CHANGED CIRCUMSTANCES AND JUDICIAL REVIEW

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The problem of changed circumstances recurs throughout constitutional law. Statutes often outlive the conditions they were meant to address. A once-reasonable law may come to impose burdens that the legislature never intended and would not now be willing to impose. This Note asks whether courts are ever permitted to step in and declare that, as a result of postenactment changed circumstances, a once-valid law can no longer be constitutionally applied. It argues that the propriety of changed circumstances review depends first on whether the applicable doctrinal test is substantive or motives-based. A substantive test is one that imposes an absolute prohibition on certain categories of legislation, or requires a particular degree of fit between legislative means and ends. A motives-based test asks only whether the enacting legislature intended to further an impermissible objective. This Note demonstrates that where the underlying test is substantive, a reviewing court must at least consider whether circumstances have sufficiently changed since the challenged law's enactment to justify striking it down. If the test is motives-based, then the court should generally consider only whether the statute is valid based on facts as they existed when it first went into effect.

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INTRODUCTION

Laws often outlive the conditions they were meant to address.[1] A once-reasonable law may come to impose burdens that the enacting legislature never intended.[2] New studies may cast doubt on a statute's underlying assumptions.[3] Technological change may permit the state to achieve its objectives in other ways.[4] Public sentiment may evolve to the point where the law's purported interests are no longer recognized as legitimate.[5] And yet, for a variety of reasons, even outdated or unreasonable statutes may be extremely difficult to amend.[6] When a law's burdens or justifications change in a way that raises new constitutional doubts, are courts permitted to step in and declare that the law, while valid at the time of enactment, can no longer be constitutionally applied?

Judge Guido Calabresi grappled with this precise question in a 1995 case fittingly captioned *United States v. Then*.[7] At issue was an equal protection challenge to the 100-to-1 sentencing ratio for the sale

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[1] *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (noting that "because a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and that *some* of these laws . . . do not fit, are in some sense inconsistent with, our whole legal landscape").

[2] *See, e.g.*, TJS of New York, Inc. v. Town of Smithtown, 598 F.3d 17 (2d Cir. 2010) (positing that a time, place, and manner regulation of sexually oriented businesses may become unduly burdensome over time if all of the sites initially allocated for the adult establishments are no longer available).

[3] *See, e.g.*, Caruso v. Aluminum Co. of Am., 473 N.E.2d 818, 821 (Ohio 1984) (finding that there is no longer a scientific basis for the legislature's belief that silicosis cannot "manifest itself more than eight years after exposure to silica dust").

[4] *See, e.g.*, Miller v. Albright, 523 U.S. 420, 484 (1998) (Breyer, J., dissenting) ("When the statute was written, one might have seen the requirement as offering some protection against false paternity claims. But that added protection is unnecessary in light of inexpensive DNA testing that will prove paternity with certainty.").

[5] *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) (finding that society no longer subscribes to "old notions" that women are destined to tend to the home while men obtain education and employment).

[6] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 106–08 (1991) (arguing as a matter of public choice theory that legislative systems are "*designed* so that laws will outlive the political coalitions that enacted them" because such systems facilitate stability).

[7] 56 F.3d 464, 466 (2d Cir. 1995) (Calabresi, J., concurring).

of crack versus powder cocaine.[8] Congress had adopted the ratio in 1986 amidst a flurry of panicked exposés about a new "epidemic" of drug abuse and violence in the nation's cities.[9] At the time, Congress might reasonably have concluded that crack was exponentially more dangerous than powder cocaine.[10] By the mid-1990s, however, it had become apparent that much of the evidence before Congress had either been wrong or overblown.[11] Worse still, the burdens of congressional overreaction had fallen almost exclusively on racial minorities.[12] Although the circuit courts had uniformly upheld the 100-to-1 ratio against equal protection challenges in prior cases,[13] Judge Calabresi wondered in *Then* whether the sentencing scheme might be challenged anew in light of evidence that had emerged since the law's enactment. Judge Calabresi observed that "what is known today about the effects of crack and cocaine," and about the sentencing ratio's disparate impact on racial minorities, "is significantly different from what was known" in 1986.[14] "As a result, constitutional arguments that were unavailing in the past may not be foreclosed in the future."[15] Still, Judge Calabresi cautioned that it is never "easy for courts to step in and say that what was rational in the past has been made irrational

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[8] Under then-existing law, defendants faced a five-year mandatory minimum for possessing a mere five grams of crack cocaine, compared with the same mandatory minimum for possession of five hundred grams of powder cocaine. A ten-year mandatory minimum kicked in for any defendant convicted of possessing fifty grams of crack cocaine, as compared to five thousand grams of powder. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at v (1995) [hereinafter COMMISSION REPORT]. In 1995, five hundred grams of powder cocaine had a street value of $32,500 to $50,000. Five grams of crack cocaine had a street value of just $225 to $750. *Id.* at ix.

[9] DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 25 (2007).

[10] *See* Kimbrough v. United States, 552 U.S. 85, 95–96 (2007) (noting that in 1986, "Congress apparently believed that crack was significantly more dangerous than powder cocaine" because it was more addictive, harmful, and accessible). There were some even at the time who doubted the soundness of the proffered testimony or the need to respond immediately with draconian new penalties, but these voices were few and far between. PROVINE, *supra* note 9, at 111–13.

[11] *Then*, 56 F.3d at 467.

[12] In 1995, over 95% of defendants sentenced for crack cocaine possession or distribution under the federal drug laws were Black or Hispanic. COMMISSION REPORT, *supra* note 8, at 192.

[13] *See, e.g.*, United States v. Moore, 54 F.3d 92, 98–99 (2d Cir. 1995) (finding petitioner's evidence of discriminatory purpose behind the 100-to-1 sentencing ratio to be insufficient, and upholding the law as rational at the time of enactment); United States v. Clary, 34 F.3d 709, 714 (8th Cir. 1994) (same); United States v. Byse, 28 F.3d 1165, 1169 (11th Cir. 1994) (same); United States v. Thurmond, 7 F.3d 947, 951–52 (10th Cir. 1993) (same).

[14] *Then*, 56 F.3d at 467 (Calabresi, J., concurring).

[15] *Id.*

by the passage of time . . . . What degree of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached?"[16] At what point does a statute become *unconstitutional*—as opposed to simply outdated or unwise?

The problem that Judge Calabresi identified recurs throughout constitutional law,[17] and yet the questions he raised are seldom asked.[18] Courts regularly incorporate evidence of postenactment

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[16] *Id.* at 468.

[17] *See infra* notes 37–44 and accompanying text (citing examples of changed circumstances cases).

[18] A small number of scholars have considered—often in passing—whether particular doctrinal tests, such as the rational basis test at issue in *Then*, would permit courts to take changed circumstances into account. *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1061–75 (1979) (noting that both a law's purpose and rationality might change over time, and suggesting that courts should be permitted to strike down legislation that is no longer supported by circumstances as they exist at the time of suit); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 215–20 (1976) (suggesting that one impediment to substantive means-end rationality review under the Due Process Clause "is the problem of time; that is, the time at which the law must be a rational means to an end in order to be constitutional"); *see also* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 981–82 (1983) (briefly addressing whether "a law's purpose, and hence its constitutionality, can change over time").

There is of course a much larger literature on whether changed facts might alter the meaning of the Constitution itself. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–48 (1997) (arguing that the meaning of the constitution is fixed based on its original understanding); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (arguing that constitutional meaning inevitably changes to accommodate changed circumstances); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991) (highlighting the role of factual assumptions in constitutional interpretation and arguing that the Court should be more flexible in adjusting its constitutional rules when empirical research demonstrates that the operative facts have changed); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (arguing that constitutional meaning must accommodate changed circumstances, but that such changed readings are consistent with the principles of interpretive fidelity to original meanings). However, this debate offers few insights for claims like Manuel Then's, since no one had suggested that the meaning of the Constitution had changed between 1987 and 1995.

Others have considered whether the Constitution permits courts to strike down desuetudinal laws on either due process or vagueness grounds. *See, e.g.*, Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 392 (1964) ("American courts seem to disclaim any responsibility for barring the application of long-unenforced enactments."); *cf.* Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 4 (1966) (justifying rejection of desuetude on separation of powers grounds, noting that "the executive branch of government cannot nullify an act of the legislative branch by failure to enforce, any more than it can effect a repeal by direct fiat" (quoting John R. Thompson Co. v. District of Columbia, 203 F.2d 579, 594 (D.C. Cir. 1953) (Prettyman, J., concurring), *rev'd*, 346 U.S. 100, 110 (1953)). Again, this literature is of little help for Judge Calabresi since the statute at issue in *Then* had consistently been enforced.

changed circumstances into their analysis of litigants' claims,[19] but only rarely do they consider whether the Constitution would actually permit them to strike a once-valid statute on that basis.[20] Often it is easier to hold simply that facts have not changed sufficiently in a particular case than to grapple with the more difficult question of whether circumstances could *ever* change enough to warrant judicial invalidation.[21]

On the few occasions when courts have expressly considered the propriety of changed circumstances review, they have primarily voiced institutional concerns. Thus, one court questioned whether permitting review on the basis of changed circumstances would impermissibly burden the legislative processes by forcing legislatures to constantly revisit the validity of laws currently on the books.[22] Others have suggested that courts might face a constant stream of changed circumstances claims if they signaled a willingness to constantly reassess the validity of existing laws.[23] In *Then*, Judge Calabresi argued that courts should approach changed circumstances claims with extreme caution because "too many issues of line drawing make such judicial decisions hazardous."[24] None of these courts considered—as this Note does—

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[19] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 730–35 (1997) (drawing on contemporary research and experience to evaluate a ban on assisted suicide enacted in 1854 and amended in 1979); United States v. Jackson, 84 F.3d 1154, 1161 (9th Cir. 1996) (considering whether evidence presented in a 1995 Sentencing Commission report casts doubt on the rationality of the 1987 crack sentencing law).

