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ARTICLES

FIDELITY TO ORIGINAL PREFERENCES: AN APPLICATION OF CONSUMER CHOICE THEORY TO THE PROBLEMS OF LEGAL INTERPRETATION

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I. INTRODUCTION

Ours is a legal dialogue about precommitment and fidelity. We are, as a polity, committed to certain constitutional and statutory provisions and hence we are bound to follow them. Two questions naturally arise. First, why should we be bound by the dead hand of the past? And second, what is it exactly to which we are bound? Without denigrating the importance of the first question, this essay concerns itself with certain aspects of the second.

A vibrant exchange on questions of textual interpretation, much of it focused on constitutional issues,[1] has been conducted over the last several decades. Spurred in part by recent decisions of the Supreme Court, and also as a consequence of a dearth of convincing justifications for twentieth century constitutionalism,[2] legal

1. Although it has not generated as much literature as constitutional interpretation, scholarship on statutory interpretation has also been prolific. *See, e.g.*, William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (discussing one model of interpretation).

2. *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1338 (1988) (stating "no consensus has emerged about the proper

scholars have fervently attempted to ground our constitutional dialogue in some legitimating yet constraining framework. Scholarship on issues of statutory interpretation has also been prolific, especially in recent years.[3]

A number of models attempt to capture the judge's interpretive task.[4] Some legal scholars have conceived of the problem as one of determining the appropriate level of abstraction or generality at which to read a legal text. For example, the constitutional requirement that the president be at least thirty-five years old can either be read at a narrow level of abstraction (i.e., thirty-five means thirty-five) or more broadly. In this vein, we could argue that the provision was imposed as shorthand for "percentage of average life expectancy"[5] and that it therefore now implies a minimum age of roughly fifty — thus invalidating the Clinton presidency. Another scholar models the task of interpretation on that of translation. Just as the translator must connect communities that differ in their linguistic affiliations, so too are judges engaged in the task of meaningfully connecting us with the community composed of those who wrote the constitution or some other law.[6] Yet a third approach seeks to identify "neutral principles," the application of which is said to provide a disinterested solution to interpretive haggling.[7] While these differing interpretive approaches overlap in important ways, disagreements are significant and, importantly, often exist at the fundamental conceptual levels.

Although "[t]he contribution of modern microeconomic theory to the understanding and practice of the law has been one of the great academic success stories of the last quarter century,"[8] the law

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approach to judicial review or the best basis for justifying review" despite the fact that "a tremendous outpouring of scholarly works on constitutional theory has occurred.").

3. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991) (discussing statutory interpretation); Eskridge, *supra* note 1, at 1479-1555 (providing research on one theory of statutory interpretation).

4. See, for example, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); RONALD DWORKIN, LAW'S EMPIRE (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI L. REV. 1175 (1989), for some of the most important approaches not discussed in this paper.

5. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983); *see also* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 60-61 (1988) (discussing Easterbrook's approach to this problem).

6. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1172-73 (1993) (discussing the approach of translation theory).

7. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (stating that the judiciary should utilize neutral principles when interpreting the Constitution).

8. Thomas S. Ulen, *An Economic Appreciation of the Bill of Rights: The Limits and Potential of Law and Economics in Discussing Constitutional Issues*, 1992 U. ILL. L. REV. 189, 189.

and economics movement, with the singular exception of public choice theory,[9] has not had a noticeable impact on legal interpretation scholarship.[10] The microeconomic techniques which so successfully have been applied to the problems of corporation, taxation, tort, contract, accident, and antitrust law, among numerous other areas,[11] have rarely been applied to interpretive problems.

This essay draws upon the Theory of Consumer Choice in order to develop a model of legal interpretation. We argue that judges should avoid rigid adherence to literalism in situations of significantly changed circumstances since interpretive fidelity may require them to preserve the optimization of the "original preferences" of those who enacted a particular law. Sections II and III of the paper provide a more detailed discussion of the original preferences model and include applications to several much discussed interpretive problems.

With the original preferences approach in mind, it is useful to study existing interpretive theories from the perspective of both their liberating and constraining provisions. While all theories of interpretation attempt to constrain the range of legitimate interpretive possibilities to be chosen from by judges, many of these approaches fail to establish an effective and legitimate set of constraints. At the same time, other theories fail to establish an appropriate and legitimate basis for occasionally moving beyond the literal implications of a particular text. Section IV of the paper elaborates this point through discussion of the interpretive approaches advocated by Justice Antonin Scalia, Judge Robert Bork and Professor Lawrence Tribe.

Before proceeding further, two notes about this essay's scope are necessary: first, it would be improper to assume that all interpretive problems are similar. For example, a judge confronting a situation that was never envisioned by the legislature may either be dealing with the problem of legislative oversight or with the problem of changed circumstances. The former problem exists if

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9. *See, e.g.*, FARBER & FRICKEY, *supra* note 3 (providing an excellent overview of public choice scholarship).

10. In retrospect, this is somewhat surprising, since the first important economic contribution to American legal scholarship was a work of constitutional law. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (providing an economic perspective of constitutional interpretation).

11. *See, e.g.*, CORPORATE LAW AND ECONOMIC ANALYSIS (Lucian Arye Bebchuck ed. 1990) (applying microeconomic techniques to corporate law); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (applying microeconomic techniques to property law); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE of TORT LAW (1987) (applying microeconomic techniques to tort law); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987) (applying microeconomic techniques to accident law).

the legislature simply failed to foresee the situation to which the law it passed now seems to apply, even though circumstances have not changed in any way. This essay focuses on a different question, that of how a judge's interpretation of a legal enactment should change, if at all it should, when shifts in underlying circumstances upset the initial statutory or constitutional balance.

And second, this essay makes no claims that it has determined what policies any particular law incorporates. In the realm of constitutional interpretation particularly, interpretive disputes are often characterized as problems of determining the appropriate "level of generality" at which to read a particular provision.[12] Once an appropriate level of generality is identified, certain changed circumstances may increase or decrease in importance. A classic dispute about the appropriateness of different levels of generality occurred in Bowers v. Hardwick, in which the Supreme Court ruled that a Georgia statute outlawing sodomy was unconstitutional. Justice Blackmun sought to characterize the issue as whether or not there was a "right to be let alone", while Justice Scalia sought to focus on a much more specific inquiry: whether there was traditional protection of a right to engage in sodomy.

The level of generality at which one chooses to read a particular legal enactment determines the policy issues that are relevant to any discussion of it. In many ways, the debate over levels of generality is a recharacterization of a more explicitly political calculus: it is an attempt to identify the fundamental issues underlying a legislative enactment. Thus an individual who thinks that the fifth amendment is a utilitarian tradeoff between public coercion and private freedom will consider things that change this relationship to be important changed circumstances (e.g., increased levels of crime). But to the individual who sees the fifth amendment as embodying Kantian rights notions and Cartesian ideas of a mind-body distinction, virtually no social or cultural changed circumstances are relevant.

The tradeoffs underlying any legal enactment are tremendously more complex than this; the point is taken up here only in order to state that this paper makes no claims to contributing to the debate over levels of generality. We take as our starting point an assumption that the policies embodied in a particular legal enactment have already been identified, and address the often neglected

12. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1988) (stating "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"); *see also* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (asking "at what level of generality should the Court describe the right previously protected and the right currently claimed?").

issue of how, given the importance of certain issues, changed circumstances should affect judicial decision-making.

II. An Interpretive Model

> [A]ll she remembers is, that they were running hand in hand, and the Queen went so fast that it was all she could do to keep up with her: and still the Queen kept crying "Faster! Faster!" but Alice felt she *could not* go faster, though she had no breath left to say so . . . just as Alice was getting quite exhausted, they stopped, and she found herself sitting on the ground, breathless and giddy.
> The Queen propped her up against a tree, and said kindly, "You may rest a little, now."
> Alice looked around her in great surprise. "Why, I do believe we've been under this tree the whole time! Everything's just as it was!"[13]

In Lewis Carroll's *Through the Looking Glass*, Alice finds herself in a world in which she runs to stand still. The interpretive task is similar in some ways, far more difficult in others. As surrounding circumstances change, the import of legal enactments also changes. In an ideal world, judicial interpreters would re-interpret legislative and constitutional provisions in a fashion such that judges, if ever they had occasion to pause for rest, could exclaim like Alice that "Everything's just as it was."[14]

With this idealized goal in mind we seek to develop a theory that more fully explains interpretive fidelity by reference to the Theory of Consumer Choice, which is introduced immediately below. The original preferences theory is then developed in the second part of this section, and the final part of this section discusses the constraints that limit those who seek adherence to original preferences.

A. The Theory of Consumer Choice

The Theory of Consumer Choice[15] is a model of individual decision-making that seeks to explain the nature of the individual's consumption decision. As such, it may provide us with insights that allow us to better understand the decisions made by those who make law. The Theory of Consumer Choice identifies three distinct steps that are involved in any purchasing decision. These steps are:

1. *Representing Consumer Preferences* - the inquiry here is, what does the consumer want to do, absent any constraints?
2. *Representing Consumption Possibilities* - i.e., what options are available to the individual, given his income and the prices at which she must purchase?

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13. Lewis Carroll, The Annotated Alice: Alice's Adventures In Wonderland & Through The Looking Glass 208-10 (1960).
14. *Id.* at 210.
15. *See generally* Michael L. Katz & Harvey S. Rosen, Microeconomics 21-62 (1991) (discussing the Theories of Consumer Choice and Utility).

3. *COMBINING PREFERENCES WITH POSSIBILITIES* - this is the final step in explaining consumption behavior, and involves integrating the information retrieved in steps one and two above in order to generate consumption decision.[16]

For the purposes of this analysis, the goods being purchased are very broadly defined. 'Goods' are those things which increase the consumer's level of satisfaction. For an individual, it may be that hot dogs and basketballs are goods. When we analogize this analysis to the decisions made by legislators, we will view things like "protection of U.S. industry"[17] and "consumer protection" as "goods." Having outlined in general terms the mode of analysis by which this discussion shall proceed, we now turn to a more detailed elaboration of the elements of the Theory of Consumer Choice.

1. Consumer Preferences:

Assume for a moment that a consumer must choose between only two goods: say, Range Rovers and Chicago Bulls season tickets. Suppose in addition that we can ask a consumer about his preferences among various bundles of these two goods. On the basis of these preferences we can create an 'indifference curve' for the consumer. The indifference curve represents the choices (i.e., the bundles) among which the consumer is indifferent. Thus if our hypothetical consumer desires a bundle (Bundle A) of 2 Range Rovers and 4 Bulls tickets no more, and no less, than 1 Range Rover and 8 Bulls tickets (Bundle B), he is indifferent between the two choices, and they lie on the same indifference curve. It can easily be seen that there are an infinite number of indifference curves representing a particular consumer's choices as between two goods, each curve associated with a different level of total satisfaction. For example, while one indifference curve connects the equally desirable choices represented by Bundles A and B, another indifference curve might connect a bundle of 4 Range Rovers and 8 Bulls tickets to the

16. This third step implies an assumption of rationality on the part of legislators. There are serious and legitimate objections raised by public choice theory in general, and by Arrow's Theorem in particular, about whether any collective decision making body can be treated as a forum that engages in 'rational' decision making. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 384-89 (1989) (discussing the fact that collective decision making does not follow rational axioms).

17. What should be done if we learn that an assumption law-makers made while enacting law was actually incorrect? In certain circumstances, it would seem that incorrect assumptions to call for an interpretive response. It is important, however, that this not be broadened to the point where ideological shifts are recharacterized as mistaken assumptions. For example, many would argue that assumptions that protectionism is good for the country are mistaken as a matter of fact and not ideology. But these are situations in the model's penumbra, and do not affect the validity of the core assumption of a distinction between fact and value.

bundle representing 2 Range Rovers and 15 Bulls tickets. A collection of indifference curves is known as an "indifference map."

A number of assumptions are built into this model. First, we take it as given that, when confronted with any two bundles of goods, the consumer knows which one he prefers or if they are equally desirable. This is known as the "Axiom of Completeness." A second axiom is that of transitivity: If Bundle A is preferred to Bundle B, and B preferable to C, then Bundle A is preferred to Bundle C.[18] A final assumption, although not essential to our analysis, is that of "nonsatiation" or, in other words, "more is better." This means that none of the commodities with which we deal are a "bad" (of which less would be preferable to more). We can make this assumption in part because all "bads" we shall confront can be recharacterized as "goods" by reversing the variable representing them. Thus measurement of the "bad" of pollution is transformable into measurement of the "good" of clean air. This assumption is useful because it makes it easier to understands the analysis that will be presented below, in part because it implies that an indifference curve will never slope upwards (i.e., it always has negative slope).

The indifference curves used in price theory to represent consumer preferences have several properties which may be worth reviewing here. First, any bundle of goods lying above a given indifference curve is preferable to the goods that make up the indifference curve. Bundles on a given indifference curve are, therefore, preferable to bundles beneath the curve. Also, the absolute value of the slope of an indifference curve measures the rate at which a consumer is willing to trade one good for another. This is known as the "Marginal Rate of Substitution" (MRS). Since MRS declines as we move along an indifference curve, all indifference curves are convex to the origin.[19] Finally, while indifference curves cannot intersect, since this would be a violation of the Axiom of Transitivity, they need not be parallel — they can get closer or move further apart.

2. *Budget Constraints*

The indifference curves described above are a graphical representation of consumer tastes or preferences. The next step in our analysis is to understand how price theory represents what a consumer is actually able to do. This analysis is relatively straightforward in the two good context that we have been considering. A purchaser who has income I and faces fixed prices P_x and P_y for

18. Public choice theory suggests that we should have reservations about making transitivity assumptions when we deal with group decision making. We return to this issue in the discussion of textualism in Section IV(C) below.

19. That is to say, they are bowed inwards.

goods x and y could potentially purchase all quantities x and y that satisfy the following relationship:

$$(P_x)(x) + (P_y)(y) \leq I$$

Since income can only be spent on these two goods, however, and "more is better" we can simplify this inequality by assuming that a consumer spends the entirety of his income:

$$(P_x)(x) + (P_y)(y) = I$$

This equation describes a line, known as the budget line or more generally as the budget constraint, which shows the consumption choices that an individual with income I will choose between in deciding what to consume. The slope of the budget constraint represents the opportunity cost of one good in terms of the other. It tells us how much of x must be given up in order to purchase an incremental unit of y. The equation above describes a line because we have assumed that the consumer is a price taker; he has no ability to influence prices. Where prices are not constant, for example when a purchaser receives quantity discounts, the budget constraint will be non-linear.

