples involve speech and race because argument/value selection in these realms often bears special weight in the formation of major aspects of our constitutional identity (or identities). But these arenas do not form an exclusive object of inquiry; they are in many respects generalizable instances that guide a more inclusive investigation of how we select among converging paths, in law and elsewhere.

Not all the scenarios presented are equally persuasive examples of the importance of comparing routes taken or anticipated, however. Some still

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<sup>60</sup> See *infra* Part IV.E.

think, all these decades later, that Congressional power to enact the Civil Rights Act of 1964 should have been expressly spotted in § 5 of the Fourteenth Amendment, rather than the Commerce Clause, in order to avoid offense and the commodification of persons. It is hard to believe that the course of public impacts of the Act seriously turned on what constitutional provision was perceived to underlie it. But invalidation of school desegregation might have a quite different feel to it if the constitutional doctrine had required the state to demonstrate compelling interests for the racial classification, and the state failed to do so, rather than requiring the claimants to demonstrate its harm.

Obviously, any rational selection among arguments will rest on their varying properties—but which properties, selected how, and set forth in what form? Although all the choice criteria are important, there are two broad categories of selection factors that lead the pack; in a somewhat layered approach, they are briefly introduced here and elaborated in later sections. The first is a broad-based criterion that tracks the recognition and reinforcement of constitutional values; the second concerns the impact of taking an argument structure from one area of constitutional adjudication and using it in another. Other criteria, forming different analytical tracks, are discussed below in Part II.

I of course do not present a highly discrete thesis; I assert the value of focusing on a particular aspect of human decision making: the “combinatorial” assessment of converging “solutions,”<sup>61</sup> and investigate some ways in which we do this in constitutional law.

## 2. Distinguishing among converging arguments: Two starting points

a. The presentation, explanation, and reinforcement of constitutional values—or not<sup>62</sup>

This is a prime criterion—constituting a set of closely related factors—for argument selection. The inquiry concerns how arguments explain themselves and the situations they are applied to through their recognition and use of constitutional values. They do this—in different ways and to different degrees—by identifying, implementing, and reinforcing constitu-

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<sup>61</sup> “[In this book], the main emphasis throughout is on finding the number of ways there are of doing some well-defined operation.” JOHN RIORDAN, INTRODUCTION TO COMBINATORIAL ANALYSIS viii (1958) (emphasis omitted). Riordan notes in advance that “[s]ince the subject seems to have new growing ends, and definition is apt to be restrictive, this lack of conceptual precision [in definitions of “combinatorial analysis”] may be all for the best.” *Id.*

<sup>62</sup> For purposes of this analysis, I am leaving “constitutional value” undefined.

tional values at stake in the case at hand.<sup>63</sup> Indeed, the very process in which an argument explains itself by reference to constitutional values also explains the situation before it and reinforces the values; it thus offers at least a partial, tentative explanation of its adoption, formulation and particular uses. This internally complex value-implementation criterion is thus a collection of logically and empirically related factors.

Constitutional arguments of course vary in the degree to which they explain both themselves and their use in given circumstances, and also in their power to reinforce values—or mask their collision or contested or indeterminate application. These differences in evocativeness often inspire reconstructing, rewriting or replacing argument structures, even when outcomes are invariant. Some arguments might be preferred because they better express and clarify the value tensions that may be obscured in other arguments, or because they suggest possible value resolutions or tradeoffs necessary in pushing toward a conclusion, or simply because implementing them reinforces the value's status and operational impact within the community's legal and moral systems.<sup>64</sup> In this sense, the arguments may increase or preserve "moral capital." In some cases, however, keeping the value battles obscured—or passed off as easily resolved<sup>65</sup>—may be a pre-

<sup>63</sup> This is of course not a recently discovered point. For a recent iteration, see generally Anthony Edward Falcone, *Law and Limits: How Categories Construct Constitutional Meaning*, 8 U. PA. J. CONST. L. 1005, 1006 (2006) ("[T]he Court, whether liberal or conservative, purposefully constructs constitutional categories to protect perceived constitutional values."); see also Jack M. Balkin, *Rewriting Brown: A Guide to the Opinions*, in Balkin, BROWN, *supra* note 45, at 44, 46 ("By articulating these basic commitments [referring to the "basic principles" the judge wants to protect] when the right opportunity presents itself, judges can preserve democratic values and fundamental rights from later periods of retrenchment . . .").

<sup>64</sup> The ideas of reinforcing, implementing, impairing, or enfeebling a value are fairly complex. Specifying exactly how these processes occur would require entering another universe of moral/psychological discourse. For a brief attempt to explicate the terms, see Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 743 (1994).

There are several senses of "impairing a value," assuming that we have some prior interpretations of "value" in general and of some specific values in particular. In one sense, a value is impaired when the conduct required by it (efforts at lifesaving, fair procedures) simply fails to take place. In another sense, the value is further impaired when this failure is noticed by someone who is demoralized by it. In a third sense, the value is impaired if this failure results in shaping attitudes and behaviors inconsistent with the value. Finally, the apparent rationales and processes underlying a transaction affect in complex ways whether a value is impaired. For example, life can be saved for different reasons and under different procedures—markets, merit or social worth selection, lotteries. That lives are saved does not, standing alone, tell us everything. In some cases, then, we may not have a clear idea of what it is either to impair or to affirm life values.

*Id.*

<sup>65</sup> There is a complex set of jurisprudential issues concerning the apparent certitude of a constitutional argument, or any legal argument. Perhaps some constitutional values, or some aspects of constitutionalism generally, are compromised when arguments appear—or are conceded to be—rickety.

ferred course, but this too is a matter concerning the presentation of constitutional values. Sometimes obscurity and self-delusion are virtues—maybe.<sup>66</sup>

Depending on audience and perception variables, a bare outcome itself may implement the winning values and even the losing values, but, as mentioned, the impact of these outcomes may be path-dependent—that is, dependent on the argumentational route chosen. In this sense, the “impact unit” being assessed over time is process and outcome as a sort of unified field. To recall the example of segregation, the opinion in *Brown v. Board of Education*<sup>67</sup> sounded in the *requirement* of showing harm to the affected students, which in turn led to the focus on their educational interests: what better way to demonstrate harm than to point to the compromised instructional experience worked by any kind of required segregation? To be sure, the Court concluded that “separate is inherently unequal,” and one rightly doubts that this rested on empirical studies; the “show-the-harm” requirement might just have been for show, to ease the break with the past. But educational harm is what they *talked* about, and demonstrating it appears to have rested in part on matters of fact concerning the perceived meanings of formal segregation, and the harms resulting from those perceptions.<sup>68</sup> Would *Brown*’s status and impact (whatever they are) have been different if it had been decided solely on the ground that all racial classifications are presumptively invalid, and that government could not overcome that presumption? Clearly, there might have been immediate, immense, cascading effects far beyond public education, both with respect to legal doctrine and within the social, economic and political spheres. But even confined to *Brown*’s particular setting, one would expect differential impacts. The suspect-classification-yields-strict-scrutiny formula would have involved education in a far less pointed way, although issues about educational goals would have been material at the government justification stage of argument.

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Note the criterion of selection mentioned below concerning variations in the appearance of strain in reaching a conclusion. See *infra* Part II.H. But also note the “inverse illumination” criterion of choosing arguments that block recognition of value issues and tradeoffs. See *infra* Part II.C.5. Whether presenting a unified front and declaring the law as certain reflects a sounder jurisprudential principle than does allowing fragmentation and confessions of doubt is a decent question, but way beyond the scope of this Article.

<sup>66</sup> See generally GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

<sup>67</sup> 347 U.S. 483 (1954). Although *Brown* is not an “independent” target here, there are frequent references to it because it illustrates critical aspects of the search for the best among converging arguments, all of which are at least good enough to work. It is rightly viewed as a jurisprudential window into how we “do” the rule of law.

<sup>68</sup> I do not know if at any point any Justice seriously considered or pressed a pure suspect classification argument in *Brown*, although something akin to it appears in *Bolling v. Sharpe*, 347 U.S. 497 (1954). See *infra* note 225.

Even those who say they are strongly result-oriented know that future adjudicatory results may be heavily affected by the conceptual corridors that led to prior results: legal pragmatists may be weird, but they're not stupid, and they don't claim that just any argument will do.

b. The "export" of arguments: the impact—feared or welcomed—of arguments made in one doctrinal region upon other regions

To some extent, this criterion rests on matters of value presentation and ratification. It concerns the feared or welcomed effects anticipated when an argument is used in a linked but distinct doctrinal region. It of course rests on results—but *not* the results in the *case at hand*. When argument structures are "exported" or "translated" from one constitutional region into others, the results, whatever they are, might be unacceptable, even though the outcome in the case before us and in closely related cases—the constitutional region we started in—remains intact and favored.<sup>69</sup> Choosing among converging arguments in the current case may thus rest on the results of using the same arguments in other regions of law that implicate new considerations for judging outcomes.<sup>70</sup>

For example, in the field of racial discrimination, one might deny that disproportionate and serious burdens on a given racial group may in itself be an equal protection violation. Under a disproportionate impact doctrine, there would be such a violation even when the government action involved is reflected in a facially neutral rule and there is no hidden purposeful discrimination.<sup>71</sup> The same observer, however, might believe that a facially

<sup>69</sup> Terms such as "export," "translate," and "transplant" are useful, if at all, only when one can properly separate legal regions for given purposes. "Constitutional region" is of course a far-from-fully determinate concept; not all "race cases" are properly lumped into a single constitutional region—but this is obviously parallel to the difficulties we face in talking about "precedent," "rules of decision," and so on. In any given case, one might object that there is only one unitary region, or that whatever distinctions exist are of no moment, or that the distinctions are so massive that it is senseless to talk of exportation (etc.). I try to avoid begging questions about what constitutes a "neighboring region," but it may be unavoidable in some situations. Also, "export" and related terms may tendentiously suggest that the argument in question doesn't *already* reside at the "new" site. It might even be that the argument in question is better situated at the new site than at the present one.

<sup>70</sup> For additional discussion, see *infra* Part II.

<sup>71</sup> That is, "facially neutral" *with respect to the interest being protected*. All operationally meaningful rules target—are non-neutral with respect to—other interests. The same point applies to laws of "general application," which, in this context, are laws that do not facially target the subjects of possible "protective rules." Although "neutral" and "of general application" are not synonymous, there is no need here to construct more comprehensive definitions. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). In equal protection discourse, "facially targeting" such groups would include the explicit use of known proxies for membership in the groups. *Id.* In religion clause cases, the government action would facially target religion (whether to burden or support it)—either a specific one or religion in general. I do not in this Article compare the different argument



neutral rule imposing a substantial burden on the free exercise of religion should be presumed unconstitutional and trigger strict scrutiny. Neither is current constitutional doctrine, however. (That observer might also decline to use the substantial burden rule in the free exercise region, for fear it would spring into the racial arena.) The acceptability of these argument structures in other regions will also depend on their reinforcement of constitutional values and their satisfaction of other criteria, discussed next below and in later sections: some outcomes and aspects of using a “transplanted” rule may be unintended and unwanted. That prospect may drive slippery slope arguments against installing arguments that work here and now but become entrenched, risky temptations.

3. A paradox of sorts: Reconciling convergence and differentiation among arguments

As we saw, converging arguments carry different meanings and thus bear on different values, and more generally work in different ways. Of course, it is precisely those differences that generally account for the selection of some arguments over others, despite the fact that they all fairly yield the same outcome in a given case. So, rationally choosing among the converging arguments requires attention to their differences—and the clearer their differences, the clearer the nature of the choice (although it may remain difficult). But the greater the differences among the arguments, the greater is the challenge to the assumption of extensional equivalence—*i.e.*, of the very convergence calling for selection. The assumption that we have arguments with different meanings that nevertheless yield the same outcome thus bears obvious internal tensions. The more differences in meaning among arguments, the weaker is the posit of convergence. The very existence of the different arguments that allow for the topic, “How do we

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forms the Court has adopted for facial targeting in equal protection (the suspect classification cases) as opposed to “hidden” purposeful discrimination without facially suspect classifications; this is yet another choice-of-converging conceptual-systems problem. The latter cases generally do not talk the talk of “strict scrutiny” or formally describe a standard of review. *But see* *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (accepting appellants’ contention that a redistricting law that was “bizarre on its face” and defied explanation on nonracial grounds “demands the same close scrutiny that we give other state laws that classify citizens by race”). The two approaches—formal strict scrutiny, an inquiry into hidden discriminatory purposes—are functionally parallel. Other arenas of constitutional law face similar doctrinal formulation issues, and one might well explore further whether they demand different resolutions. These parallels are alluded to by Justice Scalia, writing for the majority, in *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (discussing the evaluation of laws of general application insofar as they bear on constitutional values). *See also* Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 *SAN DIEGO L. REV.* 1041, 1067–68 (1978) (describing the differing evidentiary approaches in suspect classification cases and cases of “non-racially overt governmental action”).

select among converging arguments?,” thus eats away at the assumption of convergence that defines the topic in the first place. It’s a tough situation. For better or worse, however, this almost-paradox is far from fatal to the enterprise: arguments can vary significantly in meaning and still lead to a common outcome. If situations and actions have multiple aspects, it is quite likely that there will be more than one path to the same evaluative judgments. I assert this, however, without trying to demonstrate it.

C. THE SAME-OUTCOME REQUIREMENT: A HEURISTIC IN THE SEARCH FOR CONSTITUTIONAL VALUE

1. Why this constraint?

In general, the need to choose arguments in any case drives us to search for selection criteria such as consistency with precedent, preferred results, anticipated results in neighboring doctrinal regions, and value reinforcement. But, in fact, there are cases in which argument candidates converge on one result. In those cases, we have to move to other criteria standing apart from anticipated results, whatever the region. Why expand this exercise and require that, for analytic purposes, we are to use all arguments that are invariant in outcome? Why should we look for other arguments leading to the same result if we already have one that seems to do the job? This is a question that faces the concurrers as well as the authors of majority and lead opinions.

The reason for this same outcome constraint is the analytic benefit that comes from enhanced focus: the varying characteristics of different arguments appear in greater relief when we assume the same outcome across the different arguments because we remove the possibly dazzling, complicating effects of differing outcomes. Because the varying traits of different arguments may track very different patterns of constitutional value, the comparison of converging arguments may reveal situational features that we had earlier seen only dimly, or not all: different arguments form different lenses. It is thus no surprise that the frequent calls for doctrinal reevaluation and reconstruction are often made in concurring opinions—as was Justice Thomas’s call for “a more fundamental rethinking” (retheorizing?) of a body of establishment clause doctrine.<sup>72</sup> Indeed, multiple same-result

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<sup>72</sup> To be sure, many separate concurrences present alternative arguments that are quite different in kind from the majority opinion or any other opinion in the case—they are not just the result of slight retheorizations of closely related doctrines. In those situations, the criteria for selection still apply, but play out differently. *E.g.*, *Morse v. Frederick*, 127 S.Ct. 2618 (2007). The majority opinion, per Chief Justice Roberts, dealt substantively with the First Amendment issues, ruling against a student who had

(as well as different-result) arguments may appear even within the borders of a single majority opinion, whether or not they also appear in concurrences or dissents.<sup>73</sup> Well-crafted opinions, standing alone, may present a tableau of possible argument structures—and sometimes they are viewed as well-crafted opinions in part precisely because they do so, although extended comparisons are not the norm.<sup>74</sup> Even the well-known double whammy of the *Loving v. Virginia*<sup>75</sup> opinion provided only a brief explanation of the liberty/due process argument for striking the anti-miscegenation statute, which rested on the fundamental right to marriage; the Court focused much more strongly on the law's racial classification/equal protection aspect.<sup>76</sup>

In contrast, the prime (if not the only) criterion for choosing among scientific hypotheses is precisely their diverging results; this is the dominant incentive for “paradigm shifts” in science,<sup>77</sup> and perhaps in law also. Chemists explain ordinary fire as rapid oxidation, not as phlogiston release, because the former explanation leads to confirmably correct results across the board and the latter does not;<sup>78</sup> what we lost in the use of a cool word we gained in accuracy. While elegance and simplicity<sup>79</sup> may play a role in

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been disciplined for displaying a banner bearing an oblique reference to drug use. *Id.* at 2629. Justice Breyer concurred in part with the reversal of the 9th Circuit's decision, which itself had reversed the district court's grant of the student's motion for summary judgment. *Id.* at 2638–43 (Breyer, J., concurring). Justice Breyer, however, argued that the Court should take no position on the First Amendment merits, and should reverse solely on the ground that the defendant principal enjoyed qualified immunity in this situation. *Id.* at 2640–41. The main criterion for selection would involve jurisprudential principles of parsimony and minimalism—principles that themselves promote values that may be in tension with upholding any given substantive value, such as the First Amendment. *Id.* at 2641.

<sup>73</sup> Cf. Jack M. Balkin, *Rewriting Brown: A Guide to the Opinions*, in Balkin, BROWN, *supra* note 45, at 44 (noting that the “different approaches [of the ‘concurrences’] illuminate many of the tensions implicit in the original *Brown* decision”).

<sup>74</sup> Not all concurrences involve true alternative argument structures. They may, for example, offer a deeper interpretation or rationale for a majority (or other) opinion—this is one form of reconstruction or explication—although it is sometimes hard to distinguish additional interpretations from alternative arguments. See *infra* text accompanying note 303 (discussion of *Renton v. Playtime Theatres*).

<sup>75</sup> 388 U.S. 1 (1967).

<sup>76</sup> *Id.* The substantive due process argument's brevity cuts more than one way: on the one hand, it is so simple and powerful that trying to explain it at length would diminish it; on the other hand, it's just not important enough to spend time on—it's a throwaway (for purposes of that case).

<sup>77</sup> See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52–65 (1970) (discussing “Anomaly and Emergence of Scientific Discoveries” and addressing throughout the book the role and development of conceptual paradigms or frameworks in scientific analysis).

<sup>78</sup> See generally PAUL THAGARD, *CONCEPTUAL REVOLUTIONS* 47–49 (1992). Having to choose among *apparently* converging arguments is part of the daily stuff of science, and is not confined to major historical events.

<sup>79</sup> This is a reference to the work of William (“the slasher”) of Ockham, although he may not have been the first to articulate his principle, which “gives precedence to simplicity; of two competing theories, the simplest explanation of an entity is to be preferred. The principle is also expressed ‘Entities

selecting hypotheses that seem to explain and predict results equally well, they fall away in the face of securing greater empirical accuracy when more information comes in.

Such result-relative situations—theories of fire, the laws of motion, the Big Bang hypothesis—are precisely *not* my target: convergence on the same result is a central assumption because, as I argued earlier, suppressing one major feature of argument selection highlights some of the other ways in which we formulate and choose arguments. A physicist may assume (for a time) zero friction to fix our attention on tracing the basic laws of mechanics. Just so, one way to clarify contentious and complex value confrontations is to abstract out the (possibly distracting) adjudicative results—not because they are irrelevant (they’re not), but because doing so advances our analytic investigation.

I do not want to press this comparison between selecting legal conceptual systems and selecting scientific paradigms and hypotheses,<sup>80</sup> despite some structural similarities. “Results” in scientific research are different from “results” of adjudication—they are different kinds of thing. Results in the latter may be desired or undesired for reasons quite different from those deriving from scientific thought and experiment, even though truth value may be claimed in both domains. The analogy between scientific hypotheses and legal (and moral) arguments goes only so far.<sup>81</sup> Nevertheless, both in law as in science, holding results constant across arguments (hypotheses) is a heuristic device for discerning and applying different constitutional values (scientific conceptions) that we want to further (or explore), and for identifying argument selection criteria generally.

There is nothing arcane about this framework for exploring and clarifying frameworks. Comparing converging arguments is an advocative and juridical necessity whenever we encounter more than one argument in support of a given result. Cumulation of converging arguments often enhances the persuasiveness of a lawyer’s advocacy and of a judge’s defense of her

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are not to be multiplied beyond necessity.” *Ockham’s Razor*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/424706/Ockhams-razor> (last visited Feb. 16, 2009).

<sup>80</sup> These terms are not synonymous. For an exploration of the various meaning of “paradigm,” see Kuhn’s postscript in *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, *supra* note 77, at 174–210 (responding to critiques).

<sup>81</sup> For a consideration of parallels in the argument structures of science and ethics, see RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 242–44 (1959).

decision: “If all these distinct perspectives lead to the same outcome, it must be right,” or so it might be thought.<sup>82</sup>

Without such a restriction, this Article would be a quite different enterprise. It would devolve to asking why and how, *all things considered—including* getting a particular result—we should find and adopt particular arguments. But the Article only looks to unearth the deep properties of contending arguments by comparing them under a *ceteris paribus* assumption that holds results constant.

## 2. How do we identify and describe “the same outcome”?

I note first what we are *not* looking for: an explanation of how we even get to saying that we’ve correctly spotted the “same outcome” of several arguments, rightly assuming it to be the fixed target for which we are to select the best argument. We can easily lose ourselves pondering “which came first, the outcome or the argument?,” and I can do little more than note briefly this question of “jurisprudential cognitive psychology.” Obviously, we cannot rigorously justify an outcome without a justifying argument, but we cannot pick justifying arguments without some notion of the so-far-unjustified outcomes they might be asked to justify. Much the same puzzle arises in scientific investigation: facts are significant only in light of hypotheses, but how would we come to think of any hypotheses without thinking about facts to be explained by them? One thinks here of mutually interactive units and feedback cycles.

But I loosely assume that in our schooled, lawyerlike view of situations and actions, we learn which arguments and concepts are the most on point—whether we are result-oriented and start the search from there, or we are more principle-oriented and worry about the outcomes after the rules take us there.<sup>83</sup> We may sense the rightness of an outcome, but it is not a disembodied, dangling perception *ex nihilo*. We have *considerations* in our minds, consciously present or not, and in many matters (I suppose not all), they represent arguments—understood as lines of implicit or explicit reasoning ending in a conclusion/outcome. A sense of the rightness of a particular path may depend on other, perhaps more primitive, evaluation criteria, rather than standing as an independent intuition or percep-

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<sup>82</sup> Cf. Sunstein, *Foreword*, *supra* note 51, at 43 (noting that “some Justices attempt to decide cases in the hope and with the knowledge that several different conceptions of the point will facilitate convergence on a particular outcome”).

<sup>83</sup> “We don’t need no stinkin’ [argument]”—a slight revision of a line from *The Treasure of the Sierra Madre* (Warner Bros. Pictures 1948), spoken by a bandit impersonating a law enforcement officer. Paul Andrew Hutton, *The Best of the West*, BOSTON GLOBE, Sept. 30, 2007, at N12.

tion—if there is any such thing.<sup>84</sup> If a projected result becomes apparent, it will likely seem to come infused with embedded considerations that drive its acceptance or rejection. As suggested, the very existence of multiple argument-routes yielding an outcome bolsters its hold on us. Of course, what we thought early on would be the likely outcome might be discarded or revised later; this may moot the converging arguments problem—or install a new one. These are issues that are illuminated by empirical research in the cognitive psychology of legal and moral decision making, as well as by the more familiar routes of normative/conceptual analysis.<sup>85</sup>

The next question concerns how to properly describe the “same outcome” that we hold constant while we compare the arguments converging on it. Not surprisingly, there is no simple answer to this. For now, I mention just one example to illustrate the difficulty of description.

The central problem is this: absorbing the doctrinal underpinnings of a party’s victory into the description of the outcome obscures the question of which converging arguments ought to be selected. Leaving out the doctrinal underpinnings in our description of the outcome, however, shorts us on information we need to understand “what happened” in that lawsuit. Suppose Sandrine, a Francophobe, assassinates the heir to the French Throne (who lives in Paris, Texas). Her defense rests on the claim that this was communicative conduct within the scope of the First Amendment. One way to describe the outcome is: “Sandrine was convicted of murder in the first degree.” This seems simple enough, as far as it goes, but there is some uncertainty in selecting the best description of what happened. A richer description would include information about her actions and the circumstances. A still richer description would provide an indication of what she was arguing, factually and legally. Should the “outcome” include the defense theories she proffered and which, having been rejected, left conviction as the most plausible, narrowly described “result”? To say, “She was convicted of murder, the court having cast aside as irrelevant her argument that her act of murdering the heir to the French Throne was a political statement presumptively protected by the First Amendment” conveys much more information than to say, “She was convicted.” Later, the question will be whether the court should accept the First Amendment characteriza-

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<sup>84</sup> For a brief review of moral epistemology, see Richmond Campbell, *Moral Epistemology*, in STAN. ENCYCLOPEDIA. PHIL. (Edward N. Zalta ed., 2007), <http://plato.stanford.edu/entries/moral-epistemology>.

<sup>85</sup> See generally Simon, *supra* note 37. Within this complex multidirectional process of anticipating possible results and of formulating and selecting arguments, tentative judgments about outcomes and arguments may be displaced after reflection.

tion. If it does, then presumably the “intermediate” scrutiny standard of *United States v. O’Brien*<sup>86</sup> will kick in and the court will rule that the state’s murder statute—a law of general application not targeting speech—promotes the important interest of protecting human life in a way that has only an “incidental” impact on speech, and is thus validly applied to the assassin’s act. That argument reaches the same result as the minimal scrutiny that would normally be accorded to such a law of general application.<sup>87</sup>

Of course, rejecting descriptions that avoid complete collapse of the argument-to-outcome sequence doesn’t automatically give us the “right” description. There may be quite a few alternative, concurrent and at least narrowly accurate formulations for any event or situation, from which we have to select the best, the better or the least bad. Some may think that, partly because of this, there is no such thing as a confirmable same outcome, but this is a conceptually confused claim I address next below (Part I.C.3). In most cases, the proper way to describe an adjudicatory result and to tie it to different arguments that converge on it will be relatively simple. The lingering uncertainties don’t render the situation beyond description.

So, what does the descriptive choice generally rest on? It might involve finding the most (or least) illuminating or transparent characterizations for given purposes—a process common to law, morality and indeed much of everyday life.<sup>88</sup> In this sense, descriptive choices do not rest exclusively on matters of fact: they may be heavily value-laden. For example, think of the competing characterizations of “the same bottom line” when physicians fail to treat an elderly or infirm patient’s  $n^{\text{th}}$  bout of pneumonia with an effective antibiotic. It is no small matter to decide whether to say, “The patient was allowed to die of his illness” or to say, “The patient was killed by a failure to treat.” The result—death—is the same on any description, but the two descriptions simply do not have the same sense meaning (connotation), despite their operational congruence. The differing characterizations suggest different underlying moral and legal evaluations, arguments and consequences. Some observers focus on the bare result of death and view the question of characterizing its antecedents as largely a waste of time. Others focus on motivations (“they loved her, but what a relief when she was gone”) and causal underpinnings (“no one killed her—

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<sup>86</sup> 391 U.S. 367, 376–77 (1968).

<sup>87</sup> See generally *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In the unlikely case that a homicide law expressly targets killings intended to be communicative, it might be viewed as being related to the suppression of expression, triggering strict scrutiny; a judgment of conviction would still be upheld, however.

<sup>88</sup> Depending on context, “characterization” may be viewed as a form of “argument selection” or a step in the progress of an argument.

the sickness did it”) and insist that there are massive moral and legal differences between the two “dénouements.” Whether we acknowledge it or not, we illuminate some facets of a transaction not just because they promote important values but because such illumination blots out other facets. For better or for worse, illumination through focus on specified aspects of a situation or action works (in part) *because* other things are left dark. (The comparison to metaphor is clear.)

Pause briefly on the Old French import, “dénouement”: If we apply it to the last example, it embraces somewhat more than the bare outcome” of death; it *partially* incorporates context and path by referring to “the *end* of a story, *in which everything is explained*, or the end result of a situation.”<sup>89</sup> It thus captures the idea of different “methods of resolution” of disputes—of untying different kinds of knots, in different ways. It is precisely the marked differences in meaning and sheer communicative impact between the two descriptions of the dying process that requires distinguishing between “bare outcome” and “dénouement”—even when all bare outcomes are identical. Calling something a “killing” raises a question about whether someone’s conduct is culpable homicide, and we may wish to avoid generating such doubts, even if the doubts are overcome later and we decide the killing is justified or excused. Having to go through a process before one is “cleared” of guilt or suspicion is itself a significant harm. Most of us do not want government to routinely prosecute caregivers who decline the *n*th round of antibiotics for an incompetent, debilitated and dying family member who repeatedly comes down with pneumonia. Yet the descriptive problem remains resistant because of the moral problem: “Give people antibiotics for serious bacterial infections” is a kind of default medical maxim, and departures from it—without knowing anything else about the situation—require explanation.

3. The claim that there is no such thing as “the same outcome” for converging arguments

This claim ultimately rests—and founders—on the problem described in the preceding section: moving the process-product (argument-outcome) border either to include more argumentative and situational antecedents as

<sup>89</sup> *Denouement*, in CAMBRIDGE DICTIONARIES ONLINE (2006), <http://dictionary.cambridge.org/> (emphasis added). Note also the formulation: “Unravelling; spec. the final unravelling of the complications of a plot in a drama, novel, etc.; the catastrophe; . . . the final solution or issue of a complication, difficulty, or mystery.” *Denouement*, in OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989), <http://dictionary.oed.com/entrance.dtl>. The term is thus too broad to be used as a reference to bare outcomes but probably too narrow to comprehend incorporation of extended arguments into an outcome’s description.



“outcome,” or to exclude as much as possible without going completely silent. Compare these descriptions:

- “The Court held that requiring racial segregation in state public schools was a violation of the Equal Protection Clause.”

- “The Court held that requiring racial segregation in state public schools was a violation of the Equal Protection Clause because it harmed racial minorities by providing an inherently inferior education.”

- “The Court held that requiring racial segregation in state public schools was a violation of the Equal Protection Clause, reasoning that all racial classifications were presumptively unconstitutional and that the state failed to provide justifications that would overcome this presumption.”

On the face of it, one would have to consider seriously the prospect that each outcome—perceived in whatever way it would be perceived by whatever audiences—would generate different effects on attitudes, beliefs, and behavior. I have no idea how this would be established one way or the other, but this does not render the “different outcomes, maybe different effects” claim meaningless or not worth considering.<sup>90</sup> But however slippery the question of impact, the view that outcomes based on different arguments cannot be the same rests on equivocation in the use of the term “outcome”: bare adjudicatory outcomes may be invariant; results of the outcome—taken with or without its argumentational antecedents—are something else entirely.

So, the no-same-outcome claim is wrong. There is nothing wrong with saying, as an initial description, that *Brown* held *de jure* segregation in public schools violated the Equal Protection Clause. But analyzing the claim points us directly toward the search for varying properties of converging arguments. If specific argument structures would reinforce different values, they may generate different attitudinal and behavioral impacts. The reinforcement of constitutional values is indeed a major consideration in (de)selecting among converging arguments.

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<sup>90</sup> Tracking long-run (and often even short-run) results of judicial decisions is exceedingly complex and remains strongly contested. There is an ongoing debate on what differential effect *Brown* has had on desegregation, integration, every variety of racial interaction, and national and international politics. Compare MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (Oxford Univ. Press 2004), with Mary Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429 (2005). Of course, it is may be easy to track at least the form of some behavioral impacts: The “with all deliberate speed” formula in *Brown II*—*Brown v. Board of Education*, 349 U.S. 294, 301 (1955)—was followed by a great deal of litigation in many jurisdictions testing the meaning of that formula.

D. WHEN IS AN ALTERNATIVE ARGUMENT NOT A TRUE ALTERNATIVE?

1. The idea of a true alternative

As we saw, to talk usefully about converging arguments requires that the arguments be sufficiently different to constitute true alternatives. Doing nothing more than shifting a rule from the active to the passive voice doesn't count, whatever else one wishes to say about change of meaning across different syntactical maneuvers. It is, however, hard to find clear examples: Justices who offer alternative arguments are not likely to concede that their proposal "is just another way of putting the same thing." For now, I simply suggest another example from the religion clauses—an area rich in foundational conflicts and rival argument formulations—followed by a question about "equal citizenship."

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>91</sup> the Court invalidated city ordinances that prohibited killing of animals for ritualistic reasons, ruling that the city purposefully targeted religion, that strict scrutiny was required, and that the city's program failed it.<sup>92</sup> Justice Scalia concurred, however, protesting the inquiry into legislative purpose, and relying instead on his own conclusion that the ordinances were invalid because they "singled out" the Santeria religion.<sup>93</sup> He said:

I do not join that section [on the lawmakers' subjective motivation] because it departs from the opinion's general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers, *i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, and this Court has a long tradition of refraining from such inquiries. Perhaps there are contexts in which determination of legislative motive *must* be undertaken. But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free

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<sup>91</sup> 508 U.S. 520 (1993).

<sup>92</sup> *Id.* at 547.

<sup>93</sup> *See id.* at 558.

exercise” of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.<sup>94</sup>

What exactly is the difference between the majority’s purpose-targeting argument and Justice Scalia’s singling out formulation? Is this a special case of disproportionate-impact, ordinarily of limited constitutional relevance?<sup>95</sup> The selection question here of course runs squarely into the “is-this-really the-same-thing-*slightly*-repackaged?” problem. What does “singling out” mean? It sounds (on one take) like something done on purpose—here, a purpose to pick one thing from many—but if the inquiry into legislative purpose is dropped for conceptual reasons (“there is no such thing as a unitary legislative ‘motive’”) or because of evidence problems, what is the constitutional infirmity? On another take, the problem may simply be one of appearance. Suppose the duty to turn off the lights when leaving the office is assigned to the last person out, whoever it is. Is this a singling out of that person on a given day? Doesn’t this description make more sense when it is understood (by whom?) that Marshall Artz is usually the last person out?

“Singling out” for no assignable institutional motive is an arid concept; it may be completely adventitious that a particular law impacts only one party or group. Simply being the sole unlucky one out of 6.8 billion who is hit by a meteorite—a random victim, “chosen” for no apparent reason—would (in everyday language) be a singling out only on theories (or metaphors) of purposeful causation: God’s wrath, Fate, whatever. Of course, hunting for reasons would require looking into why God had done the deed—often a difficult or fruitless task. Is the best approach to say that the law intentionally targeted only the Santeria, but that we should not inquire into the motives, reasons, or purposes for this? This doesn’t work either, because the intentions of collegial bodies may be no more apparent than their purposes. How about saying that singling out is simply what the document does: it either *says* “Santeria” and nothing else, or it *says things* that constitute clear proxies for Santeria. Identifying proxies is sometimes a matter of pure empirical correlation, without serious issues of identifying

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<sup>94</sup> *Id.* at 558–59 (citations omitted).

<sup>95</sup> Compare *Washington v. Davis*, 426 U.S. 229 (1976) (upholding a facially neutral test administered to police applicants that failed proportionally more black persons than white persons), with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down a uniform pattern of rejecting Chinese applicants for laundry licenses, despite the license law’s facial neutrality).

purpose. “Persons whose ancestors were slaves in America” is a pretty good proxy for African Americans. “Scoring less than X% on the admissions test” is not, and the only way to find constitutional infirmity is to ask whether its use was designed to screen out as many black persons as possible, even at the price of excluding some white persons.

I am not suggesting that these questions cannot be satisfactorily answered from Justice Scalia’s perspective;<sup>96</sup> I am just arguing that there is an obvious question about “true alternativivity.”

A second example is the move to address some problems of equality by embracing ideas of “equal citizenship”: “The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs.’”<sup>97</sup> Invoking equal citizenship also raises questions about alternative, reconstructed and replacement arguments that, whatever else their properties, converge on a common outcome. How does invoking equal citizenship differ from resting on the equal protection or due process clauses (including the Fifth Amendment’s Due Process Clause as a source of equality values)? Is it simply an aspect of equal protection analysis, serving as a criterion for interpreting “equal protection”?<sup>98</sup> Or is it the other way around—equal protection is an aspect of equal citizenship, perhaps derived from the Fourteenth Amendment’s references to citizenship? Either way, do we have a redundancy problem, or are we crafting an explanatory concept that forms part of an alternative argument? But what is alternative to what? If the Equal Protection Clause imposes a suspect-classification-yields-strict-scrutiny doctrine, what do we gain by invoking equal citizenship? How does “citizenship,” when placed next to “equality,” illuminate it, at least within our particular republic? How does equal citizenship more effec-

<sup>96</sup> One might, for example, rationalize “singling out” as creating an appearance of improper imposition of penalties “as if” imposed by a unitary actor, whatever the motivation. Perhaps this is one aspect of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), which invalidated under the First Amendment a use tax imposed on paper and ink that heavily affected the press, and a few newspapers in particular. *Id.* at 592–93. It disproportionately affected a single newspaper. *Id.* The Court had noted that: “In the case currently before us . . . there is no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature.” *Id.* at 580. Nevertheless, it ruled that: “Minnesota’s ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers.” *Id.* at 591. Perhaps some notion of disproportionate impact was at work here also, but this is not likely to have informed Justice Scalia’s position in *Lukumi*.

<sup>97</sup> Kenneth L. Karst, *The Supreme Court 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) [hereinafter Karst, *Foreword*].

<sup>98</sup> “The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.” *Id.* at 4.

tively, easily or persuasively generate the *Brown* outcome than equal protection does? What does it add? If it is solely a rhetorical alternative, does its impact really justify its invocation? If it is thought that the Equal Protection Clause only uncertainly yields a suspect classification doctrine, why would equal *citizenship* be a more reliable source of that doctrine—if it is?<sup>99</sup> And how literally are we to understand “citizenship,” given that many—perhaps most—of our equality ideals are meant to extend far beyond formal citizenship to membership in a political or social community.<sup>100</sup> The equal protection and due process clauses cover persons, not just citizens. Is equal citizenship another job for Ockham-man, the simplicity maven?

I do not suggest that equal citizenship ideas are in fact pointless, although it is not obvious on the face of it why they afford better explanations for key decisions concerning equality and fundamental liberties. Some observers may believe that an equal citizenship template might have more easily allowed differing outcomes in some cases (for example, in *San Antonio Independent School District v. Rodriguez*<sup>101</sup>) or might do so in future cases raising similar issues, and, more generally, might affect public

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<sup>99</sup> These and other issues are addressed in Karst, *Foreword*, *supra* note 97, at 27. Karst observes that: “When the fourteenth amendment was adopted, we have seen, its framers made no sharp distinction among the due process, equal protection, and privileges and immunities clauses. Nor does it make much functional difference which clause the Court uses in protecting the values of equal citizenship. What does matter is that those values be protected, and that we recognize the legitimacy of their protection by the judiciary.” *Id.* Karst also discusses “the role of the equal citizenship principle in equal protection analysis,” *id.* at 39–42, and concludes that: “What the substantive content of equal citizenship offers is a perspective, a way of looking at the constitutional problem of equality,” *id.* at 67. See also Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007).

<sup>100</sup> “The essence of equal citizenship is the dignity of full membership in the society.” Karst, *Foreword*, *supra* note 97, at 5. See generally Andrew Reeve, *Citizenship*, in THE CONCISE OXFORD DICTIONARY OF POLITICS (Iain McLean & Alistair McMillan eds., 2003), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t86.e196> (“Although the concept of citizenship may refer to a status conferred by law, it may also be deployed to argue that persons have entitlements as a consequence of their position within a community or polity.”).

<sup>101</sup> 411 U.S. 1 (1973) (upholding Texas’s school funding system, which permitted sharp inter-district variations in expenditures per pupil from district to district).

policies.<sup>102</sup> And some writers clearly favor the idea of equal citizenship for women as a governing framework for the analysis of abortion.<sup>103</sup>

A final point about the “alternativity” of arguments. Suppose we have canonically identical statements of a rule, but, in different hands, it derives from quite different constitutional sources. Are these alternative arguments? They may very well be, although I think no general answer works across the board.<sup>104</sup> Suppose we invoke an “equal citizenship” standard to explain and justify the results in *Brown* and in *Roe*. Would the standard be different if it were said to come from the privileges and immunities clause rather than the Equal Protection Clause or the citizenship passages of the Fourteenth Amendment? Can we reduce this confusion simply by saying that it’s the entire front portion of the Fourteenth Amendment that does this work?<sup>105</sup>

## 2. When are true alternatives too trivial to fuss over?

There’s fussing and there’s fussing. If an argument is a true alternative, its different properties are worth noting for whatever insights they provide into the multiple aspects of a doctrinal/theoretical problem, even if it has no operational significance in altering the result in the case at hand. Suppose, for example, a railroad freight car never leaves the state of Demonion, but its contents are transferred to another freight car that crosses the

<sup>102</sup> E.g., Karst, *Foreword*, *supra* note 97, at 60 n.377 (“It would be entirely consonant with the equal citizenship principle for the state to seek to compensate for the educational disadvantages of poverty by providing additional funds for educating the poor.”). As he notes in the accompanying text, “it is possible to distinguish between those economic inequalities which do and those which do not seriously impair the ability of the disadvantaged to participate as effective members of the society.” *Id.* at 60.

<sup>103</sup> See the opinions of Jack B. Balkin and Reva B. Siegel, in Balkin, *ROE*, *supra* note 35, at 31, 44 (Balkin) and 63, 65 (Siegel); see also Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

<sup>104</sup> In some cases it may in the end be indeterminate whether any given formulations are “alternative” arguments. Consider, for example, the “reductive” account suggested in Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957). The idea is that certain terms are completely eliminable from a proposition or other formulation without alteration of truth or meaning. *Id.* at 813. The example offered, “tû-tû,” is a characterization of persons who are considered by their group to be guilty of certain offenses. *Id.* at 812. Although Ross didn’t discuss this directly, an obvious illustration is “malice aforethought.” Also, what seems to be a fully distinct argument may be conceptually linked—perhaps indispensably so—to the “preferred” argument. This is noted in discussing *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). See *infra* Part IV.A.

<sup>105</sup> Recall that Justice Black, concurring in *Duncan v. Louisiana*, 391 U.S. 145 (1968), said “My view has been and is that the Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.” *Id.* at 166 n.1 (Black, J., concurring). The Court held that the Fourteenth Amendment’s Due Process Clause afforded criminal defendants a right to trial by jury for serious offenses, as determined by possible punishments. *Id.* at 161–62 (majority opinion).

border into New York. Compare this with a parallel situation in which the same cargo is placed on a railroad car that goes straight from Demonica to New York. In the latter case, we have a clear instance of interstate commerce; for purposes of finding federal power to regulate railroading in this form, there is no issue. But what about regulating the railroad car that never leaves Demonica? Either that railroad car is an instrumentality of *intra*-state commerce that is closely linked to interstate commerce—and thereby becomes an instrumentality of *inter*-state commerce because of the link; or that railroad car is a module of a unitary transaction that is *in* interstate commerce because it is an integral part of it—it is to be viewed as one continuous transaction, despite the cargo transfer. Either way, all the railroad cars are equally regulable, although some arguments require an extra step or two.

This is, in a way, a problem in how one counts things up: what is one complete thing? Is a segmented trip one trip or two? Even with the railroad car that goes directly from Demonica to New York, we could segment different parts of the trip and ask whether they are “in” interstate commerce or just “substantially connected with it.” In going from one point to another in Demonica, we might be a part of interstate commerce—the overarching, unitary trip to New York—or simply closely linked to it. Of course, this gets progressively sillier: maybe the only true interstate commerce is when the railroad car straddles the border.

Perhaps this exercise is worth going through once: it calls attention to a matter of basic doctrine—the differences and overlaps between the *in-interstate-commerce-itself* dimension and the *substantially-affecting/connected-to-interstate-commerce* dimension of Commerce Clause jurisprudence. Sometimes the distinction makes the difference between invalidating federal regulation (*United States v. Lopez*—no interstate commerce and no substantial connection to it)<sup>106</sup> and sustaining it (*Wickard v. Filburn*—no interstate commerce but substantially connected to it;<sup>107</sup> *Stafford v. Wallace*—within the very stream of interstate commerce).<sup>108</sup>

But, as Chief Justice Rehnquist said in *Lopez*, referring to Chief Justice Taft in *Stafford*, “[H]e rejected a ‘nice and technical inquiry,’ when the local transactions at issue could not ‘be separated from the movement to which they contribute.’”<sup>109</sup>

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<sup>106</sup> 514 U.S. 549 (1995).

<sup>107</sup> 317 U.S. 111 (1942).

<sup>108</sup> 258 U.S. 495 (1922).

<sup>109</sup> *Lopez*, 514 U.S. at 572 (citations omitted).

Yet thinking of that “nice and technical inquiry” calls attention to the meanings of linked concepts precisely by considering their incompletely defined border. It also helps to understand Chief Justice Rehnquist’s references to “instrumentalities” and “channels” of interstate commerce: they are bridge concepts that straddle the ideas of being *in* or *part of* interstate commerce and being *so intimately connected with it* that separate terminology is unnecessary. The freight car that never leaves Demonica and the freight car that goes back and forth are, on this view, operationally indistinguishable, despite their somewhat different descriptions.

#### E. SOME TERMINOLOGICAL AND CONCEPTUAL ADVANCE NOTES

This Article’s question includes terms that require explanation: “argument structure”; “conceptual system”; “same adjudicatory outcome”; “fairly reach the same adjudicatory outcome” (by this I do not mean that a given argument can fairly reach *only* that outcome); “extensional equivalence”; and still more. Despite their crucial roles here, I provide only a sketchy account of these ideas because anything more would engulf the Article. I rely largely on context, “ostensive definition,” and unstated understandings in discussing various argument selection tasks. The effort may seem tedious, but the definitional enterprise itself helps both to explain the Article’s question and to answer it. So, here are some of these terms, encapsulated.

▪ *Same outcome* has already been discussed (Part I.C.2). I simply enter reminders of two points: Describing “the outcome” as including the adjudicatory result with the arguments that led to it blurs the main question concerning choice among converging arguments; and describing the outcome may be seriously value-laden. The first point is more important for present needs. We cannot (at *this* stage of analysis) crumple the theory into the result. If the very distinction between result and its antecedent rationale is collapsed, the “fat” description of the outcome eviscerates this Article’s topic—the inquiry into the proper linkage between result and rationale. If this topic is to be eviscerated, it should be on other grounds. Later, in examining the different characteristics of converging arguments, we can consider lumping the subsequent social fallout from an adjudication into the description of “what happened in this case.” We can then pursue questions about the effects of this aggregated impact unit.

▪ As for *fairly reaching* the same outcome, I will say very little. To ask to define this is akin to asking the meaning of “the rule of law”—or “What is law?”—and calls, again, for an omnibus jurisprudential theory,



itself implanted within an extended legal-philosophical discourse. I am not investigating these classic problems in jurisprudence and philosophy, already addressed extensively, if not definitively, in centuries of commentary. (Much the same applies to “cases relevantly similar to the case at hand.”)