[20] *See, e.g.*, Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regulation, 763 F.2d 1106, 1111 (9th Cir. 1985) ("The Supreme Court has been ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law."); Jones v. Schneiderman, 888 F. Supp. 2d 421, 425–26 (S.D.N.Y. 2012) (noting that neither the Supreme Court nor the Second Circuit has definitively embraced changed circumstances review).

[21] *See, e.g.*, *Burlington N. R.R. Co.*, 763 F.2d at 1111 (leaving open the question of whether changed circumstances analysis is permissible and concluding instead that the statute was valid both when enacted and when petitioners brought suit); *Jones*, 888 F. Supp. 2d at 426–27 (noting that the court "need not decide whether changed circumstances are relevant" because the changed circumstances alleged were insufficient to warrant invalidation).

[22] *See, e.g.*, Murillo v. Bambrick, 681 F.2d 898, 911 (3d Cir. 1982) (arguing that by striking a New Jersey statute on the basis of changed circumstances, "the district court imposed an unwarranted obligation upon legislative bodies: the obligation constantly to reassess the continuing validity of the factual premises underlying each piece of legislation enacted over the years").

[23] *See, e.g.*, TJS of New York, Inc. v. Town of Smithtown, No. 03-CV-4407, 2008 WL 2079044, at *7 (E.D.N.Y. May 13, 2008) ("[C]ourts should not be involved repeatedly with litigation determining the validity of a zoning ordinance." (quoting Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery Cnty., 256 F. Supp. 2d 385, 397 (D. Md. 2003))), *rev'd*, 598 F.3d 17 (2d Cir. 2010).

[24] 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

whether there might be *doctrinal*, as opposed to institutional, objections to changed circumstances review.

This Note argues that the institutional concerns that courts have previously identified are at best secondary—the propriety of changed circumstances review depends first on whether the doctrinal test at issue is substantive or motives-based. A substantive test is one that imposes an absolute prohibition on certain categories of legislation (e.g., laws permitting slavery), or requires a particular degree of fit between legislative means and ends.[25] A motives-based test asks only whether the enacting legislature intended to further an impermissible objective (e.g., to burden a religious minority).[26] To see why the distinction matters, consider again the equal protection claim at issue in *Then*. In challenging his sentence, Then had argued that the crack-powder sentencing disparity was no longer rational because evidence now suggested that crack was no more harmful than powder cocaine.[27] But even if Then had persuaded the court of the statute's present-day irrationality, it is not clear that he should have won. That would depend on *why* irrational laws are constitutionally suspect. Under a "substantive" theory of equal protection, the rationality requirement ensures that all classifications plausibly further some identifiable goal and that individuals are not subject to arbitrary laws.[28] If Then could prove that the law was no longer rational, a court could justifiably strike it on that basis. However, in recent decades, the Supreme Court has increasingly shied away from substantive, means-end rationality review of facially neutral legislation.[29] Under a "motives-based"

[25] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (noting that even if an abortion regulation is adopted to further a legitimate purpose, it is still unconstitutional if it "has the *effect* of placing a substantial obstacle in the path of a woman's choice" (emphasis added)).

[26] *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that to trigger heightened scrutiny, plaintiffs must demonstrate that "the decisionmaker . . . selected or reaffirmed a particular course of action *at least in part 'because of,' not merely 'in spite of,'* its adverse effects upon an identifiable group" (emphasis added)).

[27] *Then*, 56 F.3d at 466.

[28] A classic formulation of a "substantive" equal protection standard is Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347–60 (1949) (suggesting that laws must be evaluated based on the extent to which they are over- or underinclusive). *See also* Bennett, *supra* note 18 at 1061–65 (arguing that the Equal Protection Clause permits courts to require some minimal degree of fit between means and ends).

[29] *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 311–15 (1997) (noting that the Supreme Court's rational basis cases since the 1980s evince a renewed interest in using the rationality requirement to test legislative purpose). Indeed, where the Supreme Court has struck down facially neutral laws under rationality review, it has done so after finding some reason to suspect animus, *see, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (finding that the statute at issue was motivated by animus against homosexuals); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S.

theory of equal protection, a lack of fit between means and ends is suspect only to the extent that it suggests that the law's true purpose might be invidious.[30] A law's apparent over- or underinclusiveness has no independent constitutional significance. Under this latter approach, Then's challenge to the 100-to-1 ratio would fail because changed circumstances would have no bearing on the enacting legislature's motives. In sum, only by first deciding whether rationality review is substantive or motives-based could a reviewing court determine whether there was any merit to Then's claim.[31]

This Note proceeds in three parts. Part I highlights the range of cases that might plausibly turn on postenactment developments and then explains why institutional considerations cannot resolve the threshold question of whether a reviewing court is permitted to take changed circumstances into account. Part II explains the difference between substantive and motives-based tests, and demonstrates why this distinction is critical to deciding when changed circumstances may play a role in judicial review. It argues that if the applicable constitutional test is substantive, a reviewing court must at least consider whether circumstances have sufficiently changed to justify invalidity; if the test is motives-based, allegations of changed circumstances should generally be dismissed as irrelevant to the question before the court. Finally, Part III applies the framework developed in Part II to a number of doctrinal tests—the so-called "tailoring" inquiries that

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432, 446–50 (1985) (finding animus against the mentally retarded); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973) (finding animus against hippies), or an otherwise impermissible legislative purpose, *see, e.g.*, Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 618–23 (1985) (to discriminate against newer state residents); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882–83 (1985) (to discriminate against out-of-state insurers).

[30] *See, e.g.*, *Cleburne*, 473 U.S. at 448–50 (noting that the challenged ordinance does not appear to further either of the city's offered purposes, and concluding on that basis that the ordinance "appears . . . to rest on an irrational prejudice against the mentally retarded").

[31] The purpose of this Note is not to suggest that courts must *necessarily* consider whether a doctrinal test is substantive or motives-based in evaluating a claim on the basis of changed circumstances. Principles of constitutional avoidance counsel that courts should avoid resolving difficult constitutional questions if there is a more straightforward basis on which to resolve a particular case. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (noting that the Court should "not formulate a rule of constitutional law broader than is required" or "pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of") (internal citations omitted). And as Part III of this Note suggests, the question of whether the Equal Protection Clause embraces a substantive or motives-based standard is certainly difficult to resolve. Often it may be easier for a court to determine—as did the Southern District of New York in *Jones*—that circumstances have not changed sufficiently to render a statute unconstitutional than to decide whether changed circumstances are relevant to begin with. Jones v. Schneiderman, 888 F. Supp. 2d 421, 426–27 (S.D.N.Y. 2012).

dominate much of present-day constitutional adjudication.[32] It demonstrates that tailoring tests might be read as enforcing either substantive *or* motives-based rights and that, as a result, the proper role of changed circumstances in constitutional law is very much in doubt.

I
The Problem of Changed Circumstances

The problem of changed circumstances is an inevitable byproduct of the fact that legislators often make judgment calls on the basis of imperfect information and must necessarily speculate as to what the future may hold. When legislative predictions prove inaccurate, a once-reasonable statute may start to seem ill-considered or unwise. Thomas Jefferson recognized the risk of saddling future generations with past generations' errors when he famously suggested that all laws should "naturally expire[ ] at the end of 19 years."[33] In practice, however, sunset provisions are comparatively rare,[34] and only in limited circumstances are they constitutionally required.[35] When changed facts cast doubt on a once-reasonable law, those burdened by its terms can either seek legislative repeal or turn to the courts.[36]

This part proceeds by first highlighting the range of changed circumstances cases that come before the courts. It then demonstrates why institutional considerations cannot resolve the threshold question of whether courts are permitted to take changed circumstances into account.

A. Types of Changed Circumstances

As the following (stylized) examples suggest, the kinds of developments that might constitute constitutionally relevant changed circumstances are as varied as the claims they might provoke:

- *Technological development*: A state bans out-of-state baitfish to protect its fragile ecosystem from parasites that reside on the fish. Technology now permits inspection officials to screen out parasites at

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[32] As Part III develops in greater detail, "tailoring" tests are ubiquitous throughout constitutional law. Although the formulations differ across various doctrines, all such tests require the reviewing court to establish some degree of fit between means and ends. *See infra* notes 141–47 and accompanying text.

[33] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* The Essential Jefferson 179 (Jean M. Yarbrough ed., 2006).

[34] *See* Rebecca M. Kysar, *Lasting Legislation*, 159 U. Pa. L. Rev. 1007, 1014–17 (2011) (discussing the history and use of sunset laws).

[35] One area where courts have insisted on sunset provisions is for laws that classify on the basis of race. *See* Grutter v. Bollinger, 539 U.S. 306, 341–42 (2003) (requiring that "all governmental use of race must have a logical end point").