3. *Consumer Equilibrium*

Naturally enough, rational individuals attempt to maximize their level of satisfaction given the constraints that they face. In the words of the model that we have developed: the individual chooses the highest indifference curve that does not lie above his or her budget constraint. The bundle chosen will therefore be represented by the point at which the budget constraint is tangent to a consumer's indifference curve. In the two good universe, if the budget constraint is linear, this point will be represented by the following:

$$MRS = (P_x/P_y)$$

B. An Interpretive Model

If we view the decision to enact law as a rational choice between different alternatives, the usefulness of the consumption analogy is clear. Law-makers can be treated as having a set of preferences, much as do consumers. While consumers tend to deal in products like apples and cars, the law-maker's consumption behavior involves the imbibing of public safety and the devouring, so to speak, of personal freedoms. Just as the individual consumer must give up an apple to get an orange, law-makers must trade economic growth off against increased consumer protection. And just as a consumer consumes at the point of tangency between his or her highest attainable indifference curve and budget constraint, so too should legislators tend to choose laws that maximize the values they hold dear, given the constraints that apply.

But recall that this essay concerns itself with interpretation under changed circumstances. We discuss how, given an identified set of policy variables, interpreters should react to changed circumstances in order to preserve adherence to the enacting body's "original preferences." We turn, therefore, to the development of a model that provides insight into how this might be done.

1. Fidelity to "Original Preferences"

Let us assume that we have identified the fundamental policy choice that underlies a particular law. Once circumstances change, fidelity to the "intention" of the enacting body implies making the same choice that the enactors would have made had they encountered the new circumstances that are faced by the interpreter. In the terminology of the model of consumption choice, it involves making the same consumption decision that the law-making body would have made if it encountered the new circumstances with its preferences unchanged. There are three distinct steps involved in this process.

(I) Representing Legislative Preferences

Let us say that a particular law was enacted for n reasons (x_1, x_2, . . . x_n). We can describe an indifference map for law-makers that allows them to choose the point at which they maximize their utility, given a budget constraint. Let us therefore assume that the law makers possess an indifference curve that is represented by:

$$U(x_1, x_2, \ldots x_n)$$

For example, let us assume that the fourth amendment embodies, at its most fundamental level, a determination about the appropriate tradeoff between freedom from private (x_1) and public (x_2) coercion. Thus we seek to determine the relative values of these two things to the Framer's of the Constitution. The actual choice made by the Framer's is the single most important piece of evidence in this inquiry, but evidence from other sources, most prominently legislative history, must also be looked at in order to make this determination. The actual choice itself does not fully reveal the Framer's indifference curve to us because it represents only a point: we also seek to determine how much of an increase in private freedom would to balance off an incremental increase in governmental coercion.

(II) Representing Consumption Possibilities

At any time, there is a budget constraint associated with variables x_1 to x_n. We cannot achieve an infinite amount of any good xi, either because of time or some other constraint. For example, if x_1 is the number of airline flights in the U.S. on a particular day then it is constrained both by time (only so many flights are possible in 24 hours) and technology (air traffic control systems technology is

not capable of handling more than a specified number of flights a day). In addition to absolute constraints of this type, when multiple objectives are pursued, relative constraints arise: if another of our goals (x_2) is air passenger safety, then it almost certainly, ceteris paribus, bears an inverse relationship to the number of flights, at least over the range of choices that concerns us.

Legislatures thus face budget constraints just like the consumer and in choosing how much of different policy goods they consume, there is a level beyond which they cannot rise. Mathematically, we can represent the law-makers budget constraint as follows:

$$f(x_1, x_2, \ldots x_n) \leq I$$

In order to apply the original preferences model we must understand how changed circumstances have altered the constraints that the original enacting body faced. Thus, if a law is passed that prevents the use of carcinogens because it seeks to prevent cancer (i.e., trades off benefit to public of regulation versus benefit to industry of increased profits) and an inexpensive childhood 'vaccination' is discovered that eliminates all occurrence of cancer, the budget constraint facing the original legislative body has changed rather dramatically since a great deal more prevention is now possible than was conceivable before, and at a lower cost.

(iii) Combining Preferences with Possibilities

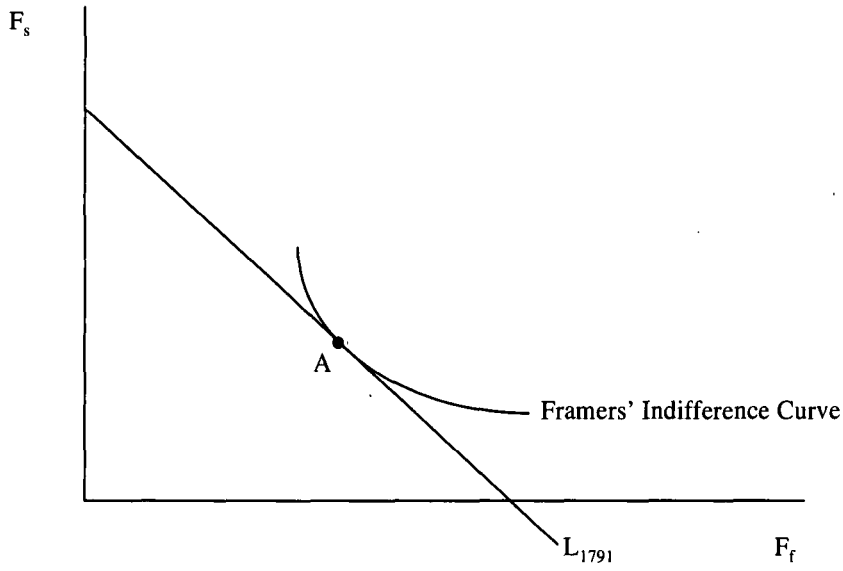
If legislation is passed in a rational fashion or if it is appropriate for courts to treat it as if it were passed in a rational fashion, then it is fair to conclude that newly created laws represent the maximization of $U(x_1, x_2, \ldots x_n)$ within the constraints imposed by the requirement that $f(x_1, x_2, \ldots x_n) < I$. Thus the amount of each of variable selected by the legislature (x_1, x_2, . . .) represents the point at which the law makers' preferences were maximized, given their perception of existing circumstances.[20] This is the point at which $U(x_1,x_2, \ldots x_n$ is tangent to the boundary condition imposed by $f(x_1, x_2, \ldots x_n) < I$.

2. *Dealing with Changed Circumstances*

Assume that a fictitious constitutional amendment passed in 1791 and dealing with the regulation of professional sports, the 1½ Amendment, seeks to balance federal proscriptive authority (x) against state proscriptive authority (y). This constitutional choice can be modeled as the selection of a point along a simple curve such as the one shown in Figure 1. We assume that the framers chose rationally and picked a point that maximized their utility, given the

20. See *supra* note 17, for a discussion on how to deal with the problems of simple factual mistake. This distinction between actual and perceived budget constraints is a broader statement of the same point.

FIGURE 1: THE 1½ AMENDMENT



F_s	Proscriptive Authority of States
F_f	Proscriptive Authority of Federal Government
L_{1791}	Original Budget Constraint
A	Original Constitutional Choice

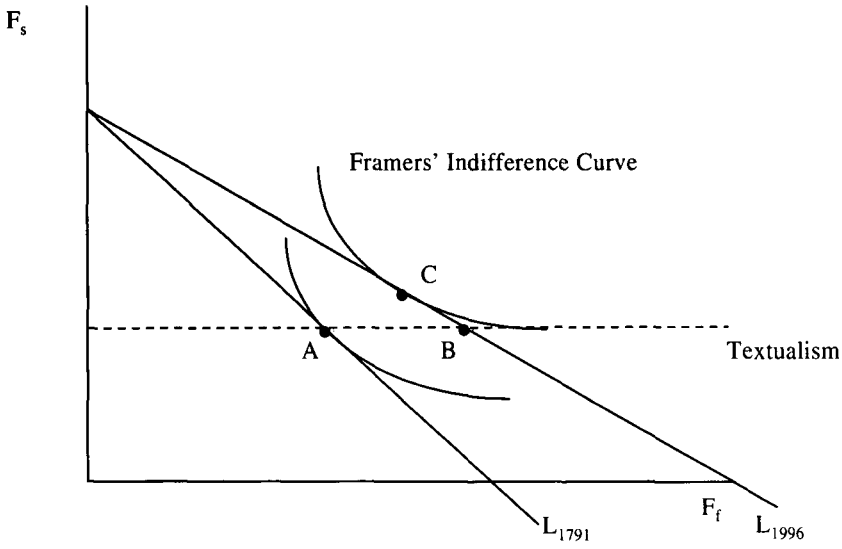
constraint imposed by L_{1791}. Thus Point A marks the position at which the framer's indifference curve was originally tangential to the L_{1791}, the political possibilities frontier (PPF).[21] Selection of this point maximized utility at the time of the framing because the PPF represents the highest achievable mix of the goods identified on the x and y axes.

The position and slope of L_{1791} is a function of the underlying factual background. Similarly, the shape of the indifference curve is a function of the values of the framers. Constitutional law tends to assume that we should adjust for changed facts from the time of the framing, but not for changes in value.[22] The interpretive task can

21. The acronym "PPF" is commonly used for "production possibilities frontier", an element of the microeconomics model from which this approach derives inspiration. *See* JOHN P. GOULD, JR. & EDWARD P. LAZEAR, MICROECONOMIC THEORY 38-53 (6th ed. 1989) (discussing utility and preference, characteristics of indifference curves, and marginal rate of substitution).

22. Lawrence Lessig, *Understanding Changed Readings*: Fidelity and Theory 6 (Draft: March 27, 1994). Adjusting for changed utility curves would be both inappropriate and difficult. The utility curve we are considering is that of the framers, not that of the public. Since there are no reasons to presume that the framers then had a utility curve that differed from that of the public, there cannot be an argument for replacing the framers utility curve of 1776 with a

FIGURE 2:
EFFECT OF INCREASED FEDERAL POWERS ON THE 1½ AMENDMENT



F_s	Proscriptive Authority of States
F_f	Proscriptive Authority of Federal Government
L_{1791}	Original Budget Constraint
L_{1996}	Modern Budget Constraint
A	Original Constitutional Choice
B	Modern Textualist Choice
C	Original Preferences Choice

thus be modeled as an attempt to determine the position at which the framer's utility would now be maximized given shifts in the location of the political possibilities frontier.

What should the interpretive response be to changed circumstances that enhance the power of the federal government in a setting where state regulatory powers are unchanged? This change is

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modern utility curve representing public opinion. In addition, there is no way to identify who the framers would be today, so we can hardly use the utility curve of some subsector of the population. It might be convenient to identify members of Congress, or some other arbitrary group, as that subsector, but as a practical matter this does not really alleviate the problem, first, because the selection of the relevant group is largely arbitrary and, second, since we really do not know how these people would behave at a constitutional convention. Bruce Ackerman, for example, sharply distinguishes between commonplace political behavior and the heightened political awareness of "constitutional moments." Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1039 (1984).

illustrated in Figure 2.[23] Point A on L_{1791} represents the original legislative choice. If the law was drafted as a limit on state power, holding legal standards unchanged, as Judge Bork might have us do, moves us to point B on L_{1996}. As we can see, while this point represents a value choice different from that of the framers, the original choice is no longer available to us, since we must choose a point along L_{1996}, which defines the modern set of alternatives. The original approach counsels us to move away from Point B in the direction of Point C, which represents holding the impact of laws unchanged in the face of changing facts. Point B, on the other hand, represents the impact of holding laws unchanged across changed circumstances.

When engaged in constitutional interpretation, therefore, courts should identify Point B—where the natural course of events will most often take us—and then move us in the direction of Point C. Not shifting in that direction, no less than moving too far, is a form of constitutional brinkmanship. Within the segment of L_{1996} between Points B and C, there are a number of different potential outcomes, several of which may be legitimate. It might intuitively seem, however, that the midpoint between Points B and C represents the "most legitimate" interpretation of the original policy choice, and that the closer we are to the midpoint the closer we are to true fidelity. This intuition is incorrect as a general matter since the actual point of maximization depends on the shape of the framer's indifference curve.[24] It is taken to be valid here, however, since this essay assumes that the indifference curves with which we deal are homothetic.[25] In other words, we assume that legislatures would "consume the same proportion of each commodity at each level of income as long as prices are held fixed, and just scale this fixed consumption bundle up and down as income changes."[26] This is an important assumption since, even if it is relaxed and we assume only that we are dealing with normal goods, it implies that taken together, Points B and C mark the outer bounds of permissive judicial discretion identified by this model. Whatever choices judges make, they should not push beyond the boundaries indicated

23. We can generally expect changes in technology to cause both the federal and state government's powers to increase in tandem. The model elaborated above illustrates, however, that even if these powers increase uniformly fidelity is not best served by maintaining the same constitutional boundary that we had maintained before. Technology that apparently causes uniform increases in the abilities of state and federal power need not result in a uniform shift, however, since certain economies of scale may favor the federal government more than they did originally. On the other hand, these economies may very well have declined from the time of the framing.

24. *See* GOULD & LAZEAR, *supra* note 21, at 199 (discussing isocliner).

25. *See* HAL R. VARIAN, MICROECONOMIC ANALYSIS 118-20 (2d ed. 1984) (discussing homothetic indifference curves).

26. *Id.* at 118.

by these two markers. This is because these points identify the endpoints of the segment of L1996 that certainly includes its point of tangency with the highest achievable indifference curve of the framers, given that we know Point A was their original constitutional choice. Thus we can say, to the extent that such a statement is possible, that if the framers were, with their values unchanged, to make a constitutional choice today they would make one located between points B and C. The assumption of homothetic preferences would allow us to say that they would choose Point D. This assumption is contestable, however, and it is important that application of the original preferences approach be nuanced by a consideration of the assumption's validity under the circumstances of any particular case.

3. *Constraints on Fidelity to "Original Preferences"*

Any plausible interpretive theory must liberate as well as constrain in a manner that is legitimate. We shall argue elsewhere in this paper that existing theories of interpretation fail to achieve a balance between liberating and constraining provisions that will help ensure consistency with original preferences. The flaw is not that they may be misapplied or misused in individual instances — human failings affects us all — rather, they fail to develop a balance at the level of theory between discretion and restraint that adequately assists judges with their interpretive problems.