- *Extensionally equivalent*, a phrase borrowed from formal logic, refers to arguments that, fairly applied, lead—or *can* lead—to the same outcome. It does not mean that in real life, all such arguments applied by all authorized decisionmakers would in fact lead to the same result. The term is also related to the familiar distinction between connotation (or “sense”) and denotation. If all red things were spherical and all spherical things were red, “redness” and “sphericity” would certainly not mean the same thing, but they would be extensionally equivalent, denoting the exact same entities. (How we would come to know their different meanings is another question.)

- *Argument* and *argument structure* refer to a sequence of propositions—premises and the conclusion they purportedly yield. The level of abstraction of these propositions will of course vary hugely from situation to situation. The term “argument structures” generally designates arguments at high levels of abstraction. All arguments embed concepts and conceptual systems, capturing them within propositional form.

#### F. SUMMARY OF PART I

1. Finding and creating our constitutional identities by examining our choices among converging arguments: Our values are our arguments are our values . . . <sup>110</sup>

Despite their often striking differences in presentation and apparent sense-meaning, different arguments may well lead to the same adjudicatory outcome. I am not examining choice among such converging arguments *just* to learn how judicial or other legal decision making works; this Article is not primarily a search for technique. When courts or legislators (or anyone) are faced with a choice of arguments (or theories, rationales, explanations, or justifications) in reaching adjudicatory results (or legal conclusions generally), the choice reveals their value dispositions and other cognitive and affective characteristics. It is no longer news that we can learn something about human thought by examining various forms of deci-

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<sup>110</sup> This is not literally true, and it is not a metaphor. What is it? It’s an incomplete characterization or reduction meant to emphasize that values—and constitutional values in particular—are realized in real situations through explicit or implicit arguments.

sion making. If we in fact have a practice of selecting some arguments as the deciding ones, and designating some of the other converging arguments as supernumerary, we should try to find out why we do so: we find ourselves in our arguments. It is not at all an overstatement (although it is quite incomplete) to say that our visions of America are reflected in our constitutional argument structures. As Professor Larry Simon puts it, “The United States Constitution establishes our governmental system and proclaims our most basic ideological beliefs.”<sup>111</sup>

If the argument is the value, then argument selection is value selection. This Article’s stress on constitutional *adjudication* is meant to bring this out. More particularly, how we choose among converging arguments may reflect aspects of the legal and moral frameworks underpinning some of the complex layers of community and culture within American society. To select or to switch arguments may often mean that one is shifting to a different constitutional dialect, addressing different aspects of the constitutional transaction, possibly changing the “meaning” of the value, and thus addressing different values and different facets of those values already in play.<sup>112</sup> To the extent that different argument structures reflect or direct us to different segments and filaments of tradition, they will emphasize different features of the richly marbled American experience. Indeed, in some cases the very function and character of the courts themselves may appear to change—or actually do change—if certain arguments are withdrawn and replaced by others, even when outcomes remain the same. The constitutional values promoted by a standard that uses a pure burden-on-religion trigger for heightened scrutiny are very different from those promoted by a standard that predicates intense review on showing that religion has been purposely targeted or otherwise illicitly “singled out.” Similarly, a court that examines racial separation by asking just how it harms anyone is performing a task very different from that of a court that approaches the question by presuming at the start that the separation is unjustified. The “constitutional identity” of the situation and the case built from it changes significantly from one argumentational mode—or “thought style”—to an-

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<sup>111</sup> Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 603, 603 (1985).

<sup>112</sup> Note this remark about “other languages” in Scott Martelle, *The Risk of Being Civilized: UCLA Professor Jared Diamond Studies Why Societies Collapse*, L.A. TIMES, Dec. 17, 2004, at E1 (quoting Diamond: “Different languages let you communicate with different people on their own terms . . . you express different things in different languages. You become a different person when you speak another language.”). The last claim is a bit hyperbolic, but the underlying point is apt: conceptual systems have differential impacts on thought even when they converge. See *infra* Part III.G.

other.<sup>113</sup> I do not say that harm-based approaches to claimed violations of equality standards are always constitutionally immaterial. Indeed, it is essential to vet the harm-based arguments in order to better understand and formulate their replacement by other equality arguments not directly calling for any showing of harm: the search for harms is part of the foundational analysis of different doctrinal forms, and affects at least some interpretational disputes. Part of the point of equality standards as they are now doctrinally formulated is to prevent palpable harm of the sort displayed in *Brown*,<sup>114</sup> and this is something to consider within a full analysis of the Equal Protection Clause. More generally, “equal protection,” “equal citizenship” and the more particular suspect classification doctrine cannot be fully grasped without traversing their intersecting strands of meaning, including the formerly vital *doctrinal* step of charting how people are harmed by certain inequalities.

These linked theoretical strands can’t be well understood and compared or “combined” without being alert to the risk of category mistakes. To illustrate: one of the foundations of the anticlassification principle is concern over the same set of harms that in turn *underlie* the antisubordination ideal. Thus, in *some* contexts, comparing anticlassification with anti-subordination frameworks is to compare an implementing doctrine with a justification for such implementation. They are not always on comparable planes in all contexts. In this light, although finding suspect classifications triggers automatic invocation of heightened scrutiny, classification doctrine does not entirely renounce harm and harm-as-subordination notions as foundational and hence as interpretively relevant.<sup>115</sup> To be sure, the princi-

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<sup>113</sup> “Thought style” is a phrase associated with Ludwik Fleck. Robert S. Cohen & Thomas Schnelle, *Introduction to COGNITION AND FACT: MATERIALS ON LUDWIK FLECK* ix, xi (Robert S. Cohen & Thomas Schnelle, eds., 1986) (linking the phrases “thought style” and “thought collective”). Obviously, I am not trying to be rigorous about explaining, connecting, and distinguishing among changes in meaning, thought style, or language. For an example of that sort of enterprise, see generally JOSEPH LAPORTE, *NATURAL KINDS AND CONCEPTUAL CHANGE* (Cambridge Univ. Press 2004). For the discussion of explication and rational reconstruction, see *infra* note 128.

<sup>114</sup> This is not an endorsement of the Court’s reference in *Brown* to empirical studies on the impact of segregation.

<sup>115</sup> The fact that in suspect classification cases harm and harm-as-subordination are not—overtly—doctrinally material suggests to some observers that those cases exclude such considerations. For a description of this view, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73, 1474–75 (2004). Siegel states:

For many, the belief that anticlassification commitments are fundamental entails the view that our tradition embraces a particular conception of equality, one that is committed to individuals rather than to groups. On this account, the tradition’s embrace of the anticlassification principle signifies its repudiation of an alternative conception of equal protection, the antisubordination principle: the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups. . . . The understanding that an-

ples, though often operating on different theoretical planes, may sharply conflict in some cases.

Given these views on value/theory/doctrine linkages, the notion that “the value is the argument,” though ontologically shaky, makes sense. To take a homely example: honesty—i.e., truth-telling as a value—is instinct with context, however abstract a given statement is. The value of truth-telling (or not), an abstraction, can only be ideated through observed or imagined concretions. Whenever we think of a value, the value contraries are implicitly impacted: truth-telling has functional meaning for us because of its constant accompaniment—*not-truth-telling*, whether by lying, misdirection or silence. As soon as this X-or-not-X is grasped, our choice involves an implicit argument, whether we act impulsively, deliberately, or even unconsciously. Our response to an armed civilian asking us where his sworn enemy is hiding is likely to be swift and to the point, as in: “He went north,” the opposite of his actual path. The argument itself is a sequence of premises about what the homicide-minded seeker wants, the presumptive evils of killing, the duty to save overcoming the duty to avoid lies—and so on. These argument formations become wired into us over time. (No, I am not saying the arguments are nothing but brain functions emerging into mind.) It makes no difference what “value field” we are in. If we say, for example, that informational privacy is an important personal interest protected by the Constitution, the point is alive only in conjunction with a matrix of possible arguments, some converging, some not. Which argument we ultimately use reflects our understanding of the status, strength, and meaning of the value assertions we rest on, and the particular circumstances at hand. If value and argument are joined, and argument entails context, then without arguments, the content of the value is indistinct and its functions are impaired.

Of course, I am not saying that the adjudicatory use of arguments is the only way to realize a constitutional value. Simply acting in accordance with it implements it, and in that way, and by accumulated observations by the community, the value is reinforced.

## 2. The link to everyday lawyering and judging

The general inquiry here is instinct with the daily practices of lawyers and judges. Examining how we select among parallel arguments enriches

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ticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision or of the earliest debates it prompted.

*Id.* at 1473–75.

both our analytic and operational understanding of doctrine because we are superimposing different conceptual templates onto the same situation, enabling us to grasp more of its multiple, concurrently operating facets—a kind of ideational “triangulation” (“polyangulation”?). The examination of converging arguments may even revise our view of the situations being addressed. “The same” situation may seem either more fragmented or more unitary, and in either case we may more fully understand it after parsing it in this way. This is a critical ongoing aspect of doing law in every field (lawyers as diamond-cutters?), and is a prime target of legal scholarship, even where changed outcomes are not called for.<sup>116</sup> In particular, pursuing the Article’s topic yields better informed glimpses into future doctrinal turns—a practical matter that is often of urgent relevance to lawyers and courts. Lawyers and judges who are able to spot such possibilities are likely to do well along several dimensions of success. (Passing note: I focus here on judicial argument selection; argument selection by lawyers may involve a criterion keyed to likely judicial argument selection, but I do not take up this analytic branch.)

One more point of clarification: to ask why we should choose one or more arguments over others leading to the same adjudicatory outcome does not necessarily reflect a view that that outcome is, all things considered, the best one and richly deserves—or requires—a reconstructed or alternative argument. Sometimes it clearly is (*Brown v. Board of Education*<sup>117</sup>); sometimes it isn’t so clear (*Roe v. Wade*<sup>118</sup>); and sometimes it clearly is not (*Korematsu v. United States*<sup>119</sup>).

3. Why this isn’t just a dressed-up general jurisprudence project—or maybe it is

At various points, I respond to arguments that the Article’s topic is neither well defined nor of any serious use in the law business. (On the latter, see the immediately preceding section, Part I.F.2.) I present these objections and responses not (solely) because of some hyper-defensive reflex but as part of the explanation-in-chief of the scope and limits of the topic itself. I mention one of them here—it’s a form of this-has-already-been-

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<sup>116</sup> See, e.g., Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 58 (1975) (arguing that “[f]or the most part, the First Amendment’s equality principle will produce results in apportionment cases similar to those reached under the Equal Protection Clause”).

<sup>117</sup> 347 U.S. 483 (1954).

<sup>118</sup> 410 U.S. 113 (1973).

<sup>119</sup> 323 U.S. 214 (1944) (upholding federal action excluding persons of Japanese ancestry from designated military areas).

done claim; the others fall more into the this-makes-no-jurisprudential-sense camp and will come up later (Part III—“Why bother?” questions).

The present objection, suggested earlier (Part I.E), is that however one spins the topic, it ultimately reduces to hoary questions of conventional jurisprudence, and its framework provides nothing distinctive that wouldn't be contained, slightly repackaged, within standard doctrinal analysis—as by asking, for example: What is the holding of a case? What is its *ratio decidendi*? What was its exact outcome? Its dénouement? Exactly which argument(s) “worked”? Is the case—its outcome and rationale—consistent with precedent? Is the case consistent with overarching values or public policies made relevant by the legal system, and if so (or if not), so what? This is just the daily stuff of law and of basic jurisprudential inquiries.

So, the observation that the topic devolves in many respects to standard jurisprudential problems and offers nothing more than a slightly varying spin on them is correct. Nevertheless, the “nothing distinctive” objection is overstated. The task of choosing among converging arguments requires us to probe the varying attributes of arguments—of precisely how they differ from each other. This is particularly so with value reinforcement issues; with estimating the varying impacts of the arguments in strongly related but nevertheless divergent areas of law—for example, if we invoke the strict scrutiny standard of review for racial classifications that seem malignant, what happens when we use it for classifications that seem benign?; and with noticing how some conceptual structures block the recognition of constitutional and moral values, while others clarify them.<sup>120</sup> Does the description “we take race into account without using quotas” explain or obfuscate exactly how a school admissions program operates?

Of course, it is hard-to-impossible to explain just how useful the investigation of converging arguments might be in evaluating constitutional adjudication.<sup>121</sup> Suppose few of those who hear about judicial decisions pay any attention to argument structure (a reasonable assumption). Perhaps

<sup>120</sup> “Obstacle concepts” are discussed in GASTON BACHELARD, *THE PHILOSOPHY OF NO: A PHILOSOPHY OF THE NEW SCIENTIFIC MIND* 18–19 (G.C. Waterston Trans., 1968).

<sup>121</sup> I add, in caution, that I am not trying to provide a general account of what “accounts for” judges and courts deciding in particular ways, nor tracing empirical impacts of particular arguments or kinds of argument or modes of argument presentation. Cf. Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Saliency: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 L. & SOC'Y REV. 259 (2007) (discussing the impacts of advocacy skills and quality of oral argument, experience of lawyers, the Justices' “personal policy preferences,” the Justices' “ideological orientations,” and the “saliency” of cases). They conclude that (among other things): “Despite their ideological alignment with various parties, the justices often emerge as discriminating consumers of legal arguments.” *Id.* at 275. Works for me.

this is true even of many who are actually affected by the decisions. If so, how would use of different arguments differentially reinforce different constitutional values? It is unusual for press editorialists and columnists attacking or defending a judicial decision to spend much time explaining the underlying arguments, or even identifying what the exact legal issues were (although the situation is less bad in some venues).

True, the bare outcome itself, and knowledge of it, will have value impacts. What they are depends on who is affected, who observes and what the observers “see.” But here we are also asking whether different *arguments* generate different value impacts. Sometimes it is a stretch to think so. Think of *Heart of Atlanta Motel, Inc. v. United States*,<sup>122</sup> which upheld Congress’s power to enact the Civil Rights Act of 1964, holding that a private motel was subject to the Act’s nondiscrimination standards. Whatever effects the case had on perceptions of constitutional value, it surely had little or nothing to do with the battle over whether Congress’s power derived solely from the Commerce Clause or also (or instead) from § 5 of the Fourteenth Amendment. From a value reinforcement perspective, that debate was academic fluff. On the other hand, different persons—laypersons or scholars—might react quite differently to an approach that condemns racial separation—or any racial classification—only when harm is shown, rather than one that reflects a presumption of harm from the very fact of separation or classification.

But public psychological reinforcement of values is only one facet of the argument selection process: we have a legal system and its integrity—its rule-of-lawness—is always at risk. Ultimately, the body politic and its citizenry may be affected in different ways through different arguments, even when many are unaware of or do not understand the arguments. Even if some portions of the body politic are acoustically separated from others,<sup>123</sup> they nevertheless are likely to strongly affect each other.

In any case, I am not going to lapse into a more extended defense of why we study constitutional argument structures. They are *there* and the focus on converging arguments may be instructive because, as we saw, it is strongly connected with a frequent objective of legal scholars: to rework,

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<sup>122</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964); *see also* *Katzenbach v. McClung*, 379 U.S. 294 (1964). (Both cases upheld the application of the Civil Rights Act to eating establishments judged to be sufficiently connected to interstate commerce.)

<sup>123</sup> *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). I am not suggesting that it makes no difference in the formation and maintenance of basic constitutional values what proportion of the citizenry follows legal arguments.

revise, rationalize, or cohere a body of doctrine or an individual case without (necessarily) changing adjudicatory outcomes, and possibly even trying to *avoid* such changes—a constraint rewriters often impose on themselves. Comparing converging arguments requires a hard look at the very standards in place for judging constitutional arguments—in particular, those arguments offered to make doctrine more consistent with perceived constitutional values, or to “clean up” the doctrinal area, while leaving results more or less intact. By pursuing the comparisons, we learn more about what new or reformulated questions to ask: what we think is a material question depends on our underlying frameworks for perception and analysis.<sup>124</sup>

This seems to be at least part of what the cottage industries devoted to rewriting *Brown v. Board of Education*<sup>125</sup> and *Roe v. Wade*<sup>126</sup> were trying to do,<sup>127</sup> and what many critiques of any area of constitutional litigation and theory are up to. Such reconstruction/rebirth projects are rightly viewed, at least in part, as operationally equivalent to efforts to find and select among additional arguments that yield the same outcome.<sup>128</sup>

<sup>124</sup> Cf. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 313 (Student ed. 1970) (stating that one of the book’s objects has been “to indicate the questions we must ask in deciding whether one system is preferable to another”).

<sup>125</sup> 347 U.S. 483 (1954).

<sup>126</sup> 410 U.S. 113, 153 (1973).

<sup>127</sup> See Balkin, ROE, *supra* note 35; Balkin, BROWN, *supra* note 45. Of course, not all rewriters want to preserve the original outcome. See Balkin, ROE, *supra* note 35.

<sup>128</sup> We might speak of arguments that are “reconstructed” or “explicated” in the sense that their underlying doctrinal or value presuppositions are made more (or less) explicit. “Recast” and “reframe” are cognate terms, but I do not explore these overlapping meanings. To put it loosely, the reformulation might present a “deeper meaning” without changing the overall meaning enough to generate a true alternative argument. (Recall the well-worn—because instructive—example of learning the molecular structure of gold: in what senses does “gold” retain the same meaning or take on a different or richer one?) If there are conflicting “deeper meanings,” however, their articulation and selection may well change an argument’s meaning enough to produce different outcomes in cases not on all fours with the case at hand. At some point, however, the determination of “the identity of a concept” will be no more definitive than the determination of the identity of transfigured persons or objects. On “rational reconstruction” and “explication,” see RUDOLF CARNAP, LOGICAL FOUNDATIONS OF PROBABILITY 576–77 (1962). See also Quine’s discussion (explication?) of Carnap’s idea of “explication”: “Any word worth explicating has some contexts which, as wholes, are clear and precise enough to be useful; and the purpose of explication is to preserve the usage of these favored contexts while sharpening the usage of other contexts.” WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 25 (1961). In ordinary language, “reconstruct” and “explicate” don’t seem synonymous, but they are hard to distinguish in the works of Quine and Carnap. Perhaps in some contexts, the term “conceptual (re)engineering” would be appropriate. See also LAPORTE, *supra* note 113 (discussing related issues of conceptual change and change in meaning).

Apply these ideas of conceptual reconstruction to Justice O’Connor’s concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984): “I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in



## II. CRITERIA FOR SELECTING AMONG CONVERGING ARGUMENTS: A STARTING LIST

### A. PREFATORY NOTES: ISSUES CONCERNING THE IDEA OF CONVERGENCE, THE NATURE AND LOGICAL STATUS OF THE CRITERIA, AND THEIR DESCRIPTIVE AND PRESCRIPTIVE PROPERTIES

I note first that this initial review of choice criteria and its later expansion do not, despite the use of the familiar outline form of numerals and letters, reflect any particular ordering or hierarchy.

The central question addressed in this Article is this: Why might we think, in a given case, that one argument is better than others that produce the same outcome? If they *all* lead to *the same* adjudicatory disposition, what accounts for which arguments are in fact selected? Which ought to be selected? And what criteria should be invoked to make the best selection? On what grounds of legal betterness is the argument  $\Phi$  actually—and properly—preferred to argument  $\Omega$ , when both yield X (“X” being the narrowly described adjudicatory outcome)?

Before the preliminary review of selection criteria—some already alluded to—here are some points to consider before going through them at greater length.

- *Uncertainty of criterial characterization.* In some cases, it is hard to specify a decisive reason for formulating given selection criteria one way rather than another. Should we speak of value reinforcement or simply illumination of value issues? Is it more important to speak of coherence or fit with “theory,” “precedent,” or “tradition”? To “settle” these formulation issues requires settling of long unsettled (and possibly unseizable) jurisprudential issues. What is a felicitous catalogue of criteria in one legal field or one judicial level or one jurisdiction might not be in another; why this might be so is a good question but I do not consider it here.

- *Overlaps, category mistakes, conflicts and rankings.* The criteria, as described here, overlap considerably; this is inevitable to some extent, but my own conceptual confusion also plays a part. They also vary in kind and

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this case as that taken by the Court, and the Court’s opinion, as I read it, is consistent with my analysis.” *Id.* at 687 (O’Connor, J., concurring). In *Lynch*, the Court upheld a city’s inclusion of a Nativity scene in a Christmas display. *Id.* at 686–87 (majority opinion). In her concurrence, Justice O’Connor presented her views on the role of apparent government “endorsement” of religion, or particular religions. *Id.* at 688 (O’Connor, J., concurring). One could say that Justice O’Connor either explicated (or reconstructed) preexisting Establishment Clause doctrine (the “Lemon” test, from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)), or amended it to the extent that it became a different doctrine.

in degree of abstraction, and so they are arguably non-comparable as expressed—that is, to compare them as coordinate factors would be a category mistake, as in “Gotham’s population is 1600 and it’s 200 feet above sea level, totaling 1800.” In some cases, one criterion may conflict with another, or several others. Some criteria may rest on or presuppose the role of other criteria. Some of them might be viewed as “substantive” (“Does this argument appropriately reinforce the value assigned to informational privacy?”), while others are dubbed “formal” (“Whatever particular values are involved, is the argument consistent with precedent—a value in its own right?”). Of course, the criteria are not likely to be of equal importance, whether in general or as applied in particular cases; sooner or later, they have to be vetted for rank-order, and rank-ordering is vulnerable to situational variables. Should consistency with constitutional precedent be expressly downgraded at the Supreme Court level? The rough priority of precedent in American constitutional law, for example, bowed to a relatively better understanding of constitutional value in *Brown v. Board of Education*.<sup>129</sup> (Even there, the displacement was implicit: *Plessy* was not expressly overruled.) In any case, it seems simpler—at this stage—just to mention these differences rather than to construct a more detailed taxonomy that displays them.

▪ *The very idea of “convergence” excludes arguments that simply don’t work.* The idea of convergence is central to this Article’s approach to argument selection, and it is also fuzzy, although not meaningless. Obviously, considering whether a given argument actually does take us to the posited outcome leads us directly to one of the criteria for selecting it from among the others: the relative ease or strain we have in pushing them to the supposedly common outcome. But whatever variations in stretching or straining we encounter, the arguments themselves all have to satisfy traditional jurisprudential rule-of-law criteria for at least minimal adequacy before they can even be considered members of the converging sets from which we cull the “winners.” These include the most familiar—though non-absolute—requirements such as consistency with precedent and adjacent bodies of law. (Perhaps these are better viewed as strong presuppositions than as selection criteria, but this is too refined a point to dwell on.) Of course, drawing clear lines in evaluating the quality of an argument’s lock on an outcome is often impossible.

▪ *“Logical and jurisprudential status”;* *normative and prescriptive criteria.* When we look at selection criteria, are we looking at elements of

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<sup>129</sup> 347 U.S. 483 (1954).

a descriptive hypothesis about how we select arguments? (“This is what courts characteristically look for when they have to pick one argument from several leading to the same result.”) Or are we looking at elements of a prescriptive formula (prescriptive by what authority?). Or are we doing both? The most I can say for present (and probably future) purposes is that, in fact, the criteria (in various combinations) form a set of predisposing conditions that help to explain argument selection, but they also embody moral and legal/constitutional norms concerning what arguments ought to be selected.

The other criteria described here are of course not plucked out of the air; they are found within the traditional set of standards we use in legal reasoning and analysis. When we choose among these jurisprudentially at-least-minimally-satisfactory arguments, we are choosing the best argument, all criteria considered, and some criteria will override others. There are large questions about the criteria for selecting the criteria—and meta-criteria—but this is as far as I go with this potentially infinite regress. For the most part, I do not directly address “tactical collegiality” and its constituent standards and protocols. I note only that the *constituents* of the tactical reasoning pursued by individual judges and groups and the terms of the agreements reached are likely, in general, to involve argument selection of the sort discussed here.

▪ *Judicial consciousness.* Whether judges should consciously attend to these choice criteria and if so whether they should do so openly are fair questions, but I mention only a few points in response.

First, these criteria, to a considerable extent, *constitute* the touchstones for jurisprudentially sound decisions; their use may not be optional. Although some criteria may seem less familiar than others, they become more patent when they are used in situations where arguments converge on a common outcome, because this convergence requires the decider to focus on comparing differences among arguments. The differing traits of arguments are less salient in the simpler one-argument, one-outcome situation because no comparisons are needed. It is hard to see the downside from whatever sharper images courts get from having to compare parallel arguments.

Second, I proceed on the following presumptions: that it is useful from practical and theoretical perspectives for judges, counsel, parties, and the legal system in which they are nested to have an idea about why some ar-

guments were selected over others; and that these ideas about how to select are often properly ventilated in judicial opinions.<sup>130</sup>

Third, from a conceptual history perspective, one might well ask whether the sense of having a serious choice<sup>131</sup> among converging arguments would always have been recognized by courts as within the realm of proper judging. The very sense of “choice” might have been—and might still be—thought damaging to the rule of law, or to the continued entrenchment of favored interests, possibly by also affecting the actual choices made. Even today, one finds judicial perspectives that demand a search for the one true path that always exists; the idea of law-as-a-science may not have entirely died. But even the law-as-a-science framework often requires (if possible at a given time) the selection of converging arguments, even if not clearly perceived as such by those who think they “have no choice.”

Finally, I suppose that perceived lack of merit in all converging arguments except one is a sort of anti-criterion for selection, but this is nothing more than the half-empty rather than half-full approach to examining the criteria for identifying the right reason.

B. THE PROSPECT THAT ARGUMENTS CONVERGING IN ONE SET WILL REACH UNWANTED OUTCOMES, WHETHER CONVERGENT OR DIVERGENT, IN OTHER, LINKED BUT DISTINCT SETS OF CASES; “REVENGE EFFECTS”

So far, the discussion has been about arguments converging to the same outcome in a given case—and, one should add for completeness, in all relevantly similar cases (those “on all fours”).<sup>132</sup> But we may be strongly concerned about several other sets of cases that could be affected by our choice of converging arguments in the case at hand. The concern, introduced earlier, is about the possible results of “exporting” a criterion, soundly used in the case before us, to related areas of law, where its use might be less sound and may lead to unwanted outcomes. These other areas may be ill-defined, perhaps even unrecognized, but they may eventu-

<sup>130</sup> These claims are of course arguable, but the extent to which judges should be explicit or even self-aware about how they identify and choose among converging arguments is not discussed here. See generally Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

<sup>131</sup> I mention for completeness that “choice,” “having a choice,” and “the sense of having choice” have a wide range of meaning.

<sup>132</sup> It seems unnecessary to add the phrase “and cases on all fours” or “all relevantly similar cases” every time I refer to converging arguments “in a given case.” For convenience, I will simply refer to “relevantly similar” cases (which of course includes “identical cases”). The nature of relevant similarity I leave to texts on jurisprudence. The cases “in the ballpark” or “in neighboring regions of law” form a set that is theoretically distinct from the set of relevantly similar cases.

ally deliver “revenge effects” if they are required to host one or more of the argument structures under consideration in the case at hand.<sup>133</sup> To be sure, there will be disagreement in many situations on whether these effects are indeed adverse.

This prospect of unwanted and often unthought-of revenge effects in other fields, and the need to consider it, is universal in human behavior: it is intrinsic to the very process of ordering human conduct through rules, principles and standards. “What if you applied the rule to *that*, as well as *this*?—as you will have to, sooner or later,” is a question that captures much of legal analysis and is, in principle, on the table in every case, and indeed in every case of lawmaking. Of course, I am not going to catalogue even the most eye-catching of these problems, but here is a straightforward example: in extramural remarks defending one of his blockbuster cases, Chief Justice Marshall said, in a letter to his colleague on the Court, Justice Bushrod Washington: “Virginia politicians did not object to the pro-Bank result [in *McCulloch v. Maryland*,<sup>134</sup>], the Chief Justice told Bushrod Washington; it was that ‘damnable,’ ‘heretical,’ nationalistic reasoning that was so offensive.”<sup>135</sup>

Of course, some of the effects in other arenas are exactly what we want and expect. Among the more important illustrations is the fact that we select among constitutional “standards of review” *in order* to change the likelihood of certain kinds of outcome over a large range of cases that arise in more than one constitutional region. The Constitution, at least as currently interpreted, embeds or encodes a hierarchy (or perhaps an ascending continuum) of values, and different standards of review are meant to track differences in constitutional value by placing very different burdens on government to justify its actions in different situations.<sup>136</sup> In this sense,

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<sup>133</sup> See generally EDWARD TENNER, *WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES* (Vintage Books, 1996).

<sup>134</sup> 17 U.S. (4 Wheat.) 316 (1819). The Court ruled that Congress had the power to set up a national bank and that Maryland was limited in how it could tax this federal facility because of the federal structure created by the Constitution. *Id.* at 436.

<sup>135</sup> John Marshall, “*A Friend of the Constitution*”: *In Defense and Elaboration of McCulloch v. Maryland*, 21 STAN. L. REV. 449, 450–51 (1969) (quoting a letter from Chief Justice Marshall to Justice Washington).

<sup>136</sup> Even where all constitutional liberty (or other) claims against government are considered of equal value, a standard of review would still be required to specify the default rule—which way the presumption runs and who bears the burden of justification; this default rule would reflect the comparative constitutional valuation of the claimant and government sides generally. (Should the starting presumption favor the claimant or the government?) Perhaps different standards of review would be keyed to different sorts of proffered state justifications, though this is quite different from current constitutional jurisprudence. Professor Rebecca L. Brown argues that constitutional liberty interests are best viewed as being of equal value at the threshold: “Until the middle of the twentieth century, liberty was

not a hierarchical collection of discrete activities, some more valued than others, but a continuum as integrated as a human life. The relevant case law acknowledges this.” Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 71 (1999) (drawing in part on HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 51–52 (1993)). I am not sure what this entails, although it may, in theory, be extensionally equivalent to recognizing hierarchy at the threshold. That is, hierarchy turns up elsewhere in operationally similar form. It may be a comment on the distinction between “personal” and “economic” claims (Professor Brown wants to displace “dichotomous reasoning” about liberty, *see id.* at 67), but it seems broader than that. (I note that Professor Brown’s concern is not to elevate protection of economic rights claims, but to argue that the umbrella concept of “protecting ‘fundamental rights’ may sound progressive, but it severely restricts the number and kind of freedoms that receive any protection at all and invites the erection of higher and higher hurdles to those seeking to claim that their right is, in fact, fundamental.” *Id.* at 90.) As for liberty claims generally, my statement in the text—the constitution embeds a value ordering that maps onto corresponding standards of review—is neutral about whether this ordering is best displayed as a step function with *discontinuities* in our ratings of constitutional value; it is not neutral, however, about whether values differ in strength: they do. My main point is that there is an ordering—*i.e.*, that some constitutional interests are presumptively of higher value than others—but that such an ordering may or may not be best represented as a smooth curve or a jagged one bearing “phase changes.” What the continuous or discontinuous function looks like will of course depend heavily on how we characterize the values.

In thinking about ordering, or the lack of it, there are several opposing possibilities that might be thought to account for the results of constitutional adjudication. One is that all liberty claims are equal—we just have to vet the government’s reasons to determine the correct outcome. Whether this matches anyone’s understanding in the 19th century I can’t say, but it is not what we have now, except (possibly) within the domain of the rational basis test. This is precisely Professor Brown’s complaint: liberty has been fragmented into different categories. She says that liberty claims, at least as formerly understood, do not vary in degrees of preferredness—it is only the call of the common good under varying circumstances that does so. *Id.* at 92–93. The difficulty here is that one needs to look in the other direction also. “The common good” is no more independent of “rights” valuation than “rights” analysis is independent of the common good. What constitutes a valid state reason depends on the nature of the liberty claim. There is no reason to think that this mutual interaction is in reality unidirectional. If government reasons can shape the contours of liberty, liberty claims can shape the contours of government reasons. Under contemporary constitutional jurisprudence, moreover, a major touchstone for analysis is that different rights claims place differing burdens on government to provide a decent justification. But if we collapse common-good justifications into the threshold rights characterization—rendering them somehow all “equal” at that analytic stage—the justification stage is melded into the threshold stage. This lumping does not, I think, promote the explicitness I would prefer, although such a “veiling” may be desirable in some contexts.

It’s not clear if this melded approach would have any effect on the scope of bottom-line rights protections. Since we have assigned names to certain kinds of rights, the term “hierarchy” seems appropriate. But even without names—as in a pure sliding scale approach—there will be ascending levels of justification required (possibly also a function of degree of impairment). Finally, to say that all rights claims are presumptively equal and that different judicial outcomes rest on the differences in government justifications does not match what the Court is now doing; it does not view liberty claims as undifferentiated with respect to presumptions about their validity. Whether the Court ever saw things otherwise I leave aside. In this Article, I can’t go beyond this response in considering the ways in which the Constitution embeds value orderings. In particular, whether an ordering is better arranged as a staircase or a slide forms an important choice of conceptual systems problem. In any case, Professor Brown’s alternative characterization (another conceptual system!) packages hierarchy in a different way from that presented here.

the constitution is both a repository and an engine for executing basic values.

Occasionally, the existence and significance of the hierarchy are underscored by a change in the standard of review applied to claimed impositions on a constitutional interest, indicating an apparent (often actual) revision of its valuation. This is illustrated, if somewhat obliquely, by one of Justice Scalia's colorful (if not always spot-on) asides. In *Employment Division, Department of Human Resources v. Smith*,<sup>137</sup> the Court rejected strict scrutiny of burdens on religion resulting from laws of general application not targeting religion. Justice Scalia, writing for the Court, stated:

Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .<sup>138</sup>

But it is precisely this "luxury" accorded by heightened scrutiny that signals the value of the interest at stake. It is a *very* big deal to choose between a conceptual scheme requiring government to present special justifications for affecting private interests in certain ways and one imposing no such burden. More particularly, and as argued at various points in this Article, saying there is a need for special justification and that it is satisfied in given cases is very different from saying that there is no such need in the first place: the diverging reasons mark different valuations, despite the converging outcomes.<sup>139</sup> Whether *Smith* in fact reflected a change in constitutional valuation I leave aside.

In this interpretive light, it is clear that constitutional standards of review are not something imposed from considerations "external" to the text; their existence follows from the presence of strongly-valued interests embedded *in* the text—a presence confirmed by every standard interpretive

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<sup>137</sup> 494 U.S. 872 (1990).

<sup>138</sup> *Id.* at 888 (emphasis in the original) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

<sup>139</sup> This is strongly suggested by Justice O'Connor's concurrence. She objected to a flat rule that laws of general application do not draw strict scrutiny in free exercise cases but thought that Oregon's exclusion survived strict scrutiny. *Smith*, 494 U.S. at 892, 901 (O'Connor, J., concurring). In this arena, the choice of standards of review will strongly affect results in other cases, which was presumably a major reason for her insistence on maintaining the strong possibility of strict scrutiny. *Cf. id.* at 902 ("The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.").

approach in present use.<sup>140</sup> If a constitutional standard of review did not heavily tilt outcomes in favor of persons claiming serious infringement of fundamental rights, then their very status as such rights would be in doubt: routine upholding of government regulations of speech (or religion, or abortion, etc.)—which would occur under minimally constraining standards of review—would greatly enfeeble this status. Thus, because constitutional value is not constant through all contexts, we want and expect different patterns of results when different standards of review are applied.<sup>141</sup> For example, most observers now embrace strict scrutiny for all government actions that classify by race when those actions are meant to disadvantage some races. But many are unwilling to impose such a rigorous burden of justification when the government action resting on racial classifications is meant as a form of rectification for prior disadvantaging of racial groups. The rule that “*all* government classifications on the basis of race are presumptively invalid” would generate the same results in a given *burden-imposing* case as would the rule that “*only* those government classifications that seek to impose *disadvantages* on the basis of race are presumptively invalid.” The latter, however, would avoid the heavy burden placed on affirmative action.<sup>142</sup> Strict scrutiny for racial classifications *of any sort* may thus have unwanted outcomes where the classification distributes a benefit (if it is indeed a benefit).

Another example of selecting arguments to avoid possible unwanted spillover effects is *Burson v. Freeman*,<sup>143</sup> where the Court presented us

<sup>140</sup> This was, of course, not always the predominant view—and indeed in some ways may still not be. See *infra* text accompanying note 217.

<sup>141</sup> Loose though it is, this describes well enough the general rationale for designating different standards of review in various constitutional fields. How these standards play out in practice and whether they conform to our expectations is another question. Professor Winkler has suggested that, to some degree, our expectations are off. See generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). The general view that strict scrutiny results in invalidation of government action far more often than not, however, is consistent with Professor Winkler’s analysis, although it seems that the rates of invalidation vary from field to field. He states, “Contrary to the Gunther myth, laws can (and do) survive strict scrutiny with considerable frequency. *While it remains true that the majority of laws subjected to strict scrutiny fall* and that the government typically faces an onerous task defending laws under this standard, strict scrutiny is not nearly as deadly as generations of lawyers have been taught.” *Id.* at 797 (emphasis added).

<sup>142</sup> There are, of course, serious questions about what constitutes a “classification based on race” and disputes about the nature of rectification and to whom or what it applies. This will come up again in Part II.F. and IV.D.1.d.

<sup>143</sup> 504 U.S. 191 (1992) (holding, via a plurality opinion plus concurrences, that a restriction on electioneering near polling places was consistent with the First Amendment). The holding of the case is unclear because there was no majority opinion. If the plurality opinion is taken together with Justice Kennedy’s concurrence, it seems correct to say that the Court ruled that strict scrutiny was satisfied. However, his concurrence itself posed choice-of-conceptual systems problems: he has criticized the



with a relatively rare case in which government regulation of the content of political speech was upheld under strict scrutiny.<sup>144</sup> The compelling goal of preserving the integrity of elections was held to justify the restriction on campaign electioneering near the polls when voting was under way.<sup>145</sup> Last minute frauds, for example, could not effectively be refuted before the damage was done. But Justice Scalia, concurring, thought this argument structure was unnecessary because the sites in question were nonpublic forums and their regulation triggered only a “reasonableness”<sup>146</sup> standard. In all relevantly similar election-site cases, however, we would reach the same outcome *whichever* argument structure is used, the majority’s or Justice Scalia’s.

So why did the majority stick with strict scrutiny, even though it was overcome? Perhaps because it feared that other cases, not so tied to election sites but still deserving of strong protection, would be scooped up by an expansive application of Scalia’s nonpublic forum doctrine, with the result that speech protections would be weakened. The idea of a *nonpublic* forum, after all, was not meant to *expand* access to speech opportunities, but to keep it bounded. Using Justice Scalia’s approach in *Burson*, however, could—the majority might have thought—lead to over-restriction of political speech in other arenas, perhaps going beyond “electioneering.”

It may also be that the Court insisted on strict scrutiny because that argument structure, with its presumptive protection of speech, more openly promoted the ideal of free and informed voting in a republic. To a point, it reinforced free speech ideals, even as it upheld a speech restriction, thus cutting First Amendment “losses.” On the other hand, there are serious value-threats deriving from the impact of watching a speech claim go down even under rigorous scrutiny; in selecting standards of review, this is an oft-recurring choice with no universal best solution. In *Burson*, the temporary squishing of political speech was justified by reference to another central value—election integrity—and the result was arguably a net gain.

The final illustration of argument selection based on fear of results in related areas of law is the choice between liberty/due process and equal protection arguments when addressing burdens on persons with socially

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view that a compelling interest can ever justify content regulation, as he defines and limits it, and believes that the use of this test creates misunderstanding that risks suppression of speech. *Id.* at 212 (Kennedy, J., concurring.)

<sup>144</sup> *Id.* at 211.

<sup>145</sup> *Id.* at 210–11.

<sup>146</sup> In public forum theory, “reasonableness” is not as minimal a requirement as that of “having a rational basis.” It is not clear, however, how much punch it was meant to have in Justice Scalia’s concurrence. *Id.* at 216 (Scalia, J., concurring).

disapproved sexual orientations. *Lawrence v. Texas*<sup>147</sup> and the case it overruled, *Bowers v. Hardwick*,<sup>148</sup> were both framed as liberty/due process issues.<sup>149</sup> In *Lawrence*, the Court held that a law targeting same-sex sex violated the liberty and privacy interests of the petitioners under the Fourteenth Amendment.<sup>150</sup> Although the question whether it violated the Equal Protection Clause was included within the terms of the grant of certiorari, the Court put it aside.<sup>151</sup> The case nevertheless was easily characterizable as concerning impaired equality: the statute specifically targeted gay persons. At the very least, the Court could have crafted a bi-clausal assault on the statute, acknowledging both its liberty- and equality-impairing characteristics. It did not explain its choice of argument structure, and, in this case, we may be better off for this omission. Although one could well argue that the case immediately “presents” itself more as a liberty than an equality issue, it also suggests a risk that an equality lens will yield bad results—at least in some eyes—in neighboring doctrinal-areas. As Professor Karlan noted shortly after the decision came down:

The Court may have feared that if it struck down Texas’s statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry.<sup>152</sup>

So, the possibility of adverse results remains, at least in the background, even when we confront a specific case or set of cases *before us now* for which all known arguments reach the same outcome; results never drop out completely, despite convergence in the case at hand, because we are not concerned solely with the case at hand and relevantly similar ones: we are concerned also with different but still cognate cases.<sup>153</sup>

Of course, the outcome itself is not the only reason for articulating or clearly manifesting the use of a rigorous standard of review: being open in this way may have value reinforcement properties beyond those associated

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<sup>147</sup> 539 U.S. 558 (2003).

<sup>148</sup> 478 U.S. 186 (1986).

<sup>149</sup> *Lawrence*, 539 U.S. at 575; *Bowers*, 478 U.S. at 192. Justice O’Connor concurred in the judgment in *Lawrence*, but relied on a vigorous use of the rational basis test in equal protection jurisprudence. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring). She did not join the overruling of *Bowers*. *Id.*

<sup>150</sup> *Id.* at 578–79 (majority opinion).

<sup>151</sup> *Id.* at 563.

<sup>152</sup> Karlan, *Foreword*, *supra* note 23, at 1460; *see also* Heather K. Gerken, *Larry and Lawrence*, 42 TULSA L. REV. 843 (2007).

<sup>153</sup> Our problem can begin all over again even in those more distant fields, because there may be additional arguments that lead to the same disposition there.

with its result in a given case, and this too is a (connected) criterion for argument selection, as outlined next below.

C. EXPLANATORY POWER AND RANGE OF “WORK” DONE BY ARGUMENTS; VALUE ILLUMINATION, REINFORCEMENT, AND BLOCKADE

1. Tracking an argument’s explanatory power via its value illumination

As indicated, I treat the ideas of explanatory power, conceptual illumination and value reinforcement (or value masking) together because of their strong connection. They can be “defined” ostensibly by once again thinking of *Brown*: Ask which doctrine better explains and illuminates the basic nature of racial discrimination and its constitutional status: (a) the strict scrutiny formula, which is opaque about *specific* kinds of harm but rests, in significant part, on a presumption of illicit purpose and likely intended harm; or (b) an argument from harm (which calls for salient images and showings of the actual harms of racial discrimination, as in *Brown* itself);<sup>154</sup> or (c) a more generalized harm argument sounding in antisubordination.<sup>155</sup> It appears that each framework illuminates—and obscures—the phenomenon of racial discrimination in different ways. Making these comparisons is precisely the point of the constitutional value criterion. It pushes us to examine the properties of alternative arguments, and to apply the criteria of value reinforcement and the generation of sound results in related doctrinal areas. Understanding the differences in these doctrinal

<sup>154</sup> “Today, we might focus on the ‘solely because of . . . race’ language, but at the time of the decision, debate focused on *Brown*’s claim about the ways segregation harmed blacks.” Siegel, *supra* note 54, at 1476.

<sup>155</sup> The harm deriving from the classification does not—under the constitutional equality theory in question—refer solely to the abstract moral harm of having been treated differently from others, even if for no good reason. The “argument from harm,” as understood here, requires a showing either of something measurable or roughly confirmable (students’ low test scores; degree of various adverse psychological states), or (possibly) a stigmatic harm—the “branding” referred to in *Strauder v. West Virginia*, 100 U.S. 303 (1880) that can be realized in many different dimensions (economic, psychological self-regard, instability of mood, etc.). For a brief review of contrasting constitutional equality theories, see the concurring opinion of Catherine A. MacKinnon in *Brown*, in Balkin, BROWN, *supra* note 45, at 143–45, 151. For more extended treatments, see generally DOUGLAS RAE ET AL., EQUALITIES 64–81 (1981) (discussing varying meanings of equality and equality of opportunity, including prospect-regarding and means-regarding forms of equality of opportunity); LARRY S. TEMKIN, INEQUALITY (1993). For a discussion of classification and subordination frameworks, see generally Jack M. Balkin & Reva B. Siegel, *supra* note 56, at 13 (arguing that “antisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice.”). This does not, however, contravene the point that show-the-harm as a *necessary condition* for an equal protection argument was abandoned after *Brown*; that form of argument just doesn’t appear as a driving premise today. Whether it ought to is precisely one of the questions one must address in selecting argument structures even when they converge.

approaches is not a minor matter: they cannot easily be combined over the same range of situations, so something is given up by choosing any given one—even if the adjudicatory outcomes remain intact.

As a matter of simply gaining a richer understanding of the case at hand, one obviously has to traverse the full range of plausible converging arguments, whether the arguments are inconsistent or complementary. But actually to embrace complementary arguments structures may be an awkward maneuver, given the constraints of the judicial function. To be sure, there are situations in which illumination would be served more by using all argument structures rather than choosing only one argument, but there is always the question whether the illuminatory benefits outweigh the confusion accompanying the use of more than one argument.

There are a number of major cases illustrating the joining of (more or less) distinct argument structures, some of which are discussed below: *City of Chicago v. Mosley*,<sup>156</sup> involving the invalidation of a picketing regulation addressed to speech content, putatively decided under the Equal Protection Clause—an argument that in turn rested on the Due Process Clause and its imposition of First Amendment constraints on the states;<sup>157</sup> *Bolling v. Sharpe*,<sup>158</sup> which fused due process and equality concepts in ruling public school segregation in the District of Columbia to be unconstitutional under the Fifth Amendment;<sup>159</sup> *Loving v. Virginia*,<sup>160</sup> which struck an anti-miscegenation statute on both equal protection and substantive due process grounds;<sup>161</sup> and *Skinner v. Oklahoma*,<sup>162</sup> which invalidated an act to sterilize certain convicted felons, with the majority relying on equal protection, one concurrence relying on procedural due process, and another concurrence insisting that both should be used.<sup>163</sup>

Illumination, of course, takes an object. One may rightly wonder what, exactly, is being lit up: not everything is illuminated by a single argument,

<sup>156</sup> 408 U.S. 92 (1972).

