Michigan Law Review

Volume 99 | Issue 2

2000

Proactive Legislation and the First Amendment

Stuart Minor Benjamin
University of San Diego School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Communications Law Commons](#), [Constitutional Law Commons](#), [First Amendment Commons](#), [Internet Law Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Stuart M. Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281 (2000).
Available at: <https://repository.law.umich.edu/mlr/vol99/iss2/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PROACTIVE LEGISLATION AND THE FIRST AMENDMENT

*Stuart Minor Benjamin**

TABLE OF CONTENTS

I. THE FIRST AMENDMENT THRESHOLD.....	284
II. EXAMPLES OF PREDICTIVE HARMS.....	290
A. <i>Turner</i>	290
B. <i>Other Contexts</i>	292
III. SUPREME COURT RESPONSES TO PREDICTIVE HARMS.....	299
IV. DISTINGUISHING PREDICTIVE HARMS FROM OTHER FINDINGS.....	303
V. A PRESUMPTION AGAINST PREDICTIVE HARMS.....	309
A. <i>Which Harms?</i>	310
B. <i>Costs of Relying on Predictive Harms</i>	312
1. <i>Current Constitutional Abridgement Versus Potential Harm</i>	313
2. <i>Avoiding a Second-Best</i>	314
C. <i>Free Speech Considerations</i>	315
VI. OVERCOMING THE PRESUMPTION	320
A. <i>Two Guideposts</i>	322
B. <i>Likelihood of Irreparable Harm</i>	325
VII. WHAT ROLE SHOULD DEFERENCE PLAY?	331
A. <i>Institutional Competence</i>	332
1. <i>Factfinding Capabilities</i>	332
2. <i>Beyond Factfinding</i>	336
B. <i>Redundancy</i>	343
C. <i>Objections</i>	348
D. <i>Looking Directly at the Probabilities</i>	353
E. <i>Unprovable Harms</i>	356
VIII. APPLICATION TO THE OTHER PREDICTIONS	358
A. <i>Predictions of Legislative Effectiveness and Fit</i>	359
B. <i>Predictions of No Effective Alternatives</i>	360
CONCLUSION	363

* Associate Professor, University of San Diego School of Law; Visiting Associate Professor, University of Pennsylvania Law School (Fall 2000). B.A., Yale University, 1987; J.D., Yale Law School, 1991. — Ed. I would like to thank Larry Alexander, Steve Burbank, Heather Gerken, Seth Kreimer, Raymond Ku, Marty Lederman, Mark Lemley, Jon Molot, Jonathan Nuechterlein, Jeff Rachlinski, Arti Rai, Mike Ramsey, Mike Rappaport, John Robertson, Dan Rodriguez, Ed Rubin, Howard Shelanski, Eugene Volokh, Phil Weiser, and Ernie Young for helpful comments. I am grateful to the University of San Diego for a summer research grant in support of this Article.

It is a commonplace that the world is changing rapidly, with whole sectors of the economy being transformed. New forms of communication, like the World Wide Web, e-mail, and satellite television, have risen from obscurity to ubiquity in less than a decade. The speed of these changes has led some to express concern about the ability of governments to respond. The fear is that governments cannot keep up with developments as they occur and thus get hopelessly behind.¹ The solution, according to some, is for the government to act proactively — before a harm has arisen, so that the government can push developments along the appropriate path and avoid problems before they occur. Indeed, there have been many calls for such legislation.²

Concern about the government's ability to keep pace with marketplace innovation is not new. James Landis, the central figure in the structuring of administrative agencies in the New Deal era, argued that unless legal constraints on agency action were reduced, the government would not be as nimble as private actors and therefore would find itself outmaneuvered and overwhelmed; he considered it essential that government be organized to act with the same rapidity as industry, so that it could shape the course of events.³ More recently, some have expressed fear (or hope, depending on their perspective) that the rapid pace of technological developments will overwhelm the government's ability to respond to them.⁴

1. One of the criticisms of the government's antitrust suit against Microsoft, for example, is that the market is changing more quickly than the government can react, rendering the case outdated before it is even completed. *See, e.g.,* Thomas W. Hazlett & George Bittlingmayer, *Befuddled by "Internet Time: The Government's Pointless Lawsuit Against Microsoft*, WKLY. STANDARD, July 5/July 12, 1999, at 23, 25 ("For all its haste, [the Department of] Justice is still too late. As the case enters its second year, the government's original complaint is ancient history . . ."); Declan McCullagh, *Why Exactly Is Microsoft on Trial Again?*, 4 INTELL. CAPITAL.COM (June 3, 1999), at <http://www.intellectualcapital.com/issues/issue245/item5266.asp> ("[T]he worst fears of government attorneys have come to pass: Their well-publicized and career-boosting lawsuit, which focused largely on the Internet Explorer vs. Netscape Navigator battle, seems to be growing more irrelevant every day.").

2. *See, e.g.,* LAWRENCE LESSIG, CODE, AND OTHER LAWS OF CYBERSPACE 218-21, 223-28 (1999); Greg Y. Sato, *Should Congress Regulate Cyberspace?*, 20 HASTINGS COMM. & ENT. L.J. 699, 718 (1998); Ilene Knable Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 HARV. J.L. & TECH. 275, 277-78 (1995); Allen S. Hammond IV, *Regulating Broadband Communications Networks*, 9 YALE J. ON REG. 181 (1992); Dan Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769, 785 (1984); ANDREW L. SHAPIRO, THE CONTROL REVOLUTION 203-07, 226-27 (1999); Harold Feld, *Whose Line Is it, Anyway? The First Amendment and Cable Open Access*, 8 COMM.LAW CONCEPTUS 23, 35-40 (2000).

3. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1-12 (1938).

4. *See, e.g.,* Robert Pitofsky, Chairman of the U.S. Federal Trade Commission, Competition and Consumer Protection Concerns in the Brave New World of Electronic Money, Remarks Before the United States Department of the Treasury Conference, Toward Electronic Money & Banking: The Role of Government (Sept. 19, 1996), at <http://www.ftc.gov/speeches/pitofsky/banking.htm> (expressing concern that "[t]he government regulatory process has generally not been able to keep up with fast changing technological developments"); David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155 (1996) (suggesting that rapid development of the global electronic network will overwhelm governments' ability to regu-

One response to these considerations is that the government should regulate an industry or technology while it is still in the formative stages. For instance, Senator James Exon, the sponsor of the Communications Decency Act,⁵ argued for his approach by focusing on the future harms that the Internet presented, rather than the ones that had already arisen (at a time when home Internet use was still relatively unusual). Notably, he justified his position by stating: "The information superhighway is, in my opinion, a revolution that in years to come will transcend newspapers, radio and television as an information source. Therefore, I think this is the time to put some restrictions or guidelines on it."⁶

Congress enacted the Communications Decency Act after the harms to which it responded — the dissemination of pornography in a manner available to minors — had already begun. On other occasions, however, legislation is entirely proactive, in that it is passed before any cognizable harm has materialized. In *Turner Broadcasting System, Inc. v. FCC*,⁷ for instance, the harms to broadcasters that justified the must-carry statute (requiring cable companies to carry local broadcasters) had not occurred before the legislation was passed.⁸ Similarly, the current debate on whether to require cable modem Internet providers to open up their lines to competing Internet service providers has arisen in anticipation of harms that have not yet occurred.⁹ In such circumstances, government action may be particularly effective: The government is likely to have significant leverage, as there is no entrenched pattern that the legislation must attempt to redirect or undo. But the potential costs are great, as it is impossible to know if the anticipated harm would actually have arisen such that the legislation would be appropriate.

There is particular reason for concern when the relevant legislation infringes upon speech interests, in light of the long-standing wariness of anticipatory overreaction in the First Amendment context.¹⁰ And, for better or worse, predictive legislation frequently will affect speech

late it); John Perry Barlow, A Cyberspace Independence Declaration (Feb. 9, 1996), at <http://www.eff.org/barlow> (celebrating the alleged inability of government to regulate, or keep up with, the Internet).

5. 47 U.S.C. § 223 (1994 & Supp. III 1997). The Communications Decency Act ("CDA") prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age, and the knowing sending or displaying of patently offensive messages in a manner available to a person under 18. *Id.* § 223(a), (d).

6. Peter H. Lewis, *Despite a New Plan for Cooling It Off, Cybersex Stays Hot*, N.Y. TIMES, Mar. 26, 1995, at A1 (citing to a telephone interview with Sen. James Exon).

7. 512 U.S. 622 (1994) [hereinafter *Turner I*]; 520 U.S. 180 (1997) [hereinafter *Turner II*].

8. See *infra* notes 35-37 and accompanying text.

9. See *infra* notes 71-82 and accompanying text.

10. See *infra* Part V.C.

interests and therefore will implicate the First Amendment. As a result, it is important to determine the appropriate judicial response to legislation based on predictive harms that infringes upon First Amendment interests. Thus far, this question has received little attention. This Article focuses on this hitherto unaddressed issue, by asking the question of how courts should respond to legislation that affects First Amendment rights and is premised on predictive harms.

In this Article, I contend that First Amendment principles dictate a presumption against legislation that is based on predictive harms, but that the presumption will be overcome if a court independently determines that there is a likelihood of irreparable harm. Part I briefly discusses the level of harm required to justify legislation that infringes upon First Amendment rights. Part II turns to proactive legislation, giving some examples of predictive harms. Part III describes the Supreme Court's responses to legislative findings in the First Amendment context, and Part IV discusses the difference between predictive harms and other legislative findings. Part V addresses the circumstances under which there should be a presumption against legislation predicated upon predictive harms and concludes that, when the First Amendment is implicated, we should be wary about reliance on predictive but provable harms. This formulation leaves open the question of what might overcome this presumption. Part VI suggests that the answer is a likelihood of effectively irreparable substantial harm. Part VII then focuses on whether courts should defer to legislative predictions of such irreparable harm, concluding that, because we can have confidence in neither courts' nor legislatures' predictions, the presumption against these predictive harms counsels against deference and in favor of redundancy. Finally, Part VIII considers the application of this analysis to other predictions contained in legislation. The upshot is that a tempting option for governments — legislating before harms arise — merits skepticism rather than acceptance.

I. THE FIRST AMENDMENT THRESHOLD

Assuming that we want the government to head off problems before they arise, who should do it? Courts are not great candidates. Not only does it seem illegitimate (where do judges get the authority to proactively manage the economy?), but also judicial involvement almost always occurs after a long course of events has taken place. Federal courts have to wait until there is an injury in fact, and courts generally address only controversies brought to them by aggrieved parties.¹¹ By that time, the harms have already occurred, so avoiding the problem in the first place is not an option.