The original preferences interpretive theory liberates us from the irrational implications of textualism, but it also seems dangerously fluid; a model requiring constant and active judicial interpretive adjustments might permit the unscrupulous judge a great deal of latitude and result, as a practical matter, in laws that have little connection to the original preferences of enactors. In actuality, however, a number of constraints on judicial activism are applicable to judges who seek adherence to original preferences. The only legitimate constraints, however, are those which can be reasonably be said to hinder practical and efficient implementation of this model. These constraints arise out of the judiciary's individual and systemic limitations, and are considered below.

(i) Magnitude and Anticipation

All changed circumstances are not equally relevant from the perspective of the original preferences model, and judges should make two important determinations when presented with a changed circumstance on the basis of which, it is claimed, some interpretive shift is required.

First, a court must assess the magnitude of the change. The law is by its very nature a crude instrument. The original legal balance between competing considerations must therefore be con-

sidered to be a range of possible values, not an isolated point. Since judges cannot micro-manage a law's impact on social circumstances they should generally remain unmoved when confronting changed circumstances. It is only when the changes are particularly significant that they should respond in the manner outlined here.

Also, courts should only use this model in order to respond to changes that were unanticipated by the enacting body. To the extent that an enacting legislature was able to foresee changed circumstances, it is entitled to deference in its choice of law. The inquiry into whether a change was foreseen is not particularly difficult since law-makers do not differ from ordinary citizens in any way that affects their ability to foresee changed circumstances. Often the questions will be exceedingly simple. For example, did the constitution's enactors foresee the twentieth century's explosive growth in interstate commerce? Of course they did not.[27]

Magnitude and anticipation are necessary requirements for the deployment of this model: a change only demands a response if it is significant and unanticipated. Adjusting for changes that are not significant is a futile method of seeking fidelity, and adjusting for those which are anticipated is inconsistent with this goal.

(II) HEURISTIC ISSUES

One of the problems with this model is that its use as a tool of interpretation will often be tremendously complex. Any particular legal enactment is at root the embodiment of a very large number of considerations and tradeoffs. A law that is purportedly about protecting consumers from the ill effects of spoiled fish may have been enacted with a mind towards its impact on the fishers of Maryland's Eastern Shore. As a consequence the number of variables that we may be asking a court to consider in its balancing equation could be tremendously large and, since the issues involved in such cases often are not subject to empirical measurement, it may be impossible for a court to determine how the variables interact, and what the appropriate response to a given changed circumstance is. But even in cases where multiple variables are involved, it may be that a small number, often only two, are the primary source of motivation. And given the constraint identified above that the impact of a changed circumstance must be significantly unanticipated before it is appropriate to respond with an interpretive shift, judges need be

27. An interesting situation presented by this line of inquiry arises when the legislative enactment represents a compromise precisely because the legislature was uncertain of future events, although it was aware of the possible course of such events. Should the legislature's ex ante enactment be altered in order to reflect information gleaned at a later date? Actually, this is a more interesting theoretical question than it is a practical one, since legislatures often defer decision-making authority to executive branch agencies in such circumstances, and courts frequently do not encounter these questions in the fashion that the problem is formulated here.

even less sensitive to such secondary concerns than were legislators. This model is therefore useful to judges even in its two variable formulation, where the fundamental choices involved boil down to a tradeoff between two factors. Use of this version of the model makes it much easier to envision the appropriate response to changed circumstances.

While this simplification significantly reduces the area of direct application of the original preferences model, it can still be used to discuss situations in which the tradeoff dynamic is more complex. Commentators as well as judges should employ it as a check on their own analysis. But, given human limitations and the lack of a medium of exchange between the goods in which legislatures trade, it does seem that the models use as a positive theory of interpretation generally should be constrained to the two variable case. Even so, the original preferences model has important things to say about a number of important situations, as we shall discuss in Section M of the paper.

(iii) Categories of Change

Contextual changes can, from one perspective, be placed within three categories. The first important category of change is factual. For example, the fourth amendment imposes a warrant requirement upon "searches."[28] The framers obviously knew nothing about remote sensing microphones so the nature of the relevant constitutional provisions was altered when technologies that could search private locations without physical intrusion developed.[29] The meaning of the interstate commerce clause has also changed dramatically. When we read the interstate commerce clause today, we no longer think of creaking horse-drawn carts plying narrow, unpaved "highways."[30] The changes belonging to this category are not directly related to the text of the law in question, but they can dramatically change the impact of a legal enactment on society.

A second category of change is linguistic, and is hinted at in the example of the interstate commerce clause above. As commerce has expanded, an intellectual movement begun in 1776 with the publication of Adam Smith's *The Wealth of Nations* has also changed the very notion of "commerce."[31] Not only is there more interstate commerce than there was in 1776, our notion of what counts as com-

28. Johnson v. United States, 333 U.S. 10, 13-14 (1948).

29. *See* Katz v. United States, 389 U.S. 347, 352-53 (1967) (holding that electronic eavesdropping without physical penetration constitutes a search and seizure under the Fourth Amendment); *see also* TUSHNET, *supra* note 5, at 27-28 (discussing the framers' lack of knowledge of wiretaps).

30. *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 664-67 (1981) (considering whether Iowa had unconstitutionally burdened interstate commerce because it banned most 65 foot long twin trucks from its highways).

31. Indeed the content of the term commerce has grown particularly dramatically in the last 20 years alone.

merce also seems to have expanded. Within the realm of the law, the high-water mark of this expansion was the Supreme Court's decision of *Wickard v. Filburn*,[32] in which the Court concluded that wheat grown on a farmer's private land for domestic consumption was part of "interstate commerce." Linguistic change is often connected to or driven by other types of change, as indeed it was in this case, but it should be considered a distinct category because there is no requirement that it be so related.

Another important set of changes are those concerned with social theories, values and systemic notions of values; let us call these ideological changes. Social theories provide a perspective from which individuals process information about the world around them. The example of *Wickard v. Filburn* is not exclusively linguistic: it is also about ideology. The declining popularity of positivism and the rise of legal realism made the *Wickard* decision possible since these trends allowed judges to conceive of the negative impact of non-participation in interstate commerce as an element of such commerce itself. Shifts in world-view thus produce liberating ambiguities for those looking back from today's perspective at the legal enactments of a bygone era.

Since change in context is inevitable, changing laws are also an undeniable reality. Our constitutional document may remain untouched but it is not unaltered — the ground is moving beneath it, and if we force it to stand still it will soon come to mark a different spot than it had marked at an earlier time. The crucial questions concern whether judges should react to such change, what type of change they should react to, and how they should respond. This paper declared at the outset that it takes precommitment and the associated value of fidelity as givens. We therefore concern ourselves with the latter two questions and, in this section, with the issue of which types of change appropriately call for a judicial response.

Measured against the yardstick of interpretive fidelity, it is clear that the last category of change, that of ideological shifts, does not provide a valid justification for a change in interpretation since the modern point of view affects neither the current budget line nor original preferences. Linguistic change, however, may demand a response since we know that if law-makers defined a particular concept or term in a certain way, then preservation of the original balance is contingent upon use of the original definition, as long as other things are unchanged. Finally, changes in facts are the most obvious examples of events calling for interpretive shifts. Adjusting for changed linguistic or factual circumstances is thus in no way inconsistent with interpretive fidelity if we take interpretive fidelity

32. Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).

to mean the preservation of the balance struck by law-makers in the light of their relative preferences.[33]

The model that was developed above captures these insights, and serves to justify them as well. The requirement that judges preserve the indifference curves of those who originally made law is a requirement that judges set aside all reference to ideological change. What is required is that judges consider only the preferences of those who originally created the law.[34]

This is also a point about linguistic change: the framer's indifference curve reflects the framer's understandings of various concepts. Thus when we interpret the word "commerce" we need to be aware of how our understanding of the term has changed with the passage of time. As we shall see in the Delany Clause example below, failure to adjust for changed meanings results in the imputation of an indifference curve to law-makers that is different from the indifference curve that their decisions actually represent. Not adjusting interpretive outcomes for changed meanings is thus equivalent to changing the law itself. In all of these circumstances, however, preserving adherence to the original intent of those making law imposes a requirement that we seek to understand how the words of the law in question were understood at the time of enactment.

Often, an enactment grants discretion to another branch of government. For example, the Sherman Act's broad prohibitions on restraints of trade have been understood as calling for judges to exercise their discretion and create a body of federal common law in the antitrust arena.[35] Another example is to be found in the fourth amendment, which restricts the manner in which police forces intrude upon the citizenry, but does not in any way seek to prevent the executive branch or local governments from placing a police officer on every corner — a step that most certainly has an impact on what they sought to achieve.[36]

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33. This is a key argument behind interpretive theories which emphasize adherence to the 'original understanding' of the interpretive community in which a law was revealed as well as those which push for consistency with the 'original intent' of law-makers. But some adherents of these approaches fail to distinguish between ideological shifts and shifts in language or factual circumstances. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 143-70 (1990) (providing a passionate defense of the original understanding theory while rejecting the idea that the basic meaning of the Constitution changes along with societal change). If interpretive adjustment to factual or linguistic changed circumstances is to be argued against, it must be on grounds other than fealty.

34. To some, this implies an at times horribly immoral legal regime (e.g., slavery)—this is substantive criticism—as well as a procedurally flawed legal regime in that it is more difficult under this method to change law. The substantive criticism is misplaced since this is a procedural theory.

35. Easterbrook, *supra* note 5, at 544.

36. This argument can be applied to the levels of generality debate. Very little legal analysis seeks to identify what a provision is about by looking at how

(IV) LEGAL CHANGE AND THE DIFFERENCE BETWEEN CONSTITUTIONAL AND STATUTORY INTERPRETATION

The model as presented so far has referred to the interpretive task generally, making no distinction between statutory and constitutional adjudication. This approach is justified since there are no significant differences between constitutional and statutory speech. Constitutional and statutory provisions differ, however, in that the level of precommitment to constitutional decisions is higher than to statutory decisions. It is therefore important to understand how certain types of change may be more or less relevant to interpreters, depending on whether they are interpreting the constitution or a legislative enactment.

As a general matter, the conclusion outlined is unchanged: interpreters should ignore ideological change and adjust for shifts in either language or facts. But it should be noted that factual change can itself be placed in two categories: changes in laws and changes in other facts. The import of a particular law can change either because of some simple factual change, such as the introduction of a new technology, or because the legal system in which a law was enacted has changed. We will see an example of this latter situation when we consider the impact on the Fourth Amendment of the common law's shift away from strict liability for those conducting searches.

We can distinguish seven basic cases of legal change. The first four are encountered when a judge is engaged in the interpretation of a statutory provision. First, if the background change in legal fact is a shift in judge-made law then, since legislation overrides but should not be overridden by common law, judges should adjust their interpretation of statutes in order to achieve the legislative outcome that would have been sought had the legislature been acting in the new legal environment, *ceteris paribus*. Since constitutional provisions preempt statutory provisions, however, whenever the underlying change in legal fact is constitutional — regardless of whether the change is a consequence of amendment or interpretation[37] — statutory interpreters should not implement the original preferences model in an attempt to achieve the desires of those

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much discretion left outside the provision has the ability to upset choices within the provision. Thus the fourth amendment, for example, may not be about crime because there are ways to affect crime that are outside the amendment. Note, however, that there were no police forces at the time of the constitution's enactment, so this example is somewhat flawed.

37. This point is questionable, since the distinction between changes that derive from constitutional amendments and those that arise out of interpretive shifts is relevant in some contexts. Certainly, it is relevant for the Supreme Court, which does not take shifts in constitutional interpretation as givens (in the manner the passage above treats them), and it may be important in other contexts as well. This point requires further thought and elaboration.

making the original law. This is because those original preferences have been overridden and no longer contribute to the content of the law, at least not in their entirety. The case of statutory change that affects the operation of existing statutes is more complicated since we must distinguish between the anticipated and unanticipated effects of a statutory enactment. Certainly a legislative body has the authority to override its earlier laws. But where it has not intended to do so it should not be construed as having had such an effect. So when judges can determine that a statutory change is having an unanticipated effect on the operation of another law, they should employ the original preferences model and make adjustments when they are appropriate. When it is clear that the legislature intended to overrule a prior law or, since we should arguable err on the side of conservatism, if it is unclear what the legislative purpose with respect to preemption was, the court should not make any interpretive adjustment as a consequence of statutory change.

A similar situation prevails when courts are engaged in the task of constitutional interpretation in the face of changed legal circumstances. Whenever changes in common law or statutory provisions affect the operation of a constitutional provision, it is essential that courts make an adjustment in order to preserve the original constitutional balance. Anything less would be tantamount to a recognition that rights and constitutions have no content distinguishing them in authority from other sources of law. Mark Tushnet makes a similar but broader point by arguing that rights exhibit a "fundamental indeterminacy" in that the claim that a right exists cannot be made real without "specifying so many details of the social setting of the right as to transform the rights claim into a description of an entire society."[38] The original preferences model represents a partial response to this powerful criticism of our rights dialogue, and demonstrates how we can defend the content of rights from an important threat, since it requires constitutional interpretations to adjust for statutory and common law changes. In addition, wherever a new constitutional enactment overrides a prior constitutional enactment, the prior enactment is no longer entitled to interpretive fidelity, since the preferences of those who passed it have been supplanted in the area where the two provisions interact. In the case of constitutional interpretation, unlike statutes, it is as a practical matter not important to speak of anticipated and unanticipated effects. Our constitution is sufficiently brief, and our enactment debates sufficiently prolonged, to ensure that there will be few effects on other constitutional provisions that are unanticipated. Thus wherever a constitutional

38. Mark Tushnet, *A Critique of Rights: An Essay on Rights*, 82 TEX. L. REV. 1363, 1371.

amendment is passed, prior constitutional provisions lose their right to be re-interpreted in the light of the changed circumstances introduced by the new provision

(v) PROBLEMS OF LEGISLATIVE INTENT

The original preferences model seems to stand diametrically opposed to the strong form of public choice arguments about legislative intent.[39] For original preferences to exist and be rational, legislatures must behave in a fashion that is akin to individual rationality, a premise that is rejected by much of public choice theory. It is not possible to mount a general response to public choice scholarship here, and this issue is revisited in Sections IV and V, but it is clear that in certain circumstances—for example, where different legislators are voting for the same provision but for vastly different reasons—public choice criticisms are valid and it is difficult to speak of a broad legislative purpose. Thus we propose a simple rule: the greater such fragmentation, the narrower should a court's reading of purpose into the text of the statute be. Where fragmentation is particularly great, courts should be relatively more bound to text, focusing on a lower level of generality.