<sup>157</sup> See *infra* Part IV.A.

<sup>158</sup> 347 U.S. 497 (1954).

<sup>159</sup> See *infra* text accompanying notes 188, 225; cf. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) [hereinafter Karlan, *Equal Protection*]. (arguing that “the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other. More concretely, this essay suggests that sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.”).

<sup>160</sup> 388 U.S. 1 (1967).

<sup>161</sup> See *id.* at 12.

<sup>162</sup> 316 U.S. 535 (1942).

<sup>163</sup> *Id.* at 542–43.

or even several arguments in one grouping or another; and in any given situation, there may be nothing much to be illuminated. The variations in understanding of the immensely multifaceted American *ethos* among different groups and communities (defined in equally intricate ways) raises critically important issues in moral and political philosophy, but here I can only suggest that this Article's topic bears on this problem in some ways. Selecting argument structures is to select among frameworks, and frameworks often—though far from always—map onto different groups and communities. *Brown v. Board of Education*<sup>164</sup> may be one case to this educator, another to that historian, any number of cases to black or white or other persons of widely differing circumstances, and so on.

One can of course question not only whether there is something there to be illuminated, or whether given persons or groups will perceive things one way or another, but also whether there is even anyone paying enough attention to allow illumination. Few pay much attention to constitutional issues, so an illumination selection criterion may not track actual illumination of a large audience, even if it affects particular groups and repositories of political power.

Here is one example of argument selection resting on discerning the explanatory power of arguments and their accompanying value reinforcement properties.

*Craig v. Boren*<sup>165</sup> unequivocally established intermediate judicial scrutiny for gender classifications and then invalidated the classification before it, which had enacted a higher permissible near-beer drinking age for boys than for girls.<sup>166</sup> *Reed v. Reed*<sup>167</sup> had previously invalidated a preference for males over females in issuing letters of administration for decedent's estates, *operationally* implementing a heightened scrutiny standard, but nevertheless *calling* it the "rationality" standard, traditionally associated with minimal-to-no scrutiny.<sup>168</sup> The degree of scrutiny applied in both *Craig* and *Reed* was functionally more or less the same, so there is no inconsistency there. But the Court's *description* of what it was doing, in explicit propositional form, was quite different in each case.

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<sup>164</sup> 347 U.S. 483 (1954).

<sup>165</sup> 429 U.S. 190 (1976).

<sup>166</sup> *Id.* at 209–10.

<sup>167</sup> 404 U.S. 71 (1971).

<sup>168</sup> *Id.* at 76–77; *cf.* *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (invalidating a statute making it harder for men to receive dependency benefits from spouses in the military than for women to receive such benefits. There was no opinion of the Court. Justice Brennan's opinion, announcing the judgment of the Court, relied on a strict rather than intermediate scrutiny formulation.).

When *Craig* finally came down, one could say that there was nothing new because the scrutiny was equally heightened in both cases, but this would be quite incomplete. There was a significant change because the Court explicitly unpacked the standard of review in a way that strongly affected how the contending constitutional values were openly presented and valued. *Reed* had changed the operational standard of review to change results—lots of them—but the Court was far from clear in displaying what it was doing. *Craig* applied *Reed*'s new standard but displayed what it was doing; it provided a far more accurate description of the standard. The new formulation transparently touted the constitutional values by identifying them and issuing instructions on how they were to be compared. The opacity of simply intoning, “Was this rational?” was replaced by the transparency of saying that gender classifications had to be substantially linked to an important government interest.

*Craig* and *Reed* thus have to be read as a pair in order to understand either one. *Reed* replaced the expected argument structure—truly minimal scrutiny—with a different one. This was not a rewording, or a reconstruction, or an explication: it was deletion and replacement, and the old and the new arguments, as used, sharply diverged. *Craig*, in using the standard of review, *explained* what had gone down in *Reed*—and thus effected far more than a change in label, like replacing “toilet” with “rest room.”<sup>169</sup> And this explanatory move was, necessarily, also a value-reinforcement move. It grounded what it did by referring to a constitutional equality value that bluntly disdained government gender distinctions, viewing them as posing special dangers. Its directions for reviewing claims involving gender classifications called attention to the constitutional values at stake—on *both* sides. That governments should act to promote the health, safety, and welfare of its inhabitants is a constitutional standard; requiring that such action be important and substantially further articulated goals reflects the strength of the constitutional equality value imperiled. There is probably a value-reinforcement difference between simply *doing* heightened scrutiny, as in *Reed*, and touting the fact that you're doing it, as in *Craig*, but I don't know how to confirm this. The explanatory difference, however, is obvious. *Craig* tells us more than *Reed* does about constitutional values and how they drive argument use and formulation, and thus ratifies them more effectively. One reason it does so is that its argument structure takes seriously the idea that heightened scrutiny applies to any sex classification, including those that—as in the situation before—constrain males more than

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<sup>169</sup> See generally Herbert Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 UCLA L. REV. 27 (1960).

females. *Craig* thus erodes the rationale that a greater need to protect women justifies classifications that burden them more than men. This is not to say, however, that there are no gender differences that cannot be taken into account by government action.

Finally, recall the loose reduction mentioned earlier: constitutional values are the arguments that implement them.<sup>170</sup> The relative masking and illumination of the values in tension reflects—for that argument structure—the value ordering that accommodates the tension.<sup>171</sup> Sometimes we want sharp contrasts to be drawn, like day and night—or even sharper: day and night, on Earth, are not complete opposites. The middle ground may be a dangerous place to be—even if sometimes it’s the safest.

## 2. Expressing, reinforcing, ratifying, and implementing values; cogency

Some separate remarks about the value reinforcement aspects of arguments are now in order. Value explanation and illumination bear on value reinforcement, and the different value-reinforcement properties of converging arguments form another criterion for selecting among converging arguments. In turn, the cogency of arguments depends in part on their value reinforcement properties, even when these properties are not patent. There is a rich set of cognate concepts that apply here—for example, how the concepts vary in expressing, promoting, endorsing, affirming, implementing, or ratifying constitutional values or the norms in which these values live.<sup>172</sup> Even if not seen as such, these notions are intrinsic aspects of

<sup>170</sup> As I said, I don’t view this formulation as a literal reduction of value to argument. It is meant to emphasize the idea of *realizing* values through constitutional argument structures. Of course, to realize a value entails that “the value” and “its realization” are not the same thing, so the one can’t be reduced to the other.

<sup>171</sup> It is not clear how best to describe this “accommodation”; it may depend heavily on the situation. There is some writing on the idea of “moral compromise.” See David B. Wong, *Coping with Moral Conflict and Ambiguity*, 102 ETHICS 763 (1992), available at <http://www.jstor.org/stable/2381553?seq=1> (arguing that “[a] complete ethic should address the question of how people are to act toward one another when they are in serious moral disagreement.” [A]ccommodation is a moral value rooted in the fact that serious conflict is a regular feature of our ethical lives.”); cf. Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1051 (2009) (describing trimmers as those who “attempt to steer between the poles”). I am not assuming that the idea of moral compromise is fully coherent.

<sup>172</sup> If a significant value is embedded within community norms, it might be viewed as *therefore* embedded within the Constitution, at least in some form. Thus, if an interpretive system in which the Constitutional text’s meaning is thought to rest in part on history and settled custom or tradition, the connection between text interpretation and surrounding values is conceptual: they are linked by the very terms of the interpretive rule. There is some tradition behind this tradition-based interpretive argument, as constitutional lawyers well know. There is also some practical and theoretic risk in using it: traditions change, and not always for the better, and they are often fractured into different and (somewhat) opposing areas of thought and behavior. For example, *objections* to a traditional practice, or some as-

text interpretation and doctrinal analysis, and not something simply grafted onto these processes.<sup>173</sup>

Together with the value-explanatory function of arguments, this complex criterion (itself an assembly of cognates) rivals the “results-elsewhere” factor (discussed in Part II.B) in patency and importance. One need only ask, “What are the functions of the American version of the rule of law?” and one is sent at once to accounts of the social system’s values, as captured in its norms and ideals. In turn, one then is directed to matters of implementing, enforcing and strengthening these values, in order to maintain and enhance right thinking and good behavior. If one looks hard at judicial opinions, academic writing, and defenses of various social and economic policies, a belief that material values are being vindicated is often the driving force in deciding a case and crafting an opinion. To pluck one instance from many: when Governor Rell of Connecticut vetoed an Act to permit the medical use of marijuana, she “expressed concern that such a law would send the wrong message to Connecticut’s youth.”<sup>174</sup> Her remarks sounds trite and conclusory (often a virtue in political communication), but it is the expression of a central reason for choosing the rules that govern us, whether originating in legislatures, courts or executive/administrative action.

But *what* “wrong message” is she referring to? That Connecticut cares about reducing the suffering of seriously ill persons? That the interests of those at risk of becoming addicts outweighs the interests of these patients? That marijuana use isn’t sinful? Who is the audience? It seems pretty difficult to specify the contents of such a complex tableau, never mind how it is read and learned from by observers.

To be sure, one can easily stop argument here by insisting that discussion of value reinforcement is parasitic upon prior determinations that the “values” in question—understood loosely as attitudes, beliefs and predispositions people hold—are indeed morally or legally valuable. But the project here is neither applied nor theoretical ethics; this is hardly the place to

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pect of it, may also be *part of a fully characterized tradition*, and the objections themselves may be fragmented.

<sup>173</sup> This is too obvious to require citation—but then, why deprive authors of an addition to their citation count? See, e.g., David Chang, *Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review*, 58 RUTGERS L. REV. 777, 935 (2006) (observing that “In our democracy, legal rules are created and enforced to serve public values—values that ought to be publicly identified, contested, and selected. No less than for contract law, or tort law, or criminal law—and perhaps more so—constitutional law foundationally ought to be about preferred public values.”).

<sup>174</sup> Matthew J. Malone, *Medical Marijuana Measure Falls with Connecticut Governor’s Veto*, N.Y. TIMES, June 20, 2007, at B1.



rethink whether the constitutional values of personal liberty, equality and the common weal (that's a constitutional value too) are morally sound.

Reinforcement is a barely manageable concept, and this in turn renders choice of arguments problematic whenever the presentation and reinforcement of basic values is the main foundation for evaluating, selecting and changing arguments. Even if we drop the argument-stopping inquiry, "Why are these held values morally valuable?" we still have to make sense of the value-reinforcement criterion that we continue to apply to argument selection and to other forms of conduct. In asserting that "X reinforces Y," what exactly might "X" and "Y" refer to, and what does "reinforce" mean? For present purposes, "Y" designates values, beliefs, and attitudes; "X" designates the use of a given argument structure; and "reinforce" means to strengthen the intensity with which values, beliefs, and attitudes are held—a form of learning. But this tells us nothing about mechanisms of reinforcement—a learning process.

Use of arguments can reinforce values in several ways, but an argument's just "being there" and available may be only modestly effective: the argument must be adopted, made manifest, and applied, and each of these stages involves different sets of players and observers and thus different learning cascades. Simply implementing or acting in accordance with a value will have value learning effects, with or without knowledge of the theoretical underpinnings of the value; such implementation may thus be both intrinsically and instrumentally valuable. Suppose we know of the implementation of a constitutional case—we hear or notice that black persons are being allowed to stay at the Heart of Atlanta Motel and similar establishments—but we don't know exactly what the Civil Rights Act says or what its constitutional foundations are. In these circumstances, there is an aura of unreality surrounding talk about reinforcement of values through selection of arguments. Moreover, who reads judicial opinions? Who even *hears* about them, beyond what their bare results are (perhaps occasionally combined with a brief and incomplete account of the reasons underlying the results). How would one confirm that an equal protection account of *Lawrence v. Texas*<sup>175</sup> would have value impacts different from those of the substantive due process argument that prevailed—and how do we know what *they* are?

How would one confirm the nature of value reinforcement when sharply conflicting signals are given within the borders of a single opinion?

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<sup>175</sup> 539 U.S. 558 (2003).

In *Youngberg v. Romeo*,<sup>176</sup> for example, the Court recognized that a severely impaired resident in a civil institution “retain[ed] liberty interests in safety and freedom from bodily restraint,” and one would suppose that the “standard of review” would require serious justification for impairing such freedoms when certain forms of treatment, training or “habilitation” are withheld or imposed.<sup>177</sup> Yet the Court said that such a “decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”<sup>178</sup>

What is the message here? The Court gave, and the Court hath taken away? What values are reinforced, aside from the fortification of judicial mystery? I am *not* saying that this is terminally mysterious and bereft of sense—there are limits to the duty of government to avoid harm to inmates within a closed institution. I mention *Romeo* simply to provide another example of the difficulties of charting value reinforcement in real life.

What about the idea that constitutional values are, operationally, the arguments that perform them? If the argument is value-incoherent, so too are “the values” that *are* the argument, right? Not necessarily. As I argued in the preceding section, a given argument embodies the ordering that addresses (satisfactorily or not) the value conflicts. The supposed incoherence may simply be a case of some values beating others—in *that* specific battle.

These difficulties certainly do not foreclose the use of a value reinforcement criterion for argument selection, or for anything else. Indeed, calls for empirical confirmation are often simply silly: we would be encased in cement if all actions, policies, and states of affairs required empirical confirmation of lessons to be learned and messages to be sent. Often, the most we can do is rely on simple, basic understandings of the general mechanisms for learning—perception, association, repeated actions, observations, and so on. Perhaps it seems flabby to insist that suspending habeas corpus, beyond its impact on particular detainees, “sends the wrong message” about the rule of law and about the government’s devotion to justice and fairness, and, more generally, places a blot on the nation, but this is part of the stuff of legal analysis as well as of daily life. It seems equally

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<sup>176</sup> 457 U.S. 307 (1982).

<sup>177</sup> *Id.* at 319.

<sup>178</sup> *Id.* at 323.

flabby to claim that not suspending habeas corpus sends a message of government weakness and serious stupidity. But even if flab isn't wonderful, neither line of thinking is rightly dismissed out of hand. "Mistakes" of widely different sorts will be made in selecting values for reinforcement—for example, morally incorrect accommodations of competing moral claims; selecting values for reinforcement that don't need it, deselecting others that do need it—but it may not be clear what a mistake is. Sometimes, we "overvalue" in order to avoid undervaluing, and perhaps *vice versa*, and doing so may not be mistakes in any sense.

Speculative or not, then, I will continue to view value reinforcement as referring to certain psychological effects of observing or knowing about conduct, including the selection, use, and implementation of an argument. I do not try to compare the learning effects of observing outcomes (as in "the Court said school segregation is unconstitutional") with the learning effects of the conceptual framework that led to the outcome—although that would be a necessary step in confirming value reinforcement claims.

### 3. Value-reinforcement tradeoffs: *Brown v. Board of Education*<sup>179</sup>

As we saw, there were several argument structures that were precedentially available in *Brown*. The chief competitors, at the time, were the familiar harm-based template of *Plessy* and *Strauder*, and the suspect classification doctrine announced in *Korematsu* and *Hirabayashi*. In the arena of suspect classifications (and hidden purposeful discrimination as well), it would today be considered an outrage to demand that equal protection claimants demonstrate a distinct harm as part of their *prima facie* case.<sup>180</sup> Requiring such showings is an implicit encouragement of discriminatory behavior because it is easier to get away with it, as compared with the suspect classification framework.

But there is much to be said for illustrating how people are damaged by discriminatory government action—without *requiring* that this be shown. This is part of what underlies the antisubordination framework,

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<sup>179</sup> I do not discuss mechanisms or kinds of tradeoffs that might occur on collegial courts. For a discussion of vote trading across cases in administrative law, see Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007). See also Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions* (Duke Law Sch. Legal Studies, Paper No. 166), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1010311](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010311).

<sup>180</sup> See *supra* note 55 (pointing out that references to the harms worked by racial classification and to the harms justifying the doctrine that all racial classifications draw strict scrutiny do not reflect any need, within modern doctrine, to establish specific harms in fact. Much the same applies to gender and other semisuspect classifications). See generally, *Johnson v. California*, 543 U.S. 499, 509 (2005) (express racial classifications are "immediately suspect").

which, as we saw, has drawn renewed interest in recent years.<sup>181</sup> Depending on who is perceiving what in which situations, demonstration of harm in a harm-based argument is, not surprisingly, likely to be more salient than in a suspect classification case, where it may appear, if at all, in the “compelling interest” stage of strict scrutiny—and if government offers no such interest, it fails to sustain its burden whether the claimants introduce evidence of harm or not. If there is a persuasive presentation of harm, however, it is likely to gain entry into some value-learning process. Recall the impact of the late Sheriff Clark’s abuses of black demonstrators in the 1960s.<sup>182</sup> (Unfortunately, such displays may reinforce sadistic as well as beneficent attitudes.) If there is a value gain from showing harm, however, it occurs alongside whatever reinforcement of discrimination is worked by demanding a showing of harm beyond some abstract “equality injury.”

I note, to promote completeness, that looking at the value-reinforcement properties of *Brown*, understood as a harm-based case resting on relative educational impairments, still leaves us with mixed messages—particularly in light of the disputes over whether *Brown* has yielded any educational benefits to black students generally, and over the degree to which it has moved public schools away from racial separation.<sup>183</sup>

4. Value reinforcement as a criterion for argument selection does not impinge on the standard jurisprudential issues concerning the separation of law and morality

This claim does not require a broad investigation of the connections between “law” and “morality”; I am simply asserting as a factual matter that, in general, we expect laws and legal doctrines to reflect, reinforce, and implement our basic values as applied by the ongoing legal system.<sup>184</sup> Perhaps this belabors the obvious, but there is a problem in stating exactly *what* it is that is obvious. The possibility that value reinforcement is often

<sup>181</sup> See Balkin & Siegel, *supra* notes 56, 57.

<sup>182</sup> See, e.g., Margalit Fox, Jim Clark, Sheriff Who Enforced Segregation, Dies at 84, N.Y. Times, June 7, 2007, available at <http://www.nytimes.com/2007/06/07/us/07clark.html?ref=obituaries>.

<sup>183</sup> Cf. Posner, *supra* note 26, at 19 (“*Brown v. Board of Education* is increasingly considered a flop when regarded as a case about education, which is how the Court pretended (presumably for political reasons) to regard it. For there is no solid evidence that it led to an improvement in the education of blacks or even to substantial public-school integration.”).

<sup>184</sup> See, e.g., NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 209 (Oxford Univ. Press 2007) (referring to “the thesis that the differentiation of right from wrong (more strictly, of wrong from not-wrong) is the basic binary opposition on which law is founded.”). However, this is neutral with respect to a prime target of the separation controversy—saying what the law is rather than what it ought to be. For a brief analysis of this characteristic claim of legal positivism, see *id.* at 210–11.

relevant in selecting arguments seems clear enough: it is probably the core notion in any “sense of rightness”<sup>185</sup> that we look to in argument selection. That value-reinforcement is relevant in every case is less so: one hears maxims that, where the law is “plain,” we are simply to follow it without doing fancy footwork implementing the right values. (Of course, doing law implements rule-of-law values in general, but this level of abstraction is not the target here.) Moreover, because more than one value is generally at stake in constitutional contests, and because they may pull in different directions, it may be quite unclear which values should be reinforced, and which ones would in fact be reinforced by invoking certain arguments. As I said, underlying every application of the “let’s reinforce values” criterion is the antecedent moral question about what values ought to be reinforced more, or less, or not at all or even rejected as values, but this is an exercise in moral philosophy and is beyond the corners of this Article.

##### 5. The rational *obstruction* of dangerous insights

Illumination is not necessarily an unalloyed benefit. For one thing, one can be dazzled by too much light: not everything is, should, or even can be illuminated. Indeed, value clarity may be an inverse criterion for argument selection: if we want to promote rational ignorance, we should favor well-chosen murk in our arguments (but perhaps not openly). We might not, in given situations, *want* to see clearly that certain values are involved, or that they conflict, or concur, or lose out despite being attended to or that they have ramifications and interactions that, if known, we would have to address. Clarity isn’t always a virtue. It may pose risks of polarization—though accentuating moral divisions may often be a good thing; this depends on the substantive moral issues, as affected by the moral factors in the situation at hand. And in fact we sometimes deliberately fashion arguments using terminology that masks a realm of valuation that we are unwilling to address—particularly if there’s a chance we will encounter good reasons against our own positions: sometimes, *sound* arguments against a position we prefer are among the last things we want to hear. We have conceptual black boxes to cover up, darken or distort material issues, relying on the affirmatively misleading effects of some arguments and concepts. Some conceptual formulations make it more difficult to notice, appreciate or understand certain matters than do alternative formulations—

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<sup>185</sup> I restate for emphasis that I am not suggesting “a sense of rightness” should be counted among the criteria for choice. It is too blunt and conclusory a notion for argument selection purposes, although it is a pragmatic preference and often a necessity in many decision making tasks. Perhaps it is on a par with “shocks the conscience.” In any case, the sense of rightness is itself challenged by the presence of converging arguments that are at least plausible, as I note later in the text.

they distract and possibly deceive us, as well as fail to enlighten us. Gaston Bachelard's discussion of "obstacle concepts" is on point here: "The concept [under discussion] blocks knowledge instead of summarizing it."<sup>186</sup>

Consider some examples of this value cover-up criterion at work.<sup>187</sup> We saw that in *Brown v. Board of Education*, the Court did not deal explicitly with any set of value considerations outside of impaired education and its impact on the lives of the segregated students. The focus on education, of course, was pretty far-reaching all on its own, but the Court did not rely on the all-encompassing and now fully-accepted notion that *all* racial classifications are suspect and presumptively unconstitutional—and, crucially, that a government defense of no-harm, no foul is utterly immaterial.<sup>188</sup> This formula for triggering strict scrutiny only became dominant later—and *without fanfare*. As far as *Brown* was concerned, segregated *education* was formally the only topic of the day—not segregated swimming pools, drinking fountains, bathrooms—indeed, even passenger trains: *Plessy v. Ferguson*<sup>189</sup> arguably was not *formally* overruled,<sup>190</sup> although it became fully defunct when the Court finally indicated, after a series of *per curiam*, uninformative memorandum decisions, that the suspect classification doctrine would govern—and always had governed, only we didn't know it?<sup>191</sup>

<sup>186</sup> "Obstacle concept" is analyzed in BACHELARD, *supra* note 120, applying the idea to the concept of mass, which can become linked to the idea of "profound wealth" and be "the object of strange evaluations": "At this stage the notion of mass is an obstacle-concept. The concept blocks knowledge instead of summarizing it." *Id.* at 19. He also refers to "strengthen[ing] the obstacle-concept by a usage that has deceptive clarity." *Id.* The latter remark parallels my point in the text that metaphors illuminate by suppressing—a "clarity" that might be "deceptive." See *supra* text accompanying notes 88–89. I suppose an obstacle concept can work its confusion by (deceptive?) simplicity and clarity, as well as by stupefying complexity.

Bachelard's notion of an obstacle concept seems to cover the idea of concepts and classifications that suppress values. It should also be compared to the concept of cognitive inertia, a different but allied notion: both concepts generate or maintain cognitive opportunity costs—the loss of illumination, often of critical importance, afforded by suppressed frameworks and maintained by inertia. I thank Paul E. Geller, Esq., for referring me to Bachelard's work.

<sup>187</sup> I suppose one could view this as involving a "demand" for ignorance—as part of a larger demand for normative reinforcement. This is not a "demand for irrationality" in any simple sense. One might speak of a demand for systematic cognitive errors of certain sorts (advertising revenues may depend in part on this) and, more generally, for stupidity.

<sup>188</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *But cf.* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>189</sup> 163 U.S. 537 (1896).

<sup>190</sup> See *supra* note 57 (*Brown's* treatment of *Plessy*).

<sup>191</sup> This seems to be how at least some European groups use *Brown*: they take it as a proxy for a broad antidiscrimination principle that covers all governance, although the aim is often focused on education. See generally Jeffrey Fleishman, *New Gypsy Vision for the Future; The Roma Use Tactics from the U.S. Civil Rights Struggle to Seek Equal Access to Education and New Opportunities for Their Children*, L.A. TIMES, June 23, 2006, at A1. For an example of post-*Brown* *per curiam* decisions, see *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (mem.) (concerning segregated public golf courses).

In a sense, the very term “per curiam” served as an instruction: “Look no further; we have nothing more to tell you up front.” The Court, in this area-by-area search for harm during the *per curiam* era, seemed to be nowhere near embracing the kind of general antidiscrimination principle reflected in the suspect classification template. The Court’s exclusive and narrow focus on education was deliberate and perhaps dictated by the times and reflected in the Court’s interior situation: it provided the boundaries that the more reluctant Justices—and the public—could buy into. And any hint that the outcome might be dictated by anything as simple and powerful as using suspect classifications to activate strict scrutiny risked massive resistance to the ruling, perhaps far beyond what was already expected. There were moral/pragmatic reasons *for suppressing certain clear matters of historic moral failings by the nation and by untold numbers of individuals* until a more politically opportune time—or so it might have been thought.

The illumination afforded by *Brown*, then, was (at least for a time) confined to a single important and continuing topic: the education of Black children and of minority children generally.<sup>192</sup> (There were, to be sure, spillover effects in reinforcing the notion of the importance of education for everyone, and in calling attention to equality values generally.) The prospect of this partial *but sharply bounded* illumination was a criterion of argument selection for the Court at the time, given the constraints it operated under. Of course, however bounded its illumination (as all illumination is), the *Brown* argument structure served its immediate purpose of striking down legal segregation in schools. The boundedness kept off to the side the obvious-in-hindsight fact that, sooner or later, the blinders would be removed and we would place *all* racial classifications in the same light.

Indeed, over time, the broader illumination—that *all* legally-imposed racial separations and indeed all racial classifications in any field are presumptively wrong—fully replaced the *Brown* argument structure, which perpetuated the awkward and offensive “Show-us-how-the-classification-harms-you” approach of *Plessy* and *Strauder*.<sup>193</sup> To be sure, the suspect

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That case was remanded, directing the District Court to enter a decree in conformity with *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam), which was itself a *per curiam* summary affirmation.

<sup>192</sup> To some degree, this is still the case. See Michael Meyers, *The NAACP at a Crossroads*, WALL ST. J., Sept. 4, 2007, at A17 (stating that “the NAACP must make public education the civil-rights issue of our times”).

<sup>193</sup> *But cf.* Balkin & Siegel, *supra* note 56, at 17–18. According to Balkin and Siegel:

What distributive or dignitary harm must a challenged classification inflict? Application of the anticlassification principle turned on such questions in *Plessy*, when the Court ruled that separate but equal public facilities did not discriminate because they inflicted no harm on the

classification doctrine itself is of course not harm-independent: it is founded, at least in part, on a presupposition that decisions based on race are generally meant to harm members of particular racial groups, and that such harms should not be compounded by putting members of the put-down group to the task of affirmatively showing the harms. Still, the doctrine effects a substantial shift in our understanding of discrimination and in the mechanisms for dislodging it.<sup>194</sup> And when comparing this now dominant form of argument based on suspect classifications with the harm-based approach of *Brown, Plessy* and (in part) *Strauder v. West Virginia*,<sup>195</sup> we see that the latter is less likely, when used openly and honestly, to converge on a common result with the former in all contexts. It would be hard to persuade people that being deprived of integrated swimming pools, however offensive and hurtful for the long term, creates catastrophic harm on the same scale as segregation in public education. Since we expect a very high rate of rejection of suspect classifications, the show-us-the-harm frameworks are no longer viable alternatives in the regions of race, ethnicity and gender. (And it may not work at all in other areas.)<sup>196</sup> On the other

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separated groups. *The Court categorically rejected this approach in Brown*, and seems to reject such an approach today when it applies strict scrutiny to affirmative action on the ground that it cannot reliably distinguish between benign and invidious discrimination. On the other hand, courts seem to act on the belief that a group-based classification must inflict some dignitary or distributive harm to violate the anticlassification principle when they uphold the use of race in census or suspect descriptions *on the ground that the classification is permissible because it merely describes social realities*.

*Id.* (emphasis added).

As to the first italicized phrase in the preceding quotation, what *Brown* rejected was not the general show-the-harm approach but *Plessy*'s more specific and utterly purblind notion of what might constitute the required harm. As to the second italicized portion, consider whether description of suspects is rightly considered a "classification" at all, in constitutional terms. Perhaps it should be so taken, given the general skepticism about the good faith of people—but not in all contexts—using race-linked language. But perhaps not, given the obvious and pressing needs of law enforcement. To use the predicate "X has freckles" is of course to say that "X is a member of the class of persons who have freckles," but it is too loose to say that because predication is classification in this technical sense, it must also be "classification" within the meaning of the Equal Protection Clause. One wonders how in fact a system of heightened scrutiny could be applied to everyday broadcasts of suspect descriptions.

<sup>194</sup> Cf. *Gutter v. Bollinger*, 539 U.S. 306, 326 (2003) (stating that strict scrutiny is always to be used to vet suspect classifications in order to "smoke out" illegitimate government purposes).

<sup>195</sup> 100 U.S. 303 (1879).

<sup>196</sup> E.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (upholding a classification in an eye-care regulation statute that worked to disadvantage opticians as compared to ophthalmologists and optometrists).

Perhaps there is an affinity between the show-us-the-harm approach of *Brown/Plessy/Strauder* and the approach in *Romer v. Evans*, 517 U.S. 620 (1996), stressing the singling out of vulnerable groups in an improperly discriminatory way. As noted, *Strauder* is not univocal in its approach: in some passages, the opinion foreshadows the suspect classification doctrine. See *Strauder*, 100 U.S. at 303; see also *infra* note 284 (discussing *Romer*'s use of the rational basis test).



hand, as we saw, one could argue that an exclusive anticlassification standard carries the risk of blocking our view of antisubordination harms.<sup>197</sup>

Here is another example of the use of the eliminate-the-illumination criterion for selecting concepts and argument structures. Remember viability? (Yes, we all owe our lives to it.) That idea is *the* touchstone for dividing a pregnancy into a “before”—where a woman’s decision to abort or not is *substantively* absolute (she can do so or not do for any reason whatsoever, and this reason cannot be inquired into).<sup>198</sup> So, viability is obviously a critical “constitutional fact.” How is it to be determined? The viability criterion bears the appearance of simplicity because the only alternative—a complex value determination often doomed to failure—seems, to many observers and judges, impossible to manage. Determining viability obviously requires biomedical expertise in acquiring data and establishing medical facts and likelihoods, and dropping difficult problems into the medical black box is a common and comforting maneuver—perhaps sometimes well justified, all things considered. But empirical expertise cannot lead us to empirical confirmation or rejection of viability, because the meaning of “viability” bears value components whenever the probability of fetal survival is greater than zero—even when far less than one. Fetuses don’t suddenly go from a zero probability of survival outside the mother (even when medical help is available) to a 90+% probability of live birth (with medical assistance).<sup>199</sup> If we map gestational age against survival prospects, or gestational weight or lung capacity against survival prospects, we get probabilities varying more or less continuously from zero to near the top. Suppose that at a gestational age of 23 weeks the probability of survival (never mind in what condition) is 11%. Viable? What about at 24 and 25 weeks—26% and 54%, respectively? If an 11% probability means viability, what about a probability between that and zero?<sup>200</sup> Perhaps after 22.5

<sup>197</sup> Cf. Siegel, *supra* note 54, at 1547 (arguing that history “shows that courts have deployed the presumption against racial classification to express, to disguise, and to limit constitutional concerns about practices that enforce group inequality”).

<sup>198</sup> It is not “procedurally absolute.” Recall, for example the sustaining of a 24-hour waiting period in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>199</sup> A discontinuity of this sort was mentioned by Justice Scalia in dissent:

Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

*Id.* at 990 n. 5 (Scalia, J., concurring in part and dissenting in part).

<sup>200</sup> See, e.g., Hugh MacDonald, MD & Comm. on Fetus & Newborn, *Perinatal Care at the Threshold of Viability*, 110 PEDIATRICS 1024, 1025 (2002) (TABLE 1, Neonatal Survival/Morbidity by Gestational Age and Birth Weight), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;110/5/1024>.

weeks the probability is, say, 3% (the curve isn't likely to be perfectly linear)—and before that, 0.5% (one out of two hundred survive). No medical expertise can tell what to do under these conditions. The expertise simply tells us what we can expect and why—if *that*.

For those preferring a legal ban on abortion, there is no viability issue. For those preferring no constraints on abortion whatsoever, there is again no viability issue. However, for those wanting to recognize a strong right to terminate pregnancies but not all the way to the time of birth, you don't hear *that* much about this issue because it's hard to lock one's mind around it and still feel comfortable. *Casey* tells us that:

[T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.<sup>201</sup>

This is as clear as the Court gets in identifying an issue that is at once empirical/medical/scientific and, at the bottom line, a value decision. And the Court's "resolution" is, conceptually, a terminal muddle. There is no "precise point." And the phrase "realistic possibility" of life is not a guiding touchstone—it's part of the very question of value at issue, the thing for which we are trying to find a guide. There isn't a word in the opinion that offers guidance in making this decision. The opaque use of "viability" marks a kind of "shortcut" inconsistent with completeness. What is "unrealistic" about 0.5%? If you want a child badly enough, 0.5% is infinitely better than 0%. Even in many everyday aspects of life, 0.5% cannot rightly be ignored. If you thought that there was a one in 200 chance your child would die as a result of being in school on a given day, would you send her? Does acting on a one-in-200 chance of survival, at least when you can

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<sup>201</sup> *Casey*, 505 U.S. at 870 (emphasis added).

afford neonatal intensive care, sound “unrealistic”? If you thought there was a one-in-200 chance you’d die in a crash every time you flew in an airplane (and you’re not a fighter pilot in extended combat situations), how often would you fly?

So, the concept of viability is intrinsically bound up with both what it conveys and what it overshadows. Perhaps it is too much to say that the concept, together with its medical managers, and with some input from the mother, is a pure black box: put stuff in, and out comes a judgment of (non)viability. Viability doesn’t transcend description, but it defies it. Of course, the suppression of the normatively and jurisprudentially disruptive idea that viability is a value-laden concept is itself hidden away, as is that hiddenness . . . and so on. I suppose one could see this not-quite-willful blindness as promoting rational ignorance.

This encounter with the normative ambiguity of “viability” reveals that the constitutional system has *delegated a moral decision* to the physician, or to the patient, or to some physician-patient gray box. This moral decision is critical to the application of a material constitutional concept on which a given case turns—viability. And this moral decision is either never to be reviewed or is considered largely unreviewable.<sup>202</sup> Viability, as it has come down in *Roe* and *Casey*, is clearly a concept we work with in a way that illuminates aspects of maternal autonomy and the value of potential or possible human life, but which also—*as we use it*—immediately slams the door on itself. We simply have no way of addressing its normative ambiguity within the framework of a constitutional jurisprudence in which we want to suppress the role of unreviewable value premises. If we are going to have a “pro-choice” abortion regime in which there are limits on choice, the determination of the critical limiting time has to be dumped somewhere—the supposed “medical” determination of viability—and (almost) fully obfuscated.

A final example of the use of “blockade concepts”: “taking race into account” to promote educational diversity—a compelling interest that may justify a racial classification.<sup>203</sup> The diversity rationale, if it is to work *at all* in a roughly predictable way, will have to rely, secretly or openly, on the same sorts of quantification (number of slots, target proportions) that an

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<sup>202</sup> *But cf.* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding certain requirements for determining viability after twenty gestational weeks).

<sup>203</sup> *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (concerning medical school admissions); Grutter v. Bollinger, 539 U.S. 306 (2003) (concerning law school admissions). The manner of taking race into account, being inappropriately clear in the University of Michigan’s undergraduate program, was invalidated in Gratz v. Bollinger, 539 U.S. 244 (2003).

overt “quota” system relies on.<sup>204</sup> There *must* be target proportions, explicit or implicit, conscious or otherwise, or there will be no answer to the inescapable question: “Exactly *how* do we “take race into account” for *any* purpose, diversity or something else? If it can’t be done without metrics but we’re not allowed to use them, how should we rank this bit of incoherence (how much? how bad?)? Or is it simply flat-out dishonesty? “Taking race into account without numbers? Not a problem. No incoherence. No dishonesty. We’re not using numbers, either openly, secretly or implicitly.” But that is a strange claim. Still, even if there is an aura of dissembling, the educational institution is promoting at least one version of equality (even while offending other versions, and interfering with certain exercises of liberty).

As a matter of pure conceptual analysis, “taking race into account” is an inapt (and inept) way to describe what might be reasonable affirmative action programs, whatever their overall evaluation. Beyond a certain point, the phrase not only fails to illuminate the notion of affirmative action, it camouflages whatever is happening. In some tactical respects, however, it is quite apt (and ept), because it embraces both horns of a moral conflict: attending to race while ignoring it. The adroitly clumsy phrase says, in effect, that race is relevant but not that relevant, and nowhere near decisive. It’s just something we think about, but then, we think about a lot of stuff. We *sort of* consider it (as we say to some), but not really (as we say to others), or at least only glancingly (as we say to disbelievers).

In its own way, the phrase “tak[ing] race into account”<sup>205</sup>—as used by the Court—is no less incoherent or dishonest than “viability”—as used by the Court. Both are argle-bargle. But if these concepts are *effective* as obstacles, incoherence and dishonesty are only dimly perceived, if at all. How can we rate unperceived challenges to the virtues of coherence and honesty? For that matter, how should we count perceived impairments of these virtues? How costly are any of these perceived or unperceived losses of virtue worth in constitutional coin—and how is that coin defined? And are they indeed losses of virtue?

These difficulties with the idea of “tak[ing] race into account” are strikingly illustrated in an exchange between Justices Powell and Brennan in *Bakke* that implicated quantification and its presentation or suppression. Justice Brennan urged that quantification (which was OK by him) was no

<sup>204</sup> As mentioned, Justice Brennan noted this in *Bakke*. *Bakke*, 438 U.S. at 378 (Brennan, J., concurring in part and dissenting in part); see *supra* note 203.

<sup>205</sup> *Bakke*, 438 U.S. at 279.

less involved in the system approved in Justice Powell's opinion than in those he rejected. The subtext seems to be something like "Justice Powell is lying or he's very confused," or "in Justice Powell's opinion, the Lord taketh away but then giveth back the same thing." Justice Powell's response impliedly acknowledged that Justice Brennan's challenge was correct, but its "refutation" was, in effect, that because the preferred system *looked* OK, it *was* OK.<sup>206</sup> Few observers take the cognitive steps required to see that Justice Powell was endorsing the same program he was rejecting—except that in his program, no one could talk about what they were *really* doing (and *had to be* doing) when they took race into account. One could of course go a step further with a "Who cares?" response: if social justice requires dissembling, so be it<sup>207</sup>—it's sometimes rational to disillusionate. But that conclusion requires a long jump into political philosophy, which seems to be more a black hole rather than a black box.

I close this discussion of obstacle concepts by mentioning the possible instrumental value in avoiding what looks like the utter trashing of important moral and legal ideas. (Such avoidance is one conduit of value reinforcement.) Think of that philosophical war-horse, the freedom/determinism/responsibility issue, and its impact on moral evaluation and penal sanctions. On the everyday legal and moral position, being free of coercion, duress, undue influence, and certain crippling physical and mental conditions indicates that one is acting freely. What happens if we push the everyday position and devolve to the more metaphysical realm of the causality posit—loosely, that all events are caused? What generally emerges from the discussion is that even limited acausality is inconsistent with responsibility and that some version of compatibilism—freedom occurs within, and only within, a causal framework—seems to be the only way to defend against the charge that there is no responsibility because there is no freedom. But, for the most part, everyday analysis never even

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<sup>206</sup> Justice Powell suggested this idea in his response to Justice Brennan's argument that the diversity-based system endorsed was no different from the more explicitly race-based systems denounced in *Bakke*: "It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case." *Id.* at 318.

<sup>207</sup> This is not the place for a more elaborate account, but one direction of analysis is this: The program upheld (partly) blunts the moral cost that a given selection program is inconsistent with equality-as-the-irrelevance-of-race. It does so, as one might argue, because it justifies that cost by promoting educational diversity rather than by misapplying the idea of rectification, which cannot be furthered without identifying specific persons who were harmed by discrimination. That is, educational diversity can successfully overcome the this-isn't-colorblind objection while mistaken rectification cannot. The "messages" of the two arguments are different: the former may be perceived to make some sense, while the latter seems (to many) to be a fake—it is merely faux rectification.

gets to the overtly metaphysical stage because the latter messes up our thinking. However appealing a sophisticated compatibilist position might be, some see it as a rickety artifact—a philosophical “trick”—and that we really cannot be free. So, we remain at a philosophically incomplete level, working only with matters of external restraint (“Kill him or I’ll kill you”) and maladies or defects of various sorts.<sup>208</sup>

#### 6. Value reinforcement and clumsy institutions

Understanding the nature of obstacle concepts leads easily to inquiries about institutional maintenance of such obstacles. No societal normative system—whether in morality or law—leads to clear and consistent results in all applications. It would be too strong to say that all normative systems are, as matter of strict logic, internally inconsistent. In everyday matters, however, we experience opposing vectors tugging away as we make decisions. As communities and individuals, we (the community, in some sense) sometimes adopt what seem to be contradictory practices, and we then denounce ourselves as hypocrites.

Consider some common examples. Most state penal codes do not immunize assisted suicide or the killing of patients to end their suffering. But, except in rare cases, we don’t go out of our way to investigate, prosecute and convict when the context is medical. We may do so if the actions are “in our face,” as with Dr. Kevorkian’s efforts, but even then we are primarily reducing our discomfort and do not believe that something *seriously* wrong has occurred. (It is quite another matter if we uncover serial killing of gravely ill or impaired patients by healthcare providers.) We retain laws against certain kinds of consensual sexual practices among adults, but we rarely hunt for these activities and prosecute them;<sup>209</sup> it is the occasional exception that stands out. We say we believe in the reign of principle, and hold that our courts are to apply our principles in legal disputes, and not simply defer to the crowd. But we also know perfectly well that deciding cases isn’t just a process of using simple algorithms, and much

<sup>208</sup> See generally DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* (MIT Press 1984).

<sup>209</sup> Of course, prosecutions occur. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court fractured the “American traditions” component of trying to identify nonenumerated fundamental liberty interests protected by the due process clauses. See *id.* at 575. The Court questioned the existence of a strong tradition of criminalizing certain sexual practices. *Id.* It distinguished between the laws on the books and our actual practices—without explaining more generally how we are supposed deal with behavioral vectors that pull away from each other. It then moved from assessing this “gap” between the-laws-on-the-books and their actual implementation to using the very fact of the gap’s existence to show an “emerging” consensus that government should not be directing our sex lives in this way. See *id.* at 572.

depends on what frameworks and modes of thought and valuation inform and affect a judge's deliberations. That is still "the reign of principle," but it is not as simple as it once might have seemed. The brute fact is that the value beliefs held by judges will influence their decisions, whatever principles are at the helm—perhaps not in every case, but certainly in those that involve values pitted against each other. Perhaps partly for this reason, states and localities generally maintain election systems of some sort for judicial positions, despite the supposed immunity of principle from politics. We design clumsy institutions—perhaps aided by use of obstacle concepts—that seem internally to work at cross purposes. One aspect of the institution promotes one value ("prohibiting assisted suicide reinforces the absolute sanctity of life"), and another aspect promotes another ("not enforcing the prohibition promotes autonomy, the relief of suffering and beneficence and nonmaleficence generally"). Working within this institution is the conceptual equivalent of being placed on the rack.

It is too simple to call this awkward system of clumsy institutions hypocritical.<sup>210</sup> The clumsiness exists in part because competing value dispositions are not meant to be discarded just because they—on balance—"lose out" in a given case. The losing values, and the persons invoking them, do not simply lyse: they continue to connect with us and stand ready to overcome each other in different ways in other cases.<sup>211</sup> So it is with selection of converging arguments: different arguments present different values—or at least different aspects of a given value. Converging arguments not selected now might be selected later in different circumstances.

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<sup>210</sup> See generally Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555 (1988).

We need clumsy institutions—and ways of conceptualizing them and talking about them—that nod in different directions to maintain overall "normative optimality."

In this light, the institutions may not be so clumsy after all: they do what they are supposed to do—help maintain the integrity of a *set* of values over time. Normative theory is not just for the moment, nor just for a particular case.

*Id.* at 1561 (emphasis added). One would expect, because of the richness and polycentricity of any modern value systems, to find awkward perceptual and decisional frameworks in many venues. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 127 (1993) (referring to "a muddled but powerful theory of social control: a decent *official* moral framework is terribly important, not only to teach a lesson but also as a way of limiting bad behavior. Some bad acts, though they are going to happen anyway, get driven underground. This means there is less of them; and the bad behavior does not threaten the general fabric of society. We can call this arrangement, this double standard, the Victorian compromise.")

<sup>211</sup> See WILLIAMS, *MORAL LUCK*, *supra* note 11.

7. In General: A note on constitutional value ontology and standards of review

If constitutional value presentation and reinforcement are touted as major selection criteria for arguments, it seems reasonable—*sometimes* obligatory—to ask whether those values are *really in* the Constitution and are *in fact* in some hierarchical order. At the very least, one can ask whether there are respectable interpretive theories that warrant concluding that the Constitution embeds *some* value hierarchy, and perhaps a particular one.<sup>212</sup>

If an observer thinks there are no plausible interpretations yielding a value hierarchy, however, she is likely to believe that the Justices' discussions of constitutional values and their rank ordering are simply "made up" to further their own "personal"<sup>213</sup> value preferences. The phrase "judge-made," in this context, is pejorative; one expects to hear complaints about "judicial legislation" and "roving commissions" to implement personal moral values, and one also expects to hear complaints about specific judges who are thought not to be following the law as laid down.

Asking whether given values and value orderings are in fact set within the Constitution's text is not at all like asking whether Sherlock Holmes's older brother Mycroft was *really* the smarter one, but it is equally unimportant *for present purposes*. Perhaps it would be too easy to blow off this

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<sup>212</sup> Certainly, no one claims that standards of review, as value implementers, are no more than rules of administration that should remain relatively uncontroversial.