11. Some states have procedures under which the highest judicial authority in the state can issue an advisory opinion in response to a legislative or executive request for guidance

Legislatures seem better equipped for proactive measures. They can survey the landscape as they see fit, obtain information from any source by a variety of means, hold hearings on any subject that interests them, and seek to influence the course of future events (i.e., legislate prospectively).¹² Indeed, one of the hallmarks of legislation is prospectivity.¹³ Legislatures are thus the natural institutions for proactive regulation.¹⁴

Legislatures might plausibly seek to legislate proactively — that is, before the harms that they fear have actually arisen — in any of a number of areas. They might, for example, perceive dangers in the importation of cheaper foreign foods (say, sugar¹⁵) and thereby limit those imports even before any farmer has been hurt by them. But one of the more tempting targets is the communications industries — the industries that create, alter, or package words and symbols. The companies and individuals engaged in the manipulation of words and symbols include programmers (video and computer), production companies, creators, editors, etc. They have helped to change society in countless ways. Legislatures may therefore be tempted to regulate activities in this segment of the economy, and to do so before the next wave hits (whatever that wave may be).

If legislatures act against companies that deal in petroleum rather than words, their actions will likely raise few concerns. There is no provision in the Constitution that prohibits statutory limitations on ordinary business dealings, and the Due Process and Equal Protection Clauses have been reasonably interpreted to give legislatures fairly wide latitude. And if legislatures act via general legislation that applies to all sectors of the economy (e.g., maximum hour laws), the fact that this legislation happens to affect, say, newspapers and Internet com-

concerning the constitutionality of a proposed act, but this dispensation with the Article III prohibition on advisory opinions is still a far cry from judicial proactive regulation. See ALBERT R. ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT 30-55, 252-53 (1918); James B. Thayer, *Advisory Opinions*, in LEGAL ESSAYS 42-46 (1908); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 213-14 (1997); Margaret M. Bledsoe, Comment, *The Advisory Opinion in North Carolina: 1947 to 1991*, 70 N.C. L. REV. 1853, 1853-54 (1992).

12. See Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931-32 (1980).

13. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City and County of Denver*, 210 U.S. 373 (1908).

14. One might be tempted to nominate administrative agencies, which also act prospectively (when they are in a rulemaking capacity, see *Londoner* and *Bi-Metallic* again). But administrative agencies get their marching orders from the statutes that create them, and the First Amendment challenges addressed in this Article would attack the statutes themselves, so the agencies' role for these purposes is derivative of the legislation, and therefore the legislature, that creates the regulatory scheme in the first place.

15. This example is not picked at random; the government does limit the importation of sugar. See United States General Accounting Office, *Sugar Program*, at 12-13 (2000), <http://www.gao.gov/new.items/rc00126.pdf>.

panies because of their demanding work schedules will not raise First Amendment concerns.¹⁶ But a legislature may want to do more than that; it may want to pass legislation more specifically aimed at a particular aspect of expressive activities, or at a particular company, just as it could do to a particular aspect of extractive activities (e.g., oil drilling), or to Exxon/Mobil. When a legislature acts specifically against a speech-manipulation activity or company, its action likely will, and should, raise serious First Amendment concerns.

Others have made this point at some length, and I will not recreate their arguments here. But it does bear mentioning briefly the arguments against this position, and the arguments for it. The obvious argument against it is that, though the legislation deals with speech-related companies, it should be seen as ordinary economic legislation in order to avoid a revival of *Lochner* through the First Amendment.¹⁷ This argument will be strongest when the regulation appears to have nothing to do with the expressive aspects of an industry or company; even a maximum-hour law specifically applicable to Internet companies might not be subject to heightened scrutiny. But when the regulation of speech, or a means of communicating speech, is involved, then the counterarguments loom large. The textual basis for the distinction is obvious enough: the Constitution provides special protections for speech by virtue of the First Amendment, which treats speech differently from other activities. The normative arguments, to grossly oversimplify, usually revolve around two related propositions — that

16. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”). *But cf. Turner I*, *supra* note 7, 512 U.S. at 640 (stating that “enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment,” and refraining from answering the question).

One application of this distinction is that courts have treated antitrust laws differently from laws aimed at communications, even when the legislature has attempted to justify such specific laws on antitrust grounds. See *id.* (rejecting the argument that the must-carry provisions should be subject to rational basis review as akin to antitrust legislation because the provisions singled out cable companies and thus were not generally applicable); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (applying generally applicable antitrust laws to a company that engaged in core First Amendment activities). This distinction takes on particular significance for purposes of this Article, because antitrust authorities sometimes apply antitrust laws (particularly the Clayton Act) based on their predictions of future harms. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962) (describing the forward-looking nature of the “incipiency” standard under the Clayton Act); *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957) (same). Such predictions of harm are not subject to the same rigorous scrutiny that, I argue in this Article, should be applied to the predictions of harm in legislation that more narrowly focuses on speech-related activities, because of the absence in antitrust law of the crucial underpinning of heightened First Amendment scrutiny.