4. Conclusion

The original preferences model claims that legislation is generally best characterized as the maximization of legislative values, under the constraints imposed by existing circumstances. This approach, in addition to representing a theory of legislation, has important implications for the interpretation of law under changed circumstances. It implies that courts should, under certain circumstances, adjust legal interpretations in order to achieve fidelity to the preferences of law-makers. At first blush this approach is problematic since it seems to imply a far greater role for judges than ever seems to have been envisioned by the Framers. But a number of restrictions constrain those who would apply this approach from unnecessary judicial activism. The most important constraint is that a change must be significant enough to seriously upset the initial legal balance, and that this change must also have been unanticipated by the law-making body. In addition, the practical constraints that restrict human reasoning imply that this approach is most useful when it is possible to identify two pre-eminent policy concerns behind a law. Restrictions are also placed on the type of changes that are relevant. While changes in factual circumstances and language may legitimately drive interpretive shifts, changes in ideas and beliefs should not. Finally, interpretive discretion should

39. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) (discussing the difference between original intent and original meaning).

be more restricted when the enacting legislature was seriously divided, since there is less of an overarching intent that may be appealed to. Where a law-making body seemed to have acted with a broad sense of common purpose, application of the original preferences model is more appropriate.

III. Application and Typology

We can apply this model in its two variable formulation to prominent interpretive problems and use it to delineate several basic categories of interpretive situation. This section interprets of the Delany Clause, fourth amendment, and commerce clause.

A. The Delany Clause[40]

The Delany Clause prohibits the Food and Drug Administration from permitting the use of a food additive if the additive "is found . . . to induce cancer in man[41] or animal."[42] At the time the Delany Clause was enacted, all scientifically detectable carcinogenic substances posed a significant health risk to human beings.[43] Technological advances in the last twenty years, however, have dramatically improved our ability to detect the presence of cancer causing agents and, as a consequence, a number of substances posing extremely low level health risks are now prohibited under the literal terms of the clause. Responding to the perceived obsolescence of the statutory language, and also reacting to the use by many food producers of substitute substances which, while not cancer causing, actually posed greater public health risks than the carcinogenic food additives they were suppose to replace, the Food and Drug Administration incorporated a *de minimus* exception into the Delany Clause and sought to permit the use of carcinogenic food additives in situations in which this would promote the goals of public safety and profitability. This *de minimus* exception was held to be unlawful.[44] In its decision, the United States Court of Appeals for the District of Colombia Circuit reasoned that the Delany Clause was unambiguous and could not be read to support the FDA's position.[45]

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40. 21 U.S.C. § 348 (c)(3)(A) (1998); *See generally* Cass R. Sunstein, After The Rights Revolution 88-90 (1990) (discussing the Delany Clause).

41. 21 U.S.C. § 348 (c)(3)(A).

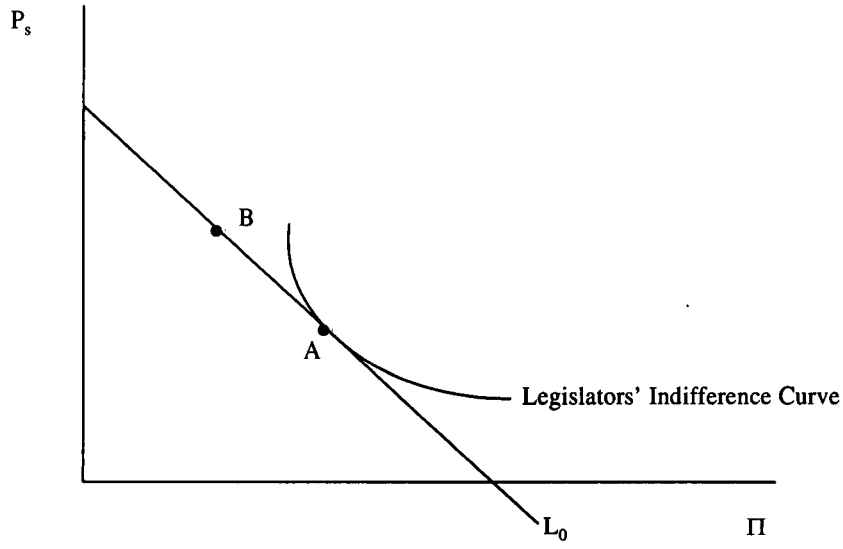
42. *Id.*

43. This discussion presumes that the fundamental choice underlying the Delany Clause is a tradeoff between (1) profitability of food manufacturers and (2) public safety. Note that this is a somewhat different issue from the intent of the framers. This point should be made somewhere in the paper and I should discuss whether the use of "underlying choice" language as opposed to "legislative intent" terms allows me to avoid any of the criticisms that have been leveled against those who seek adherence to legislative intent.

44. Public Citizen v. Young, 831 F.2d 1108, 1122 (D.C. Cir. 1987).

45. *Id.* at 1112.

FIGURE 3: THE DELANY CLAUSE



P_s	Public Safety
Π	Profits of Food Manufacturers
L_0	Original Budget Constraint
A	Original Legislative Choice
B	D.C. Circuit's Reading of Delany Clause

The original preferences model allows us to see this case in a substantially different light. If the fundamental choice underlying the Delany Clause is a tradeoff between the profitability of food manufacturers on the one hand and public safety on the other, then the original legislative selection is represented by point A in Figure 3. As a consequence of technological changes, the meaning of the words "induce cancer" has grown broader—while some things considered to "induce cancer" in the 1950's are included in the modern definition of the term, many substances within the 1996 understanding were not within the 1950's definition. Because the Court of Appeals erred in utilizing our current understanding of this term when it read the original enactment, we have moved to point B. The modern meaning was neither available to nor foreseeable by the enactors of the Delany Clause and, as has been argued above, should be disregarded when interpretive problems arise in as much as it differs from the earlier meaning. The simplest and most direct method of assuring adherence to the original meaning of the requirement is to incorporate a de minimus exception into the law, a move that would move the outcome back to point A. This was, not

surprisingly, the approach taken by the Food and Drug Administration. Application of the original preferences model therefore demonstrates the impropriety of the Court's reading of the Delany Clause, and illustrates why the FDA's approach is appropriate and in keeping with the original preferences of the Clause's enactors.

The original preferences approach is also preferable to other interpretive approaches that reach the same conclusion as it does but use alternative forms of reasoning. For example, in discussing the Delany Clause, Professor Cass Sunstein argues for the result advocated here by declaring that "[t]he background against which the Delany Clause was written was so different from present circumstances that the statutory terms 'induce cancer' should be treated a ambiguous. Whether a substance 'induces' cancer within the meaning of the Clause might well be a function of the degree of risk that it posed. In these circumstances, interpretation of the Clause to permit de minimus exceptions seems consistent with permissible understandings of judicial interpretation, and quite sensible to boot."[46] This approach, that of latching on to a particular term and arguing that it is vague in order to reach a desired interpretive result, is frequently deployed in statutory and constitutional interpretation. Compared to the justification for interpretive liberality provided by the original preferences model, however, Professor Sunstein's approach is lacking. The word "induce" is not *really* ambiguous. It was not ambiguous when the Clause was enacted, and it is not ambiguous now. Professor Sunstein's attempt to read into the term "induce" an intended declaration about the degree of risk posed is an appeal to a legitimate concern, but it is disingenuous to argue that this information is encoded in the word "induce." Actually, by appeal to this underlying issue Professor Sunstein is, while adding a step to the original preferences model, also tracking the change in the meaning of the term, and thus seeks to achieve the original balance.

While Professor Sunstein's outcome is the same as the original preferences model advocates, there is a general problem with using a resort to "ambiguity" in order to create interpretive space. It is that when one is searching for ambiguity, it is to be found everywhere. Thus if an interpreter feels that there is valid ground for reinterpreting a legal provision, she may latch onto a phrase, argue that it is vague, and push through a changed interpretation on that ground. But such reasoning never identifies the underlying concerns, which are often about changed circumstances, with the clarity of perspective and prescription provided by the original preferences model. For the very reasons identified by the original preferences model I suspect, Professor Sunstein feels that a

46. SUNSTEIN, *supra* note 40, at 199.

changed reading of the Delany Clause is appropriate, but his argument about vagueness obfuscates precisely where clarity is needed. The original preferences model provides a clear formula for interpretive fidelity, while the argument from vagueness is overbroad. Here it is used in a manner consistent with original preferences, but elsewhere it can be employed for other purposes. This overbreadth is a sin from which the original preferences model appears to abstain.

B. The Fourth Amendment Warrant Requirement

The issue before us is whether the constitution requires law enforcers to obtain a warrant before they conduct fourth amendment searches or seizures. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[47]

Textualists reading this language, like Chief Justice Rehnquist, have concluded that there is no warrant requirement for a search or seizure under the fourth amendment.[48] The amendment merely requires, on the one hand, that searches not be unreasonable and, on the other, that warrants only be issued when they are supported by probable cause.[49] The Supreme Court does not, however, read the fourth amendment in this manner. While recognizing certain "narrowly drawn exceptions,"[50] the Court has generally concluded that a search or seizure is improper if either probable cause or a warrant is lacking.[51]

The original preferences approach suggests that the Chief Justice's reading of the fourth amendment may be preferable to the Court's, given certain assumptions about the amendment's purpose. In the time since the enactment of the Bill of Rights, the background landscape has changed so significantly that it seems the framer's original value judgment is not preserved by rigid adherence to the constitutional text. The original preferences model demonstrates that these changes may have had countervailing ef-

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47. U.S. CONST. amend. IV.

48. Robbins v. California, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting).

49. *Id. But see* Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 47-49 (1974) (arguing that a textualist reading can cut either way).

50. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 1-31 (1967) (creating a "stop-and-frisk" exception to the warrant requirement).

51. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948) (holding that a search is improper if conducted without a warrant).

fect on each other, leaving the textualist outcome as the appropriate interpretation.

The fourth amendment was drafted as a protection against general warrants, and did not restrict common law searches or seizures if they were conducted without a warrant.[52] General warrants had been used by the British to control political opposition and were, therefore, widely opposed and suspiciously viewed in the American colonies both before and after independence. The Constitution's prohibition on general warrants has generally been considered an attempt by the framers to police the boundary between the federal government, on the one hand, and the citizenry on the other.[53] The analysis presented here presumes that the tradeoff fundamental to the fourth amendment is that between freedom from public coercion (i.e., governmental intrusion in private affairs) and freedom from private coercion (i.e., crime).

In contrast with general warrants, common law warrants were not targeted by the fourth amendment because they did not pose a serious threat to individual liberties in colonial times. A common law warrant "could be issued by a judge only upon sworn testimony establishing the evidentiary basis for the search."[54] In addition, two hundred years ago law enforcement was largely a private affair; there was no police force to interfere with the private rights of individuals. Common law courts also imposed strict liability for false arrest, providing additional incentive for law enforcers to tread carefully.[55]

The situation has changed dramatically. While general writs of assistance no longer pose threats to the private sphere, the ability of the executive branch to conduct searches and seizures has expanded greatly, largely because of changes in technology. In addition, we now have law enforcement agencies of vast power which, if permitted to conduct searches and seizures without restraint, would drastically alter the public-private balance crafted by the nation's founders. There have also been important shifts in the legal arena: the baseline prohibition against government intervention without judicial authorization no longer exists. Nor is there strict liability for those who make false arrests, although the exclusionary rule has been considered by some to be a weakened form of strict liability.[56] Finally, it is sometimes argued that crime levels have

52. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 283 (1984).

53. *See* Lessig, *supra* note 6, at 1229 (stating that the original aim of the Fourth Amendment was to limit the immunity of federal officials from state causes of action).

54. Wasserstrom, *supra* note 52, at 286.

55. *Id.* at 289.

56. *Id.* at 291-94.

increased dramatically since the time the Bill of Rights was passed.[57]

Each of these changes has inspired discussion about the appropriate scope of the fourth amendment. For example, in seeking to justify the imposition of a warrant requirement in light of the shift away from a strict liability standard, Professor Silas Wasserstrom argues: "the colonists sought to ensure that executive officials would be held to the strict liability of the common law unless a judge authorized their conduct pursuant to a warrant meeting the common law requirements of particularity and cause. The warrant requirement accomplishes virtually the same result in today's world."[58] Thus in the absence of a common law strict liability standard, Professor Wasserstrom argues, it is appropriate to require all those conducting searches to obtain a warrant since this achieves the "same result" as the original requirement. Professor Wasserstrom's reference to "same result" is vague, and he provides no guidance as to what the measure of this term is. The original preferences model articulates what it means to achieve the "same result" as the original enactment and, as a consequence, permits us to understand the legitimacy of Professor Wasserstrom's goals while also extending and refining his approach. Several changes are considered below, and will combine the insights at the end of the discussion.

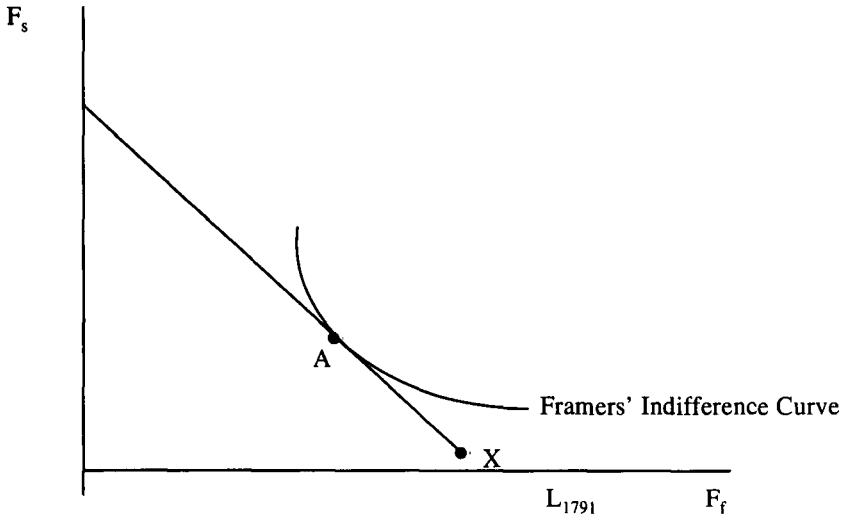
1. The Rise of the Administrative State

The argument that the rise of the administrative state demands a corresponding response in the form of increased individual protections certainly has a rhetorical appeal. From the perspective of the original preferences model, however, this argument is revealed to be considerably less powerful than it might initially seem. An increase in the number and power of tools at the government's disposal does not imply that the initial balance between public and private coercion has in any way shifted. Actually, Figure 4, which represents the initial constitutional choice, continues to remain valid. There has been no shift in the budget line since none of the variables that it is a function of has changed value. Nor have other changes that might cause a shift along the existing budget line taken place. Nevertheless, the instinct that something having to do with this model has changed is still a valid one. Where in the past the budget line became discontinuous at point X on Figure 4, it now

57. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, *cited in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW & ITS PROCESSES: CASES AND MATERIALS 6 (5th ed. 1989) [hereinafter COMMISSION] (discussing the increase in crime in recent decades).