<sup>213</sup> The scare quotes are to note the possibility that "personal" is being used as an epithet in jurisprudential contexts. The phrase "mere personal value" signals the view that the asserted value is "not real" or "objective": it is posited arbitrarily and is not supported by true social norms—never mind by "moral reality." But a judge, or anyone, might (with varying degrees of plausibility) take her own moral premises as proxies for community values (specifying the communities is a problem), or as intuited or perceived evidence of true value—*i.e.*, moral reality. Of course, to do so casually and unreflectively would often signal moral arrogance. In any event, it is not even clear what *constitutes* "a court making a moral judgment," "personal" or otherwise: the idea of "judicial value judgments" is, even after all this time, seriously ambiguous. There is a theoretical difference between a judge self-consciously applying a "personal moral view" and a judge having an empirical belief about traditional community views and how they would be applied in the case at hand. In this sense, the judge is never making a "personal moral judgment," but applying empirically confirmed tradition, history and custom. One problem, of course, is that empirical matters in these areas are characteristically hazy, and to "find" something as fact may be a function of the judge's personal moral preferences.

But the view that supposed moral judgments made by courts might reflect their rough empirical judgments about *community* moral judgments is hard to confirm. I note in passing that constitutionally-mandated searches for "evolving standards of decency" and for "tradition" at least look like regions in which courts are asked to make such empirical judgments. The immense difficulties in pursuing such "empirical" tasks, however, suggests that in many cases, a moral judgment must be made by the court in order to select among competing empirical accounts.



“value ontology” question by saying that we often proceed “as if,” and that if we live by (or with) a “fiction” about ordered constitutional values, we should just keep doing so. In any case, such a value ordering has been functionally internalized within the legal and judicial professions, as well as in the surrounding normative system. Easy or not, then, blowing off the question about value hierarchy is the only practical way to proceed in this Article. And within the framework of doctrine and theory that now forms the bones of American constitutional adjudication, this Article’s questions about selecting among converging arguments are obvious and proper. Asking them does not require answering whether constitutional value orderings, in general or in some specific form, are really “in” the constitution: we needn’t “go foundational.” I think the Constitution does indeed establish a hierarchy,<sup>214</sup> but even if it really doesn’t, the now-crystallized forms of strict scrutiny and other standards of review, heightened or feeble, are widely *seen* as the output of sound constitutional interpretation, not just as matters of current fashion. Older cases that did not explicitly use these standards are often viewed as either mistaken or confusing.

True enough, thinking doesn’t (generally) make it so, but we may find it necessary to understand and, at least for a time, work with various entrenched systems of seeing things in a certain way. For present purposes, then, there is nothing illegitimate about assuming that the Constitution objectively contains a value ordering of the sort articulated by the present Court.

On this assumption, standards of review are not optional within the operating constitutional system.<sup>215</sup> Moreover, failure to clearly articulate a

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<sup>214</sup> Operationally, the existence of such a hierarchy may in some contexts make little or no difference. *Cf. Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Chief Justice Rehnquist stated:

The requirement of standing “focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” [Citing *Flast v. Cohen*, 393 U.S. 83, 99 (1968).] Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary “sliding scale” of standing which might permit respondents to invoke the judicial power of the United States.

*Id.* at 484. The Court ruled that parties attacking the sale of military surplus property to a church-linked college on Establishment Clause grounds lacked standing to bring the action; the claimed importance of Establishment Clause issues did not justify exceptions to the standing requirements of Article III, and so the Court rejected “a view of standing under which the Art. III burdens diminish as the ‘importance’ of the claim on the merits increases . . . .” *Id.*

In cases where there is standing, of course, the Court can implement any differences in constitutional value. The “no-hierarchy” comment is about not using differential rights valuations to adjust the standards for *standing*. Whether this is, across the board, a sound doctrine of standing is another question.

<sup>215</sup> Indeed, on *any* assumption of coherence and validity of a particular constitutional adjudication, it is impossible for a constitutional argument *not* to embed a standard of review. *See generally*

standard of review may represent some loss of value reinforcement opportunities, even when the standard is in fact implicitly applied.<sup>216</sup>

Some constitutional adepts might acknowledge that the values are there and are ordered in some important way, but that the explicit standards of review presently in force are necessarily “judge-made” because they are not found in the text *in haec verba* (or close to it). But such claims are quite incomplete, and the epithet “judge-made” is equivocal: *of course* the canonical forms of strict scrutiny and other standards of review—whether formulated as tiers, a spectrum, a smooth, sloped line, or anything else—are “judge-made” in the sense that the standard’s exact words, or close synonyms, are not literally in the text. The inference that standards of review “exist”—in the sense that they are derivations from the constitutional

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Michael H. Shapiro, *Constitutional Adjudication and Standards of Review Under Pressure from Biological Technologies*, 11 HEALTH MATRIX 351, 374 (2001) (stating that “Standards of review are involved in any constitutional adjudication, because all require stages of characterization and all require specification of rules (whether dubbed ‘burdens,’ ‘presumptions,’ or anything else) governing who must show what to accomplish which outcomes”). There are—at least in theory—limiting cases, reflecting simple hierarchies, in which the “standards of review” are all-or-nothing—as in “the government [always] [never] wins.” *Id.* at 419.

I am certainly not suggesting that courts are always explicit about, or even consciously aware of, the standards of review they are using. The key is to discern what a court did by way of constitutional valuation and balancing. For example, in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), the court applied intermediate scrutiny in a military “don’t ask, don’t tell” case, stating:

In these ambiguous circumstances [the lack of explicit identification of a standard of review in *Lawrence v. Texas*] we analyze *Lawrence* by considering what the Court actually *did*, rather than by dissecting isolated pieces of text. In so doing, we conclude that the Supreme Court applied a heightened level of scrutiny in *Lawrence*.

We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review. First, the Court overruled *Bowers* . . . . *Id.* at 816 (emphasis added). And in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), the Court held that the second amendment established an individual right to keep and bear arms, and that the District of Columbia’s ban on possessing handguns was invalid; the terms, structure, and outcome of the decision entailed a rejection of strict scrutiny in favor of a relatively unspecified intermediate standard. *Id.* at 2822.

In some cases, the opinion and outcome may be consistent with the operation of more than one standard of review—a striking illustration of choice-of-converging-arguments. For example, *Reynolds v. United States*, 98 U.S. 145 (1878), which upheld a federal statute prohibiting bigamy, is consistent with both rational basis scrutiny (laws of general application do not trigger strict scrutiny under the Free Exercise Clause, *per Smith*, see *supra* notes 137, 139 for discussion of *Smith*) and strict scrutiny (even if some laws of general application did trigger strict scrutiny, prohibiting the social fallout from plural marriage is a compelling interest). Historical analysis suggests that the Mormons were the specific targets of the law and were thus “singled out,” which today might trigger strict scrutiny. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993) (strict scrutiny generated under either the majority’s analysis of legislative purpose or Justice Scalia’s notion of “singling out”). I do not speculate about what today’s outcome would be in a *Reynolds*-type case.

<sup>216</sup> *Lochner v. New York*, 198 U.S. 45 (1905), is a well-known example. The Court struck portions of a New York statute that regulated the working hours of bakers, and the operative standard of review—though couched in terms of “reasonableness”—was a form of strict scrutiny. *Id.* at 6–63.

text—does not tell us exactly what form they should take, and how they should be officially described (if at all). But the general idea of a value-ordering set up by the constitutional text rightly remains a working assumption both within our legal system and for this Article—even for those who say that in reality the text does not warrant this view.<sup>217</sup> In constitutional adjudication, it is certain that not everything we prefer is strongly protected, and, whatever rights we have, they are not likely to be of equal value.<sup>218</sup>

#### D. CONSISTENCY WITH PRECEDENT

This is, in some contexts (but far from all), the lead criterion and for that reason might have been given pride of place. However, the idea of consistency with precedent does not belong in the same category or plane of abstraction as “explanatory power” or “value reinforcement properties.” Those criteria address how we ought to formulate our precedents in the first place. In this respect, then, precedent is not an independent criterion because it raises the obvious question of how the precedent should have been decided—whether the doctrine was rightly formulated in the first place; its soundness cannot be presupposed *across the board*.

As a matter of everyday judging and lawyering, however, the default move is to check precedent before we start doing much else by way of comparing arguments, whether we have a converging or diverging set of them. If they converge on the same result, of course, this does not mean that they are equally consistent with precedent.

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<sup>217</sup> See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

The rise of the modern strict scrutiny formula demands explanation. It is not a timeless feature of constitutional law, but rather a judicially developed device of relatively recent origin that even now could be abandoned by the Supreme Court at any time. . . . The modern strict scrutiny test arose as a device to implement, or as the constitutional complement to, a closely related phenomenon of more primary significance: the Supreme Court’s solidifying commitment to a jurisprudential distinction between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or “preferred” liberties entitled to more stringent judicial protection.

*Id.* at 1285.

Professor Fallon also presents a similar account earlier on, stating: “Neither is there any textual basis, nor any foundation in the Constitution’s original understanding” for the strict scrutiny test. *Id.* at 1268. He does, however, observe that it is “a judicially crafted formula for implementing constitutional values.” *Id.*

As I argue in the text, however, I think the dominant interpretive view is that, as a matter of value ontology, the Constitution does *in fact* embed a value hierarchy implemented by suitably different standards of review. To the extent that earlier doctrine did not reflect this, it is wrong or, at best, incomplete. Although there is an obvious sense in which this view is “a judicially developed device” that could be abandoned by the Court, putting it that way seems insufficient.

<sup>218</sup> *But cf.* Rebecca Brown, *supra* note 136, on not recognizing constitutional value hierarchies at the threshold rights recognition stage.

However foggy the notion of precedent is, most persons in the law business have a working grasp of it. They also know that inspecting precedent is not a simple binary determination made by laying the situation before us alongside the situations in the precedents and determining consistency.

I will assume we have some grip on the nature and role of precedent and of the concept of *stare decisis*.<sup>219</sup> I simply note that consistency with precedent is a relational concept in this sense: a case can be consistent with a predecessor in one respect and inconsistent in another. Recall the comparison between *Craig v. Boren* and *Reed v. Reed*.<sup>220</sup> Despite the superficial similarity in using the language of minimal scrutiny, *Reed* was utterly inconsistent with prior cases where attacks on gender classifications had failed badly because the operational standard of review was radically different—as were the outcomes.<sup>221</sup> *Craig* was operationally consistent with *Reed* but verbally inconsistent with it—no small matter for value reinforcement.

#### E. COHERENCE—OF WHAT, WITH WHAT?

Coherence is a relational concept—something must cohere with something else. In law, I suppose it refers to a loose requirement that an argument be internally consistent (propositions within the argument must not contradict each other), and—a weaker constraint—that it be consistent with related doctrine. By “related doctrine,” I mean that the two (or more) sets of doctrine reside within some more abstractly but plausibly defined region of law involving shared constitutional values.

So understood, coherence is an aspect of several (or all) of the other criteria. Why does it bear separate mention? Its connection with precedent, for example, is obvious: “contrary to precedent” is as familiar as any phrase in the language of the common law. But coherence obviously cannot be reduced simply to fitting in with precedent. For example, there are cases of first impression in which “coherence” refers to the newly announced doctrine’s consistency with principles and standards governing the legal fields in question. Moreover, an entire body of precedent may be internally con-

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<sup>219</sup> See generally *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>220</sup> See *supra* text accompanying notes 168–170.

<sup>221</sup> See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a law banning women from being licensed to tend bar unless the bar’s owner was a male who was either the woman’s husband or father; the standard of review rested on the avoidance of “irrational discrimination”).

sistent but inconsistent with another line of precedent, or with principles and standards or normative ideals applying to both sets of cases.

Wherever it belongs on a conceptual map, then, coherence seems sufficiently distinct from other criteria for choosing among converging arguments to require separate itemization, despite the overlaps with the other criteria, and despite the fact that it may occupy a plane of abstraction different from those of other criteria.

Can incoherent arguments reinforce values?<sup>222</sup> It seems quite possible that at least perceived incoherence would cast doubt on whatever conclusions were reached and whichever values were proclaimed. (Who believes a clock striking thirteen?) Nevertheless, perceived or not, an argument's internal incoherence (*i.e.*, inconsistencies among the argument's constituent premises) or its incoherence with higher-order principles does not make value reinforcement impossible, although it may render the nature of the learning, if any, more unpredictable—and perhaps incoherent. Moreover, even if it is perceived, the decisionmaker might not see this as a sufficient reason for rejecting the argument. There are also strong barriers to perceiving incoherence. When arguments are complex and nested in complex circumstances, finding coherence may be a function of how matters are presented, how much time and other effort can be sunk into tests of consistency, and how good one is at tracing out the deductive consequences and other ramifications of arguments. For most people, Arrow's Impossibility Theorem is not intuitively obvious, so democracy doesn't seem formally incoherent or paradoxical, at least on that ground. And many—probably all of us at some point—will experience something like “cognitive dissonance” and turn away from whatever adds force to it. Few believers in the literal truth of the Bible spend much time thinking about where Cain's wife came from.

F. PERCEPTIONS OF DISCONTINUITY IN LAW'S DEVELOPMENT:  
INCREMENTS AND MINIMS; AVERSION TO RISKS OF SUPPOSED VALUE  
ERROR

The perceived “discontinuity” of a decision within a line of cases obviously invokes notions of precedential fit, and coherence generally. But a decision that coheres with precedent and even with overarching doctrines

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<sup>222</sup> There is of course a connected question about the coherence or articulation of the value or set of values. There may seem to be nothing coherent to reinforce—although this doesn't foreclose instances of reinforcement of *something*. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 322–24 (1982) (announcing an apparently important liberty interest in “personal security” but insulating purported intrusions on it with a strong presumption that “professional judgment” should be deferred to).

may nevertheless seem “unsynchronized” with its surroundings. Although the example is not entirely compelling, one could cite *Brown v. Board of Education*<sup>223</sup> as illustrating the rejection of an argument structure fully consistent with at least some strong precedent but nevertheless, in some eyes, appearing to be too great a leap. The suspect-classification-yields-strict-scrutiny formula had already been introduced in *Korematsu v. United States*<sup>224</sup> via the Fifth Amendment’s Due Process Clause,<sup>225</sup> but not a word of this was evident in the *Brown* opinion. Perhaps the *Korematsu* formula was silently understood not to be comprehensive—*i.e.*, not every arena of racial classification was to be tested under its strict scrutiny directive—but nothing was said about this in the majority opinion. As suggested earlier, *Brown* seemed to rely exclusively on the harm-based show-us-the-injury-from-the-classification argument that was at work in *Plessy v. Ferguson*<sup>226</sup> and to some extent in *Strauder v. West Virginia*.<sup>227</sup> To have rested entirely

<sup>223</sup> 347 U.S. 483 (1954).

<sup>224</sup> 323 U.S. 214 (1944).

<sup>225</sup> *Id.* at 216 (resting on the Fifth Amendment as an equality-protecting instrument, and stating that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny”; the Court nevertheless upheld the exclusion of persons of Japanese ancestry from certain military areas). Arguably, the suspect classification doctrine was suggested as early as *The Slaughterhouse Cases*, 83 U.S. (16 Wallace) 36, 71 (1872) (referring to “the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him” as the “one pervading purpose” of the three Reconstruction Amendments). See *Brown*’s companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), also based on the Fifth Amendment, which seems to be a form of suspect classification case, the Court stating:

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. [Citing *Korematsu*, 333 U.S. at 216 and *Hirabayashi v. United States*, 320 U.S. 81 (1943), in a footnote.] As long ago as 1896, this Court declared the principle “that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race.” And in *Buchanan v. Warley*, 245 U.S. 60 [(1917)], the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

*Id.* at, 499 & n.3.

*Bolling*’s use of the suspect classification formula of course occurred within its interpretation of the Fifth Amendment. The obvious question is: if that formula was good enough in *Bolling*’s situation, why not in *Brown*’s? Perhaps this anomaly reflected a belief that all bets were off for the District of Columbia, and that no one would notice anything amiss anyway; the *real* school segregation case was *Brown*.

<sup>226</sup> 163 U.S. 537 (1896) (upholding state’s racial segregation in railway transportation).

<sup>227</sup> 100 U.S. 303 (1880) (striking down an exclusion of black persons from serving on juries, and granting defendant’s motion to remove the case to a federal court). Not only was the argument from harm not rejected, there is a question about whether, in terms, *Plessy* was flatly overruled. The Court in *Brown* said: “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [about the impact of segregated education] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954). Note that *Strauder*’s argument structure is not inconsistent with

on the suspect-classification/strict scrutiny framework would have been too unexpected, too opaque in its constitutional foundations, and too radical a shift in doctrine, or so some might have thought (and still think).<sup>228</sup> In any event, as suggested earlier (Part II.C.1), the show-the-harm argument structure may have provided a more explicit opportunity for the Court to expound on the centrality of education in promoting equality and liberty, and the gravity of the harm to persons and groups where education is impaired.<sup>229</sup>

Nevertheless, despite the Court's "conservatism" in invoking the long-standing argument from harm, the outcome of the argument as applied in that case—the invalidation of legal separation of the races in public schools—seemed to be disconnected from the habits and understandings of

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the use of the suspect classification/strict scrutiny formula, and it contains a strong hint that it was operationally at work, if not precisely identified. The Court said:

It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment?

*Strauder*, 100 U.S. at 309.

<sup>228</sup> Still less is the *Brown* opinion founded on a rigorous colorblindness principle that all classifications by race are *per se* unconstitutional. Nor does the suspect classification framework say so: classifications by race are *presumed* unconstitutional, not unconstitutional *per se*. Thus, neither *Brown* nor the suspect classification doctrine entail a *per se* ban on racial classifications; whether racial classifications should be used in some contexts or eschewed across the board is another question. *But cf.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007) (invalidating student assignment to schools on the basis of race because the system was not necessary to promote a compelling interest, and racial diversity was not a compelling interest, being no different from racial balancing; the Court distinguished the diversity goal sustained in *Grutter v. Bollinger*, 539 U.S. 306 (2003)). *See generally* Goodwin Liu, *The Meaning of Brown vs. the Board: The 1954 Opinion Did Not Establish Colorblindness as a Legal Principle. There Is No Ambiguity to be Decided in the High Court's Current Cases*, L.A. TIMES, Dec. 25, 2006, A31 (observing that "[t]he target of *Brown's* reasoning was not racial classification but the use of race to separate and thereby stigmatize and subordinate minority schoolchildren"). On this view, one might in theory use the *Brown/Plessy* argument from harm in some race-linked cases that would not be characterized by the Court as involving either suspect classifications or hidden "purposeful discrimination." Perhaps a genetic screening program keyed to race, ethnicity, or ancestry might be viewed this way—a *tertium quid* argument structure, perhaps drawing intermediate scrutiny. For proposed reconstructions of *Brown* that seem to rest significantly, if not exclusively, on the suspect classification doctrine, see the concurring opinion of John Hart Ely in Balkin, BROWN, *supra* note 45, at 135, 137.

<sup>229</sup> This is reflected in some of the reconstructions of *Brown* by Balkin and others. *See* Balkin, BROWN, *supra* note 45. Catherine A. Mackinnon's concurrence states flatly that: "The question of the harm of school segregation by race where physical facilities are comparable (as in fact they seldom are) is the central question of this litigation." *Id.* at 145. The writers of these reconstructions attempt to reduce the danger that emphasizing education might leave other public functions at risk by stressing that the focus on education was derivable from a more generalized equal citizenship principle embedded in the Constitution, binding both the federal government and the states. *See, e.g.*, Jack M. Balkin, majority opinion in *Brown*, in Balkin, BROWN, *supra* note 45, at 81–84.

many persons, including those who wanted segregation abolished. Although there was nothing fancy about the Court's invocation of the harm-based argument, at a lower level of abstraction the application of the harm-based standard was nothing like its application in *Plessy*—although it bore a strong resemblance to *Strauder's* use of it. In this light, *Brown* effected a partial but very effective transformation of doctrine. This was a far different jump from that taken in *Craig v. Boren*,<sup>230</sup> which—as far as specifying standards of review is concerned—simply unpacked the Court's now-operational standard of review, displacing *Reed v. Reed's*<sup>231</sup> opaque but extensionally equivalent use of the language of “rational relationship.”<sup>232</sup> (Because *Craig* also “protected” men against sex discrimination, it at least partly displaced the status of the general assumption of female vulnerability.<sup>233</sup>) It was not until some time after *Brown* that the Court expressly required the suspect classification doctrine for all facial racial discrimination, avoiding the value losses (and perhaps some gains) in asking for individualized or even group showings of harm. Today, the suspect classification doctrine rules in race.

This account, I agree, is speculative, and could be much improved in the hands of a legal historian. It is also complicated by the fact that *Brown's* companion case, *Bolling v. Sharpe*,<sup>234</sup> covering segregation in the District of Columbia, *did* make use of the suspect classification doctrine in interpreting the Fifth Amendment to bar legal segregation in the District's public schools.<sup>235</sup> But if the Court was not ready to displace its atavistic harm-based argument structure, *Bolling's* framework had to remain *sui generis*.<sup>236</sup> Perhaps it was thought that confining the suspect classification argument structure to the District would be less catastrophic than announcing that it would be applicable universally.<sup>237</sup> Much the same might have

<sup>230</sup> 429 U.S. 190 (1976).

<sup>231</sup> 404 U.S. 71 (1971).

<sup>232</sup> *Id.* at 76; *Craig*, 429 U.S. at 210.

<sup>233</sup> *Craig*, 429 U.S. at 210.

<sup>234</sup> 347 U.S. 497 (1954).

<sup>235</sup> *Id.* at 499–50.

<sup>236</sup> For another account, see generally Fallon, Jr., *supra* note 217 (tracing the development of strict scrutiny in racial classification cases).

<sup>237</sup> Note the Court's linking of due process and equal protection in *Hirabayashi v. United States*, 320 U.S. 81 (1943): “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.” *Id.* at 100 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). As in *Korematsu*, however, the Court upheld the government's action, this time in convicting the defendant of disregarding restrictions—a curfew—made by a military commander under the aegis of an Executive Order. For additional commentary on the links among *Brown*, *Bolling*, *Korematsu*, and *Hirabayashi*, see Peter J.



been said about deriving the adjudicatory outcome from notions of “equal citizenship,” had they crystallized at that time.<sup>238</sup>

There is of course much more that might be—and has been—said about alternative converging arguments in *Brown* and *Bolling*, but I leave off with a brief comment on “degrees of alternativeness” among arguments. The suspect classification doctrine might be said to have several possible textual sources: the Equal Protection clause, the Due Process clauses of both the Fifth and Fourteenth Amendments, the conferring of national and state citizenship by the Fourteenth Amendment’s first sentence, and the Privileges and Immunities clause in the first clause of the second sentence. The show-the-harm framework—which remains constitutionally relevant in several ways—may also rest on the same sources. Assigning different textual sources arguably *is part of the alternative formulation of arguments* and may have hard-to-predict cascading effects in other constitutional territories.<sup>239</sup>

The “distance” between alternatives is linked to doctrinal discontinuity, and, in turn, ideas about such discontinuity are likely to appear in any discussion of constitutional “minimalism.”<sup>240</sup> Of course, the minimality-to-maximality of legal decisions is measured along different dimensions, including doctrinal breadth or slenderness and social impacts; “increments” are not all of a piece. Moreover, in some cases, “minimalism” is a strategic rather than a “high-principled” device invoked to avoid supposedly adverse doctrinal developments. Recall Justice Breyer’s partial concurrence in *Morse v. Frederick*,<sup>241</sup> where he pinned his vote against the high school student’s claim of interference with free speech on the principal’s qualified immunity, not on the student’s First Amendment interests.<sup>242</sup> (Recall also that a “surplus” of conceptual schemes may provide refuge for judges who incline toward a given outcome but do not feel at home in some of the argument structures before them; in such situations, those judges are *pro tanto* worse off under a parsimony constraint.)

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Rubin, *Taking its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879 (2006).

<sup>238</sup> See generally Karst, *supra* note 116.

<sup>239</sup> See, e.g., Concurring opinion of Bruce Ackerman in *Brown*, in Balkin, BROWN, *supra* note 45, at 100–23.

<sup>240</sup> Cf. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 353 (2006) (stating that “Like other judicial minimalists, Burkeans believe in rulings that are at once narrow and theoretically unambitious; what Burkeans add is an insistence on respect for traditional practices and an intense distrust of those who would renovate social practices by reference to moral or political reasoning of their own.”).

<sup>241</sup> 127 S.Ct. 2618 (2007).

<sup>242</sup> *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

As a bridge to the next section, I note the connections between the perception of discontinuity in doctrinal change and the degree to which any articulated change presents value issues in a new light.

G. SIMPLICITY, COGNITIVE EFFICIENCY, CLARITY, EASE OF OPERATION,  
RISKS OF MISUSE OR MISUNDERSTANDING

Simplicity and clarity are not the same, and both play a role in value illumination and obfuscation; the varying concepts here are seriously entangled. Value exposure may be exactly what is not wanted by a decision-maker, and simplicity-as-obfuscation may be the tool of choice in some cases, with blinding complexity preferred in others.

The idea of simplicity is thus not at all simple, as many have noted, and is certainly too complex to compress into a reading-bite. What is simple for some is complex for others, for many reasons—ability, training, frameworks for perception, and so on.<sup>243</sup> Simplicity involves objective factors, matters of taste and preference, and views on what is relevant, whether in science, moral valuation, and legal analysis. It may be preferred, or not, for reasons bearing less on comprehension than on what value and factual issues we want to address or suppress. With legal arguments, simplicity involves, to some extent, technical matters of form and style, but there are more important elements of simplicity at stake here. Compare, once again, *Craig v. Boren*<sup>244</sup> with *Reed v. Reed*.<sup>245</sup> The form of argument in *Reed* was somewhat impenetrable: how could the usually impotent rationality test wind up invalidating a tradition-sanctioned practice of gender discrimination? *Craig*, on the other hand (and whatever its other complexities), is “simpler,” if wordier, precisely because it explains what it is doing and does so by presenting and emphasizing equality values more transparently than *Reed*. Opacity does not generally make for simplicity, and apparent prolixity (which may appear complex) may ultimately clarify and simplify core concepts more than terse and opaque ones; conceptual richness and thinness do not fully track complexity and simplicity. One might question these cases in a more foundational mode, but here the point is to illustrate

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<sup>243</sup> And it is over-simple to put it this way. The felt ease or difficulty of operation of any task may depend on the accidents of what linguistic and perceptual frameworks have been wired into an observer, and this in turn may turn in part on cultural/ethnic variables. Persons schooled in one language system as opposed to another, for example, may experience the burdens of the same task quite differently, and they may thus prefer some conceptual systems to others. See generally Robert Lee Hotz, *How the Brain Learns to Read Can Depend on the Language*, WALL ST. J., May 2, 2008, at A10.

<sup>244</sup> 429 U.S. 190 (1976).

<sup>245</sup> 404 U.S. 71 (1971).

an important aspect of simplicity—and one which strongly connects to the explanatory-power-and-conceptual-illumination criterion mentioned above.

#### H. VARIATIONS IN THE DEGREE OF DIFFICULTY OR STRAIN IN DERIVING PARTICULAR OUTCOMES

Assessing differences in the difficulty or strain in deriving given outcomes is of special importance—and bears special risks—when the task is to distinguish concurring arguments and to pick one. Recall the phrase “fairly/plausibly reaching a certain result.” Although the topic of this Article presupposes that alternative arguments, fairly interpreted, can converge on the same outcome, they may not arrive at it with equal ease; there is fair interpretation and fair interpretation, and testing doctrine on this criterion is sensible, at least in some cases. Is the Commerce Clause or § 5 of the Fourteenth Amendment the better route, on this sense-of-strain standard, toward validating the Civil Rights Act of 1964? Again, even if this inquiry were a wash, applying the criterion may be instructive. If the strain is too great, of course, the assumption of convergence should be abandoned: at some point, one moves from talking about relative strain to concluding that an argument simply does not work well enough for honest use, or doesn’t work *at all*, never mind doing so with relative ease.

#### I. A NOTE ON IDEOLOGY

“Ideology” is a term used widely and loosely. Why isn’t it listed as a criterion for argument selection?—as in “Whichever argument best promotes (or least impairs) the correct ideology is to be given priority.” One might well expect that, whether arguments converge or not, jurists and lawyers sort them by ideology all the time—perhaps even as their prime goal.

But “ideology” can’t be a separate topic, at least for present purposes. It is a facet of the reinforcement of preferred values and is thus an integral part of the value reinforcement framework for selecting among converging arguments.

Of course, we do have the term in our lexicon, and it serves at least one relatively distinct purpose: it has a pejorative aura, suggesting that a given person’s value perspectives are held too rigidly, or are in absolute form and do not recognize countervailing values, or perhaps are just wrong or evil. It is used far more often to refer to value systems other than our own.

III. SOME *WHY BOTHER?* QUESTIONS AND OTHER OBJECTIONS  
TO THE TOPIC

A. WHY EVEN THINK ABOUT RESULTS WHEN ALMOST ANY RESULT CAN  
BE DERIVED FROM ALMOST ANY ARGUMENT STRUCTURE?: *FROM ONE-  
FROM-MANY TO MANY-FROM-ONE*

Earlier, I noted the objection that the Article's topic was just a general jurisprudence question rewrapped (possibly with the same wrapping). Law persons are especially familiar with the skeptical claim that choosing an argument to get a particular result is relatively unimportant; the fuss is simply a matter of dressing things up, which may be interesting from anthropological or psychological perspectives, but is not otherwise rewarding. After all, many arguments (some think most or all of them) can be manipulated, well within the bounds of acceptable legal analysis, to reach any of several—even inconsistent—outcomes. This is the one-argument-to-many-outcomes perspective: from one legal argument structure, a number of alternative results are often reachable. To admit this possibility is not to endorse nihilism, or even to adopt the skeptical views often heard from (or attributed to) legal pragmatists, legal realists, critical legal theorists, and from other quarters as well. I do not think that all arguments, fairly applied, can lead to just any outcome one wants, but no one can precisely define the key phrase “fairly applied,” and I am not going to engage the skeptical arguments here; the “Why-bother-with-legal-arguments?” stance is addressed, successfully or not, in a variety of literatures.<sup>246</sup>

So, I will assume that some arguments might, fairly applied, reach different, possibly inconsistent outcomes; a text is not meaningless in any strict sense just because it bears several plausible meanings.<sup>247</sup> But if at least one of those outcomes is the same outcome that *other* arguments converge on, then the multi-outcome arguments have to be considered part of the converging set. The prime target for analysis in this Article is in a sense the “inverse” of this skeptical one-argument-yields-many-outcomes position: it is the situation in which many arguments yield the same outcome.

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<sup>246</sup> See generally Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113, 149–60 (1997) (discussing legal skepticism and providing references).

<sup>247</sup> However, although it sounds odd (oxymoronic?) to say so, some texts may be *so* afflicted with multiple meanings that we can consider them operationally meaningless precisely because of this “excess” of meaning.

The particular “Why bother?” question in this section—you can reach many outcomes from any given argument—is of course closely linked to several other questions: To what extent does any given argument (or set of arguments) in fact influence the decision reached? Should decisions rely on legal arguments at all, and if not, should this non-reliance be covered up? I mention these questions simply to fill in a conceptual map of this Article’s inquiry into choice among converging arguments. They are, in a sense, foundational, and, partly for that reason, I can’t deal with them here. The very concept of an argument influencing, or not influencing, a decision process leading to an adjudicatory outcome is hard to explicate. The legal pragmatism literature is one source to turn to for elaboration of the latter point.<sup>248</sup>

Some will decry any emphasis on “argument structures” as unduly constraining in the search for—what? A justifiable result? A result that will be accepted? When working within any rule-of-law system, argument structures, used properly, are what *liberate* us from unstructured confusion and chaos. The richest imagination doesn’t create its product *ex nihilo*. And argument structures are what allow—and require—us to *situate* what we think are important variables onto a conceptual map.

B. WHY IS THERE A QUESTION AT ALL? IF SEVERAL ARGUMENTS  
CONVERGE ON A SINGLE OUTCOME, USE THE ONE MOST CONSISTENT  
WITH PRECEDENT. BETTER YET, JUST USE THE RIGHT ONE

“Use the one most consistent with precedent” is the most obvious practical criterion of choice, and, when such an argument can be uniquely identified, it is usually the winner: it is the path of least resistance, the road more traveled. But not always. A precedent can be undone, revised, or transformed, whether in result or conception, and this very “defeasibility” suggests the possibility of having to select among converging arguments. Even if the precedent’s result is accepted, a court may replace its contents with another argument that is conceptually sounder or better reinforces what the court takes to be the underlying constitutional values at stake (as with *Craig’s* “restatement” of *Reed*, or the transfiguration of *Griswold*).<sup>249</sup> Moreover, it may be difficult or impossible to say which of the contending arguments is most consistent with precedent—in which case we might view the case as one “of first impression.” In most of the cases described below,

<sup>248</sup> See generally Thomas C. Grey, *Symposium on the Renaissance of Pragmatism in American Legal Thought: Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569 (1990).

<sup>249</sup> See *supra* text accompanying note 168.

the choice among converging arguments could not have rested on a simple analysis of precedent.

Parallel points apply to “just pick the right argument.” Justice Scalia notes:

There is a couplet spoken by Thomas à Becket in T.S. Eliot’s *Murder in the Cathedral*, in which the saint, tempted by the devil to stay in Canterbury and resist Henry II in order to achieve the fame and glory of martyrdom, rebuffs him with the words “That would be the greatest treason, to do the right deed for the wrong reason.” Of course the same principle applies to judicial opinions: to get the reasons wrong is to get it all wrong, and that is worth a dissent, even if the dissent is called a concurrence.<sup>250</sup>

Justice Scalia, of course, doesn’t suggest that discerning rightness is, across the board, a simple task. If several arguments converge and all are at least plausible, one rightly asks, Of what does rightness consist? The supposed answer—just pick the right one—regenerates the question: how do you tell which is the right one when they all join at the outcome?

#### C. WHY CHOOSE AT ALL? JUST USE EVERY ARGUMENT THAT “WORKS”; OTHER ANNOYING QUESTIONS

This question was raised in passing earlier. The core of the problem of selecting one from many arguments that converge on the same result is often illustrated *within* a single opinion or ruling. It is theoretically open to a Court—if often frowned upon—to rely on multiple coordinate grounds of decision, if available.<sup>251</sup>

The idea that using all the converging arguments is disfavored is of course a critical presupposition here. If we ask “*Which* (single) argument (theory, ground, etc.) should we rest on and why?”—exactly why is “Use them all” a generally disfavored response?<sup>252</sup> The reasons have to do with

<sup>250</sup> Scalia, *Nineteenth*, *supra* note 11, at 33 (quoting T. S. Eliot’s *Murder in the Cathedral*) (boldface deleted).

<sup>251</sup> But perhaps not on every theory of adjudication. As suggested earlier, I suppose the very idea that we have a choice of arguments at all may, to some, seem damaging to the perceived integrity of the law. From the perspective of a value pluralist, this makes no sense, and even a single-value moral system will have multiple aspects, and thus multiple argument pathways. See the discussions of *Roe v. Wade* and *Skinner v. Oklahoma* in the text accompanying notes 259–266.

<sup>252</sup> Stating that a result follows from more than one constitutional argument structure is not routine in Supreme Court jurisprudence, but I have not tried a decision count to confirm this. *But cf.* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984). In rejecting a First Amendment claim concerning a sleeping-in-the-park “symbolic” demonstration, the Court in *Clark* indicated that the intermediate standard of review announced in *United States v. O’Brien*, 391 U.S. 367 (1968), was essentially the same as the usual time, place, and manner standard. *Id.* However, the *O’Brien*-type standard

how we view formal adjudication in modern legal systems, but trying to vet this area here would be unprofitable. It is enough to say that there is a certain parsimony required in judicial opinions—not (just) as a matter of taste or historical accident, but as dictated by the very nature of courts and of separation of powers, at least as understood in the U.S. and many other nations, West or East. If courts routinely use all available theories, they are unnecessarily (within our system) committing themselves to a variety of legal resolutions when they needn't do so to decide the case before them.<sup>253</sup> We implement this view by (among other things) using the idea of “dictum” to put down judicial logorrhea. There is of course room for different judicial inclinations concerning frugality with arguments, set within a larger arena of separation of powers, but the ideal of narrowly rationalized opinions remains a strong constraint.

Moreover, some of the converging theories simply cannot be used, at least in certain contexts, because they bear serious inadequacies—like being wrong. They may, for example, be offensive because they reflect the wrong values, or they may contradict precedent, or they may clash with each other and thus be unusable concurrently. Although one need not conclude with Justice Scalia that “[a]n opinion that gets the *reasons* wrong gets *everything* wrong which it is the function of an opinion to produce,”<sup>254</sup> it's not a good thing for an opinion to do.

I will assume, then, that in constitutional and legal adjudication generally, courts usually will and should use only the minimum number of arguments needed to resolve the dispute before it, resisting temptations to use other lines of legal analysis that are extensionally equivalent. Whether they ought to use the particular convergent argument that “says” the least is a related but separate question bearing, in part, on how the value-illumination criterion ought to be handled in a given case. Certainly courts, as noted, sometimes cumulate arguments for added persuasive effect in the form of inspiring added confidence in the correctness of an outcome.<sup>255</sup> (And per-

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is triggered in situations quite different from those involving most time, place and manner regulations. See also *infra* notes 259–266, for additional bi- or multi-modal decisions.

<sup>253</sup> Of course, judges are supposed to review, to some degree, all the arguments made by counsel on any side, and, depending on the case, the court, and on how well the parties are represented by counsel, there will be converging arguments to sort through.

<sup>254</sup> Scalia, *Nineteenth*, *supra* note 11 (emphasis in original); see also SUSAN LOW BLOCH ET AL., *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 583–96, 594–95 (2d ed. 2008) for additional discussion of separate opinions.

<sup>255</sup> For example, Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961) said, “The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.” *Id.* at 551–52 (Harlan, J., dissenting). In *Poe*, the Court dismissed ap-

haps they sometimes avoid such cumulation, fearing that the edifice of law is threatened by displaying an abundance of paths—there is “too much choice” for rule-of-law purposes.) This is often quite a bit more than simply counting up how many arguments there are for a given outcome: different arguments, seen together, will provide a more complete picture of the contending interests and perspectives—and this is exactly what is needed if one wishes to be alert to the need for doctrinal renovation.<sup>256</sup> Cumulation is far from simply piling up redundancies, although there is always the risk of overload.<sup>257</sup> Where converging arguments are complementary, there is thus a case for using all of them.<sup>258</sup>

There are marked differences in precisely how converging arguments are “used,” however. It is one thing to say, as in *Loving*, that both the equal protection and due process clauses independently invalidate the anti-

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peals from a ruling denying a claim for a declaratory judgment that Connecticut’s ban on use of contraceptives was unconstitutional, holding that the claims were nonjusticiable. *Id.* at 508–09 (majority opinion). Justice Harlan later referred to this dissent in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (in which the Court ruled that Connecticut’s ban on the sale of contraceptives violated the right of privacy of married couples). Of course, including what seem to be weak arguments may cut the other way. For some background in cognitive theory, see for example, Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 323, 352–53 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (discussing the impact of “increasing the number of arguments included in a message”).

<sup>256</sup> One arena of constitutional adjudication suggests this particularly clearly: the multiple interpretive/criterial paths for deriving implied fundamental rights under either the due process or equal protection clauses. Of course, these paths don’t always converge. See generally Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203 (2007).

<sup>257</sup> Cf. Ken I. Kersch, *Everything is Enumerated: The Developmental Past and Future of an Interpretive Problem*, 8 U. PA. J. CONST. L. 957, 960–61 (2006) (arguing that “it is far from clear that Justice Douglas needed to extrapolate the existence of a ‘right to privacy’ from the various amendments he cited in his *Griswold* opinion (that he chose to do so may have been characteristic of his particular, and peculiar, temperament). As it is not clear that there needs to be one, and only one, justification, it is similarly not clear that a married couple’s right to use birth control must, of necessity, derive from a single provision of the Bill of Rights. The Court might have cited all the amendments as essentially on par as applied to the facts of the case. Or it might have cited the First Amendment as *prima inter pares* . . .”).

<sup>258</sup> The use of true alternative frameworks, languages, or conceptual systems is not ordinarily vulnerable under Ockham’s principle of parsimony. If a phenomenon has multiple aspects, then it just has them—they are *there*—and to ask about parsimony would be a category mistake: alternative aspects of reality are not *redundant*, and we do not have a situation in which we are using systems that contain “unnecessary” entities, processes, or relationships. In analytic geometry, using both rectangular and polar coordinates does not violate parsimony. And failure to acknowledge the different aspects of a perceptual illusion distorts reality. More generally, maintaining the multiplicity of frameworks helps to fill out reality by means that complement each other. Of course, inconsistent scientific arguments may be tested, at the threshold, for how well they account for observations. But the value of a framework or perspective does not rest only on results: it adds meaning and insight to understanding what is observed.



miscegenation law. It is another to say, as in *Roe v. Wade*.<sup>259</sup> “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>260</sup> The former combination is a straightforward “double holding.” The latter adds perspective to the task of constitutional interpretation, but also presents the decision as loose and flabbily reasoned.

In rough parallel, calling up different but overlapping scientific conceptual systems may result in finding that they all point the same way, shoring up the confirmation of a given hypothesis. For example, some investigators think that information gathered from molecular genetic analysis, neuroscience, and patterns of linguistic evolution support certain claims about how humanity spread across the planet.<sup>261</sup>

I leave this “use all the arguments” skirmish by recalling the battle among converging arguments in *Skinner v. Oklahoma*.<sup>262</sup> Justice Douglas ruled that the Oklahoma program of sterilizing some thieves but not others was invalid, ostensibly on equal protection grounds, invoking what we would now refer to as the fundamental rights branch of equal protection jurisprudence.<sup>263</sup> Chief Justice Stone protested, insisting that procedural due process was the preferred tool.<sup>264</sup> Justice Jackson concurred with each opinion, except to the extent it rejected or minimized the theory of the other.<sup>265</sup> The overall set of opinions in a sense “used them all,” although Justice Jackson was the only one who used both of the two decisive ap-

<sup>259</sup> 410 U.S. 113 (1973).

<sup>260</sup> *Id.* at 153. Sometimes courts and counsel present arguments in “whichever,” “whatever,” or “shotgun” style because they are not entirely on top of what they are doing.

<sup>261</sup> See generally Marc D. Hauser, Noam Chomsky & W. Tecumseh Fitch, *The Faculty of Language: What Is It, Who Has It, and How Did It Evolve?*, 298 *SCIENCE* 1569–79 (2002); Gary Marcus, *From Squeak to Syntax: Language’s Incremental Evolution*, *N.Y. TIMES*, Apr. 11, 2006, at F4 (discussing the use of genomics to investigate the origins of language).

<sup>262</sup> 316 U.S. 535 (1942).

<sup>263</sup> *Id.* at 542–43. The fundamental right—procreational autonomy—was presumably a matter of substantive due process resting on the meaning of “liberty,” and did not derive from the equal protection clause. Whatever the origin of the fundamental right, however, it served to trigger strict scrutiny.

<sup>264</sup> *Id.* at 544–45 (Stone, J., concurring).

<sup>265</sup> *Id.* at 546 (Jackson, J., concurring). However, in *Railway Express Agency v. New York*, 336 U.S. 106 (1949), Justice Jackson expressed a strong preference for equal protection arguments over due process arguments because, in his view, the former are less disabling to re-legislation in the field. *Id.* at 111–12 (Jackson, J., concurring). The contexts, of course, were quite different; among other things, the Court saw no fundamental rights issue, as there was in *Skinner*. The constitutional protection of commercial speech (a regulation of advertising on vehicles was upheld) was not yet recognized.

proaches. He did not, however, discuss whether using both was inconsistent with some applicable jurisprudential canon, and it is not clear that he should have, given the close conceptual connection between the two; the rigor of the hearing procedures would depend in part on the strength of the substantive constitutional value at stake.<sup>266</sup>

Two final points about “choosing,” or not, among alternative arguments. Some might say that “choice” language is inapt because we do not consciously choose arguments in the way that we choose what movie to see, or what line we will punch on our election ballot. What we do is (in major part) too rough, intuitive, nonreflective, and indeed nonconscious to be considered “choice.”

This is not much of an objection: there is “choice” and there is choice, and it is reasonably well understood that decision making processes are not always neat and linear processes in which everything relevant is before our minds. We are properly said to make decisions while we are engaged in “automatic driving.” But whatever the decision process is in fact like, and however we want to describe it, we still have to deal with it because we are presented with the necessity of specifying one thing over another. If choice processes are messy and influenced by nonconscious mental activity, so be it: choice is not annulled as choice just because of its complex causal underpinnings.

The second point is closely related. As has long been understood, a judicial argument is unlikely to be a one-for-one replica of our actual antecedent thought processes—either temporally or as to content. When we openly rationalize something we have done or said, we may present it and unpack it—perhaps on the spot—in ways that do not track the sequences of mental representations and cognitive functioning that constituted our decision making process. Whether a choice or choice process is rationalizable

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<sup>266</sup> Both argument frameworks were puzzling. Justice Douglas did not spend much time explaining why the right to procreate was a nonenumerated “basic right,” nor why, having derived it, he used it to trigger strict scrutiny under the equal protection clause rather than the due process clause. This seems to have been the first official use of the term “strict scrutiny,” but the significance of the step went unremarked. Perhaps Justice Douglas wanted to leave open the possibility of rectifying the constitutional situation by sterilizing a larger group of criminals, but this cuts against his basic-right-draws-strict-scrutiny approach. Chief Justice Stone’s procedural due process argument was also odd. The importance of variables within a procedural due process argument structure may depend on substantive due process analysis—as with determination of the required procedures where an unemancipated minor seeks an abortion but doesn’t want to consult her parents. The nature of the hearing called for in *Skinner* thus depended, at least in part, on the value assigned to the right derived from within the substantive due process mode. The state of genetic science then, and probably now, also foreclosed the possibility that a hearing could confirm or disconfirm any claims about the heritability of criminal predispositions.

and what significance this has is an oft-discussed issue in legal philosophy, and in epistemology and psychology, but the question has little or no bearing here.

D. SINCE EVERY CASE CAN BE WARPED INTO PRESENTING CONVERGING ARGUMENTS, THE TOPIC COVERS EVERYTHING AND THEREFORE COVERS NOTHING

If the choice problem affects every case, this would seem to cut in favor of doing exactly what we're doing—analyzing the nature of the problem. More importantly, the implication of the critique is that most variations among arguments may be trivial—there aren't that many true alternatives—so we're wasting our time appraising a lot of arguments that aren't that different from each another. But if this is so, then it's quite unlikely that we will in fact waste serious time in this way. For the most part, we can tell the difference between trivial variations<sup>267</sup> and serious alternatives, and there are generally only a few of the latter, however numerous the former. To see this, look ahead to *City of Renton v. Playtime Theatres, Inc.*,<sup>268</sup> which presents an unusually large array of plausible converging arguments that present significantly different options.<sup>269</sup>

So, although the complaint “Why bother, since it's all irrelevant?” is pretty telling as objections go, it is not fatal to the Article's mission of comparing converging arguments to deepen our understanding of constitutional values.