[36] On the hurdles to legislative repeal, *see supra* notes 1 and 6.

minimal expense. Importers argue that the absolute import ban is no longer necessary and that it therefore violates the Dormant Commerce Clause.[37]

- *New scientific/social-scientific evidence*: A workers' compensation scheme imposes an eight-year statute of limitations on certain exposure-related illnesses on the assumption that symptoms almost always appear within eight years of exposure, and that older claims are thus likely to be fraudulent. More recent studies suggest that symptoms can take decades to materialize. Injured workers challenge the statute of limitations on equal protection grounds.[38]

- *Structural or market change*: Congress imposes various content-based restrictions on network broadcasters on the ground that broadcast frequencies are uniquely scarce and thus properly subject to more extensive regulation.[39] Introduction of satellite, cable, and digital broadcasting eliminates the problem of spectrum scarcity. Broadcasters insist that the regulations are no longer necessary and must be struck down on First Amendment grounds.[40]

- *Evolving public sentiment*: Initially, states permit judges to impose the death penalty on the mentally impaired. Eventually, a number of states enact laws expressly prohibiting the practice and public opinion tilts overwhelmingly against it. Defendants in the few remaining states that still allow the practice argue that executing the mentally impaired is now "cruel and unusual" under the Eighth Amendment.[41]

- *Changed social or political conditions*: Congress responds to widespread voter discrimination in particular states by requiring those states to seek Justice Department approval of all new election laws. States argue that the widespread racial discrimination that once

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[37] *See* Maine v. Taylor, 477 U.S. 131, 147 (1986) (upholding Maine's import ban but suggesting that "if and when [screening] procedures are developed, Maine may no longer be able to justify its import ban").

[38] *See* Caruso v. Aluminum Co. of America, 473 N.E.2d 818, 821 (Ohio 1984) (finding that there is no longer a scientific basis for the legislature's belief that silicosis cannot "manifest itself more than eight years after exposure to silica dust").

[39] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969) (upholding a variety of regulations based on a "spectrum scarcity" rationale).

[40] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530–32 (2009) (Thomas, J., concurring) (arguing that the television market has changed so dramatically that there is no longer any basis for the Court's spectrum scarcity rationale).

[41] *See* Atkins v. Virginia, 536 U.S. 304, 307, 314–18 (2002) (finding that executing the mentally retarded is now cruel and unusual based in part on evidence that the practice is rarely used and no longer enjoys popular support).

justified the stringent requirements no longer exists, and that the federal law now exceeds Congress's enforcement powers.[42]

• *Subsequent legislative enactments*: A state enacts Sabbath law prohibiting all commerce and travel on Sundays. Over time, the legislature adopts hundreds of exceptions for various goods and activities, producing a byzantine scheme with little distinguishing the stores that stay open from those that must remain closed. Affected business owners argue that the law is no longer rationally related to its purpose and must be struck down.[43]

As these examples suggest, the problem of changed circumstances appears throughout constitutional law. This list is hardly exhaustive. Virtually any postenactment development could plausibly be cited as a basis for invalidation if it casts doubt on the necessity or legitimacy of the challenged law. The pairings of categories and constitutional claims are also largely arbitrary. Shifts in market structure could easily give rise to an equal protection or due process claim. A First Amendment claim could undoubtedly be brought on the basis of technological change.[44] Finally, although narrowly drawn statutes—like the baitfish ban—are more likely to trigger such claims, virtually any provision could conceivably be challenged on the basis of postenactment change.

B. Prevailing Objections to Changed Circumstances Review

Although courts regularly consider evidence of changed circumstances,[45] they are far more cautious when it comes to actually striking

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[42] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (striking down Section 4 of the Voting Rights Act as no longer tailored to existing patterns of voter discrimination). *Shelby County* is not really a "changed circumstances" case since Congress had reenacted the challenged provisions in 2006 and it was this revision that was before the Court. The Court's ultimate holding, however, is essentially the same as it would have been had Congress enacted Section 4 as a permanent measure in 1965—that the scope of Section 2 enforcement power depends on the pervasiveness of state discrimination, and that congressional authority to regulate state voting procedures is no longer as extensive as it had been when discrimination was more flagrant. *Id.* at 2624–25.

[43] *See* People v. Abrahams, 353 N.E.2d 574, 578–79 (N.Y. 1976) (striking down on Equal Protection grounds a Sunday closing law that had become riddled with exceptions over time).

[44] Subject, of course, to the considerations in Parts II and III, *infra*.

[45] *See, e.g.*, Dias v. City and Cnty. of Denver, 567 F.3d 1169, 1183 (10th Cir. 2009) (entertaining plaintiff's argument "that although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational"); Atl. Coast Demolition & Recycling, Inc. v. Atl. Cnty., 112 F.3d 652, 665 (3d Cir. 1997) (insisting in a Dormant Commerce Clause case that "[t]he question is not what *was* the best system for New Jersey when the statutes were adopted, but rather whether any nondiscriminatory system could *now serve* New Jersey's legitimate goals").

down laws on this basis.[46] Pressed to explain their reluctance, courts generally adopt one of two lines of critique: that changed circumstances review infringes on legislative authority (institutional cost considerations), or that courts are ill equipped to undertake the sort of inquiry required to determine whether facts have changed (competency concerns).

As the remainder of this Part suggests, while both sets of objections might counsel restraint in a particular case, neither addresses the propriety of changed circumstances in constitutional law more generally.

1. Institutional Cost Considerations

Any time a court strikes down a statute as unconstitutional, it imposes some costs on the legislative process.[47] Statutes often are enacted as part of comprehensive legislative programs, whose aims may be frustrated when courts strike down individual provisions. The vote swaps and compromises necessary to enact comprehensive bills are more difficult to coordinate when legislators lack some assurance that their favored measure will remain in force.[48] Yet most would probably agree that when a statute exceeds constitutional limits, the costs of judicial invalidation are justified—they are the price we pay for living in a constitutional democracy.[49]

A possible concern with permitting judicial review on the basis of changed circumstances is that doing so would impose *additional*—perhaps unwarranted—burdens on legislatures. One version of this argument, as expressed by the Third Circuit, is that changed circumstances review might require legislatures "constantly to reassess the continuing validity of the factual premises underlying each piece of legislation."[50] Although superficially compelling, this argument is ultimately a red herring. It assumes that if *courts* engaged in changed circumstances review, then *legislatures* would feel compelled to also revisit old statutes to forestall judicial intervention. But this is an unlikely outcome. To see why, imagine a world in which changed circumstances review is commonplace, and legislators know that courts will strike some small fraction of existing statutes—perhaps one

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[46] *See* Jones v. Schneiderman, 888 F. Supp. 2d 421, 426 (S.D.N.Y. 2012) (noting that since the 1930s, neither the Supreme Court nor the Second Circuit has "invalidated a statute as irrational based on changed circumstances").

[47] *See* FARBER & FRICKEY, *supra* note 6, at 106–07 (noting that the prospect of judicial invalidation "decrease[s] the value of legislation to its supporters").

[48] *Id.* at 106–07.

[49] *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46–48 (2001) (making the case for judicial review).

[50] Murillo v. Bambrick, 681 F.2d 898, 911 (3d Cir. 1982).

percent—in the coming year. How would the rational legislator respond? One option would be to scour the statute books for statutes on the verge of invalidation and to amend them before courts had the chance to strike them down. This seems to be what the Third Circuit had in mind when it suggested that only through "painstaking effort" could legislatures avoid judicial meddling.[51] There are, however, at least three reasons to think that legislators would not be inclined to adopt this approach. First, because many of the statutes challenged on the basis of changed circumstances are outdated in some way,[52] present-day legislators may be perfectly happy to see at least some of them go and would not waste the time or effort on amendment. Second, the total universe of statutes that *might* be struck down is undoubtedly larger than the subset of statutes that actually *would* be struck down in any given year. Preemptive amendment risks wasting legislative resources on statutes that would have survived judicial review. And finally, this approach would do nothing to ameliorate the actual institutional costs of judicial invalidation: the decrease in the expected value of legislation to its original proponents. These costs stem from the fact that a statute is amended or struck down, and they would accrue regardless of whether the statute was amended by a subsequent legislature or struck down by the courts.[53] In sum, the Third Circuit's concerns appear to be unfounded. And if legislatures would *not* go out of their way to amend outdated laws preemptively, then the institutional costs of judicial review on the basis of changed circumstances would be no greater than the costs of judicial review writ large.

A more plausible argument for rejecting changed circumstances review is that allowing courts to revisit the validity of past enactments would increase the *frequency* of judicial invalidation, and thus the institutional costs of judicial review.[54] But this too is debatable. If courts are barred from revisiting a statute's validity at a later date, they may feel pressure to scrutinize each statute more thoroughly

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[51] *Id.*

[52] *See, e.g.*, Caruso v. Aluminum Co. of Am., 473 N.E.2d 818, 821 (Ohio 1984) (citing new scientific data to challenge a statute enacted more than thirty years earlier); People v. Abrahams, 353 N.E.2d 574, 578–79 (N.Y. 1976) (challenging a Sunday closing law that over many decades had become riddled with exceptions).

[53] *See supra* notes 47–48 and accompanying text.

[54] This is not an argument that others have made explicitly, though it is implicit in Hand Linde's suggestion that permitting courts to consider changed circumstances on rational basis review would "subject [each statute] to continuing review regardless of its original rationality," such that "no decision [would] ever settle[ ] that a law is constitutional on this score." Linde, *supra* note 18, at 218.

when an initial challenge is brought—and perhaps to guess at how the statute might fare with the passage of time.

Justice Felix Frankfurter made this precise point in his dissent in *Morey v. Doud*.[55] At issue in *Morey* was an Illinois law exempting certain money order providers, including American Express, from state regulation.[56] In striking down the statute, the Court acknowledged that American Express was sufficiently sound at the time to justify the exemption, but emphasized that this might not always be the case: "By virtue of the exception, [sales of American Express orders] will continue to be unregulated whether or not [the Company] retains its present characteristics."[57] As Justice Frankfurter argued in dissent, the Court seems to have jumped the gun. Why, he asked, should the Court "deny a State the right to legislate on the basis of circumstances that exist because a State may not in speculatively different circumstances . . . have such right? Surely there is time enough to strike down legislation when its constitutional justification is gone."[58] Had the Court adopted a "wait and see" approach in *Doud*, it might never have had to intervene.