17. See, e.g., C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 612-80 (distinguishing individuals from entities for First Amendment purposes and arguing that structural regulation of media companies should be treated as ordinary economic regulation).

speech is a distinctive kind of good and that governments have an incentive to limit it. As to the former, the idea is that speech is not an ordinary commodity because it is not merely an end but also a means of persuading others, and because it therefore has spillover benefits that go beyond purchasers.¹⁸ And, in part because of the power of speech, governmental actors who wish to remain in office will have an incentive to control it.¹⁹

The Supreme Court has embraced this position. For instance, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,²⁰ the Court applied rigorous scrutiny to a use tax applicable to publications, even as it conceded that there was no indication (apart from the nature of the tax itself) of any censorial or otherwise impermissible motive on the part of the legislature that enacted the tax.²¹ Thus the Court invalidated a tax that, were it applied to almost any other form of economic activity, would have sailed through rational basis review.²² The Court also treated otherwise ordinary regulation as subject to heightened scrutiny in the 1994 case *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*").²³ That case involved a challenge to sections of the Cable Television Consumer Protection and Competition Act of 1992²⁴ that required cable television systems to devote a specified portion of their channels to local broadcast television stations. One of the government's main defenses of these sections (known as the "must-carry" provisions) emphasized the market power

18. See Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 959-64 (1995); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 890-904 (2d ed. 1988); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 267-80 (1996); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-87 (1963).

19. Daniel Farber suggests a slightly different normative justification, namely that information is likely to be undervalued by both individuals and the political system because it is a public good subject to the free rider problem. He argues that we do, and should, respond to this undervaluation of information by providing special constitutional protections for it. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991).

20. 460 U.S. 575 (1983).

21. *Id.* at 580.

22. See also *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking down a sales tax imposed on newspapers with a circulation of more than 20,000 copies per week and holding that, although newspapers may not enjoy immunity from general taxation, a tax aimed more specifically at them failed rigorous review under the First Amendment); see generally *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) ("[T]he usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.").

23. *Turner I*, *supra* note 7, 512 U.S. at 622. *Turner I* is so denominated because, after the case was decided, a three-judge district court issued an opinion on remand. *Turner Broad. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995). That opinion was affirmed by the Supreme Court in an opinion referred to as *Turner II*, *supra* note 7, 520 U.S. at 180.

24. Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992") (codified in scattered sections of 47 U.S.C. (1994)).

of cable operators and argued that “the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny.”²⁵ The Court squarely rejected that position, stating that “laws that single out the press, or certain elements thereof, for special treatment ‘pose a particular danger of abuse by the State,’ and so are always subject to at least some degree of heightened First Amendment scrutiny.”²⁶

Assuming, then, that it is appropriate to treat legislation dealing with speech-related activities differently from ordinary economic legislation, we are in a world of more rigorous scrutiny than is applied to ordinary legislation.²⁷ As part of raising the bar for what is required of legislation that infringes upon First Amendment interests, we expect the underlying harm to which the legislature is responding to be a serious one, with some gravity. After all, if we let the legislature characterize almost anything as a cognizable (i.e., legislatable) harm, we eviscerate not only the requirement of a harm but also the condition that the legislation be tailored to fit that harm; the legislature could simply aver a harm to which its legislation was perfectly tailored, even if the harm alleged was trivial. It seems central, in other words, that when First Amendment rights are threatened by legislation, courts require a greater justification for the legislation than they would if no First Amendment issue was presented.

Suppose that the cables in *Turner* sent, say, gas rather than video programming through their wires, and Congress passed analogous

25. *Turner I*, *supra* note 7, 512 U.S. at 640.

26. *Id.* at 640-41 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)); *see also id.* at 641 (“Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded.”).

Relatedly, the Court began its opinion by rejecting any suggestion that the First Amendment was not implicated by a statute regulating cable operators. The Court announced that “[t]here can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” *Id.* at 636; *see also id.* (“Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’” (quoting *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (alteration in original))).

27. Such speech-related legislation will often — perhaps always — apply to speech that is part of an economic activity; that is, in most cases the compensation for the speech will not be exclusively nonmonetary. This does not mean, though, that the activity involved is commercial speech. The Supreme Court has emphasized that commercial speech merely proposes a commercial transaction. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995). Neither the must-carry regime at issue in *Turner*, nor any of the other examples of proactive legislation discussed in Part II, either has been treated as a regulation of commercial speech or should be under the prevailing doctrines.

legislation — that is, a statute requiring that the operators of the cables carry gas produced by local gas companies. We can imagine a wealth of potential government interests that might be sufficient to support such legislation for purposes of rational basis constitutional review: perhaps the government wanted to give a boost to local companies simply because it preferred localism; or perhaps the government was hostile toward cable companies because it considered them too arrogant and powerful, even though (let's imagine) there was no existing antitrust or other cognizable harm. Either of those rationales, or dozens of others, would probably satisfy any court that reviewed such legislation if it were challenged as a violation of the cable companies' constitutional rights (most probably, their rights to due process). But because the cables at issue in *Turner* did not carry bits of gas, but instead bits of data — video programming — the threshold was raised; it would not be sufficient for Congress simply to say, for instance, that it preferred little companies to bigger ones, or local companies to national ones, just because Congress thought that such a world would be a better place. We are looking, instead, for a more weighty justification — that is, a fairly specific and fairly serious harm to the public interest that the legislature is trying to avoid or minimize — in order for a statute infringing upon free speech interests to pass muster.