E. SELECTING ARGUMENTS AND INTERPRETING THEM

Courts and counsel are sometimes asked to specify what interpretive theory they rely on in applying various sources of law—especially constitutional text and Supreme Court precedent. Different interpretive theories—they too are argument structures—will often converge, but there is much less pressure to select just one and to stick with it through thick and thin—unless, perhaps, one is a Supreme Court Justice, especially one who identifies herself with a particular interpretive stance. I see no reason to review this branch of argument convergence; it largely falls within interpretive

<sup>267</sup> This is not to say that in trivial variations there is *no* change in meaning. But although the communicative impact of the passive and active versions of a propositional claim may be slightly different (affording some explanation or justification of the common—and often ill-considered—aversion to the passive), there is probably no change in propositional meaning.

<sup>268</sup> 475 U.S. 41 (1986).

<sup>269</sup> *E.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *see infra* text accompanying notes 303, 457, 472.

theory generally. I note only an axiomatic point: finding that arguments converge to a common result presupposes interpretation of the arguments. So does selecting among them. Interpretation of constitutional arguments and interpretation of constitutional text are too interlaced to be easily (if at all) disentangled, and there is no reason to try doing so here.

I repeat one cautionary point: I have not shown, nor will I try to show, anything about the influence in fact of arguments on judicial decisions, nor about what that influence ought to be, either as a matter of jurisprudence, or, more broadly, of legal and moral philosophy.

F. THE CONNECTION BETWEEN EXPLAINING ARGUMENT SELECTION AND DOING STRAIGHTFORWARD DOCTRINAL ANALYSIS

The eight illustrations in Part IV, next up, might seem to be simply a set of traditional doctrinal critiques, rather than an account of how converging arguments are selected. But this contrast is not a matter of being one or the other and not both.

As I have tried to show, such selection is in the first instance, and straightforwardly, a doctrinal task, although there are legitimate jurisprudential disputes over how judicially self-aware and explicit this should be. The criteria for selection do not—as I have presented them here—sound in high theory: they are not “outside” doctrinal analysis, although they might be viewed as “meta-doctrinal” issues concerning the final selection of doctrine and its presentation as the outcome-determinative consideration. One chooses among alternative converging paths by inspecting their comparative quality in light of these criteria. In this sense, comparative doctrinal critiques are precisely what are required.

Of course, not all doctrinal analysis is about selecting among converging arguments, so, in what follows, not every doctrinal point will be critical in making such choices.

G. THE COSMIC IMPORTANCE (OR NOT) OF INVESTIGATING CONCEPTUAL SYSTEMS

Some have argued that different preexisting linguistic/conceptual/cultural patterns affect the rate of scientific and technological development. Joseph Needham, for example, said that several aspects of Chinese thought systems may have impeded scientific and technological

development beyond certain points.<sup>270</sup> Richard E. Nisbett, more recently, has argued in parallel, referring to different patterns of abstraction and objects of interest between ancient Greece and China (during most of the latter's existence).<sup>271</sup> Such claims go far beyond the study of constitutional argument structures and their enrooted conceptual systems, but I mention them—and give the topic its own heading—because they suggest that some distinct arguments reflect significantly different ways of thinking that may bear on the course of legal and cultural development. Conceptual systems, whether realized in argumentation or not, are at work from the very threshold of sensation and perception through complex ideation and decision making. Any “framework for perception” is thus likely to be understandable as a conceptual system and even an argument structure, although the latter is likely to be buried deeply in the early stages of perception.<sup>272</sup>

#### IV. EIGHT ILLUSTRATIVE AREAS

*Prefatory Note: To understand something, do we need to know all its plausible sources?*

Converging arguments are viewed as true alternatives when they differ in what they designate as constitutionally material, and thus how they embed constitutional values. Given that they embody different value elements, what are we to make of the fact that *quite* different arguments take us to a common outcome? Should we be surprised when we find that a procedural due process framework and an equality framework take us to the same place? Consider *M.L.B. v. S.L.J.*,<sup>273</sup> which held that a state could not deny an impoverished mother access to appellate review of the sufficiency of the evidence supporting a parental termination decree.<sup>274</sup> Justice Ginsburg said,

[I]n the Court's *Griffin*-line cases, “[d]ue process and equal protection principles converge.” The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. . . . The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. . . . A “precise rationale” has not been composed . . . because cases of this order “cannot be resolved by resort to easy slogans or pigeonhole

<sup>270</sup> See, e.g., JOSEPH J. NEEDHAM, 2 SCIENCE AND CIVILISATION IN CHINA 304, 335, 336, 340 (Cambridge Univ. Press 1962) (1956). I forego comparing and linking the linguistic and conceptual.

<sup>271</sup> RICHARD E. NISBETT, THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY 21, 24 (N.Y., Free Press 2003).

<sup>272</sup> For an account of cultural differences in constructing and linking concepts, see generally NISBETT, *supra* note 271, at 137–63.

<sup>273</sup> 519 U.S. 102 (1996).

<sup>274</sup> *Id.* at 128.

analysis . . . . Nevertheless, “[m]ost decisions in this area,” we have recognized, “res[t] on an equal protection framework,” . . . as M. L. B.’s plea heavily does, for, as we earlier observed . . . due process does not independently require that the State provide a right to appeal. We place this case within the framework established by our past decisions in this area.<sup>275</sup>

Perhaps asking whether and why equality and due process converge is a bit like asking if geometry and algebra are ultimately about the same thing, differently addressed. I do not search here for a theory of everything that explains why quite different considerations (or are they?) converge. I note in passing that some may believe that we do not understand statements or arguments unless we understand all their deductive consequences. If so, do we also need to know all the sources—in this context, the antecedent arguments—from which these statements and arguments derive? At the very least, if an outcome “contains” all its antecedents, it generally can’t hurt to know them. If gay persons, for example, are denied some forms of government employment, the situation is incompletely understood, at least from a constitutional standpoint, unless it is seen as being (at the least) an invasion of basic liberties, *and* an assault on equality, *and* an injustice. In this case, outcomes and their converging argument sources are embedded within each other.

Some illustrations, actual and fanciful, should help clarify what we do, and what we ought to do, when we encounter converging arguments and wish to choose among them. The search for selection criteria keeps this from simply being a series of constitutional vignettes.

#### A. *POLICE DEPARTMENT OF CHICAGO V. MOSLEY*: THE ENTANGLEMENT OF EQUALITY AND LIBERTY

In *Police Department of Chicago v. Mosley*,<sup>276</sup> the United States Supreme Court decided a case involving a content-based restraint on speech, but relied—so it said—on the Equal Protection Clause to strike it down.<sup>277</sup> A city ordinance prohibited picketing around school sites, but exempted

<sup>275</sup> *Id.* at 120. The Court held in *Griffin v. Illinois*, 351 U.S. 12 (1956), that an indigent convict had to be provided with a trial transcript in order to vindicate his rights under Illinois law. *Id.* at 19–20. Justice Black, announcing the judgment of the Court, said, “Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” *Id.* at 17 (citing *Chambers v. Florida*, 309 U.S. 227 (1940)). These and related cases are discussed in Karlan, *Equal Protection*, *supra* note 159, at 480–83.

<sup>276</sup> 408 U.S. 92 (1972).

<sup>277</sup> *Id.* at 102.

peaceful labor picketing.<sup>278</sup> I want to be clear on exactly what question I raise here: it is not just about how free speech, especially freedom from content regulation, is entangled with equality; today this seems obvious.<sup>279</sup> It is about why the Equal Protection Clause was invoked as the main constitutional text to apply, rather than the First amendment as an only theory. Just why the Court chose equal protection as the prime route is unclear, and, given the topic here, that is the core issue for present purposes. Perhaps it saw the dispute as a “civil rights case” of sorts: the picketer was an African-American complaining of racial discrimination at the school he was picketing. His sign read: “Jones High School practices black discrimination. Jones high school has a black quota.”<sup>280</sup> He was a federal postal employee, but this had no bearing on the case. The opinion does not explain what his claim was based on, and I have done no historical investigation. The Court might have seen the situation as a civil rights case, but Justice Marshall’s opinion didn’t openly turn on the merits of Mr. Mosley’s claim of racism or on his race.<sup>281</sup> In any case, the Equal Protection Clause is not the only clause relevant to “civil rights” cases.

Another possibility is that the case “presented” as particularly equality-laden because the content distinction took the form of blatant favoritism of labor picketing over all other forms. On the other hand, the equality turn bore the possible disadvantage of pointedly suggesting the option of a total ban on picketing—a familiar all-or-nothing quandary. The overbreadth problem of a total ban would be serious,<sup>282</sup> and overbreadth entails issues of equality—but the equality problems within a total ban might be enshaded.

Of course, the opinion mentioned the First Amendment because it *had* to: the equal protection argument would almost certainly not have worked without a trigger for heightened scrutiny.<sup>283</sup> Absent suspect classifications,

<sup>278</sup> *Id.* at 92.

<sup>279</sup> It wasn’t always. See Geoffrey R. Stone, Kenneth Karst’s *Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37 (2008). See generally Karst, *supra* note 116.

<sup>280</sup> *Mosley*, 408 U.S. at 93.

<sup>281</sup> See *id.* at 92–102.

<sup>282</sup> See Karst, *supra* note 116, at 38–40 (noting the criticism that the Court’s use of equality left it open to the government to ban all picketing).

<sup>283</sup> For a discussion of this intersection between equal protection doctrine and the First Amendment, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1079–81 (7th ed. 2004) (observing that “[a]lthough the analysis of First Amendment classification under the equal protection guarantee is not common, it is important to remember that it is always permissible to review such laws under the guarantee. . . . This form of analysis [in *Mosley*] may offer some benefits in decisions where the Court feels that the classification in terms of the fundamental right is not permissible but, for some reason, is unwilling to interpret the substantive guarantee of the First Amendment in terms of the state activity involved in the case.”). The phrase “for some reason” is of course occasioned by the opacity of

the only clearly acknowledged official route for such equal protection scrutiny is a classification involving impacts on a fundamental right or a “liberty interest,” although there are cases involving heightened equal protection scrutiny that do not fall into these bins.<sup>284</sup> (This is, once again, the “fundamental rights / interests branch” of equal protection.)<sup>285</sup>

Because of this *conceptual* connection between the “alternative” argument structures—equal protection and free speech—the choice problem is not quite as stark as one might find in other cases: the two arguments are not only not fully independent of each other, they are inextricably connected because there is no other well-established way for *Mosley* to be a smoothly successful equal protection case (for the claimant) without the help of the First Amendment. Given existing doctrinal constraints, free speech must be involved in the decision, whether equal protection is mentioned or not. In this sense, one might argue that there really wasn’t “more than one ground” for the decision: it was all the same argument, with different facets emphasized at different points. But this still leaves us with having to explain why one way of addressing the situation—which emphasized one particular facet—was selected rather than the other, in the face of their strong linkage.<sup>286</sup> The “content doctrine” is an equality doctrine—but does it require the Equal Protection Clause as a crystallized mechanism to defend against unequal impairments or facilitations of speech opportunities?<sup>287</sup> Why wasn’t Ockham’s razor taken to the (arguably) superfluous equal protection framework?

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the Court’s opinion. Also, if the Court is indeed unwilling to apply substantive First Amendment protections, triggering strict scrutiny under the Equal Protection Clause would be problematic.

<sup>284</sup> There are several prominent exceptions in which the Court, absent suspect classifications or classifications involving impairments of fundamental rights or liberty interests, still managed to strike down government action, ostensibly under the “rational basis” test. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (vindicating the interests of mentally impaired persons); *Romer v. Evans*, 517 U.S. 620 (1996) (vindicating the interests of gay persons by striking state-imposed burdens on opportunities to secure rights). Recall also the discussion of *Reed v. Reed*, 404 U.S. 71 (1971). See *supra* text accompanying notes 167–169. The Court’s insistence on referring to “rational basis” analysis while doing what it characteristically does in strict or intermediate scrutiny cases is itself a matter of choice of argument form, although the operational rule underlying the two formulations is the same in both.

<sup>285</sup> For an account of this aspect of equal protection jurisprudence, see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 791–919 (3d ed. Aspen, 2006). This mode of triggering heightened scrutiny in equal protection cases extends both to “fundamental interests” thought to derive from the Equal Protection Clause, and fundamental rights or liberty interests inferred via a substantive due process analysis.

<sup>286</sup> Even with less tightly linked arguments, if two or more argument structures reach the same outcome one would be well-advised to at least consider whether they have something important in common, even if at a fairly high level of generality.

<sup>287</sup> “[T]he principle of equality lies at the heart of first amendment’s protections against government regulation of the content of speech.” Karst, *supra* note 116, at 21. But Professor Karst implicitly



In the abstract, there is nothing surprising about this confluence of equality and free speech: *every* regulation of the content of speech is at once about speech *and* about equality.<sup>288</sup> (So also is every time, place, and manner regulation, but perhaps less vividly so.) And the fact remains that the Court *said* it was deciding on a certain ground. Even if the Court was confused about its own basis for the decision, we have a case in which the Court chose to describe what it was doing in one way (using one argument) rather than another (using the “other” or even both arguments), and the two modes of talk obviously weren’t identical in sense meaning. (And if the Court was confused, this requires explanation too.)

Justice Marshall was certainly well aware of the equality argument’s link to free speech. Writing for the Court, he noted that “the equal protection claim . . . is closely intertwined with First Amendment interests . . . .”<sup>289</sup> But this is a somewhat misleading way to put it, as if one could, given some topological aptitudes, untangle the “intertwined” cords and attend to one of them while ignoring the other. This can’t be done because the cords are conceptually connected by the logic of the governing constitutional doctrine; they are not merely adventitiously enmeshed. The “one” argument (equal protection) does not survive without the “other” (free speech). Strict scrutiny in *Mosley* required the Court to find a classification based on how the claimant exercised his fundamental right to speak on whatever topic he chose—and classifying in this way just *is* regulating the communication on the basis of its content. There were no other fundamental anythings at issue: no suspect classifications; no singling out of specific groups for special burdens or abuse—the latter framework (possibly) yielding a heightened scrutiny version of the ordinarily empty rational basis standard;<sup>290</sup> and no other basis for firming up the rational basis test.<sup>291</sup> Jus-

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raises the Why-the-Equal-Protection Clause question himself: “Despite the Court’s choice of an equal protection ground for decision, its opinion speaks chiefly to first amendment values and primarily cites first amendment cases as authority.” *Id.* at 27. First Amendment values, however, *conceptually* include equality notions. Moreover, as managed in the First Amendment, these notions embed “a presumptive prohibition against government control of the content of speech.” *Id.* at 31. Content discrimination, to be sure, is not the only form of speech regulation to embed equality considerations of some sort, as Karst argues extensively.

<sup>288</sup> Since, as commonly said, all laws classify in some way, there is, in bare theory, an equal protection argument in the wings for any complaint of constitutional invalidity.

<sup>289</sup> *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>290</sup> *See Romer v. Evans*, 517 U.S. 620 (1996). Nor was there in *Mosley* any evidence of hidden purposeful racial discrimination (which could have resulted in invalidation on purely equal protection grounds)—no hidden animus toward speech by black persons, or certain kinds of speech by black persons, or speech by Mosley himself.

tice Marshall himself recognized that its formulation of the equal protection argument was not just “closely intertwined” with the First Amendment considerations but *rested* on it:

The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. . . . Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.<sup>292</sup>

Why not: “Therefore, under the First Amendment, it may not stand”?

True, there is some value illumination and reinforcement in the Court’s reliance on both equal protection and free speech. The opinion reminds us that all content discrimination inherently implicates equality issues as an intrinsic aspect of *what it is to be a free speech matter*. Assuming speech isn’t completely wiped out, equality impairments are a logically connected aspect of speech constraints.<sup>293</sup> Indeed, it is a logically connected aspect of any liberty constraint, although this is not always of constitutional dimension.<sup>294</sup>

Is this enlargement of perspective the reason for the Court’s mode of argument, and if so is it a good reason?<sup>295</sup> Simplicity and directness pull

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<sup>291</sup> As indicated, in recent years, the Court occasionally pumps up the rational basis test, although not always as a way station toward recognizing a semi-suspect classification, as in *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>292</sup> *Mosley*, 408 U.S. at 101–02. Of course, it isn’t just the Equal Protection Clause that requires “narrow tailor[ing]” when First Amendment interests are “affected” (in certain ways); the First Amendment on its own requires certain kinds of First-Amendment-affecting laws to be narrowly tailored, without a boost from the equal protection clause.

<sup>293</sup> See Karst, *supra* note 116. This is clearly so for regulations that distinguish among persons and groups, but one might imagine a total shutdown of all communication everywhere. Some might say that this reflects an assumption of inequality between government and nongovernment: why should the content preferences of the lawgiver one outweigh those of the subject?

<sup>294</sup> See, e.g., Karlan, *Foreword, supra* note 23, at 1449 (referring to the “use of equal protection decisions to inform conceptions of liberty” in discussing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)). This is certainly not to say that the clauses are even extensionally equivalent, never mind identical in sense meaning. In some contexts, depending on the senses of “equality” and “liberty” being used, they are quite different. Cf. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) (stating that: “Since its inception, the Equal Protection Clause has served an entirely different set of purposes from the Due Process Clause. The Equal Protection Clause is emphatically not an effort to protect traditionally held values against novel or short-term deviations.”). For a critique of aspects of Sunstein’s analysis, see William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000).

<sup>295</sup> Karst critiques the view that “[f]raming the problem of free expression in equal protection terms” confuses ideas of liberty generally and of First Amendment foundations in particular. Karst, *supra* note 116, at 21. But one can quarrel with the way he puts part of his response:

the other way. Invoking the First Amendment would have been the simplest way to reach the same outcome, and it could have been done without invoking *or even mentioning* equality or the Equal Protection clause. To be sure, it would have been entirely appropriate to say that part of the very evil of content regulation is its unequal treatment of speech and speakers. All constitutional protection of individual rights promotes equality in some respects (although it may impair equality in others).<sup>296</sup> Nevertheless, the First Amendment does not take its sustenance from the Equal Protection Clause alone; free speech is often bonded with more general ideas of equal treatment.<sup>297</sup>

It seems unpersuasive to argue that the Court's equal protection framework was, somewhat paradoxically, the most illuminating way *at the time* to broadly capture the core of maximum harm to free speech. The easy phrase, "content regulation of speech is presumptively a violation of the First Amendment" (qualifications left aside) was perhaps not as firmly established within the First Amendment canon as it would be later. Indeed, *Mosley* is often the first case pointed to when writers refer to the explicit recognition of the concept of content regulation as a trigger for heightened scrutiny.<sup>298</sup> But this history explains little or nothing. Devolving to the

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Although the critics' preference for the first amendment as a ground for decision is perfectly sound, their argument gives life to a false assumption about the amendment's meaning. The principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the "central meaning of the First Amendment."

*Id.* As I argue in the text, however, the First Amendment on its own logically embeds an equality principle and cannot rightly be contrasted with it—or at least not with all forms of equality. If so, it is more confusing, rather than less so, to invoke the Equal Protection Clause, which is a particularized vehicle for specially protecting *certain* forms of inequality. However, Karst may have meant to refer to equality *generally*, rather than the Equal Protection Clause ("the amendment") in particular; in the same paragraph, he invokes "the equality principle."

<sup>296</sup> *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."). In the context of free speech, preventing someone from being penalized for expressing a certain viewpoint promotes her equality as compared with those holding other viewpoints who are not penalized. (But tolerating racist speech has its anti-egalitarian impacts.)

<sup>297</sup> Equality itself bears strong links to fairness, justice, autonomy, and various forms of utility. Ultimately, finding inequalities in the speech area have to do with our rankings of speech and of impairments of it. Thus, the inequality inherent in permitting the punishment of speech that incites unlawful conduct while protecting advocacy of other sorts is justified by the differing interests of the state in the varying situations and, possibly, by the assignment of different values to the speech in those situations. Perhaps this necessary interplay reveals the "emptiness" of equality, but there is no reason to pursue the matter here. On the supposed emptiness of equality considerations, compare Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), with Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983), and Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983).

<sup>298</sup> *E.g.*, CHEMERINSKY, *supra* note 285, at 932.

Equal Protection Clause as a more familiar route would still founder on the need for a heightened scrutiny trigger—and the role of content regulation, however hazy at that point, was still required.<sup>299</sup>

Moreover, it was clear enough from prior cases that the Court took a dim view of government action against expressions of opinion, and that it had not been using the language of equality to say this. *New York Times v. Sullivan*,<sup>300</sup> for example (decided eight years before *Mosley*), was obviously founded on hostility to government retaliation against speech content. And the Seventh Circuit had said in *Mosley*:

We conclude that [the ordinance] denies absolutely plaintiff's right to express his views by the mere carrying of a sign as he walks upon the public sidewalk adjoining the school during school hours. It is, therefore, patently unconstitutional on its face. [¶] Having determined that [the ordinance] is unconstitutional on its face, we do not deem it necessary to examine plaintiff's other constitutional contentions.<sup>301</sup>

These unexamined “other constitutional contentions” included an equal protection argument, which had been formulated by Mr. Mosley, as: “The anti-picketing and demonstration ordinance violates the Equal Protection Clause because it permits peaceful picketing of a school only when it is involved in a labor dispute.”<sup>302</sup> This addresses content. So, it seems unpersuasive to say that some version of the rule that content regulation is presumptively invalid had not crystallized.

Whatever the explanation for the Court's opinion, it displays, as I suggested, some of the benefits of inquiring into alternative but converging argument structures—and sometimes in piling them on. Different arguments reflect different aspects—including different *value* aspects—of whatever we are arguing about, and these variant aspects often map onto different value positions. It is easy to imagine studying the First Amendment and, absent *Mosley*, simply never think consciously of the fact that all First Amendment cases—especially content regulation cases—raise non-

<sup>299</sup> The Seventh Circuit's opinion in *Mosley* had addressed “pure” First Amendment arguments, on the one hand, and an equal protection argument, on the other, but the First Amendment planks did not refer to “content discrimination” *in haec verba*. *Mosley v. Police Dep't of Chicago*, 432 F.2d 1256, 1258 (7th Cir. 1970), *aff'd*, 408 U.S. 92 (1972). Still, the Circuit Court did say that the ordinance “denies absolutely plaintiff's right to express his views,” which does not facially sound in equal protection. The overall emphasis, however, was on “overbreadth” and “vagueness.” *Id.* at 1259.

<sup>300</sup> 376 U.S. 254 (1964) (ruling that public officials must prove malice—among other things—in order to recover damages for false defamatory statements).

<sup>301</sup> *Mosley*, 432 F.2d at 1259.

<sup>302</sup> Brief for Appellant at 24, *Police Dep't of Chicago v. Mosely*, 408 U.S. 92 (1972) (No. 70-87, 70-5106), 1971 WL 133358.

trivial equality issues, and might, in theory, be serious equal protection cases in the constitutional sense. That is an aspect of the First Amendment that is certainly *there* for all to see, but it is usually unnoticed and if it is noticed, is not dealt with as a matter for the Equal Protection Clause. If equality is centrally implicated in the very idea of content (or any form of) discrimination, the connection is worth thinking about, at least from time to time, and indeed the very formulation of the First Amendment doctrine as involving “content *discrimination*” reflects this.<sup>303</sup> Focusing on content regulation’s concurrent facets is a kind of “conceptual triangulation” in which using different but overlapping frameworks brings out features of a situation that had been, in a way, camouflaged.

In this way, something may be gained beyond the persuasiveness of rhetorical excess, by piling on the converging theories. Thinking about equality helps explain to some extent *just why* content regulation is so frowned upon within First Amendment adjudication: it makes major distinctions in how people are treated, based on their views, or at least their expressed views, or on their subject matter interests, or on their respective personal identities or associations. Pursuing multiple perspectives gives us greater comprehension of just what it is we are dealing with—a point that is easily exemplified in any field of thought. Realizing that three times two equals six does not necessarily bring to mind that two times three also equals six, but when we do realize it for the first time, it counts as a genuine (if very simple) insight about the nature of sixness—and about number itself.

If so, perhaps we should be asking why the Court *does not* invoke the Equal Protection Clause or equality generally in content discrimination

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<sup>303</sup> *E.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 57 (1986) (“This selective treatment [concerning permissible location of theatres] strongly suggests that Renton was interested not in controlling the “secondary effects” associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit.”) (Brennan, J., dissenting).

More generally, this claim reflects the idea that in some cases, the elements of a constitutional free speech claim overlap those of a constitutional equality claim. Of course, there are instances in which the elements of a constitutional speech claim, if recognized, either negate a constitutional equality claim or, more generally, work against some equality standard. Think, for example, of upholding the many forms of “hate speech” that do not qualify for categorical exclusion. Under prevailing doctrine, satisfying the elements of a free speech claim involving purported hate speech would make it difficult to formulate a successful equal protection claim involving any form of heightened scrutiny, despite the pull of a more general “promoting equality” justification. Instead of a concurrence between liberty (in some form) and equality (of some sort), we have, at least, an apparent conflict between them. There may also be internal conflicts within the concepts of freedom (of speech, or anything else) and equality. *Cf.* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 *SAN DIEGO L. REV.* 527 (2006) (discussing the idea of conflicts between freedom of speech and equal protection).

cases.<sup>304</sup> Why not use Justice Marshall's argument structure in *Mosley* all the time? One explanation for omitting equality references might be that, for most American observers, most content infringements *present* themselves more as straightforward one-on-one (the government versus me) speech intrusions than as unequal treatment, despite the logical connection between the very ideas of content regulation and equality. Our equality-sensitive antennae react most strongly (though not exclusively) to animus against defined groups.<sup>305</sup> In *Williams v. Rhodes*,<sup>306</sup> for example, the Court seemed to rest on *both* First Amendment doctrine and the Equal Protection Clause (though the latter was favored). The Court invalidated a state's restriction of the general election ballot to parties that had garnered at least 10% of the vote in the preceding race for governor or collected signatures on nominating petitions amounting to 15% of those voting in that election.<sup>307</sup> The associational rights are obvious—but so too is the favoritism extended to the entrenched “old-boy” networks. Writing for the Court, Justice Black remarked that:

No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. . . . The State has here failed to show any “compelling interest” which justifies imposing such heavy burdens on the right to vote and to associate.<sup>308</sup>

<sup>304</sup> Although time, place and manner regulations also raise equality issues, the nature of the distinctions made seem quite different from those involved in burdening some content and not others. It would not be to the point to probe this aspect of First Amendment doctrine. I note only that, whatever the differences in the form of discrimination, some observers recommend the same standard of review for both content and non-content impairments. See, e.g., Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142–50 (1981) (discussing a unified system of analysis for First Amendment cases using a compelling interest standard).

<sup>305</sup> See generally Karlan, *Foreword*, *supra* note 23 at 1460 (“As an empirical matter, the Court is most likely to recognize rights which reflect the practices of large numbers of people whose lives the Court otherwise finds worthy of respect.”); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (“From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history. The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. . . . The two clauses . . . operate along different tracks.”).

<sup>306</sup> 393 U.S. 23, 31 (1968).

<sup>307</sup> *Id.* at 24–25, 35.

<sup>308</sup> *Id.* at 31. Justice Black, however, framed the doctrinal discussion by asking whether Ohio's system “result[ed] in a denial of equal protection of the laws.” *Id.* at 30. For additional analysis, see Karst's discussion of “The Equality Principle as a Preferred Ground.” Karst, *supra* note 116, at 65–68.

Still, we do not always view government regulation of content as deriving from a supposed inequality of status between government and ourselves, rather than between ourselves and others who are treated better. To be sure, explaining exactly why things “present” themselves one way rather than another (or in some mixture) is often very difficult. It seems to be a function both of deep, wired-in perceptual structures, and of the adventitious ways in which a given culture leads us to frame our value judgments. To an extent, what is less patent to us at any given time is what we have *made* less patent to ourselves. Perhaps the current reason we do not see content regulation primarily as an equality issue is that equality notions are glazed over by the emphasis on liberty. But this just refashions the question: Why did the doctrine of the priority of liberty develop that way in the first place?<sup>309</sup> “This is just the way we see things” is rarely a full explanation, never mind a justification, for much of anything, but it can be a starting point for tracking the influence of value frameworks on perceptual characterizations and the formation of constitutional (and other) arguments meant to reflect and reinforce those values, whether by highlighting or shadowing.<sup>310</sup>

B. *ROCHIN V. CALIFORNIA*:<sup>311</sup> “LEAV[ING] JUDGES AT LARGE”<sup>312</sup>

Sheriff’s deputies in Los Angeles County entered Mr. Rochin’s home and saw two capsules on a nightstand.<sup>313</sup> When asked what they were, Rochin swallowed them. The deputies took him to a hospital, and a physician

<sup>309</sup> The parties’ briefs may influence an opinion’s structure, but the Equal Protection Clause was certainly not the exclusive mode of argument presented in Mosley’s behalf. See Brief for Appellant, *supra* note 302. Equal protection arguments might have been particularly salient at the time because the notion “the new equal protection” was in the air. That phrase referred, in part, to what is now called “the fundamental rights branch” of equal protection adjudication. It may also refer to tightened means-end analyses under the rational basis test. See generally Gerald Gunther, *Foreword: In search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8, 23 (1972).

<sup>310</sup> Determining exactly *why* some aspects of some situations “present themselves” more powerfully than other aspects—as when they bear varying degrees of “salience”—is a major aspect of studying how and why we choose among converging conceptual systems. Human thought and behavior are in general influenced by complex interactions among genetic and nongenetic influences, including cultural frameworks of perception and adventitious conditioning. On the technical meaning of “salience” in cognitive psychology, see SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 145 (1991). See also Daniel M. Wegner & John A. Bargh, *Control and Automaticity in Social Life*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 446, 469 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (discussing selection of information for “attention and consideration out of the great amount of available stimulation, because they automatically grab one’s attention”).

<sup>311</sup> 342 U.S. 165 (1952).

<sup>312</sup> *Id.* at 170. My thanks to Ron Garet for suggesting the use of *Rochin* in this context.

<sup>313</sup> *Id.* at 166.

gave him an emetic via a stomach tube after being directed to do so by the police.<sup>314</sup> (I have not investigated whether the physician or the police officers were ever professionally called to task for this; at the time, neither was very likely.) Rochin vomited and the retrieved capsules were found to contain morphine. He was convicted and lost all his state post-conviction efforts, although several appellate judges expressed outrage at the law enforcement performance.<sup>315</sup>

In finding a violation of due process, Justice Frankfurter, writing for the majority, said:

Applying these general considerations<sup>316</sup> to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience.”<sup>317</sup>

There was not much more to it than that, and some might object that the Court’s presentation was too flabby to be called an “argument,” but that is what I will call it. To anchor his opinion, Justice Frankfurter did refer to Justice Cardozo’s well known formulation referring to matters so embedded in American traditions and conscience that they rank as fundamental.<sup>318</sup> Justice Frankfurter did not reach his “shocks the conscience” standard until later. The majority’s argument structure, however, is quite different from the one offered by Justices Black and Douglas, concurring in separate opinions: they argued that the deputies’ actions violated the privilege against self-incrimination. Then and now, the self-incrimination argument, as a matter of doctrine, doesn’t work on these facts—the evidence unearthed is not testimonial—but the relevant point for us is that Justices Black and Douglas believed that it worked and that it took them to the

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<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 166–67.

<sup>316</sup> Justice Frankfurter’s reference to “general considerations” is unclear. The quoted passage appears in a paragraph that begins:

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the due process clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

*Id.* at 172.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 169. The hunt for tradition, custom, and history occurs not only in deriving nonenumerated rights, but in filling out the scope of rights we view as explicitly mentioned and which thus qualify as candidates for fundamental rights status.



same result as did the majority's argument. Thus the questions: Why would one choose the self-incrimination argument structure over the notion of substantive due process, resting as it did on "conscience-shockingness"? Why would one do the reverse? Why didn't Justices Black and Douglas concur with Frankfurter's outcome and his rationale? They could have added a notation that the self-incrimination argument structure might have been used as a concurrent ground of decision—but even then, one might ask, Why bother? Of course, one could equally well ask why Justice Frankfurter preferred his approach.

Justice Black's main complaint, at bottom, was that the Frankfurterian mode of argument gave judges way too much power.<sup>319</sup> He thus agreed with Justice Douglas's preference for the more specific-sounding terms of the privilege against self-incrimination. Frankfurter did not offer his views on the self-incrimination theory, but presumably rejected it on fairly simple grounds: the self-incrimination clause of the Fifth Amendment had not yet been ruled applicable to the states, and he evidently felt no special pressure to so rule; in any case it was inapplicable because the circumstances involved no testimonial compulsion.

There are still more questions: Why did Justice Douglas write separately from Justice Black, not even registering a concurrence with his opinion along with his separate statement? Legal historians are more informed about this than I, but, to speculate, Justice Black said a lot of things, particularly about his view that the Fourteenth Amendment's restrictions on states "incorporated" the first eight amendments and thus constrained the Court from exercising "unlimited power to invalidate laws."<sup>320</sup> Justice Douglas, although sympathetic to the total incorporation theory, may not have endorsed all of Justice Black's sweeping critique of the majority's work with the Due Process Clause.<sup>321</sup> Moreover, Justice Douglas specifically attacked Justice Frankfurter's claim that Mr. Rochin's involuntary stomach-pumping procedure fell outside the "decencies of civilized con-

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<sup>319</sup> For an explicit discussion of various rationales for selecting among the converging arguments in *Rochin*, focusing heavily on the idea of the proper scope of judicial discretion, see DANIEL W. SKUBIK, *AT THE INTERSECTION OF LEGALITY AND MORALITY: HARTIAN LAW AS NATURAL LAW* 14–40 (1990).

<sup>320</sup> *Rochin*, 342 U.S. at 176 (Black, J., concurring). The total incorporation theory holds that the Bill of Rights (for our purposes, the first eight amendments) was meant to be applied to the states, not just the federal government, by the terms of the Fourteenth Amendment.

<sup>321</sup> This is suggested by Justice Douglas's majority opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (ruling that Connecticut's ban on the sale of contraceptives violated the right of privacy of married couples); Justice Black dissented. Although Justice Douglas referred at length to the Bill of Rights, his view that the Due Process Clause protected the right of married couples to acquire contraceptive devices did not seem to be based on an incorporation theory. *Id.* at 482–86.

duct” formulation of “due process.”<sup>322</sup> Justice Douglas observed that the evidence excluded in this case would be admissible in the vast majority of states, a fact that, for him, rendered the tradition-oriented notion of “decent civilized conduct” inapplicable.<sup>323</sup>

Of course, the debate over the merits of “total” versus the ill-named “selective incorporation” accounts of the meaning of the fourteenth amendment presents a distinct selection-among-converging arguments situation. As far as current doctrine is concerned, the adjudicatory outcomes seem not to turn on whether the Fourteenth Amendment is thought to incorporate the first eight amendments *in haec verba* (adding or substituting the requisite “no state shall” language) or instead authorizes an independent fundamental rights approach that considers each claim of right as it comes up. Within the latter framework, the Bill of Rights serves solely—but importantly—as evidence of what we should recognize as a fundamental right or a liberty interest.<sup>324</sup> (It may be pretty persuasive evidence.) I note in passing that the fundamental rights approach has resulted, coherently or not, in applying exactly the same doctrines against both state and federal government. In theory, the non-incorporation approach leaves open the possibility of diverging state and federal bodies of precedent. (To some extent, the full incorporation theory does also.) The only “choice among converging” arguments left today is thus to argue either that the selfsame body of doctrine being applied at both levels has a common origin in the exact terms of the Bill of Rights, or that the doctrine, when constraining the states, sprang (in bits and pieces) from the Fourteenth Amendment considered mostly “on its own.” It is not clear how meaningful this distinction is. I do not pursue this particular debate about alternative interpretive paths any further.<sup>325</sup>

<sup>322</sup> *Rochin*, 342 U.S. at 177–78 (Douglas, J., concurring).

<sup>323</sup> *Id.* at 178.

<sup>324</sup> On the formulation of the fundamental rights approach, see Justice White’s majority opinion and Justice Harlan’s dissenting opinion in *Duncan v. Louisiana*, 391 U.S. 145 (1968). As Justice Harlan observed in *Duncan*, the application of the exact same doctrinal “details” in both the state and federal realms is not a straightforward consequence of addressing the Fourteenth Amendment as “stand[ing] . . . on its own bottom.” See *id.* at 181 (Harlan, J., dissenting) (discussing incorporation “jot for jot”). The “own bottom” language is from Justice Harlan’s concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

<sup>325</sup> Although interpretive arguments are found in Supreme Court opinions from time to time as explanations or rationales for the formulation of various alternative decisional arguments, considering them would distract from the main goal of examining selection among the converging doctrinal alternatives. It is sometimes noted in the literature that, for many issues, interpretive paths converge. See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987) (Fallon’s “‘constructivist coherence theory’ holds that the various categories of constitutional argument, though distinct, are sufficiently interconnected so that it usually is

Finally, I note that at the end of his opinion, Frankfurter said (quoting language from another case): “[T]he Constitution is ‘intended to preserve practical and substantial rights, not to maintain theories.’”<sup>326</sup> It’s not entirely clear what function this not-quite-a-disavowal-of-theory served. His patience might have been tried by having had to defend his due process theory while listening to the self-incrimination theories of Justices Black and Douglas. After all, if the actions “shock the conscience,” that very reaction tends to reflect impatience with “Well, now, let’s examine this a bit further and see exactly what the problem is, and *why* it shocks the conscience.” Perhaps Justice Frankfurter felt it was one of those situations where it is morally offensive to pursue careful analysis—as when someone proposes a debate on the merits of genocide. And perhaps he feared an inurement to evil—or even the dissipation of the very perception of evil—arising from such a detached inquiry. If things are bad enough, trying to explain just *why* they are so bad can make things worse. In any case, Frankfurter’s dismissive remark about “maintain[ing] theories” is simplistic, at least for scholarly purposes, if not for opinion-writing.<sup>327</sup> In many ways, one preserves rights and promotes their reign precisely by their support in constitutional, moral and political theory. Selecting among converging arguments rests on finding variations in the nature and degree of such support—on detecting which ones best maintain and reinforce certain highly-ranked value frameworks. This is so whether or not the Court explicitly refers to value-reinforcement.

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possible for a constitutional interpreter to reach constructivist coherence—a reflective equilibrium in which arguments of all five types, following a process of reciprocal influence and occasional reassessment, point toward or at least are not inconsistent with a single result.”).

<sup>326</sup> *Rochin*, 342 U.S. at 174.

<sup>327</sup> Although *Rochin* stands, its distinctive end-of-the-discussion signal, “shocks the conscience,” has been said to be “strictly limited . . . to cases of physical assault on a suspect’s person.” *United States v. Penn*, 647 F.2d 876, 880 (9th Cir. 1980). The “standard” is not very illuminating, given the lack of specified criteria, and this may be one reason for such limitations. On the other hand, *Rochin* not only endures, the “shocks the conscience” formula is, according to Whitebread and Slobogin, “the Court’s standard way of describing the scope of substantive due process protection.” CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 101 (Foundation Press 4th ed. 2000). On this view, Justice Frankfurter might have thought that his shocks-the-conscience formula covered a variety of strands and comprehended non-testimonial compulsion of certain sorts.

## C. THE FRANCOPHOBIC ASSASSIN SPEAKS (OR NOT)

As we saw, because of Sandrine's hatred of all things Gallic, she kills the heir to the French throne, who resides in the United States.<sup>328</sup> She makes it clear before, during, and after the assassination that her action embodies a message that Frenchness is intrinsically and instrumentally evil, and that such evil must be negated ("Anyone who fails to act against it acts for it"), whatever the cost.<sup>329</sup> She is arrested and charged with murder one.

At the preliminary examination, she presents a First Amendment claim, arguing that punishing her for this homicide would constitute a penalty based on the content of her speech. As we saw, this claim should not generate strict scrutiny because the homicide laws do not target speech. Under *United States v. O'Brien*,<sup>330</sup> however, the law's application to the (ordinarily noncommunicative) conduct she has designated as communicative would still draw scrutiny with punch.<sup>331</sup> So, she loses; the court rules that there is an important interest in protecting persons against termination of life without due process of law, and that this overcomes the free speech claim because even the most rigorous narrowing constraint—that there must be no less intrusive but equally effective way to fulfill this goal—is satisfied. (*O'Brien's* operational narrowing constraint is probably less rigorous than the "less intrusive" language would signal today.) Without a system of criminal punishment, or some other severe sanction, the purposes of criminalizing homicide (or anything else) are unacceptably diminished.

What is wrong with this story? Although the assassin was sure to lose even if a court thought her First Amendment claim was relevant, most courts would be far more likely to reject the First Amendment's very appli-

<sup>328</sup> It is reported that there is a lawyer in India who some believe is next in line for the French throne. Henry Chu, *Bourbon of Indian Vintage*, L.A. TIMES, Jan. 10, 2008, at A1, available at <http://articles.latimes.com/2008/jan/10/world/fg-bourbon10>.

<sup>329</sup> Such Francophobia is no laughing matter. According to the Oxford English Dictionary, it was said, in SPECTATOR, Oct. 20, 1961, at 532, that "Federalist Francophobia led to the passage of the Alien and Sedition Laws." *Francophobia*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); see also GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 4–78 (W. W. Norton & Co., 2004) (discussing, in Chapter I, "The 'Half War' With France: The First First Amendment"). Sandrine's motivations had no connection with France's refusal to endorse the American program in Iraq pursued by President George W. Bush.

<sup>330</sup> 391 U.S. 367 (1968).

<sup>331</sup> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; 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." *Id.* at 377. Although framed more rigorously, the final plank is viewed as a requirement of narrow tailoring short of a full-fledged least-restrictive-alternative standard.

cability, and perhaps to denounce its very invocation. For those courts, it would not be enough that at day's end, the First Amendment does not insulate the murderer against prosecution, conviction, and punishment; free speech can have no purchase here at all: it's a non-starter—it doesn't belong in the picture. It is morally and constitutionally offensive to say otherwise. It is quite mistaken to think that all communication among sentient beings comes armed with moral or constitutional value. There is no communications imperative and some people should shut up.

But how can this *it-can't-be-speech* account be doctrinally correct? After all, there is nothing in the bellwether case, *O'Brien*, that provides even a hazy edge beyond which we can no longer designate behavior as communicative. Although the Court only accepted *arguendo*<sup>332</sup> Mr. O'Brien's "By-this-burning-I-am-speaking" claim, the Court now seems firmly committed to recognizing *at least some designations* of conduct as speech. But why not *all* of them—at least assuming the record shows that a communicative act was intended and occurred? The Court has never explained its remark, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."<sup>333</sup> But why can't it accept that view? There is no apparent *conceptual* limitation on the idea of designating conduct—even lethal processes of communication—as speech. If the conduct designated as speech is sufficiently risky or harmful, government will have an overwhelming interest in preventing it. However uncertain the "sufficiently risky or harmful" qualification, homicide—even just one—is easily harmful enough. So why would we be unlikely to tolerate, *even when it is doomed to lose*, a First Amendment protective cloak for "expressive homicide"? The cloak, after all, proves to be thin and ineffective: the First Amendment claim is *readily* defeated.

To work this out, consider what would follow from taking seriously the idea that the criminalization of homicide should be carefully scrutinized whenever it constrains killing that is designated as communicative. A common reaction would be that the claim doesn't *deserve* to be taken seriously: we are simply not dealing with speech that is "covered" by the First Amendment—never mind "protected" at the bottom line; it is offensive to

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<sup>332</sup> *Id.* at 376. "[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the first amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity." *Id.*

<sup>333</sup> *Id.*

grace such conduct with constitutional dignity.<sup>334</sup> Any characterization that grants constitutional merit, in the form of presumptive protection as a fundamental right, to expressive political assassination (or to various other serious crimes) is an abomination within our moral/constitutional system.

This account more or less replicates the brief debate between Chief Justice Burger and Justice Marshall in *Clark v. Community for Creative Non-Violence* (“CCNV”),<sup>335</sup> where the CCNV proposed that homeless persons sleep in a park maintained by the District of Columbia.<sup>336</sup> The sleep-out was designated—at least by CCNV—as a message about the plight of the homeless. The National Park Service, however, applied a no-camping regulation to the plan, which was to set up an array of symbolic tent cities for which a permit had been already issued.<sup>337</sup> The CCNV and some individuals sued to prevent the no-camping regulation from being invoked against sleeping in the tents. The District Court issued a summary judgment for the Park Service, but the Eleventh Circuit reversed. In the end, the Supreme Court reversed, holding for the Park Service.<sup>338</sup>

Chief Justice Burger, concurring, presented a *reductio ad absurdum* argument against accepting the claim that sleeping in the park, if carried out as planned, would be a form of communication within the First Amendment’s ambit.<sup>339</sup> If one were to accept that argument, where would one stop? One would be logically committed to (at least briefly) insulating killings stipulated to be communicative. And even without going as far as claiming that homicide may be speech, it nonetheless “trivializes the First Amendment to seek to use it as a shield in the manner asserted here,”<sup>340</sup> by touting the park sleep-in as speech.

Of course, for *reductio* arguments to work, the inference must be to something that is indeed an *absurdum*. Exactly what is the absurdity? Af-

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<sup>334</sup> On the covered/protected distinction, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89–92 (1982) (explaining that covered speech is all speech that is not categorically or otherwise flatly excluded speech; protected speech is speech that, at the bottom line in given cases, is held immune from content-based regulation). Unprotected speech is covered speech that, as in turns out in a given case, is not immune at the bottom line.

<sup>335</sup> 468 U.S. 288 (1984) (rejecting a First Amendment claim concerning a sleeping-in-the-park demonstration).

<sup>336</sup> *Id.* at 291.

<sup>337</sup> *Id.* at 292.

<sup>338</sup> *Id.* at 292, 299.

<sup>339</sup> *Id.* at 300–01 (Burger, J., concurring).

<sup>340</sup> *Id.* at 301. Although some *reductios* take the form of empirically-based slippery slope arguments, in this case the *reductio* is about logical or conceptual commitment derived from the stance under attack. Such logical *reductios* might accompany slippery slope *reductios*. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

ter all, as we saw, the killer is convicted whether or not the First Amendment characterization is accepted. The speech-protective starting presumption just cannot stand alone against the commanding government interest in keeping people alive; little conceptual effort is required to overthrow the presumption—it isn't *that* protective. And at the end, which presents itself almost immediately after the beginning, you get the intuitively correct result (she's 100% guilty) and the First Amendment gets a boost to boot, for vindicating common sense.