58. Wasserstrom, *supra* note 52, at 295.

FIGURE 4:
ORIGINAL FOURTH AMENDMENT BALANCE



F_s	Proscriptive Authority of States
F_f	Proscriptive Authority of Federal Government
L_{1791}	Original Budget Constraint
A	Original Legislative Choice

continues downward. In other words, there was a maximum level of enforcement in the past, and a minimum level of crime associated with it. We can now decrease crime further because we are also able to increase levels of governmental intrusion beyond where they were capable of being at the time of the framing. But all these events occur well away from the crucial parts of Figure 4. The point of tangency has not changed, and hence neither should the law. The original preferences model therefore implies that technological shifts do not necessarily demand an interpretive response.[59]

While this conclusion may seem initially counterintuitive, it is comprehensible once its implications are properly understood. Since the same restrictions that applied to physical searches also apply to the state's more modern weapons in the war on crime the argument that no shift should occur does not mean that the level of governmental intrusion will increase. Thus, since the rise of the

59. But if the number of policemen per person goes up, has not the original balance shifted? Yes, it most certainly has. But it has shifted in a manner that is legitimate—i.e., one that the Framers did not seek in any way to restrict. As long as these police are subject to the same restrictions as the old police, this is a decision that the Constitution leaves to the government.

regulatory state and improvements in the technologies of surveillance do not, other things equal, cause any shift in the original constitutional balance, there is no reason for courts to respond by dynamically interpreting the fourth amendment.[60]

2. *The Strict Liability Standard*

The second import change that we must consider in light of the original preferences model concerns the common law shift away from a strict liability standard for improperly conducted searches. The impact of this change on the initial legislative balance is demonstrated in Figure 5. The shift in legal regime did not produce a shift in the budget line since it was not a change of the sort that creates new opportunities or eliminates the achievability of prior possibilities. However, the shift in background legal fact forced a move along the existing budget line away from the initial constitutional choice. This is a situation similar to that encountered in the Delany Clause example. Under the original preferences model the appropriate response to this shift is a move back down the budget line. There are a number of ways to accomplish this, one of which is the imposition of a warrant requirement.

Some courts, particularly those that advocate a literalist reading of the constitution, would argue that a shift in background facts is not an appropriate ground for changed interpretation because the law itself has not changed. This is equivalent to an argument that the appropriate set of preferences is represented by the indifference curve I' in Figure 5. But this was never a set of preferences held by the legislature and textualism of this sort is therefore fundamentally inconsistent with legislative purposes.[61]

3. *Rising Crime Levels*

The final change that will be considered in the fourth amendment context involves crime. It is difficult to determine exactly what crime levels were at the time of the framers, since no statistical analyses of criminal activity were conducted in that period.[62] Given the marked increase in crime levels in recent decades,[63] however, let us assume that crime levels are higher today than they were at the time of the framing of the constitution. The freedom

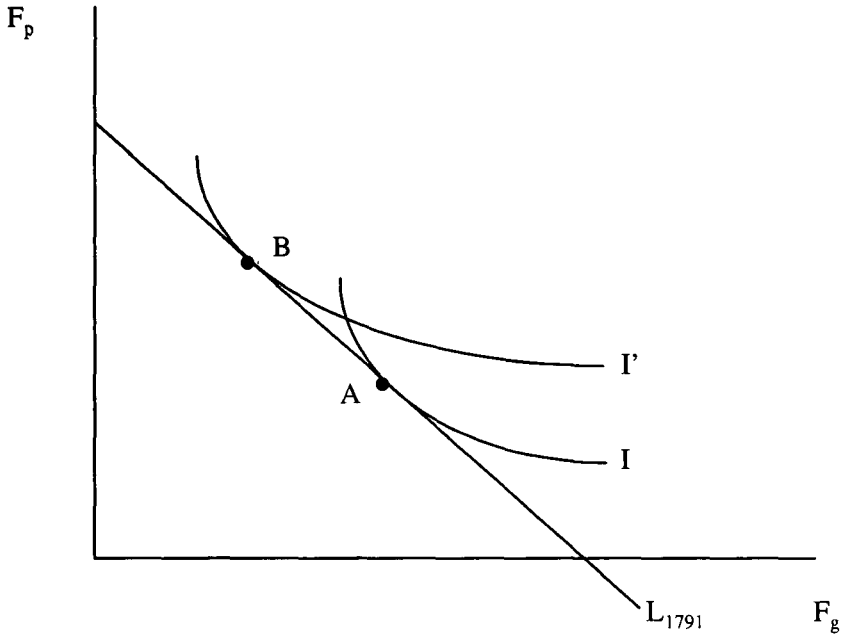
60. This example illustrates that the original preferences model can reign in initially activist interpretive instincts.

61. As a consequence of which it is not surprising that textualists deny the possibility of legislative intent.

62. *See* Luis Salas & Raymond Surette, *The Historical Roots and Development of Criminological Statistics*, 12 J. CRIM. JUST. 457, 458 (1984) (stating that no analysis of data on criminal activity occurred prior to the early nineteenth century).

63. COMMISSION, *supra* note 57, at 6.

FIGURE 5:
IMPACT OF RELAXED STRICT LIABILITY STANDARD
ON FOURTH AMENDMENT

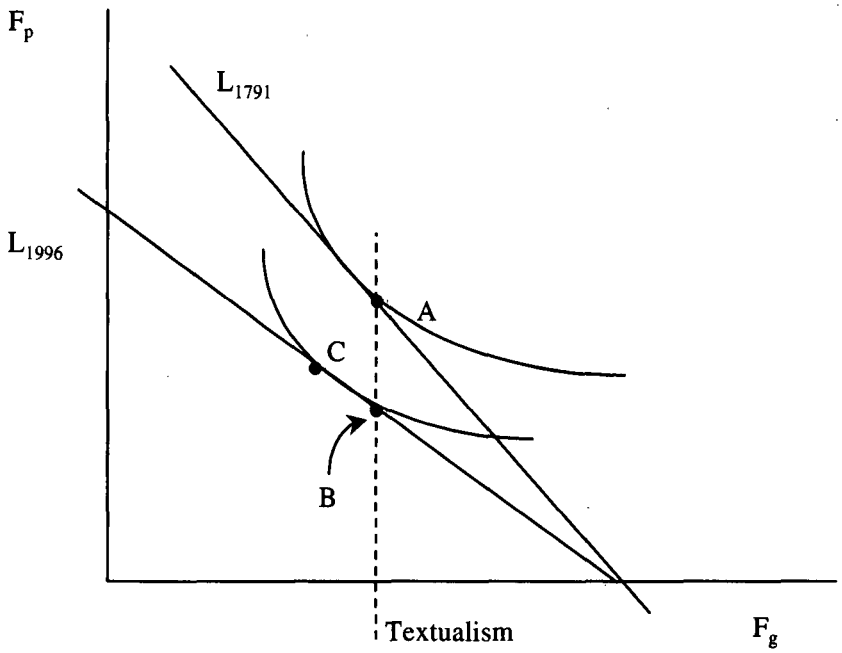


F_p	Freedom from Private Coercion (i.e., from crime)
F_g	Freedom from Federal Coercion
L_{1791}	Original Budget Constraint
A	Original Constitutional Choice
B	Modern Textualist Choice
I	Framers' Indifference Curve
I'	Improperly Imputed Indifference Curve

from private coercion this discussion refers to is, in many ways, just shorthand for freedom from crime, so an increase in crime represents an increase in the price of "freedom from public coercion."[64] This is represented as L_{1791}, in Figure 6. It might be tempting for courts to respond to this change by holding constant the constraints on governmental intrusion in private affairs for the purposes of law

64. How is it not shorthand for crime? One example would be changes in perception about the impact of crime (e.g., minding individual intrusions less relative to government intrusions than they had been minded before, perhaps because of a belief that particular activities are more deplorable if the government engages in them).

FIGURE 6:
IMPACT OF RISING CRIME LEVELS ON
FOURTH AMENDMENT



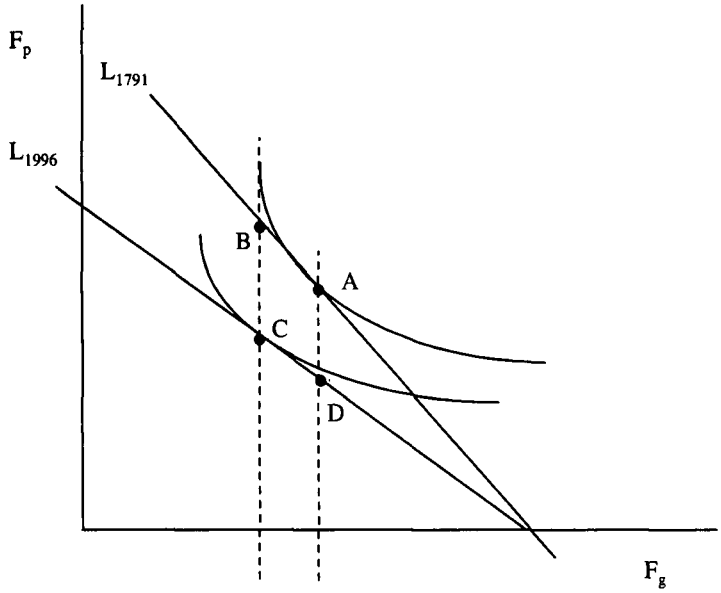
F_p	Freedom from Private Coercion (i.e., from crime)
F_g	Freedom from Federal Coercion
L_{1791}	Original Budget Constraint
L_{1996}	Modern Budget Constraint
A	Original Constitutional Choice
B	Modern Textualist Choice
C	Original Preferences Choice

enforcement, a decision that is represented in the Figure as the choice of Point B. But such a decision would not satisfy Professor Wasserstrom's avowed goal of achieving the same result as was envisioned two hundred years ago, since it would produce a level of crime higher than would have been preferred by the framers. Thus the appropriate response to an increase in crime levels, other things being the same, is an increase in the level of governmental intrusion in private affairs for purposes of law enforcement. It is thus appropriate to interpret the fourth amendment in a fashion that moves us to Point C.

4. Conclusions

From the perspective of the original preferences model there have been at least two changes in the fourth amendment context that call for an interpretive response. The first of these was the elimination of a strict liability standard for those who conduct searches, and the second is the general increase in crime levels. The interaction of these two changes is seen in Figure 7. The origi-

FIGURE 7:
COMBINED EFFECT OF RISING CRIME LEVELS AND RELAXATION OF STRICT LIABILITY STANDARD ON THE FOURTH AMENDMENT



F_p	Freedom from Private Coercion (i.e., from crime)
F_g	Freedom from Federal Coercion
L_{1791}	Original Budget Constraint
L_{1996}	Modern Budget Constraint
A	Original Constitutional Choice
B	Outcome if Strict Liability Relaxed, ceteris paribus
C	Original Preferences Choice (Combined effect of rising crime and relaxation of strict liability standard)
D	Outcome if Crime Levels Rise, *ceteris paribus*

nal preferences model allows us to see that these two forces have a countervailing effect. In this case, the rise in crime levels calls for precisely the sort of interpretive shift that is represented by the elimination of the strict liability standard. As crime levels rise further, the force of the interpretive shift should perhaps be strengthened. Thus we may need to further soften the strict liability

standard, perhaps by loosening the requirements of the exclusionary rule. An interesting and surprising conclusion of this analysis is that Chief Justice Rehnquist's approach to the interpretive problem presented by the fourth amendment may be the appropriate one, although for reasons quite different from those that he might offer.

C. The Commerce Clause

Changed readings of the constitution have been frequent in the federalism context. As we have already noted, the concept we speak of as "interstate commerce" has changed through time, primarily as a consequence of economic and technological advances, but also due to a shift in laws and the nature of legal reasoning. A literal reading of the constitution's provisions therefore produces modern day federal intrusion into economic life that far exceeds what the framers seem to have foreseen. In this section we consider whether modern readings of the commerce clause are consistent with the original preferences model of constitutional interpretation.

The history of commerce clause jurisprudence is complicated and frequently contradictory. We join the story with the Supreme Court's consideration of *United States v. E.C. Knight Co.*[65] in 1895, at a time when Congress had increasingly begun to pass legislation regulating interstate commerce. The Supreme Court held that the federal government lacked the authority to regulate a national sugar manufacturing monopoly, reasoning that sugar was a local concern and therefore not an element of interstate commerce.[66] Restrictive readings of the commerce clause powers reached their height when the Supreme Court first reviewed New Deal legislation for constitutional validity. In a series of important decisions, the Supreme Court construed the commerce clause power narrowly and struck down key elements of President Roosevelt's legislative package.[67]

The constitutional revolution of 1937 brought with it a new reading of the commerce clause power. In that year, the Court upheld legislative enactments which would have certainly failed to pass constitutional muster under its earlier mode of analysis.[68] And from 1937 onwards, the Court began to read the commerce clause as a remarkably broad provision. In 1942, for example, the

65. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

66. *Id.* at 17.

67. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding key provisions of the National Industrial Recovery Act unconstitutional).

68. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379, 390-400 (1937) (abandoning substantive notions of due process to uphold minimum wage legislation).