This point takes on particular significance for my purposes because it is central to the category of predictive harms. In the example of a must-carry statute for gas, let's assume that no discernible detriment has flowed to the local gas companies from the pre-statute arrangement (i.e., with no must-carry regime); the local companies have no evidence of harm that could justify the statute. That absence should not be a problem, for purposes of constitutional review; the low threshold for ordinary rational basis review means that it probably is sufficient for the legislature to justify the statute simply by saying that the relevant harm was the mere possibility that local companies might be excluded. Or the government might instead recharacterize the harm as something that is occurring (perhaps a particular gas company is losing money) and have that serve as the justification for the legislation.²⁸ In so doing, the legislature can avoid the assertion that the harm is speculative by redefining the government's interest in a way that renders the harm current. As long as the threshold for such harms is quite low, such redefinition will probably work.

But if heightened scrutiny applies, that approach would, and should, be insufficient. Heightened scrutiny entails a more serious threshold. As in the antitrust context, a harm to a competitor will not

28. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[T]he existence of facts supporting the legislative judgment is to be presumed . . .”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (stating that the legislature's judgment is “well-nigh conclusive”).

suffice; we would be looking for a harm to competition, and thus to consumers. And because we are looking for more substantial harms, legislatures will not have the option of just picking some current phenomenon and articulating that as the harm. Harms sufficient to satisfy heightened scrutiny may not yet exist, and thus may be predictive.

II. EXAMPLES OF PREDICTIVE HARMS

A. Turner

Turner I highlights the significance of the threshold. The central issue in *Turner I* was the standard of review for the must-carry legislation. Turner Broadcasting argued, and four dissenting Justices agreed, that the legislation constituted a preference for the programming offered by local broadcasters and thus was content-based. Content-based legislation is subject to strict scrutiny, under which the government interest must be “compelling” and the statute must be the least restrictive means to further the articulated interest.²⁹ The majority concluded, however, that the must-carry provisions were content-neutral. The Court thus held that the provisions were subject to intermediate scrutiny under which the required interest must be “important or substantial” and the statutory scheme need not be the least restrictive so long as the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.”³⁰

What interests me here is the first part of that test, in which the *Turner* Court considered whether the interest involved was sufficiently “important or substantial” to justify the legislation. The government did not even bother to argue that the legislation was constitutional because, for instance, Congress simply prefers local companies to national companies. Instead, the government presented three more specific interests involved in the legislation: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”³¹ Significantly, these more specific interests were not sufficient. *Turner* accepted them in the abstract but quite appropriately held that, in order to pass constitutional muster, the harms had to be more specific, and more powerful.³² The plurality stated that, “in applying *O’Brien* [i.e., intermediate] scrutiny we must ask first whether

29. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

30. *Turner I*, *supra* note 7, 512 U.S. at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

31. *Id.*

32. See *id.* at 664.

the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry.”³³ Moreover, the required showing was fairly specific: not only would the government have to show that a significant number of broadcast stations would be refused carriage (or otherwise disadvantaged) on cable systems, but “the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result.”³⁴

This, then, illustrates the difficulty: when we are looking for “important” or “substantial” or “compelling” interests — that is, when heightened scrutiny is involved — the harm may be sufficiently important and particular that its existence is not a given. Thus, it may be that the only cognizable harm is a predictive one. *Turner* itself is one example. There was already evidence that some local broadcasters were not carried by cable operators. But, as eight of the Justices agreed,³⁵ that was not sufficient to satisfy the requirements of intermediate scrutiny. The plurality instead required the aforementioned showing of dropped broadcasters leading to genuine jeopardy to their economic health. The problem, as the plurality acknowledged, was that those harms had not yet come to pass. There was little evidence that there had been any harm to local broadcasters. Rather, Congress was making what *Turner I* acknowledged to be “predictive judgments”³⁶ about what Congress feared would happen in the future to broadcasters absent must-carry. The main harms thus lay in the future,³⁷ and the Court remanded the case for further evidence on them.

33. *Id.* at 664-65.

34. *Id.* at 667. The remainder of this paragraph of the opinion highlighted the seriousness of the substantive hurdle. The plurality emphasized that “the parties have not presented any evidence that local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues as a result of their being dropped from, or otherwise disadvantaged by, cable systems.” *Id.*

35. Justice Stevens was the only Justice who would have affirmed the district court and upheld the statute in *Turner I*. He believed that the government’s showing had been sufficient. Because, as he noted, a vote to affirm would have left the Court with no majority for any disposition, he voted with the plurality to remand the case. *See id.* at 674 (Stevens, J., concurring) (“Were I to vote to affirm, however, no disposition of this appeal would command the support of a majority of the Court. An accommodation is therefore necessary.”).

36. *Id.* at 666.

37. *See* William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1308 (1998) (“The thrust of these findings [in the Cable Act of 1992] is not that cable has in fact harmed television broadcasters, but a prediction that cable’s unchecked market power may lead to harm.”).