This seems to have been Justice Marshall's position, expressed in a side comment within his dissenting opinion.<sup>341</sup> But in the Burgerian view, although giving free speech a boost is often a good thing, in this case doing so renders the First Amendment complicit in evil: it contaminates free speech values by associating them not merely with evil ideas but with intrinsically evil and maximally harmful acts.

There is in fact little chance that the full Court would ever embrace the First Amendment "defense" of someone like the Francophobic assassin; one doubts that even Justice Marshall would have done so if directly pressed.<sup>342</sup> The convergence of the free speech and no-free-speech arguments does not wash out their strikingly different paths. Within the free

<sup>341</sup> *Clark*, 468 U.S. at 307–08 (Marshall, J., dissenting).

The Government contends that the *Spence v. Washington*, 418 U.S. 405 (1974) approach is overinclusive because it accords First Amendment status to a wide variety of acts that, although expressive, are obviously subject to prohibition. As the Government notes, "[a]ctions such as assassination of political figures and the bombing of government buildings can fairly be characterized as intended to convey a message that is readily perceived by the public." . . . The Government's argument would pose a difficult problem were the determination whether an act constitutes "speech" the end of First Amendment analysis. But such a determination is not the end. If an act is defined as speech, it must still be balanced against countervailing government interests. The balancing which the First Amendment requires would doom any argument seeking to protect antisocial acts such as assassination or destruction of government property from government interference because compelling interests would outweigh the expressive value of such conduct.

*Id.* As noted, however, the maximal requirement of "compellingness" would probably not be imposed under *O'Brien*, given that the homicide proceedings would occur under a law of general application: whatever it *in terms* applies to, it isn't speech.

<sup>342</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (stating that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (stating that "like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices [certain forms of invidious discrimination] are entitled to no constitutional protection"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."). The comment in *Wisconsin v. Mitchell* was, however, peripheral to the ruling. *Mitchell*, 508 U.S. at 489–90. The Court held that Wisconsin did not violate the first and fourteenth amendments by enhancing defendant's penalty for aggravated battery where the motive was race-based. *Id.* at 490. Defendant, however, was not arguing that the harmful conduct was speech, as Sandrine the assassin did. His argument, rejected by the Court, was that the installation of motive as a penalty enhancer punished defendant for his beliefs. See *id.* at 483–84.

speech framework, we sense that the ideal of free speech has been inappropriately applied to unworthy causes, impairing First Amendment coin, and possibly attenuating the standing of free speech (and other) values in our normative system by holding constitutional argumentation up to ridicule. (True, honoring that act of murder reinforced the values of the assassin and her ideological comrades, but, from the overall community's standpoint, avoiding that reinforcement is a gain. Not all value attitudes are of equal value.)

One might think, however, that this debate is over a red herring—that the First Amendment is mistakenly invoked because there is no true communication here; we simply infer the assassin's views based on what she did (perhaps including whatever she was saying about what she was doing at the time). The so-called communication was no communication; we simply figured out her views about French things.

But this is not how I set up the example. The fact that we would have in any event figured out her views doesn't alter the fact that there was a stipulation of meaning. We didn't *simply* infer her views based on what she did; she "expressly" said what she was saying by doing what she did. Simply engaging in conduct enabling an observer to infer the actor's views, motives, or character is, at least in theory, quite different from engaging in the conduct *and* expressly designating a meaning for it, although the message's exact contents may remain hazy.<sup>343</sup> And from the observer's standpoint, learning a person's views by inference from her conduct is just not the same as grasping her communicative stipulation and then viewing the killing as itself embodying the direct communication she promised.<sup>344</sup> Even if the inference is compelling, this does not itself mean that the actions are communicative in the *O'Brien*/First Amendment sense.

The point is that despite the ultimate failure of her First Amendment case, its very application (in many eyes, at least) accords the killing an undeserved moral status in which it requires respectful attention—its fifteen minutes of constitutional distinction—even though such consideration is swiftly swamped by countervailing interests. Such a level of respect is not conferred when one simply applies the ordinary, default minimal rationality requirement to the homicide statute and its application to her conduct, without invoking any basis for that conduct's *special* protection. Without

<sup>343</sup> In this sense, there are (at least) two communications, including the stipulation (loosely, a meta-communication).

<sup>344</sup> See Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525, 1526, 1552–56 (1993) (distinguishing communicative impact from processes of inference based on observed noncommunicative acts).



such a basis, the killing is not honored, even momentarily, as worthy of presumptive constitutional shelter. For all practical purposes, it gets no respect at all, although the perpetrator herself may gain some status, especially among Francophobes or fans of killing. Nevertheless, even though the presumption of protection is easily overcome in the way described by Justice Marshall, it is still offensive because *it does not cohere* with our belief in the high intrinsic value of life. It suggests ratification or toleration of evil.<sup>345</sup>

Even though such offense against honoring evil does not result in easily identifiable and palpable harm, being offended is a kind of harm that we often try to avoid. This is particularly the case when offense is linked to enhanced fears about the weakening of moral fiber, the decline of the rule of law, and the encouragement of evil. Of course, there is avoidance and there is avoidance. Determining that certain forms of directly destructive conduct can never be entitled even to threshold free speech protection seems constitutionally legitimate, although it is hard to be precise about the nature of the conduct considered beyond the pale. Suppressing what is rightly viewed as speech is something else. To portray Hitler as an innocent youth, perhaps not yet gone (entirely) bad, may be intolerable to many persons, especially if the portrayal results in commercial benefit (to anyone).<sup>346</sup> Some might prefer to think that evil can have no favorable aspects, but we cannot suppress standard linguistic speech that presents such a favorable aspect unless a strict standard of review is satisfied—and this remains unlikely in the U.S. constitutional system. However upsetting the portrayal of the youthful Hitler and the reminder that he was once someone's cooing baby might be, we cannot import the objection made in the assassination case: "How *dare* you even *think* about 'messages' and 'protecting political speech'?" when the message is embodied in a killing?

We can test out this view of the constitutional limits on protecting the designation of (ordinarily) noncommunicative conduct<sup>347</sup> as First Amend-

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<sup>345</sup> The "problem of evil" is a rich topic that cuts across moral philosophy, cognitive psychology, and theology, at the very least. Although not always recognized or so named, it is central to a great many disturbing public policy problems and personal decision making. It comes in several logically distinct but nevertheless closely related forms. See generally MICHAEL H. SHAPIRO ET AL., *BIOETHICS AND THE LAW: CASES, MATERIALS AND PROBLEMS* 106–07 (2d ed. 2003) (discussing the problem of evil).

<sup>346</sup> *Hitler: The Rise of Evil* (CBS television broadcast May 18 & 20, 2003); see Alessandra Stanley, *Architect of Atrocity, The Formative Years*, N.Y. TIMES, May 16, 2003, at E1.

<sup>347</sup> Describing the *O'Brien* family of problems is tricky. Much depends on which of several alternative descriptions we use. "Setting fire to something" is certainly not, without more, a clear case of communication: standing alone, the act/process of incineration is not linguistic and isn't a conventional symbol. But if we add descriptors—"setting fires to generate smoke to be controlled as signals," "set-

ment speech. First, ask whether rejecting First Amendment stature for political assassination clashes with certain other free speech doctrines—for example, viewing some suicides as political speech within First Amendment coverage. Although suicide/homicide bombings of the political/military sort regularly reported in the press would be no more likely to receive First Amendment protection than pure homicide, a few observers might count certain forms of suicide—or suicide-risking behavior—as speech. For example, one might view a particular hunger strike by a prisoner—say, to protest her confinement or prison conditions—as speech within the First Amendment’s coverage. Political hunger strikes might in theory, be better tolerated as messages than flag or cross burning or political killings, but this is only marginally reflected in the precedents.<sup>348</sup>

Despite the appearance of wild inconsistency between the assassin case (no First Amendment characterization) and the hunger striker (possible First Amendment protection), the two differing outcomes are at least thinly rationalizable on a value reinforcement theory. Suicide is not a crime in any state, and, at least in the form of a hunger strike, directly threatens no one else’s life or physical integrity, although its emotional impact may be devastating. Suicide for political reasons, however ill-advised, falls (on this view) within the domain of autonomous acts, imposing no direct physical harm on others, that are in theory defensible even as against proffered state justifications, paternalistic or otherwise. Indeed, such acts are often deemed praiseworthy: think of Socrates’ refusal of easy escape: if not suicide, it was something close to it.<sup>349</sup>

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ting fire to a draft card in the public square,” “setting fire to a cross anywhere”—then the conduct, as more fully described, can not only become a conventional symbol but might, depending on context, be seen as such from the start, without explanation. The point remains, however, that there is an underlying general descriptor—setting fires—that is not ordinarily communicative. On the other side, there are some actions that, under ordinary circumstances, are unlikely to be viewed as anything other than communication, or attempts at it. If someone in an everyday social/interactive setting sounds her vocal cords and orally modulates the nature of the auditory output, she is likely (though not dead certain) to be communicating, and to be perceived as doing so. So also with typing words on a keyboard or making marks with ancient writing tools like the penne, or whatever it was called. (The use of the “O’Brien standard” of intermediate scrutiny has expanded beyond this context of ordinarily noncommunicative actions being used communicatively, as, for example, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984).)

<sup>348</sup> The cases I have read do not squarely address the suicide-as-communication/expression issue. Cf. *Zant v. Prevatte*, 286 S.E.2d 715, 716 (Ga. 1982) (upholding prisoner’s refusal, viewed as based on a constitutional right of privacy; the lower court quoted the prisoner as “contend[ing] that he has the right to control his own body; he says his right to express himself through his hunger strike is of constitutional proportions and that it would be a violation of those rights”).

<sup>349</sup> See generally D. Sneed & Harry W. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-action Test*, 32 HOWARD L. J. 549 (1989). On Socrates’ death as suicide, see Jose Maria Monzon, *Let There Be Justice: The Double Standard of Application of Legal Norms*, 16 FLA. J.

Still, suicide is a killing, and it is not incoherent to formulate a doctrine that limits First Amendment coverage, within the “speech/conduct” domain, to communicative actions that are not in themselves seriously harmful to anyone. I do not try to construct a comprehensive account of “intentional infliction of harm as speech,” nor indicate how much further the “this-can’t-be-seen-as-speech” limitation should go.<sup>350</sup>

Compare these “conduct-as-speech” cases with the somewhat misnamed field of “categorization vs. balancing.”<sup>351</sup> In *New York v. Ferber*,<sup>352</sup> the Court ruled that child pornography was categorically excluded from First Amendment protection; that the presumption of constitutional immunity for speech was thus not to be indulged; and that no scrutiny beyond that afforded by the rational basis test was required.<sup>353</sup> An alternative argument structure—obliquely suggested by the opinion—would be that such material is presumptively protected but the government’s compelling interest in protecting children overcomes the free speech claim.<sup>354</sup> The Court’s

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INT’L L. 639, 647 (2004) (noting the view that “the suicide of Socrates” is viewed as “good violence” as opposed to bad). However, for those who think that Socrates shouldn’t have implemented his execution, this may not be the best example of “good violence” because the imposition of the Socrates Sanction was fundamentally unjust.

<sup>350</sup> Supporting this account would require extended theorizing. Some tangential defense for it is suggested by ordinary linguistic usage (whether the usage seems to make sense or not). For example, the idea that card and flag-burning are forms of communication in *any* sense, never mind the First Amendment sense, is often denounced; in the “conduct-as-speech” realm, the First Amendment may include more actions as speech than does everyday language. The likeliest explanation deals not with the logic of communication but with the fact that the conduct designated as communicative is widely despised. To be sure, it takes more than that to keep it from being (at least *arguendo*) First Amendment speech, as in *O’Brien, Clark*, and *Texas v. Johnson*, 491 U.S. 397 (1989) (finding flag burning to be expressive conduct within the First Amendment).

<sup>351</sup> See generally Sullivan, *Post-Liberal Judging*, *supra* note 17. Although I don’t pursue the matter, the categorization vs. balancing debate is a form of—or is at least closely related to—formalist-functional disputes in other regions of constitutional law. These ostensibly warring frameworks, which may require choosing among converging argument structures, are familiar in various doctrinal areas, including separation of powers and implied federalist constraints on the exercise of Congressional authority. See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985) (rejecting a transit authority’s claim for immunity from federal wage provisions and leaving protection of state functions within the federal system to the constitutional political process).

<sup>352</sup> 458 U.S. 747 (1982).

<sup>353</sup> *Id.* at 773–74.

<sup>354</sup> There is some minor—but instructive—confusion in *Ferber* occasioned by Justice White’s statement that protecting minors is a “compelling” interest. *Id.* at 756–57. That characterization was part of the argument justifying recognition, at the threshold, of a categorical exclusion; it was not the application of a strict scrutiny standard for presumptively protected speech. The use of the same term of course suggests the moral/conceptual overlap between these stages of argument.

In general, it is not always clear whether a given case establishes a categorical exclusion or instead installs a rigorous standard of review. The formula set out in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), either establishes incitement as a crystallized version of the clear and present danger test (which in turn, seems to fall within the more general strict-scrutiny-compelling-interest formula), or establishes

decision avoids aligning itself with evil by refusing to see child pornography even briefly hallowed as protectible speech, even though a ban on this form of protected speech would probably survive strict scrutiny, yielding the same bottom line as the categorical exclusion: that there is no constitutional protection because avoiding harm to children is a compelling interest that can be substantially furthered only by imposing heavy sanctions on producing and using the material. The Burgerian position that homicide cannot be viewed as speech at any stage is roughly in sync with *Ferber*, although there remains a doctrinal difference between the situations of Mr. Ferber and the assassin. With *Ferber*, we have a “categorical exclusion of speech” case; with the assassin, we have a “this-isn’t-even-speech” case, thus raising no formal categorical exclusion issue. Neither route graces crime, thus avoiding the appearance and the actuality of compounding evil by according it undue respect. The this-isn’t-even-speech route perhaps avoids this more completely than conceding that something is “speech” within ordinary language, but is categorically excluded, and so not within the First Amendment. As one might say, killing isn’t talking, even if obscenity and child pornography are.<sup>355</sup>

To be sure, the argument that justifies a categorical exclusion as a categorical exclusion may look a lot like the use of strict scrutiny—especially in the bellwether case establishing (or recognizing) the exclusion.<sup>356</sup> After all, what one *looks at* in running the comparisons and weighings done by strict scrutiny are the same things one *looks at* (with somewhat different lenses) in announcing and then implementing a categorical exclusion. So, the two kinds of cases are not utterly disconnected, and matters of differential value reinforcement or attenuation do not take an all-or-nothing form. One still is dealing with the pulls of “free inquiry” and “children’s best interests.” This complicates the value-reinforcement analysis, but the final outcome is clear enough: *Ferber’s* inquiry into the nature of

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a categorical exclusion. The outcomes are the same under either framework. This choice of argument issue falls squarely within our topic, although I do not cover it here.

<sup>355</sup> I do not discuss First Amendment considerations raised by a law specifically prohibiting killings meant to send a message, but simply suggest that it would survive a First Amendment attack. *Cf.* *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating a law providing that where a person convicted or accused of crime earns income from works describing the crime, the funds must be placed in escrow and made available to his victims and creditors).

<sup>356</sup> This justificatory stage in recognizing a categorical exclusion has been called “definitional balancing.” See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1184 (1970). This is not to say that such balancing events represent explicit historical moments in Supreme Court jurisprudence. Of course, the factors considered within the definitional balancing stage generally come up again in deciding whether any given communication falls into the excluded bin, but they are, in theory, addressed in a different manner (not well explained by the Court).

child pornography was to show that henceforth it was not to be considered within the presumptive protection of the First Amendment. The Court's argument was, on this view, not an evaluation of government interests tendered against a valid presumptive claim of constitutional protection under the First Amendment made by a specific claimant in a specified situation. Indeed, its argument in effect *denied* that this was the proper approach. And it held this despite the acknowledgment of a small risk of error in border determinations that improperly denied First Amendment coverage and possibly ultimate bottom line protection to certain presentations.<sup>357</sup> The value-protectiveness of the categorical exclusion approach, with its more-salient condemnation of the excluded material, outweighed this marginal danger. Thus, as compared with accepting categorical inclusion but nevertheless sustaining a government intrusion after serious scrutiny, a categorical exclusion generally *disvalues* what is excluded.

These two conceptual systems for dealing with communicative material or actions—border determinations for categorical exclusions, and balancing after inclusion—may thus (in theory) have different reinforcement effects, although one would expect any differing behavioral effects to be difficult to trace.<sup>358</sup>

Finally, the “categorization vs. balancing” cases, the “conduct-as-speech” cases, and the “crime-speech” cases bear strong structural and value-reinforcement similarities.<sup>359</sup> Of course, they are far from identical: a major consideration in the “conduct-as-speech” cases is the very conceptualization of what constitutes speech as opposed to something else—a question that is more difficult than whether obscene and pornographic materials are instances of communication.<sup>360</sup>

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<sup>357</sup> Acknowledging the Court of Appeals' concerns, the Court mentioned medical school texts depicting pathological conditions in children, and referred to National Geographic pictorials, but nevertheless indicated that the risks of overbroad applications were very low. *New York v. Ferber*, 458 U.S. 747, 773 (1982).

<sup>358</sup> I do not view the application of specific standards of review such as strict and intermediate scrutiny to be equivalent to “ad hoc balancing.” The latter term is poorly defined in the literature, but further commentary is not needed here.

<sup>359</sup> This does not exhaust the possibilities for such structural isomorphisms within free speech jurisprudence. For example, consider Professor Greenman's view that behavior, such as subliminal advertising, that bypasses our “free will” should not be considered communicative, and thus not presumptively protected speech, even though it is intended to (and in fact does, one should add) transmit information. John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1337 (2008).

<sup>360</sup> Note, however, the view that such materials might better be characterized as “sex tools” rather than forms of communication. See Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 923 (1979) (viewing pornography as a “type of aid to sexual satisfaction” and thus not “communication in

D. EQUAL PROTECTION, LOOKING FOR SUSPECTS, AND LOOKING FOR RISKS<sup>361</sup>

1. When is apparent attention to race not true attention to race? Some contrasting conceptual systems

a. Descriptions of suspects

Not surprisingly, someone spotted the French-hating assassin and described her to the police as white, consumptive-looking, and female. The police instruct their officers and the general public to be on the lookout for a very pale woman. The police, of course, as agents of the state, are subject to constitutional constraints, and are presumptively forbidden from using racial classifications in performing their duties. But what exactly is it to use a racial classification? Did they act unconstitutionally in setting up their search for the killer? This topic obviously spills over into issues of “racial profiling” at various stages of law enforcement, but I do not directly deal with this.<sup>362</sup>

Our developed cognitive frameworks and intuitions strongly suggest that not only was the police description rational, the omission of the suspect’s complexion or her race would have been professionally incompetent—a Keystone Cops move. A colleague told me that, years earlier, he had approached a law professor in one of the offices of a law school, and said, “I’m looking for John Q. What does he look like?” He was told something like, “He’s over six feet tall, very thin, about forty, last seen wearing a dark blue suit.” The fact that John was black was left out, perhaps in a hapless effort to avoid reinforcement of a race-based ethic. Of course, even these mal-descriptors are likely to provide the relevant racial or complexion designation if asked certain questions, such as, “Which one is the hostage and which one is the kidnapper?—I can’t tell whom to shoot.”

The constitutional question arrives for its brief (one hopes) moment of attention from a well-known, often used, and very important argument structure already discussed: Government directives relying on racial classifications are presumptively unconstitutional and can be justified only by showing that such reliance on race is necessary to significantly promote

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the cognitive sense”). This, of course, is a conceptual system that removes any aura of communicative value deriving from the materials.

<sup>361</sup> A more complete doctrinal analysis would include discussion of the Fourth Amendment. See generally Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

<sup>362</sup> See generally Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163 (2002).

compelling interests. The latter showing requires government to establish that there are no less intrusive ways of furthering these interests, and by showing that these interests are indeed significantly furthered by the government action.<sup>363</sup>

Leaving aside some important issues contained in this formulation,<sup>364</sup> it is an argument structure that embeds several conceptual systems. The conceptual systems of interest right now concern race—the very meanings of “race,” “relying on race” or on “race as such,” “using racial classifica-

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<sup>363</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003). The less-intrusive-alternative standard seems to be a somewhat more specific way of articulating at least one aspect of the requirement that government actions be “narrowly tailored” to further its interests. *Id.* at 339–40. (discussing the meaning of the narrow tailoring requirement). However, the “narrowly tailored” formulation has also been used in intermediate scrutiny cases to signal that the no-less-intrusive-alternative standard should be understood not to impose unrealistically heavy search requirements on government. For example, *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989) was a commercial speech case that upheld SUNY’s ban on certain commercial activities on campus, such as “Tupperware parties.” *Id.* at 472. The Court said, per Justice Scalia, that the means-end fit required in such cases “employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” *Id.* at 480. These uses of “narrow tailoring” are confusing; the phrase seems to be a “generic” formulation meant to include both the no-less-restrictive-alternative formulation and the looser idea of a fit that is proportionate to the interest pursued. *Id.* In theory, “narrow tailoring,” if used even more comprehensively, also includes the idea of overbreadth; that latter term is most often used in the First Amendment context, but is logically applicable to any heightened scrutiny standard, if in varying degrees. Overbreadth, “narrowing,” and the “least restrictive alternative” are all members (of varying strength) of a generic constitutional efficiency principle—the biggest bang (furtherance of the government’s goal) for the least buck (lowest cost in constitutional interests impaired—least restrictive alternative, overbreadth), or at least not the most expensive buck (“narrowing,” in its narrower sense). Charting the precise differences between the concepts of overbreadth, the least restrictive alternative, and “proportionate fit” as constitutional efficiency requirements (“narrow tailoring” in the full generic sense) would be interesting, but not to the point here.

<sup>364</sup> For example, there may be issues concerning the presupposition of state (or other government) action, as opposed to private action; whether any open reference to race entails strict scrutiny, whatever the context; and what constitutes a racial classification or an underlying discriminatory purpose. See generally CHEMERINSKY, *supra* note 285, at 507–39, 690–748. There are also more abstract questions about the very structure of standards of review, such as whether they are better crafted as smooth “sliding scales” or as having all-or-nothing thresholds. See the staircase versus slide discussion, *supra* note 136. It may be that “sliding scale” could apply to some variations within the “interior divisions” of a particular standard of review. There are significant pockets of constitutional doctrine that more openly use a “flexible standard” and view burdens on constitutional interests as continuous functions. See, e.g., *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1628 (2008) (Souter, J., dissenting) (upholding Indiana’s voter identification law: “Given the legitimacy of interests on both sides, we have avoided pre-set levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue.”) Justice Stevens’s plurality opinion also noted the rejection of the view that strict scrutiny “applies to all laws imposing a burden on the right to vote.” *Id.* at 1616 n.8 (plurality opinion) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). And of course the undue burden constitutional “standard” is itself a sliding scale, per *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Still, the default mode in formulating and using standards of review is to impose named structures, perhaps in part because we feel lost without them, but to explore this would unduly burden the present task.

tions,” the nature and role of ascribing race in any given task,<sup>365</sup> the constitutionally mandated hostility to government actions framed “by reference to race” (an antidiscrimination principle, or at least an aspect of a more comprehensive principle of justice or fairness), and the somewhat lesser—or at least different—constitutional hostility to “indifference” to matters of race.<sup>366</sup> When mention of race in a suspect’s description bears no signs of hostile, subordinating purposes aimed at race, then it seems amiss to use a term of art—“classification”—to refer to such a race-linkage. In such situations, it serves the same function as saying that the suspect had freckles, even if only the race-linked usage carries troublesome baggage. Even though “X is black” is more threatening to peace of mind than “X has freckles,” *when you’re simply looking for someone*, the two phrases simply designate what you are looking for. It is not obvious that all “race-linked” or “race-connected” references or criteria are constitutionally suspect classifications.

True, referring to a pure-hearted, good faith, *race*-blind search for criminals may mask some constitutionally questionable motives for the search. The two descriptions—“she’s black”; “she has freckles”—have different communicative impacts, but these differences are not inconsistent with the rational, proper—even *necessary*—use of either (or both) depictions when looking for someone. Also true, questionable racial attitudes may underlie loose and inaccurate announcements of searches for particular racial groups; there is no clear line between searches closer to the freckles exemplar and those closer to “let’s mess up the local minority communities.”<sup>367</sup> (To some extent, there is also a gender parallel to questions about the nature of the “reality” of racial differences.)

<sup>365</sup> Collecting race-linked data for many—or even any—purposes might be viewed as “racial classifications” that should presumptively be avoided. See generally David B. Oppenheimer, *Why France Needs to Collect Data on Racial Identity . . . in A French Way*, EXPRESSO (2007), available at [http://works.bepress.com/david\\_oppenheimer/1](http://works.bepress.com/david_oppenheimer/1) (noting in the Abstract, “French constitutional law, which embraces equality as a founding principle, prohibits the state from collecting data about race, ethnicity or religion, and French culture is deeply averse to the legitimacy of racial identity.”). The law in question has various exceptions, however, for example, for “processing of personal data for the purpose of medical research.” Act n°78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties, ch. II, § 1, art. 8, § II, ¶ 8; Ch. IX (Fr.), amended by Act of 6 August 2004 Relating to the Protection of Individuals with Regard to the Processing of Personal Data, available at <http://www.cnil.fr/fileadmin/documents/uk/78-17VA.pdf>. See also Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701 (2003).

<sup>366</sup> See generally Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

<sup>367</sup> See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1101, 1103 (2001) (“Racial profiles and suspect descriptions alike are prone to intentional misuse and inadvertent error. Officers might intentionally use either to justify the deliberate hassling of racial minorities, for example. Victims or witnesses may create



How can we sort the situations? Requiring a hearing before a judge or magistrate before an all points bulletin or a be-on-the-lookout search is announced doesn't seem conducive to effective law enforcement and would likely draw irate public objections that the law is "a ass."<sup>368</sup> Yet it is quite possible that individual search projects may be tainted not only by clear racism, but by inappropriate generalizations about and hostility towards certain groups. Here, as in most other areas of basic value tension, there is no border between sound versus improper use of racial descriptors. The flat conclusion that mentioning race in describing suspects must be, as a matter of constitutional logic, a racial classification requiring justification seems unjustified to me, but my point is that comparing the properties of the two converging argument structures in question is crucial: if there is no suspect classification, no special justification is required; if there is a suspect classification, it is justified by a compelling interest, narrowly pursued. The immediate adjudicative outcome is the same in both cases. How does the risk of bringing the antidiscrimination principle into disrepute by calling for strict scrutiny of race-linked descriptions compare with the risk of reinforcing inappropriate racial awareness through using such descriptions? Or might the latter path go the other way: treating such descriptions as nondiscriminatory vindicates (some versions of) colorblindness?<sup>369</sup>

b. Race wars in prisons; school segregation

Consider the (at least temporary) racial separation of prisoners in racially defined gangs that are at war with each other. This was at issue in

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imaginary attackers to cover their own misdeeds. . . . Perception of race itself may be more subject to error than commonly thought. Researchers have demonstrated that judgments of category membership are heavily dependent on contextual factors and therefore subject to error.")

<sup>368</sup> As Mr. Bumble put it in CHARLES DICKENS, *OLIVER TWIST* 451 (Tor 1998), available at [http://www.amazon.com/gp/reader/0812580036/ref=sib\\_dp\\_pt/105-9167649-4578859#](http://www.amazon.com/gp/reader/0812580036/ref=sib_dp_pt/105-9167649-4578859#).

<sup>369</sup> For a discussion of the view that descriptions of the race of particular suspects should be viewed as racial classifications that require strict scrutiny, see generally Banks, *supra* note 367, at 1109–1116. The various strands of analysis relevant to choice of conceptual systems are brought out by Professor Banks, but his choice differs from mine. I do not think that widespread upholding of "racial classifications" in the form of race-linked descriptions necessarily "lessen[s] the presumption against race-dependent practices," weakening strict scrutiny's strictness, although it might be perceived as doing so. *Id.* at 1119. *Conceptually*, there is nothing gossamer about viewing as compelling the goal of apprehending the perpetrator of a specific crime, and furthering the more general enterprise of vindicating the rule of law by finding perpetrators. (Recall *Burson v. Freeman*, 504 U.S. 191 (1992), sustaining a no-electioneering rule because the goal of avoiding voter intimidation and election fraud was considered compelling.) But the obvious risks of misperception and the resulting impairment of the constitutional coin of strict scrutiny seem pretty high, and the better choice of argument structure would be no-threshold-discrimination-thus-no-heightened-scrutiny.

*Johnson v. California*,<sup>370</sup> which held that a policy of racially separating new or transferred prisoners for up to sixty days requires strict scrutiny rather than the less rigorous standard of whether a policy is reasonably related to a legitimate penological interest.<sup>371</sup> The asserted purpose of the policy was to reduce the incidence of gang-related racial violence.<sup>372</sup> The gang war itself might or might not turn directly on racial issues. Exactly how the material facts would be established is a good question, but I leave it out of the illustration; I am setting this up as a case involving actual and threatened race-against-race violence, and excluding situations in which the racial segregation is a government ruse to separate the races for any other reasons. In any case, assume for present purposes that the order to “separate the prisoners on the basis of race” means, in this context, “use race as a criterion of who should be separated from whom in order to avert serious violence among the prisoners.”

One could argue that even here, race is simply a matter of describing “markers” for identifying hostile protagonists—as in describing the race of specific criminal suspects. One could “translate” the instruction in this way: “Use racial *difference* among persons confined within close quarters as a criterion for separation. Such pairwise difference is, in our specific prison situation, a well-confirmed marker for danger to the individuals and groups involved, and we seek to minimize this danger for everyone, regardless of race.” On this view, the termination of a race war in prison by separating prisoners by race is in a limited sense about race, but the main focus is not race “as such” but racial differences—“perpetrator units” where the members are of different races and may attack each other. It is no different from constructing a wall to keep out invaders, whatever their race or ethnicity.

But because the entire situation is nevertheless imbued with race, particularly from the standpoint of the hostile parties, it seems incomplete—even false—to claim that references to race can simply be eliminated by references to avoiding danger by identifying hostiles. It may well be that, from the standpoint of the government, its action is “not about race” in any important sense. (Perhaps it’s about the “secondary effects” of race characterizations.) But it certainly seems to be “about race” in other senses: it is part of the cause of the violence, and in actually implementing any danger

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<sup>370</sup> 543 U.S. 499 (2005). Not all gangs are *completely* monoracial, but confirming this would be difficult, partly because of the uncertainties in determining who is of what race (and who is in which gang).

<sup>371</sup> *Id.* at 515.

<sup>372</sup> *Id.* at 502.

reduction plan, the prison would have to address race directly in a way quite different from mentioning the reported description of a suspect's race.

To be sure, even if the prison segregation is “about race,” this is not enough to condemn it. Here, the clearly improper use of race is in the first instance not by the government but by the prisoners who attack each other because of racial difference. Depending on the exact circumstances, the “use of race” by the authorities is not only not improper, it may be constitutionally and morally required: failure to separate the combatants by race in a race war might be a sign of hostility and indifference to one or more of the embattled groups (as in “just let those Xs and Ys kill each other off—saves us the trouble”).

How we characterize such “race-linked” situations may require a choice among converging conceptual systems, and several criteria of choice can be brought into play. Of course, this is not just about what words we choose; once again, conceptual analysis is not word-play. A comparison of the quite different conceptual systems in this realm suggests (perhaps requires) that some distinctions that seem to be about race are better understood as not being “about race,” or not being about race in an invidious sense. In the prison wars case, for example, the overwhelming interests at stake (keeping people alive and unmaimed) seem to swamp the race connection, although “to swamp” is obviously not “to destroy,” and indeed logically excludes it; there does remain a link to race. This swamping effect is not simply an artifact of raw perception (and its attendant risks of error); rather, it is driven by serious value considerations—protection of human life and limb. If so, the description, “reduced” to non-racial terms, cannot rightly be described as just an end run around the constitution. To say that the *government's* actions are not about race, although the *prisoners' private* actions are, is a quite plausible account, even if, as some might think, it is not the best way or the constitutionally required way.<sup>373</sup>

So, to describe the project as being solely about keeping *any and all* prisoners from being killed is an *incomplete* description, but it is, at its core, a sound claim nonetheless, assuming government good faith. Of course, *that* is a big assumption—so big it may drive our view of the best threshold

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<sup>373</sup> When decisions in the private market take on the characteristics of government decisions is of course a central long-standing constitutional problem of state action. See generally CHEMERINSKY, *supra* note 285, at 515–16. Think, for example, of child custody cases disallowing government ratification of private discriminatory acts, as in *Palmore v. Sidoti*, 466 U.S. 429 (1984) (invalidating custody award as based on race). Still, race may constitutionally play a role as one of several factors, for example, *In re Gambla & Woodson*, 853 N.E.2d 847 (Ill. App. Ct. 2006), *cert. denied*, *Gambla v. Woodson*, 128 S.Ct. 39 (2007).

characterization: one way to prevent government misconduct is to err on the side of caution, and here this means using the suspect-classification-strict-scrutiny approach. If indeed the government's action is, overall, best viewed as *not* concerning race, this can be brought out at the stage of argument where the government proffers its justifications for using a suspect classification, rather than at the threshold, by denying a suspect race linkage in the first place. Otherwise, the government's asserted compelling interests become part of the threshold characterization, weakening or even co-opting the justification stage under strict scrutiny.<sup>374</sup> This blurring of argument stages may be appropriate in some cases but not in others. The medical arena already contains some contested cases: the sickle-cell anemia programs involving screening of African Americans, and the marketing of BiDil, a drug for treating heart failure "in self-identified black patients."<sup>375</sup> (Both are mentioned below.)

There is an obvious comparison to racial segregation in schools, or in any other social context. Indeed, the comparison is so obvious that it leads some to conclude, without much thought, that *of course* you can't segregate prisoners by race, *whatever* the risk, under *Brown v. Board of Education*.<sup>376</sup>

<sup>374</sup> These alternative frameworks are an instance of a more general problem of selecting among competing constitutionally relevant characterizations. The difficulty concerns conflating the threshold rights characterization and the government justification phases in constitutional analysis. We may be unsure whether to say that (1) "the government is infringing on interest X but there is a compelling justification for this"; or that (2) "the criteria for government intervention were *not* the forbidden classifications (*e.g.*, race, speech content) that must be shunned unless justified by compelling interest. In the second formulation, what might be described as a "compelling interest" in the first formulation is best understood not as a justification for something presumptively wrong, but as the true *basis* for the intervention in the first place. By collapsing this justification into the threshold determination, the "sting" is eliminated from whatever the racial reference concerned. The claim is that we intervene *because of the risk to life*, not because of race, which is a mere marker. Thus, heightened scrutiny is never formally reached. I am *not* saying that the latter account is the best way to view *Johnson*; it is not. I am simply saying that it is normatively, conceptually, and doctrinally instructive to note this distinction between government interests absorbed into the "threshold," and thus somewhat hidden, and government interests "unpacked within the justification stage." The latter argument structure of course concedes openly that some constitutionally favored interest has *prima facie* been adversely affected. See also Rebecca Brown, *supra* note 136; *infra* note 394.

<sup>375</sup> Press Release, U.S. Food and Drug Administration, *FDA Approves BiDil Heart Failure Drug for Black Patients*, FDA NEWS, June 23, 2005, <http://www.fda.gov/bbs/topics/NEWS/2005/NEW01190.html> (last visited Feb. 21, 2009). On hemoglobinopathies, see *infra* text accompanying note 382. "BiDil" is a trade name for the combination of isosorbide dinitrate and hydralazine hydrochloride. The drug has not done well in the market, for various reasons. See Jacob Goldstein, *First Racially Targeted Drug Is a Flop*, WALL ST.J., Jan. 16, 2008, available at <http://blogs.wsj.com/health/2008/01/16/first-racially-targeted-drug-is-a-flop/trackback>. The FDA approval probably does not prevent "off-label" use on non-black persons, or use not directed at heart failure. However, such measures might be viewed as negligent, depending on both the specific situation and the body of data on BiDil.

<sup>376</sup> 349 U.S. 294 (1955).

Given its (expressed) exclusive focus on educational harm as destructive of one's basic prospects in life, this is quite wrong. Under the terms of *Brown* as written down, each government or public facility has to be tested independently for what harms it inflicts by segregation and whether these harms can be justified.<sup>377</sup> Moreover, the suspect classification doctrine does not constitute—operationally or conceptually—a *per se* ban on racial classifications; some may be justified—and some may be *so* clearly justified that we merge the justification into the threshold stage and say that there was no racial classification in the first place because it dissolves on contact with the justification.<sup>378</sup> This is “reducing” the racial component to a marker for a non-racial component—identified with the justifications proffered by government.<sup>379</sup> Sometimes this doctrinal process makes sense, as the next section (on medical genetics) suggests.<sup>380</sup> In most cases involving government and public facilities, however, trying to reduce/eliminate the racial description and substituting a nonracial one that captures a compelling interest is lame: the very effort to eliminate race confirms its malign presence. Would we say of school segregation that it is not about race at all but about linking certain personal markers (aptitude, educability, educational achievement, and personality traits) and surrounding circumstances (distractions, insufficient resources to protect students from each other, etc.) to race? This might move some to conclude that persons of different races are educated best when educated separately. Or that, whatever the causes, blacks and whites just do not get along, or have different interests, or learn at different rates, or have sharply clashing cultural characteristics, so keeping them together impedes optimal educational opportunities for both groups. On this view, the fact of “being of different races” is just a marker for determining the most pro-educational school set up; if the claimed correlations are false, fine—but it was never about race “as such.”

No one will be persuaded that this purported reduction makes sense. (I won't even try to run this reduction on swimming pool or rest room access.) If black students of a certain age are almost uniformly several grade levels behind their white counterparts, the presumptive reason for this is racial hostility that is accepted and maintained by government. But the substitution of “violence-proxies” for race in prison war situations is not quite as invidious as using “educational-risk-proxies,” even if we ultimately reject it (as we should). True, one could imagine prison officials

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<sup>377</sup> *Id.* at 299–300.

<sup>378</sup> *See id.*

<sup>379</sup> *See id.*

<sup>380</sup> *See infra* Part IV.D.1.c.

describing “protective segregation” as called for by an inherent and near-irresistible biological drive by some racial groups to search out and destroy other racial groups. But, even if some of the corrections personnel and gang members believe this, it is not a fair description of *Johnson v. California*.<sup>381</sup>

The upshot of this comparison of frameworks in the search-for-suspects and the prison-war situations is simply this: It may be that some forms of reliance on race *shouldn't even count as racial classifications in the constitutional sense*—that is, as classifications that must be justified, if at all, by interests that overwhelm the risks of using those classifications. The instruction to look for a white, pale female is an example. It is distinctly not like saying, “stop all (non)white persons because of the elevated probability that they are in general likely to have committed a crime recently.” Nor, in the race-war-in-prison context, is it like saying, “separate all the warring black, Hispanic, Asian, and white gang members from each other,” or “separate all combatants by race”—however justified those directives might be under the circumstances. Where searching for suspects, the race of the suspect is (in general) not causally linked to the reasons for the search: to catch a criminal and to prevent further crime. The race, sex, and health of the assassin do not drive the search—they simply aid the search, varying from case to case. In trying to catch the assassin, it is not so much that a government interest causally related to race swamps the presumptive evils of race classification, it is that race as such is, from the get-go, irrelevant to the state’s interest in crime control and simply serves as a personal description—a benign indicator—of what the perpetrator is thought to look like. This is an unavoidable deference to a world in which people do not look the same. It has no bearing on whatever significance the private parties attach to race.

c. Medical genetics and race

Suppose a government public health agency pursues a program for “finding all black persons in order to identify those at elevated risk for carrying the sickle-cell anemia gene.” One could argue that this genetic screening instruction is best viewed as primarily—indeed, *exclusively*—about a hemoglobin disorder rather than race; race is simply a loose index or identifier—a proxy—for a medical/genetic status. Overall, it is clearly imperfect. There is no causal link between “race-as-such” (which I leave uninterpreted) and hemoglobinopathies. The greater incidence of sickle cell anemia among black persons—including African-Americans—has no

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<sup>381</sup> 543 U.S. 499 (2005).

connection whatever to race *as* race: *any* group of persons in a geographical area at high risk for malaria would be likely to develop an elevated incidence of hemoglobin disorder genes because being a carrier of the gene confers some resistance to that disorder.<sup>382</sup> Indeed, it is well known that persons of Mediterranean ancestry are at disproportionate risk for such disorders.<sup>383</sup>

This screening project moves *from* race *to* something else disconnected from it, in order to deal with that something else—here, medical and reproductive risks. In this setting, race is a marker or tag for something conceptually distinct from it (at least on any reasonable use of the term “race,” and there *are* reasonable uses). Although there are dangers in such programs, they are far less fearful than those projects moving in the reverse direction: *to* race *from* something else (“having emigrated from Jamaica”), precisely to get to persons of that race, whether for malignant or even for benign reasons.

On the other hand, wherever race pops up in any context, for any reason, some elevated alertness seems warranted. Decades ago, in trying to confer medical benefits through predicting, diagnosing, and treating sickle-cell anemia, the federal government apparently botched the project, in part by failing to properly address the distinction between *having* the disorder (having a double dose of the recessive gene) and being a *carrier* for it (having only one such gene).<sup>384</sup> The mistake was visible and damaging because the adversities were inflicted almost entirely on African-Americans.<sup>385</sup> Perhaps the carelessness was partly attributable to racial indifference or disdain as well as to ignorance. Perhaps (less likely) the selection of a black-linked genetic anomaly was designed to stigmatize black persons, or to inflict administrative hassles on them.<sup>386</sup> In any case, even where their use is well-intentioned, markers may be too inaccurate to allow for fair and efficient application. Whether we do or we don’t, we are damned—if not to the same extent.

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<sup>382</sup> See, e.g., Luigi Luca Cavalli-Sforza, M.D., *Race*, MICROSOFT ENCARTE ONLINE ENCYCLOPEDIA, 2008, [http://encarta.msn.com/encyclopedia\\_761576599\\_5/Race.html](http://encarta.msn.com/encyclopedia_761576599_5/Race.html).

<sup>383</sup> *Id.*

<sup>384</sup> See generally ROBERT C. KING ET AL., A DICTIONARY OF GENETICS (Oxford Univ. Press 2007).

<sup>385</sup> See generally TROY DUSTER, BACKDOOR TO EUGENICS 45-50 (Routledge 1990).

<sup>386</sup> And perhaps it was to be expected, given the ubiquity of incompetence. See generally LAURENCE J. PETER & RAYMOND HULL, THE PETER PRINCIPLE: WHY THINGS ALWAYS GO WRONG 4 (N.Y., Routledge 1969) (arguing that employees will be promoted up to their level of incompetence and remain there, “mucking” things up, and noting that when the parties at risk are minorities, the muck multiplier evidently increases.)

Even more importantly, the claim that race is being used benignly only as a marker for searching out medical dangers may be a cover for a racial preference for the group at risk for such afflictions. Whether there are indeed “white” or “male” disorders (or disorders perceived as such) that receive undue attention has been discussed from time to time. So, there is a case for retaining strict scrutiny here: in matters of race, if things go awry, they go awry big-time.<sup>387</sup>

d. Affirmative action: Education; labor; more comparisons

Affirmative action takes a variety of forms, perhaps not all equally entitled to be called “affirmative action.” Consider first the task of selecting who will be admitted to an educational institution that wishes to increase the proportion of certain minorities among the admittees. If we describe our admissions program as based on race, we might say, with the Court, that there are compelling interests in acting in *certain* race-conscious ways, and this includes choosing students for an educational enterprise that benefits from the presentation of different perspectives and insights. This reinforces and implements several layers of value. (The goal of general social rectification for past racial oppression and for the societal imposition of a subordinate status has never been accepted by the Court as a constitutionally compelling interest that could justify race-classified admissions.)<sup>388</sup> If this diversity goal is at all rational, it must be because there is some reasonable expectation that these varying, educationally relevant frameworks vary at least in part *because* of race—although not because of race-as-such, but because social/environmental variables may differ sharply from race to race, creating different perceptual perspectives and cognitive frameworks, and perhaps diverse interests as well. We may not know the exact nature of this causal connection, and may be able to confirm it, if at all, only by way of probabilistic analysis, but it is there nonetheless, as many argue.

Consider also the task of rectifying the refusal of an employer to hire (or retain or promote) persons of certain races, or who bear some other unjustly targeted trait. In some cases, we may be able to identify the specific persons who, but for their race would have been hired (or not fired or not promoted, etc.). This makes true rectification fairly easy and theoretically far less problematic than race-defined programs directed toward groups,

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<sup>387</sup> The marketing of BiDil, mentioned above, *supra* note 375, is another striking illustration of these characterization-selection issues: the heart medicine specifically targets only black persons. See Denise Gellene, *Regulators OK Heart Medicine for Blacks*, L.A. TIMES, June 24, 2005, at C1. For a critical commentary, see Jonathan Kahn, *Race in a Bottle*, 297 SCIENTIFIC AMERICAN, Aug. 2007, at 40.

<sup>388</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 326, 497 (2003) (Justice O’Connor’s opinion announcing the judgment of the Court).



rather than individuals. We would be providing rectification in some form for the right individual parties.<sup>389</sup> But, we first have to *find* them and communicate with them. So, we look for specific persons, but *only* of a certain race, in order to install them in the jobs they otherwise would have had, or to rehire, promote, or compensate them. The rectification here is specific enough to allow one to consider merging the justifications for attention to race into the very threshold stage of recognizing attention to race. As one might argue, the justifications are so persuasive that they dissipate the need for identifying the race-connection—or even discerning it as race-linked—and the reference to race can be omitted from the threshold stage. So, there is no “affirmative action” because there is no concern with race as such; it is simply a “marker for injustice”—in this case, incurring a loss because of one’s race.

On this view, the effort to rectify race-based employment exclusions or burdens is simply about rectifying unjust actions generally, *whatever form this takes*, and *whatever the identifying feature of the claimant that drew the prior unjust actions*. Being rejected for employment on the basis of race and being rejected because you are “illegitimate” are simply different forms of injustice to be rectified—and such rectification is the overarching norm.

It may be instructive to consider this account, but, having done so, it seems implausible because the *only* form of injustice involved is racial or ethnic discrimination. The situation is poorly described if one simply says that it involves rectification of injustice in hiring, firing, and promoting decisions *generally*.<sup>390</sup> Moreover, any plan specifically directed toward find-

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<sup>389</sup> The examples are instructively problematic. Achieving “diversity” within an educational enterprise is one thing; compensating someone who was actually discriminated against because of her race is another, and is far less controversial. See also *infra* note 390.