Supreme Court ruled that wheat grown for purely domestic consumption by a farmer in his own backyard was an element of interstate commerce.[69] And in 1964, the Court ruled that, since racial discrimination has a significant "disruptive effect . . . on commercial intercourse" Congress could, under its commerce clause authority, legitimately forbid private business from engaging in racially discriminatory action.[70] Since 1937, no piece of federal legislation has ever been struck down by the Supreme Court on the ground that it violates the requirements of the commerce clause.[71]

In considering whether any or all of these differing interpretations are legitimate it is crucial that we first identify the underlying changes that might provide courts with a basis for such shifts. We shall consider the importance of the following five major changes separately, relegating integration of collective insights to the end of the discussion:

1. Increase in General Level of Economic Activity

Commercial activity has increased dramatically in the last two hundred years and we must therefore ask ourselves whether levels of federal intrusion under a literal reading of the commerce clause are higher than would have been preferred by the Framers. It seems that the more prominent modern role of commerce would imply that greater restrictions should be placed on the federal government's interference in it. Reference to Figure 8 demonstrates that this instinct is a sound one. It is important to note that the Commerce Clause is viewed here as apportioning authority between the state and federal levels in an absolute, not relative sense. If the tradeoff was a relative one (i.e. if they had decided 75% of authority is federal and 25% is state) the rise in commercial activity would not affect the budget line. Figure 8 demonstrates that the increase in commerce represents an outward shift in the budget line. As a consequence, continuing to read the interstate commerce clause in a literal sense would push us towards the interpretive outcome represented by point B. This solution is inconsistent with original preferences, which call for a move towards lower levels of federal authority such as that represented by point C.

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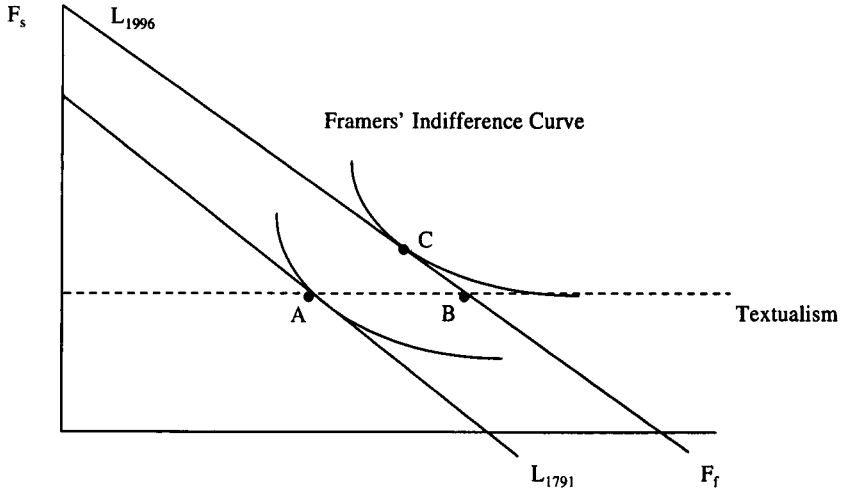
69. Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).

70. Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).

71. FARBER & FRICKEY, *supra* note 3, at 74. The court has, in at least one instance, limited the ability of Congress to pass legislation regulating the wages of certain state and local government employees. National League of Cities v. W. J. Usury, 426 U.S. 833, 852 (1976). This decision was, however, later reversed by the Supreme Court and no longer seems to be good law. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985). There are therefore no easily identifiable limits on the ability of Congress to regulate economic activity within the boundaries of the United States.

FIGURE 8:
EFFECT OF RISE IN COMMERCE



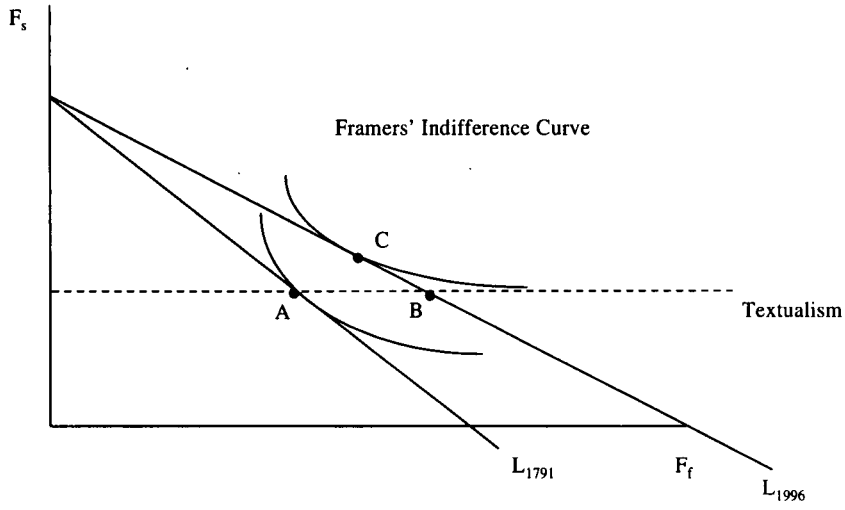
F_s	Proscriptive Authority of States over commerce
F_f	Proscriptive Authority of Federal Government over commerce
L_{1791}	Original Budget Constraint
L_{1996}	Modern Budget Constraint
A	Original Constitutional Choice
B	Modern Textualist Choice
C	Original Preferences Choice

2. *Increase in Relative Share of Interstate Commerce, as a Percentage of Total Commerce*

In addition to the general rise in the level of commercial activity, a related change presents a slightly different problem. The increase in commerce has not had a uniform impact on the distribution between interstate and state commerce, since the vast majority of modern commerce has a significant interstate nexus, while in the past the majority of commerce was conducted within a single state. This shift can be analogized to the decline in the price of one good (federal proscriptive authority over commerce) relative to the price of another good (state authority).

This analysis is demonstrated in Figure 9. Once again, we can see that some move away from textualism is required, although too radical a move can be even more upsetting to the constitutional balance than no move at all. We should end up in the vicinity of Point C.

FIGURE 9:
EFFECT OF INCREASE IN PROPORTION OF INTERSTATE COMMERCE RELATIVE TO STATE COMMERCE



F_s	Proscriptive Authority of States over commerce
F_f	Proscriptive Authority of Federal Government over commerce
L_{1791}	Original Budget Constraint
L_{1996}	Modern Budget Constraint
A	Original Constitutional Choice
B	Modern Textualist Choice
C	Original Preferences Choice

3. *Increased Interference Powers of the Modern State*

Another change recalls our earlier discussion of the fourth amendment. The dramatic emergence of the regulatory state, as well as improvements in technology, have created a modern government which has immensely more potential power than the governments of an earlier era. Just as in the case of the fourth amendment, it might seem that this change calls for an interpretive reaction. But once again the conclusion of the original preferences model is that there is no reason for such a response. The rise of the regulatory state and the development of new technologies of control has no impact on the budget line or the original choice of the framers on that budget line. As a consequence, interpreters would do best to ignore such changes.

4. *The Demise of the "Dormant Commerce Clause"*

The dormant commerce clause doctrine, which held sway with the Supreme Court through the late part of the 19th century, was

overruled by the turn of the 20th century. The original preferences model allows us to better understand the reasons for this change and also to appreciate why, despite proper intentions, it may have been misguided.

The "dormant commerce clause" established a strict boundary between federal and state jurisdiction. Certain areas were exclusively reserved for state or federal action, whether or not that authority had been exercised. Current doctrine, on the other hand, places many arenas of economic activity within the potential proscriptive jurisdiction of both state and federal governments,[72] although wherever federal regulation exists it still pre-empts state laws.

The original preferences model implies that the demise of the dormant commerce clause can be viewed as a disaggregation of the original constitutional balance into two subcategories. For those areas in which a strict separation still applies, the original balance continues to be valid, *ceteris paribus*. But wherever the dormant commerce clause doctrine has been replaced by a standard permitting the exercise of proscriptive authority by both the state and federal governments, the courts have abandoned the pursuit of a tradeoff between constraints on federal and state action. While this is inconsistent with original preferences, in that the Framers apparently conceived of a more rigid boundary between state and federal authority, it can be understood as a natural reaction to the historically increasing levels of control over commerce exercised by the federal government. The demise of dormant commerce clause doctrine can thus be understood as an attempt to move back towards achieving the "same result" as the framers by expanding the arena of state authority in the face of the shifts towards greater levels of commerce and particularly interstate commerce. That it fails to achieve its goal is revealed by this analysis. Eliminating the distinction between state and federal power does increase state power in a limited sense, even in the face of potential preemption, but it does not do so in a fashion that is capable of recovering the original balance. The original preferences model indicates that this type of attempt may be misguided since it sidesteps the fundamental choice confronted by the framers.[73] The original preferences

72. FARBER & FRICKEY, *supra* note 3, at 73.

73. One reason that this is a particularly important example to consider from the perspective of the original preferences model is that it highlights some of the approach's limitations. Where the fundamental terms of the choice confronting the modern interpreter are not analogizable to the situation that confronted a law's enactors, the original preferences model cannot be applied. We considered the example of the commerce clause above, and argued that the elimination of the doctrine of the dormant commerce clause, with its concomitant mingling of state and federal authority, was inappropriate since it 'fudged' the original terms of the tradeoff. If, however, the distinction between federal

model implies that the appropriate response to the unanticipated changed circumstances identified above is to increase the exclusive province of state authority, and not to simply fudge the distinction between state and federal authority.[74]

5. *Shifting Content of the Term "Commerce"*

The content of the term commerce has also changed with time, a fact that was discussed earlier.[75] Many decisions that would have been considered by the framers to bear no relation to commerce are now considered to be economic and commercial in nature. This essay, which analogizes legislative enactments to consumption decisions, is one reflection of that change. There have been no cases of which I am aware in which the federal government has sought to regulate activity on the basis of this enlarged understanding of the term commerce alone, however, and this is a shift that generally fails to satisfy the minimum magnitude hurdle of the original preferences model.[76]

6. *Conclusion*

The implications of the original preferences model for our commerce clause interpretations are far more radical than they are in the fourth amendment context. While we have argued that the rise of the regulatory state is irrelevant to this analysis, a number of important suggestions are made by this approach. First, the combination of the general rise in commerce with an increased shift towards interstate commerce has a compounding effect, and both of these unanticipated changes call for a shift of greater responsibility over economic regulation to the states. Second, this analysis views the interpretive movement that led to the elimination of the dormant commerce clause doctrine as a misguided one. While this movement may have been motivated, at some level, by the concerns that this analysis identifies as legitimate, the approach taken exchanges the difficulties inherent in a pursuit of fidelity for the palli-

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and state proscriptive authority had been fudged as a consequence of factual changes that were outside the control of judges, it would no longer be possible to conceive of the original tradeoff in the terms that we might believe it to have been originally conceived. Nevertheless, there is an appropriate response: namely, that the level of generality that the law is read at should be generalized, and that the most significant identifiable and preservable values or choices of the law's framers should be preserved into the future. Even so, where enough has changed, laws can become emaciated things.

74. In any case, the fact that federal regulations preempt state regulations makes the fudging achieved by the elimination of the dormant commerce clause doctrine a chimera.

75. See discussion *supra* Part IIB(3)(iii) and accompanying footnotes.

76. From the perspective of the original preferences model, this is the same interpretive difficulty we encountered when dealing with the Delany Clause. See discussion *supra* Part IIIA and accompanying footnotes.

ative of obfuscation. Finally, we consider the shift in the content of the term commerce to lack the magnitude required to make it a change inducing variable in the original preferences model.

This section of the paper has attempted to illustrate how the original preferences model can be used. The purpose of this section has not been to defend any of the various factual assumptions that have been made in the course of the analysis. Rather, it is to highlight how the original preferences model makes certain interpretive insights easy to understand. It is of course true that the analysis done here has been largely qualitative, since the level of precision in the graphs utilized has not been particularly high. With more information about the nature of legislative preferences, we would be able to more closely model the shape of the desired indifference curve. With this information in hand, we would be able to resolve the issues we have dealt with more conclusively. For now, however, the purpose has been largely illustrative.

IV. THEORIES OF LEGAL INTERPRETATION

Interpretive theories tend to be classified, in an informal but ultimately insightful way, as either conservative or liberal. Generally, those theories which emphasize judicial restraint are considered conservative, while approaches that seek to legitimate heightened levels of judicial discretion are termed liberal. While all such theories inevitably both liberate and constrain, they have often failed at one or both of these tasks. As a consequence, criticism of interpretive theories has been a much more productive enterprise for legal scholars than defense of them. It is with this thought in mind that I turn to an analysis of several interpretive theories from the perspective of the original preferences model.[77]

A. Judge Bork's Theory of Original Understanding

1. Judge Bork's Theory of Constitutional Interpretation

Judge Robert Bork has argued that the only legitimate method of constitutional interpretation is a "neutral" one that applies principles derived from the original understanding. By neutrality, Judge Bork refers to Herbert Wechsler's notion that courts should choose principles that they apply regardless of the substantive concerns at issue in a case.[78] Judge Bork identifies three essential tasks to be conducted in a neutral manner: derivation, definition and application of constitutional provisions.[79]

77. See discussion *supra* Part IIB(1), (2) and accompanying footnotes.

78. *See* BORK, *supra* note 33, at 78; *see also* Wechsler, *supra* note 7, at 15-19 (setting forth the idea that judges should apply constitutional principles without concern for substantive issues).

79. BORK, *supra* note 33, at 78.

Let us begin with derivation. According to Judge Bork it is important to derive constitutional principles from the original understanding and not the original intent of the framers because lawmaking is a public act;[80] judges should not alter the meaning of constitutional decrees as understood by the public at the time of enactment. While a framer's intent may inform us about how the contemporaneous public perceived the relevant constitutional provisions, it is what the public thought, not the framers, that is of central importance.[81]

Neutrality in the definition of principles is a somewhat more complex undertaking, and involves selection of the appropriate level of generality at which to interpret a particular constitutional provision.[82] While choosing a level a generality is part of the definitional inquiry, Judge Bork points out that the real task is to "find the meaning of a text."[83] The appropriate level of generality is therefore the level of generality that is part of the text.[84] This, Judge Bork tells us, is usually quite clear.[85] Judges may also look to the level of generality that the historical record supports.[86] A judge should not, however, "state the principle with so much generality that he transforms it."[87] Judges should also be willing to look to precedent to determine the extent and nature of a constitutional principle.