B. Other Contexts

The must-carry provisions at issue in *Turner* are by no means unique. Legislatures often act before a problem has materialized. Holding aside for the moment legislation that focuses on content,³⁸ other legislation focused on access to particular pipelines also relies on predictive harms. The same legislation (the Cable Act of 1992) that contained the must-carry requirement, for example, also included a provision requiring that Direct Broadcast Satellite ("DBS") operators reserve a percentage of their channel capacity for noncommercial educational or informational programming.³⁹ The district court invalidated this provision, finding that "[t]here is nothing in the record purporting to demonstrate that educational television is presently in short supply in the homes of DBS subscribers, nor is there a reason to conclude that section 25 was designed (or deemed necessary) by Congress to quell anti-competitive DBS provider practices."⁴⁰ On appeal, the DBS providers emphasized this conclusion, and the fact that Congress had made no findings regarding the harms to which section 25 responded. In rejecting the DBS providers' position, the Court of Appeals (in addition to concluding that the statute was content-neutral⁴¹) simply stated that "Congress could not have made DBS-specific findings for the simple reason that no DBS system was in operation at the time the 1992 Act was enacted."⁴² The court could hardly have been clearer,

38. As will be discussed below, insofar as such legislation is based on unprovable predictive harms or prevents irreparable harms, it presents a somewhat different set of considerations. See *infra* Parts V.A & VII.E; text accompanying notes 162-64.

39. The provision is section 25 of the Cable Television Consumer Protection and Competition Act of 1992, and it states:

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.

47 U.S.C. § 335(b)(1) (1994).

40. *Daniels Cablevision v. FCC*, 835 F. Supp. 1, 8 (D.D.C. 1993), *rev'd*, 93 F.2d 957 (D.C. Cir. 1996); see also *id.* at 8-9 (concluding that "[i]n the absence of a record identifying a valid regulatory purpose or some other legitimate government interest to be advanced by conscripting DBS channel space, there is no justification for any First Amendment burdens occasioned by section 25").

41. See *Time Warner Entm't, Inc. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) (concluding that *Turner*'s reasoning for finding the must-carry provisions content-neutral also applied to section 25). But see *Time Warner Co. v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) (contending that section 25 is not content-neutral, because "whereas the must-carry provisions reviewed in *Turner* [I] mandate access for particular stations regardless of their programming content, the DBS provisions speak directly to content, creating an obligation framed in terms of 'noncommercial programming of an educational or informational nature' " (quoting 47 U.S.C. § 335(b)(1) (1994) (emphasis in original omitted))).

42. *Time Warner*, 93 F.3d at 976.

then, that Congress was not responding to any existing harm created by DBS operators. This was classic proactive legislation, passed before DBS had an opportunity to do much of anything, for good or ill.

In fact, the Cable Act of 1992 produced still more examples. One of its provisions directs the Federal Communications Commission ("FCC") to limit the number of subscribers a cable operator may reach,⁴³ and a companion provision directs the FCC to limit the number of channels that can be occupied by a programmer in which a cable company has a financial interest.⁴⁴ Congress justified the limitation on subscribers on the theory that horizontal concentration would harm new and small programmers, and the limitation on channel occupancy on the theory that vertically integrated companies would freeze out unaffiliated programmers.⁴⁵ Time Warner challenged these provisions as violations of the First Amendment, arguing that the harms to which Congress responded were entirely speculative.⁴⁶ Neither the District Court for the District of Columbia nor the D.C. Circuit suggested that any of the feared harms had actually occurred⁴⁷ — and, notably, neither did Congress. As the D.C. Circuit noted, Congress identified as the harm justifying the limit on subscribers that "[t]he potential effects of [concentration in the cable industry] are barriers to entry for new programmers and a reduction in the number of media voices available to consumers,"⁴⁸ and the harm justifying the limit on channel occupancy was that "cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."⁴⁹ Again, the harms that motivated the legislation had not yet been visited on anyone.⁵⁰

43. 47 U.S.C. § 533(f)(1)(A).

44. 47 U.S.C. § 533(f)(1)(B).

45. See 47 U.S.C. §§ 521(a)(4) & (5); see also *Time Warner Entm't. Co. v. United States*, 211 F.3d 1313, 1319-22 (D.C. Cir. 2000).

46. See *Time Warner*, 211 F.3d at 1319 ("Time Warner does not argue that the Congress failed to identify an important governmental interest, but rather faults the Congress for having acted without having made findings, and without having evidence upon which it could have made findings, that either of these problems is a real one."); *id.* at 1322 ("Time Warner argues that the Congress's reason for enacting the channel occupancy provision — to prevent cable operators from favoring affiliated programmers and possibly even excluding others — addresses only a speculative harm because the Congress had no evidence that such exclusionary conduct actually had occurred.").

47. See *id.* at 1319-20 (emphasizing that Congress drew inferences about potential threats to diversity from horizontal concentration); *id.* at 1322 (noting again potential threats, and stating that a vertically integrated operator "may . . . compromise the consumers' interests").

48. 47 U.S.C. § 521(a)(4).

49. 47 U.S.C. § 521(a)(5).