<sup>390</sup> See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring).

[O]f course, a State may “undo the effects of past discrimination” in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter’s employment. *In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled.* That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

*Id.* (emphasis added). As I say in the text, this account is too anemic to be fully serviceable. One could also say that the person ultimately awarded the job did not get it because of his race, but because he was a victim of an unjust hiring decision. But the injustice remains all about race from beginning to end, even though one can move to a more abstract plane that lumps racial discrimination in hiring into an undifferentiated mass concerning the “wrongful award [of] a job to which another is entitled.” Entitled on what ground? Justice Scalia’s account, while providing some illumination by indicating that racial

ing a great many persons whose individual situations are only hazily understood would seem to bear many of the risks we associate with suspect classifications.

Compare searching for particular victims of racially discriminatory acts to looking for people at elevated risk for having one or both sickle cell anemia genes. In both cases, there probably is a compelling interest in checking mostly (even only) persons in the relevant minority groups because there is a higher probability that they are the specific victims of racism, or are carriers of the sickle cell anemia gene. (There is a level-of-abstraction issue here, however. It might be better to say that the compelling interest is in catching criminals or in medical detection and treatment of disorder generally and that the most effective and least intrusive means is to find only those persons likeliest to be guilty or medically at risk.) But in both cases we might also say that the better account is to say that race-as-such is irrelevant and so one need not invoke the baggage of strict scrutiny and its “compelling interests.”

True, the search for unjustly treated employees or applicants is, in this example, “focused on race” in an important sense, and it does not by itself amount to a universal canvassing of all labor market injustices. *Racial* injustice is the target. This is notably different from the search for carriers or victims of sickle cell anemia, where geographical location—not victimization because of one’s race—was everything: the anopheles mosquito and its accompanying malaria organisms did not search for black or Mediterranean people, but for human bodies. Still, in neither case are we trying to put down or benefit persons just because of their race. As for looking for someone described as, say, “being white and wearing a fedora,” it hardly belongs on the same page as the other programs. In a strong sense, it is not even about a group—it is about one person, and the reference to race is—in theory—no more troublesome than describing the suspect as having long straight hair. I add “in theory” because in real life stuff happens—like fictitious descriptions suggesting racial animus, as in the 1989 Charles Stuart case in Boston.<sup>391</sup>

It remains, however, that in searching for suspects, preventing race wars, finding persons at risk for sickling disorders, identifying unjustly

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discrimination falls into the abstract categories of injustice or unfairness, also masks the driving force of racial discrimination as *the* source of injustice.

<sup>391</sup> See, e.g., Margaret Carlson, *Presumed Innocent*, TIME, June 24, 2001, available at <http://www.time.com/time/magazine/article/0,9171,153650,00.html> (“By identifying the killer of his seven-months-pregnant wife as a raspy-voiced black man dressed in a jogging suit, Stuart tapped into assumptions about race and crime so powerful that they overwhelmed skepticism about his tale.”).

treated workers, and even finding diverse viewpoints, we have a plausible descriptive system involving no intrinsic conceptual connection to race (as in “persons who bear the trait of being able to provide variant viewpoints”).<sup>392</sup> What we do have is a variety of causal connections between race and something else that is not race. In some of the enterprises described, we should not view the references to race as suspect classifications, or, if we do, we should immediately acknowledge the “race-neutralizing” justification.

## 2. Evaluating the concurrent descriptions

This evaluation has already begun as part of the very process of explaining the alternative descriptions. As we saw, in some of the situations mentioned, the translation from race-linked to race-independent descriptions seems forced, to say the least. We could say that *any* situation, even classically racist ones, can be redescribed so that it’s not race *as such* we are after, but something else. In a racially segregated public school system, we could *say* that we are not targeting or evincing hostility to race “in itself,” but simply using it as a marker for devising optimally efficient educational systems. Although there is a dim veneer of sense in this account, to accept it would be to endorse the clear racism that created, in the first place, many or all of the markers for identifying those students with educational or behavioral deficits that call for their separation from the white mainstream. The very idea that one is not targeting “race as such”<sup>393</sup> falls apart

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<sup>392</sup> The question of definitional or conceptual connection is very tricky. There is no conceptual connection between being of race X and having the view  $\theta$ . But if, say, an educational institution is looking for a set of viewpoints linked to “being a black male in an American inner city,” there is more than an adventitious link between race and the desired set of viewpoints—although one still cannot confidently map particular viewpoints or frameworks onto particular persons. Conceptual connections rest on how we define the concepts or ideas in question, and it is often unclear, empirically and morally, how we ought to set up the definitions, including the levels of abstraction they address.

<sup>393</sup> “Race” is not cognitively meaningless, and inquiries into what predicates are definitionally connected with “race” and “being a member of a particular race” are obviously relevant to the discussion. It would turn the paper completely askew, however, to turn to the task of finding traits, or clusters of traits, that explicate the concept of race or race-as-such. It is enough to say that we have to ask, in every case, exactly what we are really after. I do not address the confused claim that “there is no such thing as race” from a “scientific” or “biological” standpoint. See, e.g., Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994) (stating that “race is not biological”). The fact that skin color, a largely genetic trait, or other supposed physiological indicia of racial differences are unimportant *in themselves* for various basic life purposes indicates that race is *irrelevant* with respect to those purposes, *not* that “race is not biological” or that there is “no such thing as race.” These proffered conceptual-descriptive systems and formulations about race track political ideology, and the illumination they provide on how we construct race politically and socially may be compromised by the hyperbolic dismissal of biology from among

as applied to most public facilities and programs, leading to the conclusion that there is no such thing as racism—an absurd result.

But in other cases, reducing what seem to be race-connected sorting criteria to neutral ones may be intended to avoid characterizations that suggest constitutional wrongdoing where this is unlikely. A good faith genetic screening program is not about looking for persons of particular races, but for persons bearing certain traits that are not definitionally or logically connected with the idea of race. Those traits are defined within the conceptual field of medical disorders, and we are not only properly concerned with these traits, we may be morally obliged to address them. Sickle-cell anemia is not really a proxy for race/ethnicity; *it is precisely the reverse: it is race/ethnicity that is a proxy for the true and compelling goal of promoting life and health* by finding persons or families at seriously elevated risk for the disorder (an issue in fact discussed in passing by the Court).<sup>394</sup>

In the prison example, as we saw, being of race X is an index for being killed or injured in violent combat by a person of race Y. Protecting persons at high risk of death or great bodily harm in the immediate future is an *overwhelming* reason for government preventive action. Yet the conceptual case for dropping strict scrutiny for racial and ethnic segregation in prisons in order to prevent clear, imminent dangers of catastrophic harm is unpersuasive—for the very reasons that we assume a high probability of

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the descriptive accounts of race. For a critique of the there-is-no-such-thing-as-race claim, see SHAPIRO, *supra* note 345, at 99–101.

<sup>394</sup> See generally *Bush v. Al Vera*, 517 U.S. 952 (1996) (invalidating what the Court viewed as racially gerrymandered congressional districts in Texas). In *Al Vera*, Justice Stevens dissented, arguing, [W]hen the state action (i) has neither the intent nor effect of harming any particular group, (ii) is not designed to give effect to irrational prejudices held by its citizens but to break them down, and (iii) uses race as a classification because race is “relevant” to the benign goal of the classification, . . . we need not view the action with the typically fatal skepticism that we have used to strike down the most pernicious forms of state behavior.”

*Id.* at 1010 (Stevens, J., dissenting). He offered an example: “Requiring the State to ignore the association between race and party affiliation would be no more logical, and potentially as harmful, as it would be to prohibit the Public Health Service from targeting African-American communities in an effort to increase awareness regarding sickle-cell anemia.” *Id.* at 1032.

Justice O’Connor, in response, argued,

[W]e subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign—as Justice Stevens’ example of a targeted outreach program to protect victims of sickle cell anemia . . . would, no doubt, be—or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification.

*Id.* at 984 (majority opinion); see also DUSTER, *supra* note 384 (discussing a sickle-cell screening program that had, at best, mixed results). There have been some fairly successful genetic screening efforts, but they seem largely limited to groups governed in a strict hierarchical ordering and having strong inside/outside borders—for example, Hasidic Jewish communities. See SHAPIRO, *supra* note 345, at 821–24, for an overview of the topic. The completion (so-called) of the Human Genome Project may well place more such issues on the table. See *id.* at 924–30.

inter-racial violence in prisons: racial animosity and its long history. Prisoners are likely to attack each other because of racial hatred; government is likely to be hostile to racial and ethnic groups—racial hostility is not confined to the imprisoned. The risks of abusing or over-using even morally and constitutionally required protective actions, including racial separation, are too great to “merge” the interest in preserving life and limb into the classification furthering that preservation. The prison situation is just too different from the sickle-cell problem—and way different from the search for the pale lady with the fedora who just assassinated someone.

3. What is the proper constitutional argument structure?

a. Of rational bases and strict scrutinies

First, to loop back to our topic’s question: What difference does it make if the government action is upheld under the rational basis test or under strict scrutiny? The answer, still gossamer, is that framing the question one way or another can raise value hackles that are unpleasant and may even teach the wrong lessons. And if we cannot confirm any impacts on attitude or behavior, “it sends the wrong message” remains, for better or worse, a central criterion in argument selection and in many other arenas of life. The idea of the “expressive function” of law has a very long history, although it gets rediscovered or reinvented from time to time. Sometimes the notion of sending messages is all we have to work with in deciding cases.<sup>395</sup>

In all of these programs, the characterizations present obvious and important facets of whatever we are doing. Even if what we are looking for has no direct conceptual connection with race, however defined, our particular investigation does not stand alone. Whenever we *put into operation* any program described with the use of racial designations, we will be dealing with race, across many cases, in a simple, immediate and intuitive sense.

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<sup>395</sup> See Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 693–97 (1994) (discussing “Regulation” and “Regulatory Message”); see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (offering many examples of messages communicated by various government and private actions). For an early account of the “denunciatory effects” of the criminal law, see generally 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81–82 (1883). On connecting value reinforcement with cognitive psychology, see Kenworthy Bilz & Janice Nadler, *Law, Psychology & Morality*, in MORAL COGNITION AND DECISION MAKING (D. Medin, et al. eds., Northwestern Law & Econ. Research Paper No. 08-13, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1155104](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155104) (stating that “even when there is little reason to believe that a change in law will lead to changes in behavior or attitudes, groups see the law as a form of moral capital that they wish to own, to make a statement about society”).

This is risky business, even if we are puzzled about how to explain the linkage. (The fact that the linkage is puzzling may be a factor in calculating the risk.)

Keeping these risks in mind, consider again the search for the assassin who killed the wannabe French monarch. Interposing “the race card” to block even briefly the search for a perpetrator of a serious crime, or for persons at risk for a genetic disorder, or for persons dismissed from work because of race, etc., may impair the coin of the suspect classification doctrine, and weaken its value reinforcement properties.<sup>396</sup> When public safety is at risk—as when a dangerous criminal is at large—*it offends important values by pitting them against other values*, such as an antidiscrimination principle, *that are not necessarily seriously at risk* in the situation.<sup>397</sup> The patent misuse of strict scrutiny—as by applying it inappropriately to burden or limit government action—weakens it by impairing its protective “message.” Although the risks of race-based constitutional offenses when searching for suspects are certainly not zero, the harms would probably be worse for a ban on—or heightened scrutiny for—racial descriptions in searching for specific suspects. How would constitutional suspicion of racial descriptions be implemented through heightened scrutiny without impairing law enforcement and respect for constitutionalism? Although the irony is not surprising, treating racial descriptions as suspect classifications would call attention to race in a way that places anti-subordination sentiments under a cloud of suspicion.<sup>398</sup>

The same variables apply to screening a group for a dangerous medical predisposition, genetic or nongenetic or mixed, but possibly with different results. Because of the dangers in running programs that expressly refer to race and link it to possibly stigmatizing conditions, such projects might be candidates for strict scrutiny. However, unless special facts are shown—such as targeting a race for harassment purposes—raising the race card in such cases may again be misguided. It carries a risk of impairing public respect for the suspect classification framework and the values it

<sup>396</sup> “Yet it is difficult to imagine an effective prohibition on suspect description reliance. Police officers and private citizens alike would evade the prohibition. Witnesses would display looks of incredulity when told that their description of their assailant’s race would be ignored or treated as no more important than eye or hair color.” Banks, *supra* note 367, at 1117–18.

<sup>397</sup> *But cf.* Jack M. Balkin & Reva B. Siegel, *supra* note 56, at 27–28 (“Perhaps, after a decade or so of sustained challenge to the use of race in profiling and describing suspects, courts will one day come to apply heightened scrutiny to the use of race in detaining criminal suspects—although the events of September 11, 2001, have no doubt diminished the likelihood and imminence of such reform.”). As an across-the-board matter, this “reform” is not necessarily something to look forward to.

<sup>398</sup> Compare the remarks of Professor Banks, *supra* note 367.

implements. Still, doing so is not nearly as perverse as subjecting the search for the assassin to strict scrutiny because she was described by reference to race.

b. Blurring values by blurring the stages of argument

As for prison wars, as with the search for genes, medical conditions, and for particular victims of racism, the basic choice is the same, however different the analytic conclusion. Either we deny at the threshold any racial classification, or we accept its presence but invoke it at the government justification stage—at which point we would encounter the same competing interests that suggested there was no threshold racial classification in the first place. Although these two frameworks clearly differ in meaning and involve different modes of dealing with the underlying interests in tension, there is a strong likelihood that the bottom line will be the same in each case.

Nevertheless, deciding between the two argument frameworks in searches for the medically at risk, for victims of discrimination, and for victims-to-be of prison wars is more difficult than in the search for the assassin. The degrees of connection of a project to race and to the social dangers thought to justify the link to race are hugely variable and involve multiple dimensions of value risk. Although a certain degree of value ordering is possible, the descriptive alternatives available at the threshold—race classification or not—do not fall into a neat sequence marking distinct degrees of risk to racial equality. Nor do government interests all fall into orderly parallel sequences of importance to society. It is thus hard to say whether these social interests should be merged into the threshold (there is no racial classification, so minimal scrutiny is the standard) or kept disaggregated (there is a racial classification and it triggers strict scrutiny). There is no universal rule here assigning a preference to lumping or splitting.

So, what would and should we *make* of research designed, say, to explain whether and (if so) why African-Americans are at greater risk for high blood pressure?<sup>399</sup> Such a project merits careful attention from all quarters and probably should not be put down, from fear of imposing racial

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<sup>399</sup> Part of the problem here is that some conditions seem to be empirically connected to being of a given racial or ethnic group. For example, black persons living in the United States are said to be at elevated risk for hypertension, but the relative contributions of genetics and environment and their interactive effects have not been sorted out. See generally Mayo Clinic, *How Being Black Affects Your Blood Pressure*, CNN.COM, Apr. 27, 2005, <http://www.cnn.com/HEALTH/library/HI/00067.html>.

stigma or other harms, by subjecting it to a presumption of constitutional impropriety.

Blurring these stages of strict scrutiny might be thought to be preferable to the explicit unpacking inherent in such review because it reduces the risk of undervaluing very strong government interests, and of weakening the reputation—and utility—of the suspect classification doctrine. For example, suppose the following were viewed as racial classifications requiring strict scrutiny: screening only (or primarily) black persons for sickle-cell anemia, and approving BiDil for black persons only. How would we characterize the compelling interests said to justify the classifications? Protecting the health of the black population? Is this a constitutionally legitimate goal? Or would we simply recharacterize the matter to reblur what we have unpacked—as by saying that we simply want to improve everyone’s health, and the most cost-effective way to do this requires searching for and treating people efficiently? On this view, we waste money if we search for the sickle-cell gene among the Scotch-Irish, and we put white persons at risk by prescribing BiDil for heart failure when the data justify such use on black persons only (as I assume for present purposes). The least-restrictive alternative standard is thus satisfied by race-conscious actions—as in various forms of affirmative action. Similar questions might be asked of medicines that affect men and women in different ways.<sup>400</sup>

More generally, convergent though they are, these competing accounts of several of the situations described here reflect different ways of thinking about and evaluating race-linked transactions, and so bear different moral/constitutional freights. Even though both minimal and strict scrutiny would likely yield the same outcome, and probably would have no unwanted spillover effects in other constitutional fields (a point I get to shortly), insisting on strict scrutiny in searching for Sandrine and for persons medically at risk pulls against constitutional values and felt moral obligations.

If so, would relying on the one conceptual system rather than the other have long term effects—adverse or beneficial—on our moral attitudes, beliefs, and behavior? After all, how we frame things reflects how we think and feel about them, and *that* surely affects behavior—and, as I said, we may not need to prove this to support our framing. The nature of the obli-

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<sup>400</sup> See *Study Shows Drugs Work Differently in the Brains of Men and Women*, PHARMACEUTICAL NEWS, Apr, 24, 2006, available at [http://www.news-medical.net/print\\_article.asp?id=17559](http://www.news-medical.net/print_article.asp?id=17559).



gation (constitutional or moral) to confirm hypotheses about human thought and behavior is a connected topic well worth separate analysis.<sup>401</sup>

The other major criterion for selecting among our converging arguments concerns undesired outcomes in constitutionally-related areas. I don't think it has much purchase here because of the serious descriptive variability at the threshold characterization stage. Using strict scrutiny to resolve the prison segregation case is unlikely to inspire its use when fugitives from the law are described by reference to their race, ethnicity, or gender. Even if strict scrutiny were invoked, the result would rarely be in doubt: *of course* providing an accurate description is narrowly tailored toward furthering a compelling interest. And, in the other direction, the use of minimal rationality to test the search for suspects or the hunt for genetic or other medical predispositions linked to race is unlikely to weaken the hold of strict scrutiny in any region where it belongs.

As for using both conceptual systems: although the two approaches—find suspect classifications and get strict scrutiny; fail to find them and get minimal scrutiny—are often openly compared by courts, they cannot both be *adopted*. Here, the alternative conceptual systems are not complementary: a premise of the one system—“this is a racial classification within the meaning of the constitution”—is denied in the other. Only the comparison—an either/or presentation—would be in order.

Finally, note that there is, under current doctrine, an argument structure that might be imported into these uncomfortably race-linked situations: the Court's conceptually rickety use of the rational basis standard as a form of above-minimal scrutiny (not acknowledged by the full Court to be such) in non-suspect or semi-suspect classification cases such as *City of Cleburne v. Cleburne Living Center, Inc.*<sup>402</sup> This intermediate standard of review

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<sup>401</sup> See generally *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). In *Slaton*, Chief Justice Burger's majority opinion reviewed various state interests, but noted that the Court would not “resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges on rights protected by the Constitution,” *Id.* at 60. He added that governments could and did act on “unprovable assumptions.” *Id.* at 61. The Court ruled that obscene material is not speech within the First Amendment's meaning. *Id.* at 69–70.

<sup>402</sup> 473 U.S. 432 (1985) (invalidating the failure of a local government to grant a zoning variance for a facility for mentally impaired persons).

It may be that not all equal protection rational basis invalidations are disguised forms of intermediate scrutiny (although this plainly depends on what one means by any form of constitutional “scrutiny”). In *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that a state violated the Equal Protection Clause when it imposed unique burdens on gay claimants seeking greater protections of civil rights. *Id.* at 635. One could argue that *Romer* is a true rational basis case, although of a quite distinct sort. The Court said that the very goal of Colorado was to put down a particular group, and that this was not a legitimate state interest that could justify the classification. *Id.* Thus, Colorado's constitutional

would converge with both strict scrutiny and the minimal rational basis test in validating good faith government actions in the preceding examples. Indeed, one could, to promote clarity and simplicity, simply try to forge an official intermediate scrutiny standard for a range of cases in which racial *designations* appear, but the case for concluding that they are *racial classifications* in the constitutional sense is questionable. I do not recommend this course, although it seems more plausible for gender classifications that arguably track real differences (such as variations in the efficacy and safety of medicines). We would hardly improve the situation by setting up three boxes to check for “Is this a racial classification?”—Yes; No; and Hard to say. Then again, we have at least three tiers of scrutiny in several areas of constitutional law, and the system works, sort of. (Of course, the three standards of review are not meant to converge across all cases.)

E. THE CIVIL RIGHTS ACT OF 1964, THE COMMERCE CLAUSE, AND § 5 OF THE FOURTEENTH AMENDMENT: ARGUMENT STRUCTURES AND HUMAN REDUCTION

In *Heart of Atlanta Motel, Inc. v. United States*,<sup>403</sup> Justice Clark, for the majority, said:

The Senate Commerce Committee made it quite clear that the fundamental object of Title II [of the Civil Rights Act of 1964] was to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” At the same time, however, it noted that such an objective has been and could be readily achieved “by congressional action based on the commerce power of the Constitution.” Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.<sup>404</sup>

Of course, in theory, precisely the same thing might have been said about § 5 of the Fourteenth Amendment: “since the [§ 5] power is sufficient for our decision here we have considered it alone.” So why did the

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amendment failed the rational basis test because it had no legitimate goal to which its provisions could be rationally connected. *Id.* One might also view the amendment as having effectively drawn heightened scrutiny because an antidiscrimination principle was thought to be seriously impaired.

<sup>403</sup> 379 U.S. 241 (1964).

<sup>404</sup> *Id.* at 250 (citation omitted).

Court choose the one and not the other to leave in the limbo of not being ruled upon?

For a federal statute to be constitutionally valid requires at least that it be within the powers delegated to Congress. For a large proportion of statutes, finding a putative constitutional source for Congressional power is not a difficult task. The only likely source of power to substantively regulate food safety in the private market is the Commerce Clause; if that doesn't work, that's the end of it (at least in peacetime), although Congress could use the taxing and spending powers to burden the industry (and perhaps "take" some property here and there).

The enactment of the Civil Rights Act of 1964,<sup>405</sup> however, involved a debate on what *should* be viewed as the proper source of Congress's power to legislate on civil rights. The direct Congressional regulation of civil rights—as by defining offenses and authorizing their enforcement—was thought to derive either from the Commerce Clause or § 5 of the Fourteenth Amendment, and some of those who preferred the latter affirmatively dispreferred the former.<sup>406</sup> For them, the congressional powers to regulate commerce among the states and to enforce the provisions of the fourteenth amendment addressed quite different arenas of human conduct—commerce “rather than” matters of human dignity. Human dignity can be besmirched by “reducing” it to commerce, as the argument went. (But commerce cannot be besmirched by considerations of human dignity, although its workings may be affected, for better or for worse.)

This is the choice-of-argument battle described by Justice Clark in *Heart of Atlanta*.<sup>407</sup> Some opponents of the Commerce Clause foundation evidently do not see these choices as involving complementary tracks: they

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<sup>405</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

<sup>406</sup> U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. amend. XIV, § 5.

<sup>407</sup> 379 U.S. 241 (1964); *see also* *Edwards v. California*, 314 U.S. 160, 171 (1941) (striking down on dormant Commerce Clause grounds a state statute providing that anyone who “brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor”). Justice Douglas concurred, but said:

I express no view on whether or not the statute here in question runs afoul of [the Commerce Clause]. But I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines. While the opinion of the Court expresses no view on that issue, the right involved is so fundamental that I deem it appropriate to indicate the reach of the constitutional question which is present. The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.

*Edwards*, 314 U.S. at 177–78 (Douglas, J., concurring).

believe that if one of these powers applies to a field of action, the other one either cannot or should not be invoked because they are in sharp tension.<sup>408</sup>

I say nothing about the ultimate validity of either constitutional track, although believing at least one of them to be valid is, one would think, an important precursor to choosing between them. (I am not excluding the possibility of using both.)<sup>409</sup> The debate, as it took place in the 1960s and has occasionally been replicated, can be described simply and starkly, if somewhat tendentiously: First, congressional power to prohibit businesses from refusing service to would-be customers is sustainable under the Commerce Clause.<sup>410</sup> Second, even if so, to found civil rights protections on the Commerce Clause requires that we view individuals as commodities, and as being entitled to the basic right to be free of racial discrimination only (or primarily) because of their participation in commercial transactions. Third, this is morally and constitutionally inappropriate. Therefore, we should use § 5 of the Fourteenth Amendment, which also validates the Act, but without the aforementioned disadvantages.

The move from “founded on the Commerce Clause” to “your basic rights turn on your status as a participant in commerce” is a *non sequitur*. Nevertheless, for some observers, the Commerce Clause foundation is unacceptably “reductive”:<sup>411</sup> within a market framework, human beings are viewed largely as mechanisms of commercial exchange, their full value as

<sup>408</sup> See Justice Douglas’s concurrence in *Edwards*, 314 U.S. at 177; see also *infra* note 420.

<sup>409</sup> Note Justice Black’s dissent in *Daniel v. Paul*, 395 U.S. 298 (1969), which ruled that a snack bar fell within the domain of the Civil Rights Act of 1964. *Id.* at 307–08. He protested that “I could and would agree with the Court’s holding in this case had Congress in the 1964 Civil Rights Act based its power to bar racial discrimination at places of public accommodations upon § 5 of the Fourteenth Amendment. But Congress in enacting this legislation did not choose to invoke this broad Fourteenth Amendment power to protect against racial discrimination; instead it tied the Act and limited its protection to congressional power to regulate commerce among the States.” *Id.* at 309 (Black, J., dissenting). Justice Black, however, had joined Justice Douglas’s concurrence in *Edwards*. *Edwards*, 314 U.S. at 181 (Douglas, J., concurring). One may ask whether a federal law not authorized under one congressional power provision but valid under another one not specified by Congress should be upheld because it has *some* sustainable constitutional foundation. If Congress argues *only* the § 5 foundation, but the Court rejects § 5 authorization while believing the legislation valid under the Commerce Clause, one would think the legislation valid.

<sup>410</sup> Quite a few material issues are buried in this description, but presenting the doctrinal details of Commerce Clause jurisprudence would be of no value here. I note simply that the Court has not required that every individual service/no-service transaction be shown to be “in” or substantially connected to interstate commerce. For a review of the principal cases in the development of these doctrinal tools, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 123–78 (15th ed. 2004) (covering the commerce power).

<sup>411</sup> On reduction, see generally Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) that Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISC. L.J. 1, 14–16, 120–67 (2000) (distinguishing various forms of reduction).

persons having reduced to a defined mercantile sum.<sup>412</sup> Moreover, within these transactions, people are not only seen mainly as commercial actors but, even worse, as being among the commodities being exchanged or purchased. (Recall the ancient wisdom that law students aren't simply the customers of law schools, they are the products being manufactured.) Rather than seeing this Commerce Clause foundation as an artifact of the nature of our federal system, critics see it as a moral contaminant when used to enable civil rights legislation.<sup>413</sup>

To which one might respond: so what? This is just a bunch of abstract, fussy flapdoodle. If people have rights to engage in commercial transactions and if vindicating these rights is important for human dignity, the doctrinal underpinnings of the right are irrelevant. The critics have a loopy distaste for "the market," and seem incapable of understanding that markets are forms of socialization that build and maintain civilization and assist many of its other forms of socialization.<sup>414</sup> The Archbishop's salary must be paid. The Commerce Clause readily addresses the simple but powerful insight that one can be *excluded* from the realm of personally desired commercial transactions (acquiring lodging, food, gasoline) *in ways that offend the intrinsic value of personhood*. Forbidding commercial transactions because of racial hostility reduces the excluded person to the status of a nonperson—to thinghood. (Thinghood isn't limited to commercial entities.) Even if, from the standpoint of the toothpaste vendor, I am just a fungible customer being used to generate revenue, to prevent me from patronizing that vendor because of my race or ethnicity is a racist assault on my moral right to make my way in the market. It is a matter of individual autonomy and personal dignity. If one is being used by the vendor, one is not thereby *merely* being used—a critical adverb often left out of Kant's Formula.<sup>415</sup> The commercial market, as ordinarily understood, is meant to promote the autonomy of its individual constituents, and indeed, presupposes it within the legal system that enables the market. Commercial markets facilitate personal interactions and benefits that might be difficult or

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<sup>412</sup> *Id.* at 14–16.

<sup>413</sup> See *supra* note 408 & *infra* note 420.

<sup>414</sup> See generally Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463, 1472 (1982) (stating that "some features of market society make for social integration rather than the opposite"), available at <http://www.jstor.org/stable/2724829>.

<sup>415</sup> This is a reference to the second formulation of Kant's Categorical Imperative. "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end." THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* 38–39 (1992) (analyzing "the second formulation of the Categorical Imperative").

impossible in a regime stressing restrictive kinship or personal attachments rather than the more encompassing factor of ability to pay.<sup>416</sup> Squashing, on racial grounds, a proposed transaction where the party seeking goods or services has the ability to pay is a moral and legal outrage. Allowing one to pay for legal goods and services doesn't "reduce" anyone to a commodity. Moreover, tending both to one's basic needs and one's *everyday* personal interests often requires a commercial transaction. Acquiring toothpaste on a given occasion may not be of great importance in one's life, but being told that "we don't serve customers of your kind" is a major offense every single time it occurs, whether the foregone opportunity is toothpaste, education, employment, or lodging. One's trade, business, profession, or residence; one's personal style in presenting oneself; one's acquisition of necessities—all these are leavened by a commercial underpinning or some form of exchange, whether viewed as "economic," intrafamilial, or a matter of gift giving.<sup>417</sup> One does not become a physician, lawyer, or carpenter without critical supporting exchange transactions.

More generally, the Commerce Clause doesn't care whether it's regulating product quality or upholding human rights: both are important to autonomous persons. It was established long ago that even if Congress's purposes in enacting a regulation are "moral" rather than "commercial" (between which there are no clear boundaries—if one can even speak of "boundaries" here), that alone does not annul its powers under the Commerce Clause.<sup>418</sup> One might well say that the main point of the Civil Rights Act was to facilitate commerce. The only sensible point to debate is whether either or both clauses of the Constitution provide Congress with the power to enact the Civil Rights Act.

One might object here that an important comparison is being overlooked. It is not so much that the market objectifies people; and no one denies its role in promoting individual liberty and dignity. The point is that § 5 promotes these values better and totally co-opts any reductive risks. On the face of it, § 5 was meant to promote human dignity, fairness and equality against a state's threats to these values. Although it has no explicit link

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<sup>416</sup> See Shapiro, *supra* note 395, at 761; see also Gregory Rodriguez, *The Economy of Affection*, L.A. TIMES, July 2, 2006, at M5. ("Our collective tendency to romanticize pre-modern life leads us to believe that people were friendlier before the advent of capitalism. But recent studies suggest that relationships in pre-capitalist England were frequently characterized by caution and suspicion. Trust among strangers required the exchange—the social mixing—of the marketplace.")

<sup>417</sup> Not every form of exchange is a market transaction, of course. Kinship, for example, may be a dominant element of a distributive system, bearing properties different from (if overlapping) market distribution. See generally Hirschman, *supra* note 414.

<sup>418</sup> E.g., *Champion v. Ames*, 188 U.S. 321, 358–62 (1903) (the "Lottery Case").

to the market, it protects one's rights to participate in the market, but doesn't "condition" federal protection on the occurrence of sales transactions. The Commerce Clause argument, in making the institution of commerce a *precondition* to protecting the rights of persons, grates against the moral value of personhood, which is impaired when persons are treated, in effect, as nothing but commercial antagonists—merchants and would-be buyers—or as *themselves* items of property.<sup>419</sup> In principle, as one might urge, persons should be protected *absolutely* just because they are persons, rather than being protected *contingently* on whether they become the subjects of commercial transactions.

This isn't total nonsense, although that view comes to mind. What is the audience in whose eyes travelers are commodified? No more than a few academics, judges, and posturing politicians. Who in fact sees persons "reduced" through protecting their commercial transactions on a theory of federal power based on commerce among the states? The differences in the paths to validity are arcane and impenetrable to almost all but a few law-trained people. The Civil Rights Act is the Civil Rights Act and, jurisdictional "hooks" or platforms for interstate commerce aside,<sup>420</sup> it would have said what it says in almost exactly the same terms *whatever* Congress's power was thought to be. A black person free to register at the Heart of Atlanta Motel because of the force of the Civil Rights Act is unlikely to feel objectified because the Act was founded on Congress's Commerce Clause

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<sup>419</sup> Persons-as-property (or as otherwise objectified, reduced, or merely used) is an oft-invoked conceptual *bête noire* in various areas of law. Cf. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (holding that a leukemia patient stated a claim on a fiduciary obligation/informed consent theory by alleging that some of his cells were used without his knowledge by his physician and others to construct a valuable cell line; the court avoided characterizing his interest as involving "property").

<sup>420</sup> That is, one would not draft provisions on the connection of the regulation to interstate commerce if one were relying solely on § 5. Some members of Congress cited the Commerce Clause in support of the Civil Rights Act of 1964; others relied on § 5. I do not know if any members thought both clauses to be reliable foundations for the Act. See generally RICHARD C. CORTNER, *CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA HOTEL AND MCCLUNG CASES 24–27* (2001) (comparing the views of Republicans and Democrats and indicating that Republicans generally preferred the § 5 foundation, in part because of the Commerce Clause underpinnings of New Deal legislation that they had opposed in the 1930s; the Democratic administration preferred the Commerce Clause). Attorney General Robert F. Kennedy, however, argued that the Act was theoretically sustainable under both clauses. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 159 (11th ed., Foundation Press 1985) (quoting Mr. Kennedy's testimony during Senate Committee Hearings in 1963). Professor Gunther preferred the § 5 argument because the Fourteenth Amendment had "a natural linkage to the race problem," and denounced the Commerce Clause framework as involving a "demeaning task than the construction of an artificial commerce façade." *Id.* at 163 (quoting from a letter of June 5, 1963 from Professor Gunther to the Department of Justice). "It would, I think, pervert the meaning and purpose of the Commerce Clause to invoke it as the basis for this legislation." *Id.*

powers—even if she is a law professor. In any case, she is likely to feel far more objectified if she is refused service because of race or gender.

Using the Commerce Clause is also arguably the safest way to provide this protection, given various uncertainties concerning the reach of § 5. Perhaps, in some eyes, it is also the simplest and most intuitively plausible foundation, as suggested by Professor Freund in 1964.<sup>421</sup> For a number of observers, the sense of strain in reaching the adjudicatory outcome favoring those suing under the Act is significantly less with the Commerce Clause than with § 5. Indeed, some may think that § 5 can't bear this strain, and the two source-of-Congressional-power arguments simply do not converge. If so, there is no argument-convergence problem here because there is only one argument that validates the Civil Rights Act—the Commerce Clause alone.<sup>422</sup>

#### F. THE LOCATION OF SEX-ORIENTED THEATRES: THE FRAGMENTATION—OR UNITY—OF THE IDEA OF SPEECH CONTENT

Zoning-like regulations that restrict the locations of sex-oriented movie theatres and related businesses have been upheld by the Supreme Court in several cases (referred to earlier as the X<sup>n</sup> movie theatre cases); the best known is *City of Renton v. Playtime Theatres, Inc.*<sup>423</sup> Sometimes the theatres and related businesses are told to concentrate themselves in a given area, so as to isolate and confine these moral contaminants—somewhat like a public health containment approach. Sometimes they are told to disperse, so as to avoid a critical mass that generates a moral chain reaction—the formation of a red-light district that in turn brings higher crime rates, lower property values, demoralization (except for the profit-takers from these events), and whatever other ills follow from all this.<sup>424</sup> Determining which is better—and whether either (or any) maneuver is likely to be successful at

<sup>421</sup> He suggested an analogy to the “security act [referring to regulation of interstate sales of securities] or pure food and drug technique,” which rest on the regulation of goods that generate or facilitate evil. Paul A. Freund, *Civil Rights and the Limits of Law*, 14 *BUFF. L. REV.* 199, 203 (1964). “This seems to me to be technically easier and also more persuasive to the ordinary man.” *Id.*

<sup>422</sup> It remains unclear how far Congress can go in regulating private conduct either as a means of enforcing the Fourteenth Amendment via § 5 or under the Commerce Clause. For example, the Court in *United States v. Morrison*, 529 U.S. 598 (2000), invalidated the federal Violence Against Women Act of 1994, both under the Commerce Clause and § 5. As to the latter, the Court stressed that the Fourteenth Amendment was directed primarily at state action. *Id.* at 621 (Chief Justice Rehnquist, delivering the majority opinion). I do not discuss the impact of *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) on present-day argument selection.

<sup>423</sup> 475 U.S. 41 (1986); see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

<sup>424</sup> See *Young*, 427 U.S. at 54–55.



all, and in what terms—may be difficult. The Court has not, so far, found it necessary to seriously review the empirical foundations of this issue.

Despite the relative frequency of having to choose among converging arguments, few constitutional cases involve as large a range of choice as was presented in *Renton* and its affiliated cases, so it is worth an extended look.

### 1. Some preexisting argument structures

There are several First Amendment argument structures that might be considered in these cases, and they seem to meet the requirements for extensional equivalence: each of them can plausibly be put to the facts to reach the same outcome, though not necessarily with the same ease. To understand why we can reach the same adjudicatory result on most of these alternatives, keep the following propositions about First Amendment doctrine in mind; each one can be taken as a distinct conceptual system or argument structure that might be used to rationalize the outcome of the case—the upholding of the (re)location requirements. I am of course not presenting anything approaching a complete account of the applicable doctrine.<sup>425</sup>

(a) It is sometimes said that government regulations of message content are presumptively invalid, drawing strict constitutional scrutiny.<sup>426</sup> This is much too breezy and misleading for even a loose redaction of doctrine. There are spheres of communication in which either the presumption doesn't hold or it is weak or otherwise qualified—for example, in public schools and the various connected but distinct facilities within them when viewed as nonpublic forums.<sup>427</sup> The theory accounting for these somewhat disconnected spheres is complex and much has yet to be worked out. It is not even clear whether some or all “viewpoint” regulations are to be subjected to strict scrutiny in nonpublic forums; viewpoint regulations aren't

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<sup>425</sup> For a useful review of the Court's use of intermediate scrutiny in various areas of First Amendment law, see generally Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

<sup>426</sup> *Cf. Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 101 (1972) (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.”)

<sup>427</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267–70 (1988) (upholding the regulation of a school newspaper by school officials, viewing the newspaper as not constituting a public forum); *cf. Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–80 (1986) (upholding a sanction against a student who delivered a sexually suggestive speech at a school assembly; the Court, however, did not use the term “public forum”; Justice Stevens, in dissent, mentioned the concept in passing).

all of a piece. “No Republicans will be allowed to speak at the civics assembly” is not likely to be treated in the same way as “No Nazis will be allowed to speak at the civics assembly.” Just what “content regulation” is and what is wrong with it from a free speech perspective requires extended analysis, but not here. Briefly (and incompletely), it involves burdening speech because of its viewpoint, subject matter, or, in some cases, the speaker’s identity, which may be a rough proxy for viewpoint or subject matter.<sup>428</sup> To satisfactorily explain the notion of content regulation ultimately requires attention to the very meaning(s) of “communication,” “communicative impact,” “propositional content,” “idea,” and this includes matters relating not only to comprehension and understanding, but to modes of securing and keeping attention and facilitating recall.

(b<sub>1</sub>) Laws and rulings that target the “time, place and manner” (TPM) of speech but not its content are scrutinized too, but less intensely, and such TPM regulations are regularly—though far from always—upheld.<sup>429</sup> TPM regulations are understood to be content-neutral by definition—or at least so it was thought until the X<sup>n</sup> movie theatre cases came up—and some still think so. This posit of the content-neutrality of TPM regulations is a critical premise in *Renton*.<sup>430</sup>

(b<sub>2</sub>) The basic standard of review for TPM regulations is “reasonableness,” a concept that constrains government less than does strict scrutiny, but is notably more binding than minimal “rationality” scrutiny. (Although the terminological situation is awkward, it is clear that “reasonable” and “rational” have strikingly different meanings in constitutional law, depending on context.) For TPM purposes, the standard can be viewed as a form of intermediate scrutiny, but much depends on which Justice or judge is using the term.<sup>431</sup> From the government’s perspective, it is obviously far

<sup>428</sup> See generally CHEMERINSKY, *supra* note 285, at 932–94.

<sup>429</sup> See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–48 (1981). “As the Minnesota Supreme Court recognized, the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. . . . ‘We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.’” *Id.*

<sup>430</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–48 (1986).

<sup>431</sup> *Cf. Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (stating that the *O’Brien* standard “is little, if any, different from the standard applied to time, place, or manner restrictions”). *But see infra* note 436 (observing that the two standards, TPM and *O’Brien*’s, arise from differing circumstances).

There are, no doubt, theoretical and operational differences among “intermediate” standards—an unsurprising situation, given the large range of intermediateness. Does the government bear the burden of justification in time, place, and manner cases, as it does in, say, gender discrimination? See *United*

better if its actions are viewed as TPM regulations rather than content regulations because the former draw a lesser standard of review.

(c) Although it has never officially caught on with a majority of the Court except in the commercial speech area, argument structures might rest on placing very different values on different kinds of speech. Not surprisingly, this argument would assign a low value to what is presented in X<sup>n</sup> theatres. Differential valuation of speech categories that are *within* the First Amendment's protective domain is not unknown: as mentioned, commercial speech is assigned a lower value than political and allied forms of speech, but it is the only example officially acknowledged by the Court with respect to speech "within" the First Amendment's protective mantle.<sup>432</sup> Of course, the forms of speech "categorically excluded" from First Amendment protection—including obscenity, non-virtual child pornography,<sup>433</sup> and fighting words—are obviously not highly valued within the overarching First Amendment framework that recognizes behavior as speech, ranks it, and either excludes it or includes it in some way. Because of the categorical exclusion, one might say that the First Amendment value of the speech is zero. In a sense, that is true, but because of the heavy consequences of being assigned zero value, a fair amount of effort is spent by courts in determining the "constitutional fact" of whether a communicative item is, say, child pornography or obscenity and therefore categorically excluded. Speech intrinsic to—perhaps constitutive of—the commission of crimes ("crime speech"—for example, saying "I do" in an otherwise valid marriage ceremony when one is already married), generally does not attain the dignity of being called "categorically excluded" speech. In the sight of the First Amendment, crime speech is incapable of categorical inclusion or exclusion, or of being assigned low (but nonzero) value.<sup>434</sup> In effect, the First Amendment recognition system says it's not even bad speech.

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States v. Virginia, 518 U.S. 515, 532–33 (1996) (stating that where the government has made classifications based on gender, "[t]he burden of justification is demanding and it rests entirely on the State").

<sup>432</sup> One could argue that there is another low-value category of protected speech: conduct that is ordinarily noncommunicative but is designated as conveying a message (say, burning a draft card as a war protest) may draw intermediate scrutiny when government action impinges on it (as with a law prohibiting the destruction of draft cards). However, if such messages are targeted for their content, the government action draws strict scrutiny. The basic articulation of this doctrine is in *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>433</sup> That is, material using children to generate images, and not relying solely on computer-generated representations. Compare *New York v. Ferber*, 458 U.S. 747 (1982) (involving use of children), with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (ruling that "virtual" child pornography—computer generated material—cannot be banned).

<sup>434</sup> On "crime speech," see generally KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

One obvious question is why the categorical exclusions, which keep certain forms of speech out of the First Amendment special protection sphere *altogether*, are viewed as more acceptable (at least to most Justices) than differential valuation *within* the first Amendment sphere. This is closely linked to the questions raised earlier about the Francophobic assassin. Although I don't address the categorical exclusion issue directly, some of the comments in the balance of this section may bear on this issue; it is, after all, a clear instance of the problem of selecting among converging arguments.

(d) There are many doctrinal strands that greatly complicate this account. For one thing, there are spheres of communication in which the operating doctrines are somewhat different from those just outlined. Sometimes the doctrinal variations rest on the type of forum in question: Is the contested speech in a public school rather than a public park or sidewalk? Does it involve regulation of the broadcast media? Is it about communicating with juveniles? Should we view speech opportunities as associated with public forums as particular kinds of property or as loci of certain governmental managerial functions—or are these frameworks functionally equivalent?<sup>435</sup> (This too is worth extended “choice-of-converging-frameworks” treatment.) And so on. None of this is of any special concern here.

Against this doctrinal backdrop, consider some alternative conceptual frameworks for dealing with the troublesome regulation of these troublesome theatres. The argument structures are stated compactly, without all the reservations required for complete doctrinal accuracy.

## 2. Some alternative argument structures<sup>436</sup>

(a) We might first argue that *the regulations are not directed at speech at all*. Requiring theatres that show X<sup>n</sup>-rated movies to be concentrated in one area or dispersed across several is not a presumptively forbidden con-

<sup>435</sup> See generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1797 (1987).

<sup>436</sup> This is not a comprehensive review. For example, I do not include a “takings” argument in this discussion. Nor do I consider arguments that the speech, whether regulated by content or not, is categorically excluded as obscene; this was not at issue. There is thus no occasion to consider whether the First Amendment was violated by making impermissible content judgments within the categorically excluded obscenity area. Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380, 396 (1992) (invalidating an ordinance prohibiting the placing on public property of certain “bias-motivated” symbols, such as a burning cross or Nazi Swastika; the Court assumed that the ordinance targeted only the categorically excluded field of fighting words, but ruled that impermissible content distinctions were drawn within that field).

tent regulation because it's not about speech—it's just a zoning rule, and the zoning rule is concerned with controlling sexual activities. It is "beyond" content-neutral because the issue of content isn't even in the picture; speech is irrelevant—not a part of the regulatory plan. The minimal rational basis test would then apply—not the intermediate "reasonableness" test of TPM regulations, which in theory governs only laws *directed at speech but in a content-neutral way*.<sup>437</sup>

This position—"there's no speech here; speech (in any sense) is irrelevant"—is understandable as a rhetorical device to support a favorable characterization. From a more detached standpoint, however, it is quite unsound, flying in the face of the bare fact that the zoning rule targets enterprises—and *only* those enterprises—that are engaged in a particular form of communication with the general public. (The idea that exhibiting motion picture films is generally not First Amendment speech has no purchase whatever in First Amendment doctrine.) The claim that "this is about zoning (or anything) and not speech," taken literally in this context, is silly, sheer advocative considerations aside. "This is not about speech, it's about Y" is frequently offered in defense of regulating Y or within the region of Y, and sometimes it's well taken; at other times, it is simply circular, collapsing the reason for regulation into the characterization. In *Renton*, the question is indeed whether the regulation of movie theatres is in some sense about speech, and if so, what the doctrinal implications are.<sup>438</sup> Here, the connection between the zoning regulation and the content of the communication is *there*, in *some* form, and it is no coincidence. A better, but still problematic description, is: "This matter is *more* about Y than speech," which devolves to "the government's countervailing interests in commu-

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<sup>437</sup> In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court caused some confusion by "equating" the TPM standard to the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Clark*, 468 U.S. at 298. In *O'Brien*, the Court formulated a test for situations quite distinct from those involving time, place, and manner regulation. See *O'Brien*, 391 U.S. at 378–81. The facts—as viewed by the Court—involved legislation that did not target speech at all, even in a content-neutral mode. See *id.* at 376. In the Court's view, the draft law was one of "general application"—for example, in this context, not directed at speech, either facially or by way of hidden purpose. See *id.* (The latter view seems questionable.) However, it was applied to a situation in which the claimant had designated an ordinarily non-communicative process (described at a high level of generality—say, "burning whatever") as an antiwar message. To be sure, *O'Brien* situations may involve TPM regulations: it is one thing for a law of general application to foreclose a modality of communication (burning the draft card); it is another to say that all public demonstrations have to be held at non-rush hour times. If a law targeted certain modes of usually non-communicative process for special TPM rules ("fire extinguishers must be readily available for messages involving fire"), one would have to find from the circumstances whether the purpose was message suppression and, if not, whether the TPM measure was reasonable.