2. *Competency Considerations*

A more compelling objection to changed circumstances review is that courts are not equipped to evaluate the existence or significance of the changed circumstances that petitioners allege. Consider the examples with which this Part began. Some changed facts will of course be easy for courts to discern. If petitioners argue that a statute is no longer rational as a result of a subsequent enactment, the reviewing court need only look at the most recent version of the statutory code to verify whether circumstances have indeed changed. Claims based on new scientific evidence or technological changes are also relatively straightforward. Although they might require courts to consider expert testimony or to probe the strength of scientific consensus, these are the sorts of judgments that judges—and occasionally even jurors—are regularly asked to make.[59]

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[55] 354 U.S. 457 (1957).

[56] The regulations exempted businesses that sold money orders provided by the United States Post Office, the Postal Telegraph Company, Western Union, and American Express. *Id.* at 461–62.

[57] *Id.* at 467.

[58] *Id.* at 474 (Frankfurter, J., dissenting).

[59] For example, in a products liability claim, the fact-finder must determine whether a product is defective by considering the feasibility of alternative designs—which is essentially what the reviewing court would have to do in order to determine whether technology now permits state inspectors to screen out parasites in out-of-state baitfish.

On the other hand, the Eighth Amendment challenge to the execution of the mentally impaired presents a much harder case. In *Atkins v. Virginia*, which considered this precise claim, the petitioners argued that the Court should reconsider its prior ruling upholding the practice because public sentiment had shifted decisively against executing the mentally retarded in the intervening years.[60] The Court sought to mitigate the complexity of judging public sentiment by relying on "objective indicia" of change, including recent legislation adopted by the states.[61] Yet as Justice Scalia argued in another Eighth Amendment case, even "objective" criteria of this sort may be misleading.[62] Justice Scalia observed that "legislative support for capital punishment, in any form, has surged and ebbed throughout our Nation's history."[63] By the early 1970s, enough states had either abolished the death penalty or drastically restricted its use that the Court might reasonably have concluded that a national consensus had developed against it.[64] However, when the Supreme Court struck down Georgia's death penalty scheme in 1972 and signaled that other states' laws might be similarly invalid, thirty-five states immediately enacted new death penalty laws to address the Court's new procedural demands.[65] National sentiment, it seems, had not changed after all. By taking a snapshot of the relevant facts as they exist at the time of suit—particularly when the "facts" at issue are fluid and ambiguous—a court risks invalidating legislation on the basis of ephemeral change.

Even when the fact and permanence of change is readily apparent, the *significance* of change may not be so obvious. For example, in *Shelby County v. Holder*, both the majority and dissent agreed that voter discrimination in the Southern states was no longer as flagrant as it had been in 1965, when Congress first adopted the coverage formula and preclearance requirements in Sections 4 and 5 of the Voting Rights Act (VRA).[66] The Justices disagreed, however, regarding the conclusions that the Court should draw. Did changed circumstances indicate, as the majority insisted, that the preclearance

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[60] 536 U.S. 304, 313–17 (2002).

[61] *Id.* at 312–13.

[62] Roper v. Simmons, 543 U.S. 551, 612–14 (2005) (Scalia, J., dissenting).

[63] *Id.* at 612.

[64] *See* Furman v. Georgia, 408 U.S. 238, 291–93 (1972) (noting an average of just one hundred death sentences were imposed each year between 1961 and 1970, and that just forty-six executions had taken place between 1963 and 1972).

[65] *See* Gregg v. Georgia, 428 U.S. 153, 179 (1976) (noting that "[t]he legislatures of at least 35 States" had adopted new statutes).

[66] *Compare* 133 S. Ct. 2612, 2625 (2013) (noting that "things have changed dramatically" in the fifty years since the Voting Rights Act first went into effect), *with id.* at 2632–33 (Ginsburg, J., dissenting) (acknowledging that "progress has been made" since the 1960s).

requirements were no longer necessary to ensure the rights of minority voters?[67] Or did evidence of lingering discrimination—albeit on a smaller scale—demonstrate that the VRA was still necessary to keep more egregious violations of voters' rights at bay?[68] As William Araiza has suggested, courts are not particularly well suited to render these sorts of "evaluative or predictive judgments."[69] Yet these are precisely the kinds of judgments that courts are often called upon to make in changed circumstances claims. Broadcast frequencies may no longer be numerically "scarce," but does this necessarily mean that the structure of the industry has sufficiently evolved to obviate the need for more stringent regulation?[70] Scientific studies may show that silicosis symptoms can develop more than eight years after exposure. Does it automatically follow that the legislature's concerns over fraudulent claims are entirely unfounded?[71] These sorts of judgment calls counsel restraint in constitutional litigation generally, and may be especially problematic in a changed circumstances claim about which a court must make a value judgment without the benefit of a congressional record. It is little wonder that Judge Calabresi ultimately concluded that courts should exercise caution in considering whether to strike a statute on the basis of postenactment change.[72]

Nonetheless, these objections are cautionary rather than decisive. They suggest that courts should avoid ruling on the basis of nebulous "facts" and that courts should keep in mind that even where the changed circumstances themselves are readily apparent, the conclusions that follow may not be. None of the aforementioned factors addresses whether changed circumstances are constitutionally relevant to begin with. That determination—and the considerations that should inform it—are the subject of the remainder of this Note.

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[67] *Id.* at 2628–29 (majority opinion).

[68] *Id.* at 2650–52 (Ginsburg, J., dissenting).

[69] William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 953–54 (2013).

[70] This is likely what the Court had in mind when it declared that it was "not prepared" to revisit its spectrum scarcity rationale "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 n.11 (1984).

[71] *Cf.* Caruso v. Aluminum Co. of Am., 473 N.E.2d 818, 821 (Ohio 1984) (citing recent studies to conclude that the eight-year statute of limitations on silicosis claims could no longer be constitutionally applied).

[72] United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

II
Substantive and Motives-Based Doctrines

The Constitution's various commands can generally be classified as either substantive or motives-based.[73] Substantive constitutional rights are those that courts enforce by policing the *content* or *effect* of state action. The Eighth Amendment, for example, imposes an absolute bar on "cruel and unusual" punishment. A practice that is objectively cruel and unusual violates the Eighth Amendment regardless of the legislature's intent in adopting it or the procedural safeguards put in place to guard against its arbitrary use.[74] By contrast, the Constitution's motives-based doctrines are outcome-neutral.[75] A court might look to a statute's content or effect as a proxy for purpose, but ultimately, a statute's validity depends on whether state actors were motivated by impermissible considerations at the time of enactment. Substantive tests focus on the right of individuals or groups to be free from unwarranted burdens or intrusions. Motives-based tests focus on government actors and police the ends that they are permitted to pursue.

The debate between the majority and concurrence in *Employment Division v. Smith* illustrates the distinction between a substantive and a motives-based test.[76] At issue in *Smith* was Oregon's ban on the possession or use of peyote, a hallucinogenic drug used by

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[73] The Constitution's procedural safeguards arguably make up a third category of commands. They are not discussed in detail here because procedural provisions are unlikely to prompt changed circumstances challenges and are thus beyond the scope of this Note. Charles Fried identifies a similar set of categories in *Types*, 14 Const. Comment. 55 (1997). Fried argues that there are ultimately three kinds of constitutional tests: intents, effects, and acts. The last category includes those tests that "simply and directly require or prohibit particular acts," *id.* at 66, such as the requirement that the president take an oath of office, or that a defendant be indicted by a grand jury if he is to be tried for a "capital or otherwise infamous" offense. U.S. Const. amend. V. Most of the provisions he identifies as falling under the third category might also be characterized as *procedural*, and thus beyond the scope of this Note. Richard H. Fallon offers yet another typology of doctrinal tests. Richard H. Fallon, Jr., Implementing the Constitution 77–79 (2001). Fallon focuses on what the tests *require*, not the interests that they are ultimately intended to serve. For example, he identifies the strict scrutiny requirement under the Equal Protection Clause as a "suspect-content" test in that it renders laws that classify on the basis of race presumptively unconstitutional. *Id.* at 78. As Part III demonstrates in greater detail, when courts are asked to rule on the basis of changed circumstances, the question is not *whether* a law is presumptively suspect but rather *why*.

[74] *See* Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("[T]he Eighth Amendment has been recognized to affect significantly both the *procedural* and the *substantive* aspects of the death penalty . . . ." (emphasis added)).

[75] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

[76] 494 U.S. 872 (1990).

some Native Americans in tribal rituals. Nothing in the legislative history suggested that Oregon legislators had banned peyote so as to impede Native American religious practice.[77] In upholding the ban, the plurality insisted that the First Amendment did not apply to "neutral" laws that were "not aimed at the promotion or restriction of religious beliefs."[78] Since the petitioners had not alleged discriminatory intent, the Court did not find it necessary to scrutinize the strength of the state's rationale for banning the drug.[79] The concurring Justices also would have upheld the ban, but only after assuring themselves that the state's asserted interests in fact justified the substantial burden on Native American religious practice.[80] They insisted that motive cannot be dispositive: A "person is barred from freely exercising his religion regardless of whether the law" is intended to burden religious practice or is merely burdensome in its effect.[81] Thus, according to the concurrence, the Free Exercise Clause embraces a *substantive* right to unhindered religious expression. To the Justices who signed on to the main opinion, it guarantees only a narrower *motives-based* right of state neutrality with respect to religious belief.