50. The D.C. Circuit relied on the deferential approach to predictive harms enunciated in *Turner II* as its basis for rejecting Time Warner's arguments about the speculative nature

Disputes over predictive harms are not confined to the past. Some brewing controversies also involve such harms. For example, one of the major current battlegrounds in the world of television is a new must-carry issue — the possibility of requiring cable operators to carry broadcasters' digital signals. The federal government has granted each television broadcaster the use of an additional six megahertz of spectrum until 2006,⁵¹ at least some of which must be used to broadcast digital television.⁵² Digital compression technology will allow broadcasters to send multiple digital signals over the six megahertz, if they so choose.⁵³ Broadcasters are pushing the FCC and Congress to require cable operators to carry all of their digital broadcast signals.⁵⁴ Cable operators, meanwhile, consider such digital must-carry to be a more serious intrusion than the must-carry regime at issue in *Turner*, as the multicasting allowed by digital compression would greatly increase the number of cable channels that must be devoted to broadcast signals.⁵⁵ The FCC is currently considering the matter; in July 1998, the FCC issued a Notice of Proposed Rulemaking that laid out options ranging from no must-carry obligations to a requirement that all cable systems carry not only the existing analog stations but also all digital commercial television stations.⁵⁶ The harms that would justify must-carry rules, however, are predictive; neither the broadcasters nor anyone else has marshaled evidence of the harms flowing from the absence of a must-carry regime that would be necessary to justify the imposition of such a regime.⁵⁷ Rather, proponents argue that the ab-

of the harms. That is, the court found not that the harms had already begun, or that they were inevitable, but rather that Congress had drawn "reasonable inferences, based on upon substantial evidence," in identifying these potential harms, and that under *Turner II* no more was required. See *Time Warner*, 211 F.3d at 1319-20, 1322; see also *infra* notes 98-103 and accompanying text [discussing *Turner II*'s deferential approach to predictive harms].

51. See 47 U.S.C. § 309(j)(14) (Supp. V. 1999). Broadcasters do not pay for this use of the spectrum, and the statute allows for extensions of this grant to broadcasters beyond 2006. Subsection (j)(14) provides that the FCC can extend a broadcaster's use of both sets of spectrum beyond 2006 if 15% of the households in a given market do not either subscribe to a multichannel service that carries the available digital transmissions or have a television receiver capable of receiving digital signals.

52. See *Advanced Television Sys.*, 12 F.C.C.R. 12809, 12820, ¶ 28 (1997).

53. See *Advanced Television Sys.*, 11 F.C.C.R. 17771, 17774, ¶ 5 (1996).

54. See, e.g., Brooks Broliek, *Hedlund Tells ALTV to Keep Fighting for Digital Carriage*, HOLLYWOOD REP., Jan. 25, 2000, at 12.

55. See, e.g., Christopher Stern, *Cablers to Battle Must-Carry*, VARIETY, Nov. 1, 1999, at 22; Decker Anstrom, *Should Cable Provide Digital Must-Carry?: No, Cable Networks Shouldn't Be Relegated to Second-Class Status*, ELECTRONIC MEDIA, Jan. 18, 1999 at 36.

56. *Carriage of the Transmissions of Digital Television Broad. Stations*, 13 F.C.C.R. 15092 (1998).

57. See generally Thomas W. Hazlett, *Digitizing "Must Carry" Under Turner Broadcasting v. FCC* (1997), 8 SUP. CT. ECON. REV. 141 (2000); Harris J. Aaron, Note, *I Want My MTV: The Debate Over Digital Must-Carry*, 80 B.U. L. REV. 885 (2000).

sence of a must-carry regime for broadcasters' digital signals will result in noncarriage of those signals,⁵⁸ and that such noncarriage will harm broadcasters to the point that their digital offerings, and ultimately perhaps the broadcasters themselves, will eventually die.⁵⁹ These harms are potentially serious; if they came to pass, their elimination would constitute an important or substantial government interest. But at this point they are speculative.

Another prominent example of predictive harms involves competitors' access to cable modems for the delivery of Internet services. This is the most controversial current issue in the world of Internet access.⁶⁰ Congress and the FCC have thus far refrained from acting,⁶¹ but many localities have mandated such access,⁶² giving rise to litigation.⁶³ In the background, but largely unexamined, looms the issue of predictive harms.⁶⁴

58. *But see* 7 WARREN'S CABLE REG. MONITOR (Sept. 6, 1999), available at 1999 WL 6826118 (noting that AT&T signed its second DTV distribution agreement and the industry's third agreement, agreeing to transmit Fox's 22 major market-owned stations through 2009); *AT&T & NBC Deal: A Digital Template*, MULTICHANNEL NEWS, June 14, 1999, at 6, available at 1999 WL 10009242.

59. *See* Aaron, *supra* note 57.

60. *See* John Schwartz, *How Much Room in the Fat Pipe? Internet Providers' Fortunes Are Riding on Fight for 'Broadband' Access to Homes*, WASH. POST, Sept. 19, 1999, at H1; Corey Grice, *AT&T Case Could Decide Fate of Fast Net*, CNET NEWS.COM, Nov. 1, 1999, at <http://news.cnet.com/news/0-1004-202-1425825.html>; Peter S. Goodman, *AT&T Cable-Internet Case Looms Large*, WASH. POST, Nov. 2, 1999, at E1; *The Battle for the Last Mile*, THE ECONOMIST, May 1, 1999, at 59.

61. *See* David Kaut, *Tauzin, Dingell Ready Broadband Bill, but Face Stiff Resistance from Colleagues*, 4 ELECTRONIC COM. & L. REP. (BNA), No. 26, at 577 (June 30, 1999); Bill McConnell, *Panel Splits on Unbundling*, BROADCASTING & CABLE, July 5, 1999, at 12; FCC CABLE SERVICES BUREAU, *BROADBAND TODAY*, A STAFF REPORT TO WILLIAM E. KENNARD, CHAIRMAN FEDERAL COMMUNICATIONS COMMISSION (1999) [hereinafter *BROADBAND TODAY*]; Internet Ventures, Inc., 15 F.C.C.R. 3247 (2000) (order denying petition for declaratory ruling that Internet service providers are entitled to leased access to cable facilities under section 612 of the Communications Act); Bryan Gruley, *FCC Encourages Court to Stop Portland from Making AT&T Open Cable Lines*, WALL ST. J., Aug. 17, 1999, at A4; FCC OFFICE OF PLANS & POLICY, *THE FCC AND THE UNREGULATION OF THE INTERNET* (1999).