Finally, judges should apply the principles they derive and define in a neutral manner.[88] For Judge Bork, *Shelley v. Kraemer*[89] is an excellent example of a court applying principles in a non-neutral manner.[90] *Shelley* involved a challenge to the enforcement of restrictive covenants forbidding the sale of certain private homes to non-whites.[91] Since the constitution restricts only government action, it might seem that such private covenants would be, while deplorable, also legal.[92] In striking down the covenants, however, the Supreme Court argued that court enforcement of these covenants amounted to state action, hence bringing them within the rubric of the fourteenth amendment.[93] The problem with this logic is,

80. *Id.* at 144, 146-47.
81. *Id.* at 144.
82. *Id.* at 148.
83. *Id.* at 149.
84. BORK, *supra* note 33, at 149.
85. *Id.*
86. *Id.*
87. *Id.* at 148.
88. *Id.* at 151.
89. Shelley v. Kraemer, 334 U.S. 1 (1948).
90. BORK, *supra* note 33, at 151.
91. *Shelley*, 334 U.S. at 4.
92. *Id.* at 9.
93. *Id.* at 20.

Judge Bork is quick to point out, that it proves far too much.[94] Under *Shelley* everything the government touches is state action.[95] Since courts are unwilling to fully accept the implications of this principle, and apply *Shelley* selectively, it fails Judge Bork's requirement of neutral application.

2. Constraining Judge Bork

The constraints that exist in Judge Bork's approach are problematic because they do not necessarily connect us in a particularly meaningful way to the original intent or original preferences of the law-makers. Judge Bork would like us to implement today the understanding that existed at the time of enactment.[96] To a certain extent, this approach seems consistent with the original preferences model. For example, Bork agrees that fidelity to original understanding implies use of the meaning of terms as they existed at the time of enactment and so distinguishes himself from textualists. This is a step that is consistent with the original preferences model.

Also, as the model advocates, Bork would argue that future changes in ideology bear no relation to the interpretation of a legal provision. While Bork's conclusion with respect to the relevance of ideological change is consistent with the original preferences model, he provides a significantly different rationale, since he would posit that this is so because opinions and preferences are in no sense law; his theory is not interested in ideology at all. The original preferences model, however, refers to the ideas of those who wrote the Constitution, but sharply distinguishes these ideas from the ideology of those doing the interpreting. In this sense it might be said that the model incorporates an optimistic sense of the judicial function. This difference between Bork's model and the one developed here is more evident when we consider the two theory's approaches to the problem of factual change. Bork's theory is *unable* to consider the relevance of factual change and thus is forced to discount it all together. But the interpreter who ignores factual changes unmoores the law from its tether to reason and sets it adrift in a sea of circumstance, allowing the ship of state to run aground wherever it may. The original preferences model demonstrates that once circumstances have significantly changed, adherence to "original understanding" will almost always result in an outcome that the lawmakers would not have chosen, given their preferences. Unlike Bork's theory, the original preferences model is able to, and does, account for the relevance of factual changes. And it is able to do so

94. BORK, *supra* note 33, at 152-53.
95. *Id.* at 153.
96. *Id.* at 144.

in a manner that is consistent with original intent.[97]

Judge Bork also speaks of the role played by precedent.[98] He points out that stare decisis is a prudential principle that should not be unreflexively applied.[99] While Judge Bork notes that precedent deserves respect, he also argues that "precedents that reflect a good-faith attempt to discern the original understanding deserve far more respect" than precedents that do not.[100] As a systemic matter, therefore, Judge Bork's approach will tend to limit the scope of operation for precedents that do not appeal to original understanding, either by overturning them or by limiting the extent to which their logic is extended into new contexts. This, it can be argued, constrains decision-making by imposing a uniform method upon judicial dialogue, slowly reshaping previous decisions in the doctrine of original understanding.[101]

It is important that an interpretive structure provide a balance between its constraining and liberating provisions. Judge Bork's theory fails to do this, and is overly constraining. As an initial matter, it is too constraining in that it fails to make reference to factual changes as an adequate justification for a change in interpretation. But the strength of this initial constraint is aggravated even more by a strong theory of precedent that seeks to make interpretive rigidity a central element of the legal system.[102]

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97. By implementing the original understanding Bork seems to mean that we should hold the legal rules at the position that they were at originally.

98. BORK, *supra* note 33, at 155-59.

99. *Id.* at 155-56.

100. *Id.* at 157-58.

101. We are assuming that there will be some minimum level of consensus on the content of original meaning.

102. Other constraints in Judge Bork's theory are also less than satisfying. For example, Judge Bork points to the text as a constraint on the level of generality at which we read the constitution. BORK, *supra* note 33, at 149. Judge Bork's own discussion, however, demonstrates how the text of the constitution is not always a sufficient constraint. Consider the following constitutional provision: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Putting aside our own sense of reasonableness, this would seem to be a statement that verifies Judge Bork's declaration that the level of abstraction encoded in a constitutional provision is usually clear—no laws means no law. But Judge Bork would disagree; he declares that the constitution states "majestic generalities that we *know* cannot be taken as sweepingly as the words alone might suggest", and cites the First Amendment as an example. BORK, *supra* note 33, at 147 (emphasis added). Judge Bork may or may not be correct about how we should read these "majestic generalities" — the important point is that he is by no means *obviously* correct. An important element of Bork's approach is a presumption of shared world-views. Since Bork's world-views are not shared as widely as he would like, we must question his assertion that the level of generality is usually "clear" in the constitutional text. The constitutional text introduces substantial indeterminacy's that cannot be escaped by taking refuge in claims of "plain meaning."

We would, of course, like to agree with Judge Bork. Certainly there must be room in the constitution to forbid the proverbial exclamation "Fire!" in a crowded theater. But to arrive at this result we look beyond the text and to our

B. Professor Tribe's Constitutional Choices[103]

1. Professor Tribe's Theory of Constitutional Interpretation

Professor Lawrence Tribe offers a theory of constitutional interpretation that differs in important respects from the theory of original understanding presented by Judge Bork. Professor Tribe focuses on attempts to locate the appropriate level of abstraction at which to read the constitutional text and, unlike Judge Bork, Professor Tribe is quite frank about the role judicial values play in the constitutional adjudication process.[104] Despite making this concession, Professor Tribe is optimistic that he can identify a legitimate means of determining the appropriate level of abstraction.[105]

Professor Tribe identifies three principles that guide this choice. First, he argues that "it is crucial to define the liberty [in question] at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct."[106] Second, he argues that it is important to "identify the central value or values implicit in a specific constitutional clause" and "locate that clause within the overall structure of the rest of the Constitution."[107] Thus Tribe's approach advocates treating the constitution as a whole and not reading individual provisions without placing them in the context of the broader document. Finally, Professor Tribe emphasizes the role of precedent, writing that as long as judges generalize from precedent in the method of the common law by distinguishing between essential and non-essential facts, they can adjudicate in a relatively value neutral manner.[108]

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own sense of propriety. While examples like that of the first amendment highlight the role played by our subjective beliefs in shaping meaning, in actuality all language derives meaning from a set of interpretive principles that we bring to it. It is therefore improper to say that the text forces us, in any particular instance, to a specific level of generality. If agreement exists about the level of generality encoded in a text it is probably a consequence of assumptions we bring to the text. Those who bring a different set of assumptions to the text may locate a different level of generality.

Judge Bork also declares that judges should not transform the principle that is at stake when they choose a level of generality. *Id.* at 148. Such a statement is problematic because it presumes that we know what the principle at stake is. Of course we do not—the whole level of generality inquiry is an attempt to determine what the principle to be preserved is. Judge Bork's logic is circular and cannot constrain judicial interpretation.

103. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985).

104. Tribe & Dorf, *supra* note 12, at 1058 (stating "[t]he selection of a level of generality necessarily involves value choices").

105. *Id.* at 1059.

106. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1428 (2d ed. 1988).

107. Tribe & Dorf, *supra* note 12, at 1063.

108. *Id.* at 1059.

2. *Professor Tribe's Lack of Constraint*

Professor Tribe's proposals have drawn much criticism, some of it surprisingly vitriolic.[109] We will briefly discuss some of these. criticisms, and offer a few observations of our own.

Precedent must be connected by some consistent threads if it is to satisfy Professor Tribe's invocation of it as a constraint on judicial decision-making. But constitutional law is full of glaring inconsistencies. The Supreme Court has taken widely varying positions on segregated public schooling,[110] substantive due process,[111] and abortion[112] - to name only a few of the more prominent examples. Uncritical reliance on a stock of precedent that is not itself coherent is therefore a recipe for interpretive uncertainty. The combination of a call for judges to weigh precedent with a focus on the constitutional document as a whole introduces additional problems into Tribe's analysis, since different constitutional provisions were meant to operate at different levels of abstraction.[113] The stock of precedents thus operates at different level of abstraction for a number of reasons, one of which is that the framers intended for it to sometimes be so. A theory that seeks, in a particular case, to distill a particular level of abstraction from analysis of all constitutional law may therefore not produce adequate constraints on judicial action.

Of course, Professor Tribe does caution judges to differentiate between essential and non-essential facts when weighing prece-

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109. *See, e.g.*, BORK, *supra* note 33, at 199-206 (severely criticizing Professor Tribe's proposals); Richard A. Posner, *The Constitution as Mirror: Tribe's Constitutional Choices*, 84 MICH. L. REV. 551, 565 (1986) (commenting on Professor Tribe's writing style in that "[t]his is awfully plummy prose ('season of completion,' etc.), written by someone who takes himself awfully seriously").

110. *Compare* Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (stating "we cannot say that a law which authorizes or even requires the separation of the two races . . . is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children . . . the constitutionality of which does not seem to have been questioned") *with* Brown v. Board of Ed. of Topeka, 347 U.S. 483, 495 (1954) (rejecting *Plessy* and holding that the "separate but equal" doctrine violates the Constitution).

111. *Compare* Lochner v. New York, 198 U.S. 45 (1905) (recognizing the concept of substantive due process) *with* Griswold v. Connecticut, 381 U.S. 479 (1965) (presenting six different opinions on substantive due process) *and* Washington v. Glucksberg, 117 S.Ct. 2258, 2267-68 (1997) (limiting substantive due process rights to those already recognized).

112. *Compare* Roe v. Wade, 410 U.S. 113, 164 (1973) (recognizing a woman's right to abortion) *with* Rust v. Sullivan, 500 U.S. 173, 203 (1991) (upholding restrictions on the use of federal funds in programs that include abortion services).

113. *See* Frank H. Easterbrook, *Levels of Generality in Constitutional Interpretation*, 59 U. CHI. L. REV. 349, 365 (1992) (stating "Tribe and Dorf assume but do not demonstrate that the stock of reference points is consistent. Why should we expect it to be consistent? The Third, Fourth, and Seventh Amendments operate on dramatically different planes of generality.").

dent.[114] This call for good judging is certainly relevant, for if we cannot depend on judges to make these sorts of determinations we shall never be able to interpret the constitution in a consistent manner. But an invocation of high judicial standards, which is all this distinction between essential and non-essential facts boils down to, can hardly be considered an element of a theory of constitutional interpretation. It is merely a reaffirmation that judges should be judging.

The argument that we should read constitutional provisions broadly enough to protect variants[115] is also problematic, because it tells us very little about where we should draw crucial constitutional boundaries. There is widespread consensus that our constitution contains countermajoritarian rights— the troublesome issues concern the nature and scope of these rights. Professor Tribe's simple declaration that minorities should be protected tells us neither which minorities to protect nor how much we should protect them.

Professor Tribe's theory of interpretation is difficult to compare to the original preferences model because the former conceives of interpretation as involving the distinct tasks of first identifying relevant concerns and, second, determining how to apply them in the modern context. The original preferences model itself only deals with the second of these concerns, putting aside discussion of the first for another day. But while Professor Tribe spends a great deal of time discussing the search for an appropriate level of generality, he fails to recognize that even if he is correct about how to identify this level, his theory has provided little discussion of how to proceed with that information.

Thus, if we were willing to accept Professor Tribe's approach, it might seem that it provides a complement to the original preferences model. Why could we not first use Professor Tribe's ideas to identify a level of generality and the original preferences approach to implement it? Aside from the specific criticisms of Professor Tribe's approach that are discussed above and which make its effective implementation impossible, there is another a serious problem with such an attempt at integration, since Professor Tribe seeks to foist a preference for the protection of minority rights upon any interpretive decision. From the perspective of the theory of original preferences, this is an unacceptable demand since it implies that unless the indifference curve of those making laws values minority protection exactly as does the Tribal judge, judicial interpreters, whenever the issue of minority protection comes up, should first determine the preferences of those who made the law and then tem-

114. Tribe & Dorf, *supra* note 12, at 1059.
115. TRIBE, *supra* note 106, at 1428.

per them with this external concern. Such an approach necessarily divorces us from the preferences of the Framers and so is inconsistent with what we can posit they would have wanted, had they encountered modern circumstances.

Professor Tribe's approach has generally been criticized for providing far too much leeway to judges. Judge Bork, in *The Tempting of America,* declares that the "theory is . . . protean and takes whatever form is necessary at the moment to reach a desired result."[116] Judge Posner concurs, writing that Professor Tribe "argues, in effect and often in words close to these, that the Constitution is what we want it to be."[117] A broad sense within the legal community therefore is consistent with the argument presented here that Professor Tribe's views err excessively on the side of interpretive discretion.

C. The New Textualism[118]

1. The Textualist Approach

In recent years, legal scholarship's most outspoken voice has been that of those who style themselves "textualists." From their prominent positions in the American judiciary, Justice Antonin Scalia and Judge Frank Easterbrook have, with the aid of their academic allies, launched a radical critique of the traditional methods of interpretation. The fundamental claim of this interpretive approach is that courts should implement the "plain meaning"[119] of statutes and constitutional provisions and that once plain meaning has been established, there should be no recourse to legislative history or arguments about enactor's intent.[120] Where meaning is not plain, however, judges may rely on the structure of the relevant legal provision, the interpretation of similar provisions, and canons of construction in order to arrive at an interpretive outcome.[121]

Public choice theory provides the foundational insight for the new textualism, and argues that there exists no collective intent that is attributable to a group of decision-makers.[122] According to public choice scholarship this is so primarily because agenda con-

116. BORK, *supra* note 33, at 199.

117. Posner, *supra* note 109, at 551.

118. *See generally* William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621 (1990) (presenting the new textualist approach to statutory interpretation).

119. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J. concurring) (refusing to join the majority opinion which discusses legislative history after examining a statute's plain meaning).

120. Eskridge, *supra* note 118, at 623.

121. *Id.* at 623-24.

122. *Id.* at 642-43.

trol can be determinative of outcomes.[123] Textualists thus base their argument against resort to legislative history and intent on the public choice claim that legislatures have no identifiable intent and the related assertion that there is no discernible method for determining how a given legislature would have voted on an issue with which it was not presented.

In addition to this underlying theoretical foundation, a number of other arguments are referred to in support of the textualist position. First, an argument is made that the bicameralism and presentment requirements of Article I of the U S. Constitution, which provide that an enactment is not law unless it has been passed in the same textual form by both houses of Congress and signed, again with the same text, by the President,[124] require a singular focus on an enactment's text.[125] The new textualists argue that any time reference is made to legislative history this constitutional lawmaking process is short-circuited since new law comes into existence without the appropriate pedigree.[126] In addition, the new textualists also argue that reference to legislative history and intent by the courts is tantamount to a violation of the system of separation of powers that is central to our constitutional regime, since it amounts to the enactment of legislation by the judiciary.[127]

A number of more pragmatic arguments are also raised. For example, textualists insist that their approach would place limits on judicial law-making and activism by decreasing the number of tools available to those judges who pursue unwarranted discretion.[128] Textualists also feel that legislative history is likely to mislead courts and, to the extent that it ceases to be a point of reference in adjudication, courts will make decisions that are more consistent with legislation itself.[129] Finally, it is argued that the process of sifting through legislative histories is expensive and unrewarding, and hence courts are best off it they avoid it altogether.[130]

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123. Frank H. Easterbrook, *Foreword: The Court and the Economic System,* 98 HARV. L. REV. 4, 15-18, 51 (1984).

124. U.S. CONST. art. I, § 7, cls. 2-3; *see also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 946-52 (1983) (discussing the Presentment and Bicameralism Clauses).

125. Eskridge, *supra* note 118, at 671.

126. *Id.* One of the interesting aspects of the new textualism is its combination of ultra-Realist positions, such as the public choice argument which are used to discredit legislative history, with more conservative and traditional positions on a number of other issues. The emphasis on pedigree, for example, is traceable to legal positivism and H.L.A. Hart, among others. Positivism is, to say the least, an approach that is in tension with legal realism.

127. *Id.*

128. *Id.* at 656.

129. Eskridge, *supra* note 118, at 656.

130. *Id.*

2. *An Original Preferences Critique of the New Textualism*

Much ink has been spilled in the attack on, and defense of, the textualism of Justice Scalia and Judge Easterbrook, and there is little point in repeating many of the arguments that have been made. The new textualism directly confronts the original preferences model in a number of important ways, and it is therefore natural that this essay should focus on these issues to the exclusion of those that have already been dealt with elsewhere.

A number of the specific assertions made by textualists are contestable in light of the original preferences model. An important set of textualist claims revolve around the assumption that, whenever a court interprets in an active fashion, it is acting in a manner that is inconsistent with the law.[131] The original preferences model responds to this assertion by arguing that inaction may represent greater infidelity than appropriate judicial activism.[132] The Delany Clause is a simple but very clear example of this. Public choice scholars have provided us with a great deal of theorizing about the emptiness of purpose behind our laws, but the assertion that the Delany Clause is in a fundamental sense about consumer safety is hardly contestable. If it is to be argued against, then the new textualist is not unlike the skeptical epistomologist, a dry intellectual whose lack of connection to the real world we rightfully deplore when real parties seeking a real judgment are involved. Clearly, those who enacted the Delany Clause sought a level of safety that is different from what we have now achieved. While textualists seek a fidelity of form, original preferences emphasizes one of substance.

Textualism would not be quite so problematic if language did not occasionally change, but small shifts in language can produce great conundrums for the textualist. Once again, the Delany Clause provides an excellent example. The clause only bans substances that are dangerous to "men" or "animals."[133] While the word "men" meant members of both the male and female genders when the clause was enacted in the 1950's, the word "men" may soon exclusively mean males. So how does the textualist deal with this? Under his or her reading, the Delany Clause does not apply to women and a legislature that, whatever may be said about public choice, clearly intended to protect women would be construed as having had no such intent. The problem is compounded by the new textualist reliance on canons of interpretation. Justice Scalia has, in the past, resorted to the use of the canon that "the inclusion of

131. See discussion *supra* Part IVC(1) and accompanying footnotes.
132. See discussion *supra* Part IIB(3) and accompanying footnotes.
133. 21 U.S.C. § 348 (c)(3)(A) (1998).

one thing implies the exclusion of all others."[134] Thus the new textualism would insist that the Delany Clause protects men and animals, but not women. Under this new textualist interpretation, no food additive causing breast cancer would be banned by the Delany Clause, while even the smallest degree of harm potentially directed at a "man" would be illegal. That intelligent "men" would defend such propositions is surely ridiculous. And the fact is that they do not, thus revealing that even they appeal at some level to legislative intent, despite their frequent protestations to the contrary.

The original preferences model rests on one of two assumptions: either law making bodies have consistent preferences, or there is some justification for acting as if they do. Public choice theory and the new textualism represent a vociferous attack on the first of these claims. But even if the new textualists insist that they reject the first claim, their behavior as judges, which frequently includes reference to legislative history,[135] suggests either that they are insincere in this assertion or that they accept the second claim: that we should act as if law-makers have a collective intent. This latter claim has an honorable pedigree: it can be recharacterized as the essence of an important argument made by Ronald Dworkin in *Law's Empire*. Dworkin might agree with the new textualists that collective decision making bodies lack an intent; he argues however that it is essential that judges "impose the best interpretation on our constitutional structure and practice" and interpret "in the best light they can bear."[136] Thus Dworkin's approach is consistent with a practice of imputing original preferences towards law-makers. The implications for the original preferences model of an imputed intent approach, whether based on Dworkin or otherwise, are different in some ways from the implications of arguing that legislative intent actually exists in certain circumstances. But while a fuller articulation of the original preferences model requires a more involved discussion of these issues, we cannot embark on that endeavor here.

D. Conclusion

None of the interpretive theories considered in this section succeeds in balancing constraining and liberating provisions. Judge Bork's theory has tended to be overly constrained, while Professor

134. Eskridge, *supra* note 118, at 664. This phrase is known to lawyers and like-minded people as "inclusio unius est exclusio alterius." *Id.*; *see also* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 132-34 (1989) (Scalia, J.) (applying this canon); Eskridge, *supra* note 118, at 664 (stating "[t]he Burger Court rarely invoked [this] canon . . . but the new textualism has given the canon fresh life").

135. *See*, e.g., Pierce v. Underwood, 487 U.S. 552, 565 (1988) (Scalia, J.) (referring to Advisory Committee Notes in construing the phrase "substantially justified").

136. DWORKIN, *supra* note 4, at 360.

Tribe's theory is not restrictive enough. And to the extent that Professor Tribe does impose ideological constraints on interpretation, they are arbitrary in the sense that they do not require for their legitimacy that they be part of the law in question. Finally, textualism both liberates and constrains, but in an arbitrary and hence unsatisfying manner.

V. ASSESSMENT OF THE ORIGINAL PREFERENCES APPROACH

The approach I have taken in this essay is certainly not immune to criticism, but it also has certain useful qualities. This section discusses some of the benefits and limitations of the model.

One of the benefits of this model is that it operates as a real, but not completely stifling or arbitrary, constraint on judicial activism. Under this approach judges are permitted to make adjustments as the world changes, but their attention is firmly directed towards shifts in certain fundamental variables. These variables themselves reflect movements in the location of fundamental constitutional and legislative boundaries, preservation of which is an important legal principle. Under this approach, the constitutional interpreter is pointed in a certain interpretive direction, but also warned: "You may go only so far if you are to maintain fidelity to the constitutional boundary." This approach is therefore commendable because, first, it is consistent with judicial integrity and, second, it seeks to preserve the preferences of enactors.

An important set of criticisms of interpretive approaches that rely on notions of original intent comes from public choice theory. Building on the work of Kenneth Arrow, which revealed inherent instabilities in majoritarian systems of aggregating preferences,[137] some public choice scholars argue that "the outcomes of collective decisions are probably meaningless because it is impossible to be certain that they are not simply an artifact of the decision process that has been used."[138] Those who draw on public choice scholarship also note that enacting bodies never have only one intent — they have at least as many intents as they have legislators, and it is therefore misleading for judges to refer to notions of collective intent when determining the meaning of ambiguous statutory and constitutional provisions."[139]

Another benefit of this approach is that its focus in certain contexts on the boundary between public and private alleviates ten-

137. *See* MUELLER, *supra* note 16, at 384-89 (discussing social decision making in the context of Arrow's approach).

138. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law,* 65 CHI.-KENT L. REV. 123, 126-27 (1989).

139. Eskridge, *supra* note 118, at 642-43. This position dovetails nicely with the Scalia/Easterbrook argument that, as a matter of principle, only the text of a statutory or constitutional provision can impose legal obligations.

sions between the desires of past, present and future majorities. Our approach implies that the choice between the preferences of a past and present majority may not be as stark as it might otherwise seem. Present majorities may temper the influence of a past majority by giving a direction to the traditions of the past. For example, if citizens choose to engage in a particular activity today more than they have engaged in it in the past, that activity should, under my approach, generally be accorded somewhat greater constitutional protections. The counter-majoritarian problem, if this approach is followed, still presents difficulties, but at least it is less counter and more majoritarian.

The model developed here also has serious limitations, and needs to be thought out more fully before it will be implementable. For example, the Realist critique has demolished the notion of separate, easily distinguishable spheres of public and private activity, and changes in the dormant commerce clause doctrine have blurred the clear boundary that, in earlier times, distinguished the authority of federal from non-federal government—yet if enactors relied on such notions the original preferences model implies that we must as well.

Other difficulties with the model also exist. For example, the model calls upon judges to engage in historical analysis in an attempt to determine the nature of the original constitutional provision in the society of the framers. As we saw in the fourth amendment context, this is not always easily done. For example, while we now have extensive criminological statistics available to us, no such data can be found from the time of the framing of the constitution. The fact that historical data is difficult to unearth and construe re-introduces into this model some of the indeterminacy that has been the basis for criticism of alternative interpretive approaches."[140]

In addition, the model I have outlined presumes that there is a one-to-one relationship between the variables that make up its essential components. As we have seen in the fourth amendment context, however, increased intrusions on private liberties can either be a consequence of uncontrollable changed circumstances—such as technology levels—or of changes that are more discretionary, such a budget priorities. Similarly, our commerce clause analysis was complicated by changes in dormant commerce clause doctrines. For

140. A related criticism argues that if the search for meaning in constitutional law is really a historical inquiry then the selection of lawyers for this task is improper. Daniel A. Farber, *Legal Pragmatism and the Constitution,* 72 MINN. L. REV. 1331, 1340 n.42 ("Presumably, if constitutional interpretation were purely a matter of historical research, we would do better to turn constitutional law over to the American Historical Association rather than the Supreme Court.").

now, the model does not distinguish in any meaningful way between these different types of changed circumstances. A more complete model might.

Another problem with the model is that it is simple — the focus on only fundamental constitutional or statutory relationships greatly underestimates the richness of legal documents. While this is a valid concern, it is also a source of strength. First, if the relationships we have focused on in this essay truly are the most fundamental aspects of a given constitutional or statutory formula, then fidelity to them is more important than fidelity to other parts of a document. The range of interpretive alternatives that fidelity to the most essential aspect of the constitution dictates is properly taken as a limit on judicial discretion. Second, if the nature of collective decision-making actually comports to the descriptions contained in more cynical forms of public choice theory, the richness of constitutional and legislative deliberation that this model fails to capture is no great loss.

Also, the model needs to be supported by a more elaborate justification of its basic approach: that of preserving preferences by adjusting for changes in fact but not in values. Some have argued that adjustments should also be made for shifts in opinion.[141] Also, there is an assumption imbedded in this analysis that either, first, the values of lawmakers would not have themselves changed in light of changed circumstances or, second, that we should not be concerned with whether the their values would have changed. At least one form of this assumption must be defended.

Finally, the assumption of homothetic preferences is an important simplification which, if invalid, would change our analysis of the examples of Section III in important ways. For example, if the Framers viewed federal regulation is an inferior good, our assumptions about the shape of the indifference curves in the fourth amendment and commerce clause examples are incorrect, and an increase in income (e.g., a rise in commerce, a fall in crime) should lead to relatively less federal regulation than would be implied under the assumption of homotheticity.

VI. Conclusion

> I long for fidelity from a beloved,
> who knows not the meaning of fidelity.[142]

With these words, Mirza Asadullah Khan Ghalib, greatest of the Persian and Urdu poets, bemoans the infidelity of a supposed paramour. Unlike what we can surmise about Ghalib's beloved,

141. Eskridge, *supra* note 1, at 1483.
142. Mirza Assadullah Khan, *Diwan-i-Ghalib*.

many modern judges at least wish they could achieve fidelity to the wishes of those who enact laws. The problem is that they do not know what fidelity means.

Some scholars of jurisprudence would like to replace the nuance of attempts to discern the meaning of fidelity with mechanical rules the purpose of which is more to constrain indiscretion than it is to promote fealty.[143] Others recognize that fidelity to original intent requires more than the mechanical constraints on interpretative indiscretion[144] that arise from textualism or the utilization of overly narrow levels of generality.

This essay is an attempt to explain what interpretive fidelity means under conditions of unanticipated and significantly changed circumstances. While the model developed here derives its inspiration from the dismal science the goal is not to argue that judges can or should replace soundly reasoned opinions with graphs and equations. Rather, it is to illustrate how the discipline of economics can identify what fidelity might mean and to argue that judges should make themselves aware of the insights gleaned from thinking in this manner. Laws are complex things: they are rarely only about one thing or another, and it would be folly to characterize this as a complete theory of legislation or interpretation. But while Ghalib would no doubt be driven even further into depression were fidelity explained to his beloved in the manner it has been discussed here, the original preferences model does provide insights that can be of value to those who must interpret old law in a new world.

143. *See* Eskridge, *supra* note 118, at 623 (stating "[t]he new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.").

144. *See, e.g.*, Tribe & Dorf, *supra* note 12, at 1063 (stating that "any inquiry into 'intent' must be indeterminate").