As the remainder of this Part demonstrates, recognizing the distinction between substantive and motives-based provisions is critical to understanding the role of changed circumstances in judicial review. When applying a substantive test, the court must necessarily consider evidence that a law's burdens and justifications have changed in a way that raises new constitutional doubts (subject of course to the limitations set out above in Part I). Under a motives-based test, the court need only consider whether the motives of the *enacting* legislature were legitimate. Allegations of changed circumstances—no matter how compelling—will typically have no bearing on that determination and thus no role to play in motives-based review.

A. Substantive Doctrines

When substantive rights are at stake, courts should evaluate a challenged law's burdens and justifications in light of circumstances as they exist at the time of suit. The reason for this is fairly self-evident. If an individual enjoys a protected liberty interest, his constitutional rights are violated if the government intrusion on that interest is not justified by some countervailing public need. As this section suggests,

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77 *Id.* at 878.
78 *Id.* at 879.
79 *Id.* at 890.
80 *Id.* at 905–07 (O'Connor, J., concurring).
81 *Id.* at 893.

the fact that such an intrusion might have been justified in the past has no bearing on the question before the court.

Take for example the Fourth Amendment's bar on "unreasonable searches and seizures."[82] In applying this reasonableness requirement, the Supreme Court has expressly disclaimed any interest in the motives either of the enacting legislature or the cop on the beat.[83] The reasonableness inquiry is substantive, and the validity of a particular search or seizure policy depends at least in part on whether it is justified in light of contemporary technology and practices.[84]

Thus, in *Tennessee v. Garner* the Supreme Court considered a Tennessee law authorizing police officers to use deadly force to capture and arrest a fleeing felon in light of then-existing policing practices.[85] At common law, most American jurisdictions had authorized the use of deadly force to subdue suspected felons.[86] But a lot had changed since the late eighteenth century. For one, the vast majority of felony offenses were no longer punishable by death.[87] Continuing to permit the indiscriminate use of deadly force would impose on fleeing felons a punishment far worse than they could expect under the law. Technology had also changed in the intervening years. At a time when sheriffs and constables were generally unarmed, "[d]eadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk."[88] In *Garner*, by contrast, the police officer had been standing at a relatively safe distance when he shot the fleeing suspect in the head.[89] Citing these changed circumstances, the Court held that the

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[82] U.S. CONST. amend. IV.

[83] *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."). The Court has, in its special needs cases, considered the *purpose* behind a regulatory search or seizure, but has made clear that it is concerned only with the objective purpose of the stop, not the subjective purpose of officers or legislators. For example, in *Maryland v. King*, the Supreme Court upheld DNA collection from felony arrestees as furthering a purpose of identification, even though the authorizing statute's preamble and legislative history made clear that no one conceived of DNA collection as necessary to identify felony arrestees. *See* 133 S. Ct. 1958, 1985–86 (2013) (Scalia, J., dissenting).

[84] *See, e.g.*, Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 62 n.1 (1991) (Scalia, J., dissenting) (noting that the permissible delay before an arrestee must be brought before a magistrate "is obviously a function not of the common law but of helicopters and telephones").

[85] 471 U.S. 1, 4 (1985).

[86] *Id.* at 12.

[87] *See, e.g.*, BLACK'S LAW DICTIONARY 694 (9th ed. 2009) (defining a felony as "[a] serious crime usu[ally] punishable by imprisonment for more than one year . . . .").

[88] *Garner*, 471 U.S. at 14–15.

[89] *Id.* at 4.

Tennessee law was unconstitutional to the extent that its application authorized the use of deadly force whenever a suspected felon attempted to flee.[90]

Or consider what a changed circumstances claim might look like under the substantive theory of the Free Exercise Clause embraced by the concurring Justices in *Employment Division v. Smith*.[91] Writing for the concurrence in *Smith*, Justice O'Connor had insisted that the substantial burden on Native American religious practice must be justified by a compelling state interest.[92] Based on the record in the case, O'Connor found the state's interest in maintaining uniform drug laws and prohibiting the use of a dangerous substance to be sufficient.[93] Any number of developments could plausibly alter this determination. Studies might show that peyote is far less harmful than once believed. Experience in other states could demonstrate that a religious carve-out would not undermine the goal of otherwise stamping out the peyote trade.[94] In the end, these changed circumstances might not be sufficient to warrant striking the law. But under Justice O'Connor's theory of the Free Exercise Clause, a reviewing court would at the very least need to scrutinize the balance between the peyote ban's *current* burdens and rationales to determine whether the Native American plaintiffs had a viable claim.

Of course, the mere fact that courts *may* decide to invalidate laws on the basis of changed circumstances does not imply that they necessarily *should*. Prudential considerations may counsel restraint where the fact of change is difficult to establish or the rights at stake are peripheral to an amendment's core concerns.[95] But as Part I demonstrated, such considerations ultimately have no bearing on the proper temporal focus of judicial review—that is, whether courts should evaluate constitutional claims in light of circumstances that existed at the time of enactment or at the time of suit. Where the Constitution embraces a substantive guarantee, courts must at least be willing to consider the possibility that a statute is no longer valid on the basis of postenactment change.

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[90] *Id.*

[91] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring).

[92] *Id.* at 894.

[93] *Id.* at 903–07.

[94] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 226 n.15 (1972) (relying in part on the fact that other states have flexible education statutes to find that Wisconsin's compulsory education law impermissibly burdened the Free Exercise rights of Amish families).

[95] *See supra* Part I.B (highlighting potential institutional concerns).

B. Motives-Based Doctrines

In recent years, the Court has increasingly turned to purpose tests both to determine the appropriate degree of scrutiny and to define the scope of constitutional rights.[96] Under the First Amendment, "[t]he government's purpose is the controlling consideration."[97] The same is true under the Dormant Commerce Clause, which imposes a "virtually *per se* rule of invalidity" to intentionally protectionist laws.[98] To trigger heightened scrutiny under the Equal Protection Clause, plaintiffs must demonstrate either that a statute discriminates on its face or that it was adopted with a discriminatory purpose in mind.[99] Two similarly worded statutes might produce divergent holdings if one were enacted to serve a legitimate purpose and the other to discriminate on the basis of race.[100] In most cases, a finding of discriminatory purpose—or the lack thereof—is outcome-determinative.

Where the Constitution mandates scrutiny of legislative purpose, the potential relevance of changed circumstances is far less obvious: Although changed circumstances may cast doubt on the wisdom or necessity of legislative action, they cannot retroactively alter congres-

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[96] *See, e.g.*, *Smith*, 494 U.S. at 879 (holding that a law of general application "not aimed at the promotion or restriction of religious beliefs" was beyond the scope of the Free Exercise Clause). On the prevalence of motives-based tests, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1758–65 (2001) (describing various areas of law where such tests apply and drawing general rules regarding the application of motives-based tests).

[97] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Clark v. Comm. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that content-neutral statutes governing expressive conduct are subject to a lower level of First Amendment scrutiny).

[98] City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[99] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (internal citation omitted)). *See also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that to trigger heightened scrutiny, plaintiffs must demonstrate that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

[100] *Compare* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking down a facially neutral provision of the Alabama Constitution disenfranchising those convicted of crimes of "moral turpitude" on the ground that the provision had been adopted by the State's 1901 constitutional convention with the express purpose of disenfranchising Black voters), *with* Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (upholding Mississippi's felon disenfranchisement law after finding that while the provision was originally enacted to exclude Black voters, the State's decision to amend the provision in 1968 "removed the discriminatory taint associated with the original version") *and* Johnson v. Governor of Fla., 405 F.3d 1214, 1224–25 (11th Cir. 2005) (en banc) (upholding Florida's felon disenfranchisement law on similar grounds).

sional intent. Recall the discriminatory purpose challenge to the 100-to-1 ratio at issue in *United States v. Then*.[101] As the Eighth Circuit observed in rejecting a similar claim, "[s]cientific disagreement with testimony in congressional hearings, offered at a later time and after additional research, simply does not establish discriminatory purpose."[102] Or as the Second Circuit explained in rejecting another defendant's appeal, such evidence cannot "affect our analysis of *Congress' intent in 1986*."[103] It would surely defy the laws of causation (not to mention common sense) to suggest that events in 1995 could alter the purpose of the enacting legislature nearly ten years prior.

Nonetheless, some have argued that changed circumstances may be relevant if they suggest a discriminatory purpose behind nonrepeal. As Judge Calabresi observed in *Then*, "facially-neutral legislation violates equal protection if there is evidence that the legislature has 'selected *or reaffirmed* a particular course of action'" on racial grounds.[104] Judge Calabresi argued that if Congress persisted in ignoring the ratio's "dramatically disparate impact," then subsequent "claims of discriminatory purpose might well lie" and "would not be precluded by prior holdings that Congress . . . had not originally acted with discriminatory intent."[105] Even though postenactment changed circumstances may not be able to alter the *enacting* legislature's purpose, perhaps, as Judge Calabresi suggests, they can demonstrate that the legislature's purpose had changed. The Supreme Court implied as much in *Rogers v. Lodge* when it struck down a facially neutral voting scheme on the ground that it was being maintained for the purpose of excluding Black residents from participation in county government.[106]

Unfortunately, this argument does not hold up to closer scrutiny. Although the facts of *Rogers* underscore the desirability of changed circumstances review, the Court's reasoning in that case demonstrates instead why motives review should likely focus only on the intent of the legislature that first enacted the challenged statute.

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[101] *See supra* notes 7–24 and accompanying text (explaining in detail the circumstances of *Then* and the possible ways of addressing the doctrinal concerns the case raised).

[102] United States v. Clary, 34 F.3d 709, 714 (8th Cir. 1994).

[103] United States v. Moore, 54 F.3d 92, 99 (2d Cir. 1995) (emphasis added).

[104] United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

[105] *Id.*

[106] 458 U.S. 613, 627 (1982).