<sup>438</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986).

nity preservation are more important than the free speech interests.” In that form, the claim reflects intelligible First Amendment doctrine. So, we consider Y as entering into the justification phase of the government’s argument, rather than the threshold characterization stage, where we would encounter a lesser standard of review.<sup>439</sup>

One variant of the “There’s only conduct here, not speech” argument seems to reflect Justice Scalia’s view in *City of Los Angeles v. Alameda Books, Inc.*<sup>440</sup> In his concurrence in *Alameda*, he argued that speech has nothing to do with *Renton*-like situations because the business being regulated isn’t any sort of communication—it is simply the crime of pandering. Since it’s hard to pander without communicating, however, reaching the no-speech-here conclusion seems to rest on the idea that pandering is “crime speech” and doesn’t count as First Amendment speech (it isn’t even First-Amendment-categorically-excludable speech). Justice Scalia said:

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the “secondary effects” [this idea is explained below—*ed.*] of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment traditions make “secondary effects” analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex.<sup>441</sup>

Here, then, is a fairly explicit if ill-conceived choice among conceptual systems: Justice Scalia sees that two arguments—the one based on avoiding “secondary effects of speech” (the crime, lowered property values, etc., thought be linked to X<sup>n</sup> theatres) and the one averring that “this isn’t

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<sup>439</sup> As we saw earlier, however, there may be contexts in which Y does show up at the threshold stage. The value of the right seems to be assigned by working “backwards” from the justification stage: we consider how much of a burden of justification we think the government should have to bear, select the standard of review reflecting this burden, and thus implant a right into a particular region of the value hierarchy. But the very notion of determining how much work the government should have to do is a function of how important we think the claimant’s interest is. Rights valuation is thus bi-directional in this way. Perhaps the separation of races in order to get at genetic disorders more effectively is one example. See *supra* text accompanying notes 393–394.

<sup>440</sup> 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring). The plurality opinion by Justice O’Connor (in which Justice Scalia joined) stated that the city could reasonably rely on a 1977 study to support the view that prohibiting multiple-use adult businesses helped reduce crime. *Id.* at 436–37 (plurality opinion).

<sup>441</sup> *Id.* at 443–44 (Scalia, J., concurring). Justice Scalia cited to his concurring opinion in *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), in which the Court upheld the regulation of nude dancing under a public indecency ordinance banning public nudity; there was no majority opinion. *Id.* at 301–02. Assuming nude dancing could be pandering, it is not clear why showing X-rated films must also be. In any case, “pandering,” as a legal term, is generally defined by reference to prostitution. See, e.g., CAL. PENAL CODE § 266i (Westlaw 2006).

about speech at all, even its ‘secondary’ effects”—reach the same result. One path uses a form of intermediate scrutiny, the other draws minimal rationality, but the outcomes are identical. He says, however, that the secondary effects argument should be rejected because it doesn’t apply—it is immaterial to the facts as he sees them (pandering as crime talk, not involving First Amendment speech) and it would thus be doctrinally incorrect to invoke it.<sup>442</sup> It would, put otherwise, unduly honor the property owners’ activities to reward them with intermediate scrutiny. Minimal scrutiny, if that, is all they deserve. But Scalia does not put it that way, and does not need to. His criterion for choice of arguments here is simply doctrinal correctness as defined by precedent. Of course, if a decision is inconsistent with existing doctrine, the problem can be dispatched by a formal ruling that reformulates the doctrine, and so doctrinal correctness is not always a decisive criterion.

Despite Justice Scalia’s view that “secondary effects” analysis is immaterial, his own argument—we have crime speech (or no speech) here, not protectable speech—implicates the core of the secondary effects argument. It is thus useful to mention that argument here, rather than leaving it entirely to the next section, which is officially devoted to it. The secondary effects doctrine holds that the only regulatory targets in *Renton*-like cases are the *nonspeech* “secondary” consequences of using a business establishment to purvey sex-speech—for example, sleazing up the neighborhood through lowering property values, an expected result of attracting persons such as prostitutes, pimps, onanists, and drug dealers to the neighborhood.

This secondary effects perspective thus *acknowledges the role of First Amendment speech*—it doesn’t take the situation as *simply* involving criminal conduct; indeed, that’s why the term “secondary” is used: to present the contrast with the “primary” communicative effects of showing movies. (But it also suggests the other direction: departure from content and a turn toward effects viewed as state interests—which would justify the scant attention paid to content.) Nevertheless, the City’s regulation is not, on this view, directly concerned with the particular message and its communicative impact. The regulatory effort is thus no different—so the argument goes—from aiming at pollution from a manufacturing enterprise. (It seems *quite* different, although Justice Kennedy seemed impressed with the analogy.)<sup>443</sup> If a regulation is not directed (even content-neutrally) at speech at all, but at its secondary (or primary, tertiary, quaternary, etc.), the City’s position must be that the fact that the speech effects are indeed

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<sup>442</sup> See *Alameda*, 535 U.S. at 443–44 (Scalia, J., concurring).

<sup>443</sup> *Id.* at 444 (Kennedy, J., concurring).

*speech* effects is relatively unimportant, if not entirely immaterial. Still, the secondary effects doctrine is about the “secondary effects of *speech*,” not about claiming that speech isn’t involved at all. The comparison of *burning-coal-yields-air-pollution* and *showing X<sup>n</sup> movies-yields moral-pollution* offers some insights, but it is seriously off the proper descriptive mark. But Justice Scalia was unwilling to concede a role for free speech, given his pandering-isn’t-speech-it’s-crime position.<sup>444</sup>

Justice Scalia was of course not denying that the exhibition of pornographic films might generate the feared secondary effects of what the other Justices viewed as speech. He was just saying that this prospect makes no difference: no speech, no First Amendment problem, and the analysis can end right there (after spending a nanosecond or so confirming minimal rationality).<sup>445</sup> Although he didn’t present the argument, he might have said that, on his position, there is no risk of saying anything that might be taken to offend the First Amendment—it avoids any possibility of reducing the stature of presumptively protected speech by first openly admitting that the city is regulating presumptively protected speech (a quite plausible characterization) but then validating the severe constraints on it under the secondary effects doctrine. This may seem (to some) to cut against the grain of First Amendment values because it acknowledges their presence while simultaneously upholding their impairment—and possibly their functional demise at a given site. (Relocating a business is often costly.) The assault on speech is knowing and premeditated.

Of course, the obvious response is that where there are no serious First Amendment interests, not only is there no reason to try to reinforce free speech ideals, it would be counterproductive to such ideals to insist that they are at risk when they are not. It’s like falsely crying “wolf” in a crowded meadow. It impairs the coin of First Amendment value. Moreover, it is a very good thing, morally and constitutionally speaking, to indicate one’s disdain for moral garbage.

As for the supposed free speech embarrassment of asserting presumptive First Amendment protection and then holding the presumption to be overcome, the harm is overestimated. The possibility of overcoming a fundamental rights claim when strong interests require it is an intrinsic part of

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<sup>444</sup> Although it is not entirely clear, Justice Scalia seems to have viewed pandering as a local-option-crime: “The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex.” *Id.* at 443–44 (Scalia, J., concurring). Depending on the state, however, there may be questions about preemption or consistency with state policy.

<sup>445</sup> *See id.*



standards of review. Moreover, even if the speech (or any) aspect of a situation is overshadowed or outweighed by another, it doesn't cease to exist and its doctrinal pull continues. The very imposition of heightened scrutiny of some sort shows that there are serious First Amendment interests, even though the First Amendment claimants lost.

Still more, incorrectly refusing to situate the issues within the First Amendment initial-protection zone at all seems an even more serious move against free speech than conceding its pull but ruling against it for nontrivial reasons. Whatever the doctrinal uncertainties, denying *any* free speech dimension at all by fixing on pandering-as-nonspeech seems far-fetched; the dispute, properly viewed, is about how we characterize the regulation of the speech in constitutional terms, and, having done so, what sort of constitutional review it requires.

The question, then, is whether the situation—relocating all and only those theatres showing certain types of film—is better described with or without reference to speech, and in what sense of “betterness.” In this light, Justice Scalia probably picked the conceptual system that was less informative *because* it was less informative: replacing the references to speech with references to the crime of pandering masks the underlying constitutional values because it leaves out material aspects of the situation—the singling out of businesses that present certain forms of communication to the public.

True, Justice Scalia's argument increases the emphasis on the connection between pornography and actual sex, commercial or otherwise. The link was never very obscure, however, and it is easier for the free speech component to get lost. Even though the no-speech-here account leads to the same holding as does the speech-*is*-here view, the former masks the material facts. In this case, it's hard to see the benefit of such concealment—and in any case, no one is really fooled, which makes the “no-speech-here” account look phony. Once pointed out, it's easy to see that speech and speech content make a real-world difference here, and even if the speech claims lose out, *denying their existence makes constitutional analytics look bad*. (To whom? is a good question; the only answer I give here is: presumptively to everyone.) Adopting Scalia's argument not only does not reinforce free speech values but casts doubt on them by embracing what is, in this case, a sharply counterintuitive theory. Saying that something isn't there—speech within the First Amendment sense—when it's almost in your face suggests that the speaker is having an inverse hallucination.

Return now to the series of alternative conceptual systems for *Renton*. However they differ from one another, they provide far more illumination about *the full range of proper considerations* than the this-is-just-conduct spin. The illumination criterion, of course, has its limitations, one of which is that it isn't always desired or even desirable; there is something to the cliché about staying outside the sausage factories. This is an issue I will briefly recall in the final section.

Beyond exploring the view that the regulations were not directed at speech, we have also examined these frameworks:

(b) There is the *secondary effects* position, described above, and briefly elaborated here. The idea is that *the regulations are directed at speech, but not at its content*: they are directed, instead, at more remote but quite important consequences that have only a "secondary" connection with speech content, not a primary one. In particular, they are directed at implementing the state interests defined by those secondary effects. Because the regulations, on this view, do not target messages because of what they say, they should be seen as TPM regulations, subject to the middling reasonableness standard.

The standard of review is decisive here. Many TPM regulations are upheld, but only a few content-based regulations survive strict scrutiny.<sup>446</sup> Recall that TPM regulations are (or were) *definitionally* required to be content-neutral, and that they import an intermediate standard of scrutiny—"reasonableness." TPM regulations do raise First Amendment alarms, but the scale of intimidation of speakers is far lower than with content discrimination, and such constraints were historically understood to be disjoint with content-based regulations.

This conceptual structure for dealing with the location of X<sup>n</sup> theatres—"the law *is* directed at speech but not at its content"—makes some sense for at least two reasons. I trace these out briefly because they are integral parts of any explanation of how this somewhat unexpected (and, to some, counterintuitive) secondary effects argument was formulated and adopted.

*First*, "secondary effects" concern matters that (for better or for worse) local governments have historically had a strong discretionary hand in controlling: the overlapping matters of neighborhood appearance, tone, other "milieu" considerations generally, and—this is the primary target—

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<sup>446</sup> Recall the electioneering case, *Burson v. Freeman*, 504 U.S. 191(1992). See also *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding, under strict scrutiny, some restrictions on campaign spending and invalidating others).

the economic impacts of all these factors. (The well-worn term “lifestyle” refers to some aspects of these effects, but probably not all.)

On this view of secondary effects, the “primary” or “direct” causal consequences of speech—loosely, its “communicative impacts”<sup>447</sup>—are not specifically involved. The government is not concerned with the “mental events” or the sexual stimulation engendered by the movies or other presentations; indeed, they are not concerned with the movies as such—except insofar as they are instrumental, *whatever their content*, in generating adverse social and economic effects *down the causal line*. Being located down the causal line (“downstream”?) is why they are dubbed “secondary effects.” But the “mental events” (including the felt sexual stimulation) are considered part of the primary communicative impact—for example, the immediate mentational effects and their direct behavioral sequelae.<sup>448</sup> The government’s position, then, is that it is not concerned with voluntary, knowing viewers being offended, nor is it worried about others in the community being offended simply by knowledge of the film presentations and of the presence of the sorts of persons who attend them. Insofar as they are in fact offended in these ways, the zoning’s avoidance of such offense is gravy for the community, but is not the prime object of the zoning—protection of the locality’s economic and financial status. That status is threatened when people (outsiders or insiders) visit the theatre areas looking for viewers who have seen the X<sup>n</sup> materials, hoping to identify those in the audience interested in purchasing services of the kind one might wish for after viewing the films. This infusion of questionable persons and their associated transactions changes the feel of the neighborhood, and, closely connected, its economic characteristics.

Under the secondary effects argument, then, the local government doesn’t really care what the primary communicative impacts of the X<sup>n</sup> films are; they could be anything. The city is interested only in avoiding local economic and social degradation, not in preventing offense or in upholding some moral ideals—except insofar as the switching of ideals (whatever they are) generates economic costs. It is not trying to stamp out political or moral views as inherently, rather than instrumentally, bad. (For

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<sup>447</sup> “Communicative impact” is a richly complex term that has received some deserved attention. See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L.REV. 189 *passim* (1983).

<sup>448</sup> Cf. Schauer, *supra* note 360, suggesting that some forms of obscenity and pornography are better viewed as sex tools rather than as covered speech. In that light, speaking of the primary communicative impact of X<sup>n</sup> movies, or at least hardcore scenes, would generally be rejected. Pandering itself, however, seems inescapably connected to true communication because of its link to acts of prostitution, which do not occur without communication.

the skeptics, note that Justice Brennan also thought this argument was twaddle.)<sup>449</sup>

The distinction between primary and secondary effects is never going to be made precise, but uncertainty of this sort is intrinsic to most legal analysis, and the division of consequences, rough as it is, is meaningful in many contexts. One can indeed trace out networks of causation radiating from any communication: imagine a loud scream for help, a terrified person running away, a collision with a glass door resulting in the victim's exsanguination, followed by his death, the disintegration of his surviving family and business, and the collapse and dissolution of the community following the fall of the victim, its indispensable leader. One needn't be a close student of *Palsgraf v. Long Island Railroad Co.*<sup>450</sup> to get the idea about causal chains and networks. The question, in many cases, is whether the messiness of a concept or distinction occasions an intolerable risk of error. Moreover, the government's defense of its program is beset with a walking-a-fine-line problem: there must be a causal link between the regulated business and the secondary effects said to form the basis for the government interests being asserted.<sup>451</sup> But if the link is *too* direct—too close, too “primary”—then the claim that the regulation is content-based is a forceful one.

Despite the near-obliteration of the speech dimension within the secondary effects argument, complete constitutional evaluation of the zoning decisions in *Renton* still involves weighing the impairment of protected speech against a risk of neighborhood decline. An assumption of government purity of purpose (for example, maintaining neighborhood economic and lifestyle integrity) may be unrealistic; despite the sizeable customer base, there is likely to be strong disdain for sex-arousal speech and a concurrent (if not dominant) purpose of preventing improper thoughts, offense, disgust, and other forms of moral ruin. Of course, such sentiments are all about content. Sexual arousal would seem to be a *primary* or *direct* communicative effect, although the point is arguable. It is not clear that such an anti-sin, anti-offense purpose, even if proved, would be fatal where there is a bona fide concurrent purpose of preventing secondary effects that is sufficient to explain the regulation.

<sup>449</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 58–63 (1986) (Brennan, J., dissenting).

<sup>450</sup> 162 N.E. 99 (N.Y. 1928) (ruling that defendant was not negligent with respect to plaintiff, who had been injured through an unlikely chain of events).

<sup>451</sup> The nature of the government's burden of establishing the required causal connection is not entirely clear. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *supra* note 440.

Note that secondary effects are “secondary” in two linked senses, reflecting different dimensions of analysis—effects and purposes: as for *effects*, the secondary ones are more “remote” or “indirect” than primary communicative impacts; as for *purposes*, the point of the regulation—the state interests being furthered—concerns precisely those more remote effects, either exclusively or predominantly.<sup>452</sup> I suppose that personal on-the-spot moral degradation resulting from viewing filthy communications, if it occurs at all, is a primary effect—a direct communicative impact—and efforts to suppress it by regulating speech are subject to strict constitutional scrutiny. Still, these more remote effects *are still effects of the speech—its content, mode of presentation, and the circumstances of its expression*. So, following Justice Brennan, one could say it is truer to existing doctrine—and makes more sense—to separate the threshold (*this is speech and the government action is regulating its content*) from its standard of review (*the government action triggers strict scrutiny, or some lesser but still heightened form of scrutiny*).<sup>453</sup>

Second, the secondary-effects-content-neutrality argument structure might seem defensible in light of one of its main logical consequences, already noted: if the city were indeed acting in good faith, it would have no reason to care about content of any particular sort; it would care only about neighborhood decline deriving from whatever film genre is driving the causal sequence from communication to economic decline. All that would matter is whether bad things go down in the neighborhood because of the theatres. This is another use of the “subtraction” maneuver—the thought experiment testing for necessary or sufficient conditions by removal of a particular factor, and perhaps substituting another.

This thought experiment, however, requires some effort, which casts some Ockhamian doubt on it. It is not clear what sorts of film would generate neighborhood declines like those threatened by X<sup>n</sup> theatres. Still, there are some possibilities. Think of presenting World War II-era films—but from the Nazi viewpoint. American wannabe storm troopers wind up hanging around the neighborhood and making trouble. Or suppose the

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<sup>452</sup> Some may think this sense of secondary effects relies excessively on “mechanistic” ideas of causation—identifying effects that are thought to be indirect or remote, or too far down the causal chain. Whatever the causal account, however, it would be incoherent or unintelligible without some mechanistic aspects to it. There is, in any case, nothing intrinsically wrong with making analogies to colliding billiard balls, as long as both the weaknesses and strengths of the analogy are examined. Of course, “Person X in fact caused harm” does not, standing alone, entail that person X is liable for it.

<sup>453</sup> “The fact that adult movie theaters may cause harmful ‘secondary’ land-use effects may arguably give [the city of] Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral.” *Renton*, 475 U.S. at 56 (Brennan, J., dissenting).

theatres were showing material that strongly appealed to computer nerds and their close relatives, the geeks driven by current disputes in theoretical physics and cosmology. When the films are over, these groups emerge from the theatres, pumped into a state of altered consciousness, and go on their respective rampages, tossing pocket protectors in people's faces and otherwise harassing bystanders, breaking windows, using the streets and lawns as outhouses, and so on.

However appealing, neither this nor similar stories were relied on by the Court. Nonetheless, the secondary effects argument is in fact the one embraced by the Court in *Renton*. The two perspectives—forestalling events several steps down the causal network, on the one hand, and subtraction and substitution of different starting points for the causal chain (sex films or geek films), on the other—are simply different facets of the main underlying point: the city wanted to prevent untoward events generated by speech activities, whatever their content. The speech content was simply a “marker” for the unwanted effects, and of no independent significance. “The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside,” as Justice Kennedy put it in *Alameda*.<sup>454</sup> The secondary effects argument shifts one's attention from exclusive concern with content suppression to highlighting longer-term effects of presenting the content, whatever it is. From the standpoint of some of the Justices, this is precisely the argument's function: they think the longer-term adverse consequences of speech *require* attention, and they defer to the local government's preference to avert these consequences. For them, the very idea of content suppression inappropriately obscures more important values—a neighborhood's quality of life—and is thus a kind of “obstacle concept.”<sup>455</sup> For other Justices, of course, turning to secondary effects is the true value-obscuring move.

But the obscurantist objection against the secondary effects notion doesn't work as it does against the Scalian argument that there is no speech involvement at all—it's just sex and pandering for it. In concept, the secondary effects doctrine is far removed from that no-speech view for the simple reason that the secondary effects are *conceded* to be effects of *speech*, so the role of speech is hardly suppressed.

There is, however, a question of focus. To say that the regulations are content-based and draw strict scrutiny entails that we attend to both speech

<sup>454</sup> *Alameda*, 535 U.S. at 449 (Kennedy, J., concurring). The point is structurally akin to saying that race is simply a marker for the elevated genetic risk of sickle cell anemia in African-Americans. See *supra* text accompanying note 394.

<sup>455</sup> See BACHELARD, *supra* note 120.

and its effects. But to say that content is immaterial and secondary effects are the target is to turn one's gaze fully away from suppression of speech and move it toward prevention of economic loss and perhaps some related adversities. Each direction of focus bears risks. Which focus obscures or illuminates better than the other involves both factual and value issues. There is nothing surprising about this. Because of the very nature of abstraction, all concepts both occlude and illuminate.

For the dissenters, however, accepting the secondary-effects TPM framework was not necessarily fatal. Justice Brennan thought the regulations failed even the less-than-fully-rigorous TPM standard because they were not appropriately narrowed; for him, even content-neutrality couldn't save them.<sup>456</sup> Moreover, one could mount a pointed argument that the TPM regulations were unreasonable because they created huge financial and other barriers to the relocation of the theatres, leaving the owners with no satisfactory alternative speech opportunities. This has never been satisfactorily addressed by the Court.<sup>457</sup>

(c) The next argument structure rests on the claim that *the regulations are directed at content but are justified by a compelling interest that they in fact significantly promote through use of the least intrusive means reasonably available*.<sup>458</sup> If we concede that the regulations are indeed content-

<sup>456</sup> *Renton*, 475 U.S. at 63 (Brennan, J., dissenting).

<sup>457</sup> Justice Brennan stated in his dissent:

The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[l]imiting adult theater uses to these areas is a substantial restriction on speech." . . . Many "available" sites are also largely unsuited for use by movie theaters. . . . Again, these facts serve to distinguish this case from *American Mini Theaters*, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses."

*Id.* at 64 (Brennan, J., dissenting). The Court's casual attitude toward this imposed cost is unfortunate. Chief Justice Rehnquist's tart remark disposing of this issue was: "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Id.* at 54 (majority opinion). But these "other prospective purchasers" hadn't been told that if they wanted to present certain communications, they would have to move somewhere else at great expense. See also Justice Souter's remark in *Alameda* that the "breakup regulation"—a one-building, no-more-than-one-adult-business-within-it policy—"sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation." *Alameda*, 535 U.S. at 466 (Souter, J., dissenting).

<sup>458</sup> This is not the usual canonical formulation, but I think it captures the "least restrictive alternative principle" reasonably well. As mentioned, a constraint referring to means that are "narrowly drawn" to achieve government interests has become entrenched in American constitutional law. It may refer either to the strict scrutiny least-restrictive-alternative formula, or to a weaker doctrine of means-end "fit" in intermediate scrutiny. In its fully generic sense, it arguably comprehends the overbreadth doctrine also. Both doctrines are at least implicit features of heightened scrutiny, and usually explicit in strict scrutiny. See *supra* note 363.

based, they must, in this and many other contexts, face rigorous scrutiny.<sup>459</sup> The government's defense of the regulations rests on showing (among other things) a compelling interest in keeping property values up and promoting public safety. Maintaining the moral tone of the neighborhood doesn't sound like the stuff of compelling interests as that notion is currently (if hazily) understood, but there is an incompletely understood link between moral tone and public safety. Of course, the government's defense also rests on the accompanying claims that the zoning regulation is indeed narrowly tailored to its task, and notably furthers it.

This is the argument structure least likely to be extensionally equivalent to the others because it involves the strictest form of scrutiny, not a middling sort; it thus is not one of the converging alternative systems leading to the Court's outcome. I introduce it, of course, both for completeness and because comparing it to the other argument structures helps clarify the entire set of applicable arguments, converging or not. The idea of constitutional "compellingness," as it has come down so far, generally (though not universally) excludes financial considerations such as drains on the budget and, perhaps, declines in property values.<sup>460</sup> So, the law enforcement costs of protecting critics of Jane Austen from members of her extremist fan clubs would not ordinarily be thought sufficient to justify forbidding such criticism.<sup>461</sup> Much the same holds for descending property values: a local

<sup>459</sup> Public forum analysis is not helpful here, and in any case would lead to the same outcome, so I ignore it, except to note that the issue cannot be finessed by saying that theatres are located atop or abutting public forums ("the streets and sidewalks") and so must be considered part of them; this is a *non sequitur*. Taking it seriously would go far toward evacuating the meaning of the public forum doctrine (and probably anything likely to "replace" it), which is meant—at least in the present day—both to authorize and to limit speech access. Its earlier appearances as doctrine, however, seem to have been to further certain speech access claims. *Cf., e.g., Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding facially invalid a city ordinance prohibiting distribution of literature at any time, any place, and in whatever manner, without a permit; the ordinance specified no criteria for granting or withholding permits).

<sup>460</sup> *Cf. Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that, under the circumstances, defendant in a murder case was entitled access to a psychiatrist's assistance in presenting an insanity defense, and stating that "where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield"); *Schneider v. New Jersey*, 308 U.S. 147, 162–63 (1939) (holding that under the First Amendment the burden of street cleaning did not justify prohibiting the distribution of leaflets).

<sup>461</sup> Of course, government can rightly take some prophylactic measures. *But cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (invalidating on its face a county ordinance allowing government to charge different fees for parades and assemblies, depending on estimated cost of protecting public order; the ordinance was held to lack narrowly drawn, reasonable and definite standards to determine such fees). Nevertheless, burdens on government that are costly in various ways may rise to compellingness. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435, (2006) (stating that "[prior] cases show that the Government can demonstrate a compelling inter-



government, for example, cannot totally exclude abortion protestors from picketing residential neighborhoods, even though such speech activities may render those neighborhoods less desirable, thus lowering their economic value.<sup>462</sup> This is not to say that no argument from financial burden could ever succeed under strict scrutiny—but little would be gained by pursuing this question here.<sup>463</sup>

This strict scrutiny argument structure was in fact used by the *Renton* dissenters, who viewed the regulation as straightforwardly content-based: “The ordinance discriminates on its face against certain forms of speech based on content.”<sup>464</sup> They may have been right, but as we saw it’s not quite as *straightforward* as they thought. They concluded, unsurprisingly, that under such intense review, the regulations were invalid.<sup>465</sup>

(d) In yet another argument structure, we could again concede that *the regulations are directed at speech content, but view the speech as having low First Amendment value*, and thus subject to more stringent regulation than full-value speech. Content regulation of such speech would trigger a lesser, intermediate standard of review, which is all this junk speech deserves. One could then uphold the theatre location rules as implementing “important” interests, even if those interests fall short of “compelling” stature. This degree of intermediate scrutiny might be similar to that accompanying TPM regulation.

This tack was, more or less, Justice Stevens’s view, although he was also the inventor of the secondary effects doctrine, which had appeared in a footnote in *Young v. American Mini Theatres, Inc.*<sup>466</sup> He is obviously a

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est in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program”)

<sup>462</sup> Cf. *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding ordinance that prohibited focused picketing of a person’s residence).

<sup>463</sup> Financial considerations of course enter into the consideration of rights and interests that are highly protected, such as the right to pursue criminal appeals on an equal basis with others. See *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956); see also *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971) (holding that state interests in allocating its scarce resources did not override a person’s interest in gaining access to courts in order to dissolve a marriage). Moreover, one can fashion plausible arguments for protecting the financial integrity of governmental programs as against claims of interference with important rights and interests. See generally Roy G. Spece, Jr., *A Fundamental Constitutional Right of the Monied to “Buy Out of” Universal Health Care Program Restrictions Versus the Moral Claim of Everyone Else to Decent Health Care: An Unremitting Paradox of Health Care Reform?*, 3 J. HEALTH & BIOMEDICAL L. 1 (2007).

<sup>464</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 57 (1986) (Brennan, J., dissenting).

<sup>465</sup> *Id.* The dissenters also believed that a discriminatory motivation was probably shown as a matter of fact. *Id.* at 62.

<sup>466</sup> 427 U.S. 50, 71 n.34 (1976). As to low-value speech, Justice Stevens said, in the course of his discussion of the Equal Protection Clause: “Even though the First Amendment protects communi-

creative force on the Court—responsible (among other things) for two of the extensionally equivalent conceptual systems addressed in this example—the “low-value” and the secondary effects frameworks. Most people never invent anything of note. And he batted .500 in this constitutional region. (The low-value theory hasn’t formally made it yet, except in an independent area, commercial speech, but he wasn’t responsible for that development.)<sup>467</sup>

(e) *Finally, we might again concur that speech content is indeed the target, but conclude that there are different ways for government to be directed at content, and because different aspects of content may have different First Amendment value, each way of addressing content may bear a different level of scrutiny.*<sup>468</sup> Of course, existing doctrine already involves

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cation in this area [sex-oriented material] from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.” *Id.* at 70–71 (Justice Stevens, for the plurality; this portion of the opinion—Part III—was joined by Chief Justice Burger and Justices White and Rehnquist, constituting less than a majority). As to secondary effects, Justice Stevens said:

The [Detroit] Common Council’s determination was that a concentration of “adult” movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of “offensive” speech.

*Id.* at 71 n.34.

<sup>467</sup> As noted, Justice Stevens presented his notion of low-value speech in his discussion of the equal protection clause, concluding that Detroit could place the adult material presented in a classification different from other, more valuable forms of speech. An obvious question is why the low-value maneuver wasn’t presented as part of a pure First Amendment argument. We bumped into a similar question in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

<sup>468</sup> For a suggestion representing still another conceptual system, see generally Alan Howard, *The Mode in The Middle: Recognizing A New Category of Speech Regulations for Modes of Expression*, 14 UCLA ENT. L. REV. 47 (2007) (presenting the idea that “mode” should be distinguished from “content,” rather than being seen as an aspect of it, and draw intermediate scrutiny.) I do not try to compare and contrast the ideas of mode, format, or “manner of presentation.” This would require a comprehensive account of communication and, in turn, a discussion of why and how these abstractions matter in First Amendment analysis. There is no space here for constructing a full anatomy of a communication event. I suggest, for present purposes, that one basic distinction that helps sort through some of the conceptual confusion contrasts propositional content and some aspects of its mode of expression. A simple example: “Britannia est insula” has the same propositional content as “Britain is an island.” To be sure, the distinction is itself unclear, and in some cases simply vanishes, as in some forms of art. Even there, however, it has some punch: the “propositional content” (understood as what the notes in the score designate) of, say, a concerto for flute may be identical to what is presented when an oboe is substituted for the flute. In any case, these examples suggest the risks in contrasting mode/format/presentation with content rather than assimilating it to a form of content. I do not endorse setting the standard of review lower for, say, choice of language (“Tell us about Britain in English, not Latin”) as opposed to choice of propositional content. Propositional content may easily be lost if the mode of presentation is inadequate to draw attention or allow sufficient comprehension. Even if the protection of propositional content is considered the primary object, its intricate connection with language, mode and presentation make it unacceptably dangerous to subject regulation of such choices to less than strict scrutiny.

different forms of linkage to content. The substance of “content regulation” can vary sharply because regulation can aim at different *kinds* of content—viewpoint, subject matter, speaker identity (often a proxy for the first two), and perhaps aspects of format or presentation or mode that bear on salience, vividness, and apparent reliability, and thus on securing and maintaining attention and promoting clear recall. Communication is a very large universe of discourse.<sup>469</sup>

But, as we saw, regulations can also target different regions of *effects* or impacts, direct and indirect, of any kind of communication. The initial and most obvious results are the very perceptions and understandings generated by the presentation’s contents and (at least) the immediate cognitive and emotional effects of such communicative impacts—all given the format and the circumstances at hand, including the nature of the audience. This is the usual focus of most cases concerning regulation of content. The terminology for describing these impacts is rich but expectably imprecise and involves many levels of abstraction—for example, learning, insight, understanding, offense, anger, inspiration, motivation, and emotional and volitional effects generally. There is likely to be cycling within this set of overlapping effects. Moreover, the very distinction between content and effect or impact is obscure: recognizing something as an aspect of content that deserves attention may depend on how we think it affects our mind and behavior.

Put otherwise, content and effect of content are interlocking concepts that feed into each other. It is easy to see that *italics* and **boldface** and **FONT** are matters of content that secure attention and even change meaning. But if sans serif type font makes reading more difficult, is that a matter of “content”—or something else we don’t view as “content” and consider to be of lesser speech-protective importance?

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<sup>469</sup> This familiar triad of content regulation—viewpoint, subject matter, and speaker identity—does not form a complete tableau of content regulation, and it’s hard to tell what would be a complete account, given the imprecision of the very ideas of content and its cognates (such as “communicative impact”), and the uncertainty of what constitutes “regulation” of content. Still, comprehensive efforts to explain the linked concepts of content regulation, content neutrality, communicative impact, and allied ideas emerge in the literature from time to time. See generally Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991). As suggested, certain measures that affect the securing of attention or convey the speaker’s intensity of preference may also be viewed as matters of content. See also Stone, *supra* note 279, at 41–42 (referring to “the nuances of content discrimination”); Frederick Schauer, *Free Speech and the Demise of the Soapbox* 84 COLUM. L. REV. 558, 570 n.48 (1984) (reviewing ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983) and referring to “format discrimination”). For present purposes, it is unimportant to distinguish between a regulation that is facially directed at speech and one that is facially neutral but occasioned by hidden content-based government aims.

In any case, *Renton* moved beyond immediate and near-term effects toward less directly or linearly connected causal regions. For example, sexual entrepreneurs who are aware of the direct audience impacts of X<sup>n</sup> films may try to capitalize on them. If entrepreneurs' actions themselves are not direct communicative impacts, many of such actions are immediately adjacent to such impacts, and are thus "content-linked" in this somewhat extended sense. In turn, one would expect radiating effects in a multi-dimensional causal network. One wonders how far we can traverse the causal network and still maintain a strong content-link, but this is a matter that cannot be definitively settled in general, however confident we may be in particular cases.

How does this idea of different "levels" or kinds of content regulation differ from the secondary effects doctrine? As a matter of sheer conceptual understanding of the idea of content and its limits, it does not seem all that different. Indeed, the sole difference is that reconstructing the idea of connection to content stresses the relative closeness of the regulatory target's connection to "true" content, while the secondary effects notion stresses its distance—its purposive orientation toward the government's interests. The former looks both at what generated certain effects, and at the effects themselves; the latter looks mostly at the effects. The two approaches are different views of the self-same cathedral; they are each other's "obverse" in the same sense that "half-full" and "half-empty" are. They must also be extensionally equivalent.

Nevertheless, we might say that *directed-at-content*<sub>1</sub> refers to regulations that target primary communicative effects—say, becoming aware of immoral ideas that befoul us simply by entering our minds; doubting the moral authority of the natural order; being offended; learning bad things about one's leaders and thus compromising their authority and electability; understanding the nature of gravity waves; being incited to engage in unlawful conduct, and so on. And we might say that *directed-at-content*<sub>2</sub> is "content correlated,"<sup>470</sup> but that the correlation is attenuated because it is

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<sup>470</sup> This is Justice Souter's phrase in his dissent in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 457 (2002) (Souter, J., dissenting). He does not seem to have adopted it as his official designation, however, but floated it as a plausible description of the zoning ordinance. He noted:

Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said.

It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship.

based on the same, less direct consequences that the secondary effects doctrine addresses: economic and social damage to a community.

Although this form of content correlation falls short of complete content-neutrality, one could argue that it nevertheless shouldn't be held presumptively impermissible—and if it is, the presumption should be much weaker. Moreover, in *Renton*-like cases, the “zoning” context might be thought to provide a satisfactory “built-in” rationale for content-correlated regulation that rebuts any lingering presumption of impermissible purposes. This is what Justice Kennedy argued.<sup>471</sup> After all, the city, on this view, is just doing what cities are (for better or worse) paid to do: among other goals, they are there to protect neighborhood property (and thus some lifestyle values), and one good way to do this is to control slime crime.

But speech that is directed-at-content<sub>2</sub> does not draw the maximum standard of review for content regulation—“strict scrutiny” is not called for under this proposed calibration of content connections. A less demanding intermediate standard is sufficient, and under it the Court can uphold the regulation relatively easily.<sup>472</sup> This was, more or less, Justice Kennedy's approach in *City of Los Angeles v. Alameda Books, Inc.*<sup>473</sup>

### 3. *Renton* wrap-up

One can make too much of the mini-burst of argument structures in *Renton*, but the case not only illustrates the choice-among-converging-arguments problem in general, it displays its normative/conceptual importance in a number of specific constitutional regions. The acme of First Amendment value is loosely captured by the idea that regulations of con-

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*Id.* at 457. Justice Kennedy, in concurring in the judgment, agreed that the ordinance was content-based in some sense. *Id.* at 448 (Kennedy, J., concurring). He also extensively challenged the empirical evidence of secondary effects, and so objected to the Court's reversal of a summary judgment in favor of the regulated businesses. *See id.*

<sup>471</sup> “The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.” *Id.* at 449. The Court upheld an ordinance that prohibited the operation of more than one adult business in a single building. *Id.* at 442–43 (majority opinion) The narrow issue concerned whether, under intermediate scrutiny, the City of Los Angeles could reasonably rely on a police study that linked crime with concentrations of adult businesses. *Id.* at 435.

<sup>472</sup> There is one more argument mentioned in *Renton*, but it was dismissed in a footnote: Respondents argue, as an “alternative basis” for affirming the decision of the Court of Appeals, that the *Renton* ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986) (citing *Young v. Am. Mini Theatres, Inc.* 427 U.S. 50, 63–73 (1976)).

<sup>473</sup> *Alameda*, 535 U.S. at 444 (Kennedy, J., concurring).

tent are disfavored, although the degree of disfavor varies among contexts. This is the prime reason that moved the Court to withhold the characterization “content regulation” from the city’s action. The value reinforcement patterns here are complicated by value vectors pulling in different ways—at least for different observers. The Chief Justice’s opinion wants to avoid or minimize the reference to content because it inappropriately reinforces free speech considerations he considers to be minor. The supposedly superior illumination afforded by a content-correlation theory is, for him, an inversion of values; the thinner meanings assigned to “content regulation” are preferable. It is not easy to see how this view could be reconciled with the dissent’s position that the case involves straightforward content regulation that cannot be justified under strict scrutiny.

More generally, the concept of “content of communication” extends to a wide variety of aspects and functions of communication, and it is hard to believe they are all of equal constitutional stature. It would be out of place to do this here, but parsing communication requires constructing a full anatomy of the idea of a communications event—and of communications events of different sorts. This would be a kind of “fragmentation” of the notion of content, and this is a risky enterprise: a strong free speech principle would caution against breaking up the unity of content, because doing so invites the question whether some aspects of communication are less valuable—and thus more regulable—than others.

In one of its most intuitively obvious forms, content is “propositional content”—the meaning that is common to “*Britannia est insula*” and “Britain is an island.” Beyond trotting out examples, we are close to the limits of definition here, and so I suggest nothing more in explicating “propositional content.” “Content” also applies to various aspects of the presentation propositional content. Thus, “Britain is an *island*” doesn’t “mean” quite the same as “*Britain* is an island.” Its meaning may also vary with the speaker and the setting. It is one thing if someone from the armed services says “Britain is an island;” it is another if a poet recites it.

I make no attempt to look for propositional content, or its analogues, in the arts. I inserted this jaunt into content theory partly in response to this question: How many *legitimate*, nontrivial alternative conceptual systems can you find for *Renton*—or for any other case in whatever field? Recognizing true alternatives is a conceptually uncertain enterprise for many reasons, including the problem of understanding “content,” “communicative impact,” and affiliated terms. Although I think the classic division of speech regulation into content-based and content-neutral is serviceable and I do not recommend replacing it, it is important to see why there is an *issue*

about what the distinction means. How would we think—*differentially*—about rules that said: ▪ “You can’t talk about England’s islandness.” ▪ “Say what you want about England’s islandness, but you can’t do it in Latin or German.” ▪ “Say what you want about England’s islandness, unless you’re the Archbishop of Canterbury.” ▪ “Say what you want [etc.] but in a type font no larger than eleven.” ▪ “Say what you want [etc.] but not on a billboard.”

Are all these different restrictions best viewed as being matters of content? Should some aspects of content be considered less privileged than others? Or should we say that format, mode, presentation, and so on, are not best seen as content variables? Whether or not one finds this conceptually interesting, it is doctrinally important to sort the free speech value of these aspects of communication because it bears on deciding what constitutional level of scrutiny is in order. In a given case, protecting—or controlling—propositional content may be far more important than anything connected with mode or “packaging.” (“No one shall transmit American military secrets to the enemy.”) In other cases, perhaps it is the presentation, or aspects of it, that outweigh—without annihilating—the propositional content. Perhaps some people select books as much for their binding and typeface as for their propositional content. People who don’t understand an opera’s language can still enjoy the singing that expresses it—perhaps even more, considering the variable quality of the librettos—although this involves adding what is clearly content: the music.

But, as I said, fragmenting the idea of content is First-Amendment-hazardous for obvious reasons. I am not saying that, in parsing the value of different aspects of communicating via different aspects of content, we are bound to “strict (or heightened) scrutiny or bust” for every aspect of a communicative event. Nevertheless, even if one agrees with *Renton*’s outcome and with much or all of its analysis, the case is still unsettling. The fact is that government selected a set of communicative enterprises for regulation in a form—required relocation—that could easily destroy them. This is something to which *attention must be paid*.<sup>474</sup> Choosing conceptual systems is, in this case, not a benign academic exercise; this kind of regulation may be life or death for a commercial enterprise, and if one calls it a

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<sup>474</sup> Willy Loman’s wife said this in Arthur Miller’s play *Death of a Salesman*. ARTHUR MILLER, DEATH OF A SALESMAN 40 (1949). It was quoted in the somewhat offensive obituary notice for Miller contentedly reporting his death. “Attention Must Be Paid,” Said Willy Loman’s Wife of Her Husband in Arthur Miller’s *Death of a Salesman*, NAT’L REV., Mar. 14, 2005, available at [http://www.findarticles.com/p/articles/mi\\_m1282/is\\_4\\_57/ai\\_n13487713](http://www.findarticles.com/p/articles/mi_m1282/is_4_57/ai_n13487713).

“mere” TPM regulation, one presumes a number of suppressed premises embracing precisely what is in question.

## V. CONCLUSION

Some cases require us to choose among alternative constitutional arguments that lead to the same adjudicatory outcome. The examples discussed here certainly do not exhaust the field,<sup>475</sup> and may not even be the best examples to present, but they do display the nature of the choice that must be made. There was, for example, *Renton*'s rejection of the argument that the theatre regulations were content-based, and its resulting acceptance of the time, place, and manner framework; the rejection of the Francophobic assassin's free speech claim; the use of the argument from harm in *Brown*; and the converging commercial and dignitary foundations of the Civil Rights Act of 1964.

What accounts for these choices among arguments? I don't think the Court's selection of the TPM route in *Renton* or the show-the-harm argument in *Brown* just “happened to happen,” but it's not entirely clear what explains the choices, or even what clear difference it made that one framework was selected over another.

The criteria for selection that have emerged so far—both as descriptors of what we do in fact and prescriptors of what we should do—seem intuitively plausible, although I attempted no empirical confirmation of any claims that they generate sound attitudinal and behavioral outcomes. A primary (in some cases dominating) consideration derives from the Constitution's status as an instrument that authoritatively specifies the main values it embeds and imposes them on us. This says nothing about whether those “values” are to be understood as moral values entrenched in the constitution *just* because we framed it that way; or as reflecting an antecedent independent objective morality (roughly, natural law) that *must* be immanent in the text, whatever we write in it; or simply as a stipulation that these values (whatever their moral value, if any) define how we are to run the American show, at least from the top down.

Within any of these perspectives on the value-bearing properties of the Constitution, arguments and outcomes in any given case are expected to

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<sup>475</sup> They don't even exhaust this Article. I have excised a comparison of possibly converging “tiered” and “continuous” standards of review; and an investigation of whether proposals for improving the public forum doctrine without (necessarily) altering outcomes constitute true alternative converging arguments, a reconstruction of the doctrine, or simply a prolix style change with little impact on propositional meaning.



implement and reinforce at least some of these values. Indeed, if they didn't, they wouldn't even count as arguments on issues material to the case: in that sense, this is a foundational constraint.

An argument must of course also satisfy other selection constraints, but the comparative ranking of these constraints is unclear. The criteria of selection include an argument's internal consistency; its consistency with precedent and with neighboring conceptual systems; the risk that it will produce unwanted outcomes in adjacent fields of law to which an argument might be transplanted; our preferences for greater or lesser illumination of certain value tensions embedded in disputes; our notions of the rule of law that push against actual or perceived discontinuities in doctrinal development; and perhaps simplicity, efficiency, and ease of use of some arguments as compared with others.

To apply the Article's topic to itself: Does viewing some constitutional situations as involving a choice among converging arguments make any difference in how we think a case should come out? If judges understood those cases in this way, would this change any outcomes? On the other hand, haven't they always seen cases this way? Is it even possible *not* to see constitutional adjudication in this way, when faced with cases such as *Renton*, *Rochin*, and *Brown*?

I can't definitively answer this question about changed outcomes. But it is not the only question in play: outcomes can't be everything; the reasons we set out are often more important. I don't want to press the point too far, but different forms of argument reflect different perspectives—each may bear a different ethos. To see the outcome in *Brown* as an instance of successfully proving the harm of a particular racial practice in a particular field of behavior seems very different from seeing it as the result of a strong general presumption, not overcome, that dealing with people on the basis of race is wrong. I suppose one can still say, "What's the difference?" but the world *is* different under those two visions, and the difference is likely to affect *felt* norms and *actual* behavior. The inability to show this empirically does not disentitle us from acting on moral/behavioral vectors that are in place, and many of these vectors can be found by placing the converging-arguments template on constitutional adjudication.