1. Changed Purpose Analysis in Rogers v. Lodge

Like most municipalities at the time, Burke County elected its five-member Board of Commissioners on an at-large basis.[107] Candidates were required to run for a specific seat and to receive a majority of votes.[108] Although Blacks composed a majority of Burke County residents, they represented only a minority of voters.[109] Because of the at-large voting scheme, no Black candidate had ever been elected to the Commission.[110] At trial, Plaintiffs introduced substantial evidence to prove that the Commission systematically discriminated against Black residents. Black residents were largely excluded from public employment.[111] Schools in Black neighborhoods remained in a state of disrepair.[112] Newly paved roads stopped right at the border between traditionally White and Black sections of town.[113] Each of these individual policies could no doubt be challenged on equal protection grounds. The petitioners in *Rogers* insisted that the entire electoral scheme that made such discrimination possible violated their Fourteenth and Fifteenth Amendment rights.[114]

Had the Court limited its inquiry to the original purpose behind the at-large scheme, *Rogers* would have been an easy case. As Plaintiffs conceded, the Georgia state legislature adopted the challenged at-large voting scheme to govern county elections in 1911, at a time when Blacks had been almost entirely disenfranchised across the South.[115] Whatever the Georgia legislature's motives in 1911, purposeful discrimination against minority voters was almost certainly not one of them.[116] Although the scheme had the *effect*—after 1965—

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[107] *See* City of Mobile v. Bolden, 446 U.S. 55, 60 n.7 (1980) ("According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977."). In an at-large election, there are no individual districts. Members are elected from the jurisdiction as a whole.

[108] *Rogers*, 458 U.S. at 615.

[109] This was a legacy of Burke County's history of racial discrimination against Black voters. Although Black voters were now able to register without impediment, Black voters' registration and turnout rates continued to lag behind those of White voters. *Id.* at 624.

[110] *Rogers*, 458 U.S. at 623–24.

[111] *See id.* at 625 (listing numerous jobs tainted by discrimination).

[112] *Id.* at 624–25.

[113] *Id.* at 625–26.

[114] They also claimed violations of their rights under the First and Thirteenth Amendments. *Id.* at 615.

[115] *Id.*

[116] At the time, at-large electoral schemes were championed as the preferred alternative to single-member districts, which tended to encourage parochialism and corruption in city government. Georgia's scheme, by requiring that each member run for a specific seat, did not entirely conform to the urban reform model, and was likely intended to solidify majoritarian control—just not majoritarian control along racial lines. *See* City of Mobile v.

of raising a substantial barrier to Black candidates in Burke County, the Court had previously made clear that at-large schemes could not be challenged under either the Fourteenth or Fifteenth Amendments on the basis of disparate impact alone.[117] Absent a finding of intentional discrimination, the voting scheme would undoubtedly have passed muster under rationality review.[118]

Citing the indisputable record of discrimination and exclusion, the Supreme Court concluded that although the scheme was "racially neutral when adopted," its purpose had changed.[119] The scheme was now "being *maintained* for invidious purposes in violation of appellees' Fourteenth and Fifteenth Amendment rights."[120] The Court ordered that Burke County be divided into five separate electoral districts, distributed such that Black voters would constitute a majority in at least two.[121]

2. *Theoretical Justification for Changed Circumstances Analysis Under Discriminatory Purpose Review*

As a threshold matter, there are reasons to think that if a law's validity depends on legislative purpose, then courts *should* be permitted to inquire into the purpose behind nonrepeal. The Court has repeatedly emphasized that the Equal Protection Clause guards first and foremost against intentional discrimination against members of protected groups. This view of equal protection is based on the principle that "certain characteristics"—such as race—"should be simply irrelevant to all, or almost all, governmental decisionmaking," and that their use is thus inherently suspect.[122] Under a motives-based theory of equal protection, the injury results not from the fact of unequal burden, but from the fact that such burdens were intentionally imposed. And if harm results from the perception that racial animus

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Bolden, 446 U.S. 55, 70 n.15 (1980) (describing the system as a well known anticorruption measure).

117 *Id.* at 74.

118 *See, e.g.*, Milwaukee Branch of the NAACP v. Thompson, 929 F. Supp. 1150, 1157–59 (E.D. Wis. 1996) (upholding a challenged at-large election scheme absent a finding of discriminatory purpose).

119 *Rogers*, 458 U.S. at 616.

120 *Id.* (internal quotation marks omitted).

121 *Id.* at 615–16.

122 *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 311 (1991) (discussing the issue in the context of affirmative action); *see also, e.g.*, Fullilove v. Klutznick, 488 U.S. 448, 533–35 (1980) (Stevens, J., dissenting) ("Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race 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.").

played a role in shaping the state's policies, then so long as race consciousness is evident from legislative inaction, then the constitutional injury is the same as it would have been had the law initially been motivated by considerations of race.

The same set of arguments would support consideration of changed purposes in other doctrinal contexts as well. Recall that in *Employment Division v. Smith*, the Court emphasized that the state had not specifically intended its peyote ban to discourage Native American ritual.[123] Now imagine that one day state legislators announced that although they no longer considered peyote to pose much of a risk to public health, they would nonetheless leave the ban in place because it turned out to have the unintended consequence of encouraging Native Americans to abandon their traditions and convert to Christianity. Such an announcement would undoubtedly violate the principle of neutrality at the heart of the Court's motives-based Free Exercise jurisprudence. The expressive harm that would result from continued enforcement of the peyote ban would not be diminished in the slightest by the fact that the ban had been neutral at its inception.

3. The Limits of Changed Purposes Analysis Under a Motives-Based Test

The challenge for advocates of changed purposes analysis is that the expressive-harms argument only goes so far. On closer inspection, the Court's analysis in *Rogers* is difficult to reconcile either with the requirement that petitioners actually prove discriminatory intent or with the long-established principle that the Constitution rarely imposes on state authorities an affirmative obligation to act.

First, few state actors are as brazen in real life as the fictional legislators in the *Employment Division v. Smith* hypothetical. Even under the best of circumstances, legislative purpose is difficult to discern. A given legislator may choose to support a measure to promote one—or more than one—of several objectives, including of course his own chance of reelection.[124] When, as is often the case, legislation is the product of compromise, no single purpose may command a majority of votes.[125] The Supreme Court has made clear that plaintiffs need only show that "a discriminatory purpose has been a motivating

[123] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882 (1990).

[124] *See* Linde, *supra* note 18, at 212 (describing the difficulty of determining any single legislative purpose, other than the effects of the legislation itself).

[125] *See, e.g.*, Bennett, *supra* note 18, at 1072 ("The result of [legislative compromise] may be two or more groups of legislators voting for a statute with different purposes, real and attributed.").

factor in the decision," not that it "was the 'dominant' or 'primary' one."[126] Even still, because legislatures rarely make their impermissible motives explicit, courts must generally infer discriminatory intent from circumstantial evidence, including: the absence of nondiscriminatory explanations for the challenged classification;[127] prior history of discrimination;[128] and the "sequence of events leading up to the challenged decision," including any unexplained departures from standard procedures.[129]

Such analytical approaches are largely foreclosed when courts are asked to inquire into the purpose of nonrepeal. Recall that in *Rogers*, the parties agreed that the Georgia legislature had acted reasonably in adopting the at-large voting scheme.[130] Moreover, the Court had previously held that at-large voting schemes were not *per se* unconstitutional, even if they tended to "minimize the voting strength of minority groups."[131] Almost by definition, then, the challenged provision could be justified on nondiscriminatory grounds. Nor could the petitioners point to comments in the legislative history, or to unexplained procedural departures to raise an inference of discriminatory intent, since the existing record would speak only to the enacting legislature's admittedly valid motives. Sheer legislative inertia, in virtually all circumstances, would serve as a plausible rationale—and thus rational basis—for why a challenged law remained in place.[132]

Even if the petitioners could somehow demonstrate that nonrepeal was based partly on racial animus, their challenge would run up against the requirement that discriminatory intent attach to a legislative *act*, which would be absent in the case of nonrepeal. The Constitution generally does not impose on state officials an affirmative obligation to legislate.[133] To illustrate, imagine that the Georgia

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126 Vill. of Arlington Heights v. Metro. Housing Dev., 429 U.S. 252, 265–66 (1977).

127 *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (inferring discriminatory purpose to exclude Black residents from Tuskegee from the "uncouth twenty-eight-sided figure" resulting from the City's redistricting efforts).

128 *See Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

129 *Id.*

130 *See supra* note 116 and accompanying text.

131 Rogers v. Lodge, 458 U.S. 613, 616 (1982).

132 The government in *Then* would have an even stronger argument against an inference of legislative intent. Given political pressures to appear "tough on crime," any politician who votes to reduce criminal penalties—even when penalties are obviously too high—takes a substantial political risk. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001) (discussing incentives to overlegislate in the criminal law context).

133 *See, e.g.*, DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental

state legislature had refused to ratify the Equal Rights Amendment (ERA), and that individual legislators had made clear that the ERA was simply inconsistent with their deeply sexist views.[134] No court would force the Georgia legislature to ratify the amendment on the ground that the state's failure to do so had violated women's equal protection rights. Nor would a court force a state legislature to adopt a work relief bill based on a showing that Black residents were unduly disadvantaged by the existing unemployment regime—even if petitioners could prove that initial calls for reform were rejected on racial grounds. It would not matter to the court's legal analysis whether the state already *had* an unemployment scheme in place, or whether the legislature would have had to develop one from scratch.[135] So long as the existing scheme had not been adopted with a discriminatory purpose, the legislature would have no obligation to replace it with a more generous program.

If neither of the aforementioned scenarios would provide a viable basis for an equal protection claim, then it is difficult to see why legislative inaction in *Rogers* should have been any different. Although courts have required states to take affirmative steps to eliminate the vestiges of past discrimination, the measures were always justified as remedies for past constitutional *violations*.[136] A state's failure to adopt

aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("[A] State is under no constitutional duty to provide substantive services for those within its border.").

134 *See Rogers*, 458 U.S. at 648 (Stevens, J., dissenting) (suggesting this hypothetical).

135 *See, e.g.*, Harris v. McRae, 448 U.S. 297, 315–17 (1980) (finding that Congress has no obligation to subsidize abortion coverage even if the federal government already provides subsidies for other medical procedures). Some commentators have suggested that the action/omission distinction is meaningless when applied to government because a government's decision not to take a particular action nonetheless alters the "allocation of legal rights" between private citizens. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 721 (2005). This Note does not take a position on whether the action/omission distinction is desirable or correct. Rather, it simply takes the distinction as given, in light of its firm place in the Court's constitutional jurisprudence.

136 *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 213 (1973) (noting that a past history of "deliberate racial segregation in schools" may be sufficient to trigger an affirmative obligation to desegregate); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (1970) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."). It is possible to read *Rogers* as relying on a past history of discrimination to create an affirmative duty on the part of county officials to integrate Black voters into the political fold. Such a reading would be consistent with the Court's position in *Swann* and *Keyes*, which permitted courts to infer from a past history of *de jure* discrimination that persistent *de facto* discrimination is likewise the product of state action. *Swann*, 402 U.S. at 26; *Keyes*, 413 U.S. at 213. Were this the case, however, the Court would have had no reason to look to the subjective motivation of county officials in maintaining at-large elections, since once a presumption of past

these affirmative measures on its own initiative has never been sufficient to qualify as a violation in and of itself.

Had the Georgia legislature voted to reaffirm the at-large scheme—and had the petitioners been able to show that the vote was motivated at least in part by racial animus—then their case would certainly have been stronger. But then *Rogers* would no longer involve a claim that the purpose of the *original* statute had changed. In reality, the petitioners never even alleged that they had sought legislative repeal.[137] The Georgia state legislature—which had enacted the at-large scheme and would have to approve its amendment—was not even a party to the suit.[138] The petitioners' challenge amounted to an allegation that the County Board of Commissioners had failed to urge the legislature to act. Even if the Commissioners did so with an obviously discriminatory intent, it is difficult to pinpoint the source of the officials' duty to have acted otherwise.

Therein lies the fundamental problem of relying on evidence of changed purpose as a basis for constitutional invalidation. On a disparate impact theory of equal protection, the mere fact that Burke County's scheme worked to the disadvantage of Black voters would have been sufficient to raise a presumption of invalidity. But so long as courts refuse to interpret the Constitution as mandating certain substantive outcomes[139]—and this, after all, is precisely what motives-tests are intended to avoid[140]—there is no obvious way to distinguish between failure to legislate and failure to repeal. If that is the case, it is difficult to see how changed circumstances could ever cast doubt on the legislative purpose behind a once-valid law.

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discriminatory action attached, only objective evidence of persistent inequality would be necessary to trigger a state's obligation to act. *See Swann*, 402 U.S. at 28 (noting, without reference to the district's motives, that "'[r]acially neutral' assignment plans . . . may be inadequate" if they "fail to counteract the continuing *effects* of past school segregation" (emphasis added)).

137 *Rogers*, 458 U.S. at 647.

138 *See* Brief of Appellants, Rogers v. Lodge at *1, 458 U.S. 618 (1982) (No. 80-2100) (listing as defendants members of the Burke County Board of Commissioners and the Burke County Board of Elections); *see also Rogers*, 458 U.S. at 647 (Stevens, J., dissenting) (criticizing the majority for failing even to identify "the persons who allegedly harbored an improper intent").

139 *See* Washington v. Davis, 426 U.S. 229, 245–46 (1976) (noting that absent a finding of discriminatory purpose, it did not matter that disproportionately few African American applicants qualified under the police department's test).

140 *See id.* at 248 (emphasizing that were the court to interpret the Equal Protection Clause to require a "compelling justification" of any statute that "benefits or burdens one race more than another . . . [it] would raise serious questions about . . . a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white").

In sum, the potential relevance of changed circumstances depends, as a first cut, on whether the reviewing court is bound to apply a substantive or motives-based doctrinal rule. Where the Constitution embraces a substantive guarantee—as does the Fourth Amendment—courts should undertake a time-of-challenge inquiry into the statute's present burdens and rationales. Where the Supreme Court has limited the doctrinal inquiry to proof of discriminatory intent, postenactment changed circumstances would likely have no bearing on the court's analysis.

III
Application (and the Problem of "Tailoring")

If, as Part II suggests, the propriety of changed circumstances review depends on the nature of the underlying constitutional right, then the first task for a court faced with a changed circumstances claim is to figure out whether the doctrinal test at issue is meant to enforce a substantive or a motives-based right. Unfortunately, few of the Supreme Court's doctrinal tests can be classified unambiguously as either substantive or motives-based. Tailoring inquiries, which require some degree of "fit" or congruence between statutory means and ends, are especially problematic in this regard. As this Part suggests, although such tests seem to enforce a substantive proportionality standard, it may be that courts in fact rely on tailoring inquiries to test whether the legislators truly intended to further a legitimate purpose by enacting the statute at issue.

Drawing on the Court's First and Fourteenth Amendment cases, this Part highlights the uncertain role of changed circumstances in judicial review of statutory fit. It demonstrates that in order to decide whether changed circumstances are constitutionally relevant in a particular case, courts must first decide whether the tailoring test at issue enforces a substantive or a motives-based right.

A. Tailoring in Constitutional Law

First and Fourteenth Amendment claims (as well as Fifth Amendment due process claims) are governed exclusively by a series of tailoring tests. Under the Fourteenth Amendment, laws that classify on the basis of race or infringe on fundamental liberty interests must be "narrowly tailored to serve a compelling state interest."[141] Laws that discriminate on the basis of sex are subject to a lesser degree of scrutiny and must be "substantially related" to "important governmental

[141] Johnson v. California, 543 U.S. 499, 509 (2005).

objectives."[142] At the lowest tier of scrutiny, general economic and social welfare regulations need only to be "rationally related to a legitimate state interest."[143] A similar set of tailoring requirements governs First Amendment claims. Content-based restrictions on free expression must be "narrowly tailored,"[144] while content-neutral regulations—such as zoning laws governing nude dancing establishments—must be "designed to serve a substantial governmental interest" and must "not unreasonably limit alternative avenues of communication."[145]

Courts also rely on tailoring inquiries to enforce the Constitution's structural provisions. For example, the Dormant Commerce Clause prohibits states from enacting laws that discriminate against interstate commerce unless such laws serve "a legitimate local purpose" that "could not be served as well by available nondiscriminatory means."[146] Similarly, to test whether Congress has exceeded its authority under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments, courts ask whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[147]

Superficially, at least, these tailoring requirements would seem to enforce a substantive guarantee of "fit" between legislative means and ends—suggesting, perhaps, that if changed circumstances sufficiently alter the balance, the challenged law must fall.[148] Yet, as a number of scholars have argued, tailoring requirements may actually function as yet another motives test.[149] By testing whether the adopted means actually further the purported ends, courts are able to "operation-

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142 United States v. Virginia (VMI), 518 U.S. 515, 533 (1996) (internal citations omitted).

143 City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

144 Brown v. Ent. Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (noting that in the First Amendment context, a content-based restriction must be struck down "unless it is justified by a compelling government interest and is narrowly drawn to serve that interest").

145 City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986).

146 Maine v. Taylor, 477 U.S. 131, 138 (1986) (internal citations omitted).

147 City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

148 *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 803 (2006) (explaining this theory of tailoring requirements in the context of strict scrutiny); Bennett, *supra* note 18, at 1050–56 (arguing that rationality review embraces a substantive means-ends requirement).

149 *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980) ("[F]unctionally, special scrutiny . . . turns out to be a way of 'flushing out' unconstitutional motivation, one that lacks the proof problems of a more direct inquiry and . . . permits courts . . . to invalidate . . . something for illicit motivation without having to come right out and say that's what they're doing."); Klarman, *supra* note 122, at 296 ("[T]he function of equal protection strict scrutiny can be viewed . . . as uncovering illicit legislative purposes . . . .").

alize" their "skepticism about the state's claim to be acting on a benign purpose."[150] Under this latter view, changed circumstances that alter the degree of "fit" between the legislature's purpose and the means employed may not in fact be relevant to the continued validity of the challenged law.

Both positions find support throughout the Court's opinions. Justice O'Connor has suggested that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race."[151] Strict scrutiny "ensures that the means chosen 'fit' [a state's compelling interest] so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[152] Absent a searching inquiry, a court would have "no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[153] On the other hand, in *Planned Parenthood v. Casey*,[154] a fundamental rights case,[155] Justice O'Connor offered a more substantive rationale for the strict scrutiny test. In the abortion rights context, a state regulation may be invalid either because it has the purpose of restricting access to a pre-viability abortion, or because it is unduly burdensome in its effect.[156] A statute that furthers a legitimate state interest, but "has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[157] Under *Casey*, strict scrutiny is necessary not only to ferret out illicit *motives*, but also to identify unduly burdensome *effects*. In the First Amendment context, the Justices have at one time or another embraced each of these competing rationales.[158]

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150 Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196 (2002).

151 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

152 *Id.*

153 *Id. See also* Johnson v. California, 543 U.S. 499, 505 (2005) ("Racial classifications raise special fears that they are motivated by an invidious purpose.").

154 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

155 The fundamental rights—or substantive due process—line of cases recognize certain rights as "'fundamental' or 'implicit in the concept of ordered liberty,'" and require that statutes burdening these rights further a "compelling state interest." Roe v. Wade, 410 U.S. 113, 152, 155 (1973).

156 *Casey*, 505 U.S. at 877.

157 *Id.*

158 *Compare* Burson v. Freeman, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (insisting that in the First Amendment context, narrow tailoring is necessary "not to justify or condemn a category of suppression but to determine the accuracy of the justification the State gives for its law"), *with* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 893–94 (1990) (O'Connor, J., concurring) (arguing that the First Amendment protects a substantive right to individual religious expression).

The challenge for courts is that in each instance, the doctrinal test is essentially the same. When a petitioner claims that a law is no longer narrowly tailored to a compelling state interest, how does a court determine which of the rationales to adopt, and thus whether to measure "fit" as it existed at the time of enactment or at the time of suit?

B. Changed Circumstances and Statutory "Fit"

The potential for confusion is well illustrated by the disagreement between the Eastern District of New York and the Second Circuit over the relevance of changed circumstances to a First Amendment claim.[159] In *TJS of New York, Inc. v. Town of Smithtown*, business owners had challenged a local zoning ordinance restricting sexually oriented businesses to certain areas of town.[160] Under the Supreme Court's *Renton* framework, governments may regulate the location of adult establishments so long as such laws are narrowly tailored to further "a substantial governmental interest" and permit "reasonable alternative avenues of communication."[161] The petitioners, who had purchased a strip club in a prohibited location and would have been forced to relocate were the ordinance upheld, argued that the court had to consider whether the ordinance provided a sufficient number of sites in 2004 when they brought suit, not in 1994 when the law first went into effect.[162] They posed a simple hypothetical: What if the only sites left open by the 1994 ordinance had, by 2004, been paved over to form the airstrip of a major international airport? How could a court plausibly find that the city nonetheless provided reasonable opportunities for sexually oriented businesses to set up shop?[163]

In response to plaintiffs' hypothetical, the district court explained that "a municipality's burden [is] to pass a constitutional ordinance which, in order to be constitutional, must provide sufficient alternative avenues of expression *on the date of enactment*."[164] Postenactment developments that reduced the number of available sites thus could not undermine the law's validity. Although the court did not elaborate on the theoretical basis for its conclusion,[165] its reasoning is consistent

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159 TJS of New York, Inc. v. Town of Smithtown, No. 03-CV-4407, 2008 WL 2079044 (E.D.N.Y. 2008), *rev'd*, 598 F.3d 17 (2d Cir. 2010).

160 *Id.* at *1–2.

161 City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

162 *TJS of New York*, 2008 WL 2079044, at *6.

163 Appellant's Initial Brief at 18, TJS of New York, Inc. v. Town of Smithtown, 598 F.3d 17 (2d Cir. 2010) (No. 08-2789-CV).

164 *TJS of New York*, 2008 WL 2079044, at *6 (emphasis added).

165 The court relied instead on prior cases that appeared at least superficially to support the notion that a time, place, and manner regulation must be evaluated based on

with a purpose-based approach. As the court emphasized in *Renton*, cities may not discriminate against the message of erotic dancing, but may legitimately restrict the location of adult establishments to guard against their "secondary effects" on the surrounding community.[166] In a discriminatory purpose inquiry, a total ban on all adult establishments—or an ordinance that offered too few alternate sites—would strongly suggest that city officials were motivated by a desire to stamp out adult establishments because of a disagreement with their erotic message.[167] If at the time of enactment, the city provided ample space for adult businesses to locate, then subsequent events would not normally alter the benign purpose with which the ordinance had been put into effect.[168]

On appeal, the Second Circuit rejected the district court's time-of-enactment inquiry. Writing for a unanimous court, Judge Calabresi insisted that "the First Amendment does not allow courts to ignore postenactment extralegal changes and the impact they have on the sufficiency of alternative avenues of communication."[169] Judge Calabresi defined the critical interest at stake as that of "would-be speakers," who at all times must be afforded sufficient avenues from which to speak.[170] Tailoring is necessary to prevent unwarranted intrusions on the speaker's interests, not to test the sincerity of the city's motives. In fact, he emphasized that changed circumstances might on occasion save an overly restrictive ordinance from invalidity: "[I]f a municipality opens up new land to development, the availability of alternative sites might very well increase . . . thus *rendering constitutional* zoning ordinances previously enacted."[171]

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circumstances as they existed at the time of enactment. *See id.* at *6–7 (citing, *inter alia*, Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 870 (11th Cir. 2007) for the proposition that "the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect"). In reversing the district court's ruling, the Second Circuit emphasized that none of the cases on which the district court relied actually required the courts to decide between a time-of-enactment and time-of-suit analysis, and that the intended meaning of the quoted language was thus inconclusive. TJS of New York, Inc. v. Town of Smithtown, 598 F.3d 17, 24–25 (2d Cir. 2010).

166 *Renton*, 475 U.S. at 48–49.

167 *See, e.g.*, *id.* at 57–63 (Blackmun, J., dissenting) (relying on the structure of the city's ordinance and the circumstances surrounding its passage to infer that the city was targeting content, not secondary effects).

168 Subsequent commercial or residential development might be relevant, but only if sufficiently foreseeable. Had city officials been aware that they might soon construct an airstrip at a location zoned for adult establishments, a court could reasonably infer that their motives had not in fact been so benign.

169 *TJS of New York*, 598 F.3d at 23.

170 *Id.*

171 *Id.* (emphasis added).

So which is the right approach? To the extent that the First Amendment protects individual self-expression,[172] or ensures robust democratic participation and debate,[173] laws that burden speech must be judged in light of not only their purpose but also their effect. Indeed, the entire doctrine of First Amendment overbreadth—which recognizes that broadly worded statutes may have a "chilling effect" on expressiveness—would be difficult to explain if purpose were the courts' only concern.[174] Yet as others have persuasively argued, a motives-based theory of the First Amendment may in fact better explain other dimensions of the Supreme Court's jurisprudence, including the *Renton* secondary effects test.[175] This Note is not the place to resolve this thorny and longstanding debate. But as the foregoing discussion suggests, courts cannot decide between a time-of-enactment and time-of-challenge inquiry from the requirement of tailoring alone. The fact that a law must be narrowly tailored at the time of enactment does not necessary imply that a court may strike it down if it is *no longer* narrowly tailored at the time of suit.

Although scholars have debated at length whether the Constitution's various provisions are properly construed as substantive or motives-based, courts have generally paid little attention to this debate. This is hardly surprising. If a statute discriminates on its face and is not narrowly tailored to a compelling state interest, it is clearly unconstitutional. It does not much matter to the reviewing court whether it is unconstitutional because it violates a substantive requirement of means-ends fit, or because the lack of fit is indicative of suspect motives. Yet as this Part demonstrates, this distinction does matter when courts are asked to engage in changed circumstances review. To decide whether changed circumstances are constitutionally relevant, courts must—as Judge Calabresi did in *TJS*—inquire

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172 *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the freedom of speech ultimately serves the value of "self-realization").

173 *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18–19 (1993) (arguing that the First Amendment must be understood as furthering the interest of deliberative democracy).

174 *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261–62 (1994) (describing the overbreadth doctrine, which permits a reviewing court to strike down a facially neutral statute that may be read to prohibit protected First Amendment activity of would-be speakers).

175 *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414, 483–91 (1996) (arguing that "the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting," and suggesting this is especially true in the secondary effects context); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775–78 (2001) (suggesting that First Amendment tailoring serves a purpose-testing function).

whether the constitutional provision at issue guarantees a particular outcome, or whether it merely ensures that certain impermissible considerations are excluded from the decisionmaking process.

Conclusion

The purpose of this Note has been to highlight a vexing and largely unexamined puzzle in constitutional law—the extent to which courts are permitted to revisit the validity of existing laws on the basis of changed circumstances—and to propose one possible framework for resolving it. As the foregoing analysis suggests, if the applicable doctrinal test is substantive, courts are permitted or perhaps even *required* to consider laws in light of postenactment change. On the other hand, if the test is motives-based, allegations of changed circumstances will rarely have any bearing on the validity of the challenged law.

The normative implications of this analysis are beyond the scope of this Note. If motives-based tests largely foreclose the possibility of revisiting a statute on the basis of changed circumstances, perhaps courts should be wary of embracing purpose tests in additional areas of constitutional law. Or perhaps not. For Justice Powell, who dissented from the Court's decision in *Rogers*, preserving the discriminatory purpose standard was sufficiently important to justify dismissing the petitioners' claim, even if it meant that Burke County voters would be left without a "judicial remedy."[176] The purpose of this Note is not to suggest any conclusive answers to this debate, but rather to suggest another dimension along which the relative merits of purpose and substance-based approaches might be weighed.

Similarly, the fact that many of the Court's doctrinal tests might plausibly be read as either substantive or motives-based does not necessarily mean that courts should rush to clarify the content of the underlying rights. While doing so would eliminate at least some of the confusion surrounding the propriety of changed circumstances review, there may be other reasons why courts might prefer to leave the standards vague. Given the wide-ranging consequences of picking between a substantive and a motives-based test,[177] courts might reasonably wish to avoid resolving these questions until all of the potential implications of the choice are clear. At most, the problem of

[176] Rogers v. Lodge, 458 U.S. 613, 630–31 (1982) (Powell, J., dissenting).

[177] *See supra* notes 139–40 and accompanying text (noting that adopting a disparate impact—or "effects"—standard under the Equal Protection Clause would open a wide range of government programs to constitutional challenge).

changed circumstances suggests one additional implication that courts should keep in mind as they grapple with the precise meaning of the Constitution's commands.