62. Over twenty-five localities have passed, and legislatures in nine states and Congress are considering, legislation that would require cable modem providers to open up their lines to competing Internet service providers. *See* Matt Beer, *Cable on Front Line of Broadband War: Major Internet Players Battling over Access to Your Living Room*, S.F. EXAMINER, June 13, 1999, at B1 (noting such trends in Oregon and California).

63. *See* AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000). Litigation is also underway, at earlier stages, in Broward County, Florida; Henrico County, Virginia; and Madera County, California. *See* Press Release, OpenNet Coalition, OpenNet Coalition Criticizes AT&T/MediaOne Decision to Sue Henrico County over Open Access (Jan. 21, 2000), at <http://www.opennetcoalition.org/news/948493968.shtml>.

64. Some commentators have noted that the harms are predictive, but they have not discussed the constitutional ramifications of the speculative nature of the case for open access. *See* James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 77-90 (2000); Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 COLO. L. REV. 819, 831 (2000).

The essential elements of the dispute are these: Cable operators have begun to offer Internet service via a cable modem through their cables. These cables (generally coaxial) have much greater capacity, and therefore much greater speed, than ordinary, unimproved telephone copper wires. Cable Internet service is thus one of the new forms of "broadband" service — so named because of the greater bandwidth, or capacity, that it offers.⁶⁵ The cable companies have, by and large, contracted with a given Internet service provider ("ISP") to be the exclusive provider of Internet access to their customers.⁶⁶ That is, just as customers pay a monthly fee for cable television and get a specific package of channels aggregated by the cable operator, customers also pay a monthly fee for cable modem service that connects them to a particular provider of Internet access.⁶⁷ Other Internet providers, and some consumer groups, have sought legislation that would

One might argue that laws requiring cable Internet providers to open their wires to competing Internet service providers do not merit heightened First Amendment scrutiny and thus do not raise the same sorts of concerns about predictive harms. This position may seem to gain support from *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). In the course of holding that Portland lacked the authority to regulate cable modem service, the court in *AT&T* stated that cable broadband is a "telecommunications service" that may be subject to common carriage requirements. *Id.* at 878-79. Because any further discussion was unnecessary to the resolution of the case, the court did not discuss the implications of its reasoning, for First Amendment purposes or otherwise. But the opinion raises the question of the First Amendment protections available to cable Internet providers. One problem is that, the Ninth Circuit's conclusion notwithstanding, another court, most commentators, and a lengthy FCC paper have concluded that cable Internet service does not fit into the category of "telecommunications service" and is not, as a statutory matter, subject to common carrier obligations, but instead should be treated as either cable or information service (both of which would be subject to First Amendment protections). See *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000); James B. Speta, *The Vertical Dimension of Cable Open Access*, 71 COLO. L. REV. 975 (2000); Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30, available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp30.txt; Howard A. Shelanski, *The Speed Gap: Broadband Infrastructure and Electronic Commerce*, 14 BERKELEY TECH. L.J. 721, 740-42 (1999); Christopher E. Duffy, *The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251 (2000); see also *Turner I*, *supra* note 7, 512 U.S. at 636 (1994). But in any event, the placement of cable Internet service in a statutory category is not dispositive for First Amendment purposes. Many of the First Amendment concerns discussed in Part I would seem to apply to cable Internet service no matter how it was statutorily characterized. For a fuller discussion of this issue, see generally Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87 (2000). Although the issue is far from clear, the better answer seems to be that open access mandates will trigger the First Amendment inquiry discussed in this Article.

65. See Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomm. Act of 1996, 14 F.C.C.R. 2398, 2406, ¶ 20 (1999) [hereinafter *Advanced Services Order*] (defining broadband as the capacity to provide speeds of transmission permitting users "to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video").

66. See Esbin, *supra* note 64, at 77-81; David Bank, *AT&T Gets At Home Stake in TCI Deal*, WALL ST. J., June 25, 1998, at A16.

67. See Marcus Maher, Comment, *Cable Internet Unbundling: Local Leadership in the Deployment [sic] High Speed Access*, 52 FED. COMM. L.J. 211, 213-16 (1999).

prohibit this arrangement, arguing that the cable companies should not be allowed to send all their customers to a single provider and instead should be compelled to allow all ISPs to provide service to the cable Internet customers.⁶⁸

The ISPs believe that their exclusion from cable modems will weaken their position such that it ultimately harms competition among ISPs and perhaps the competitive structure of Internet services that rely on a competitive ISP industry.⁶⁹ More specifically, their argument is that cable modem service will likely become so popular that it will exercise the sort of bottleneck power that harms competition and thereby justifies regulation of speech-related activities;⁷⁰ indeed, this is exactly the argument that persuaded the plurality in *Turner II*. Such harms, though, do not yet exist.⁷¹ As the FCC recognized when it approved AT&T's merger with cable provider TCI, the market for Internet service is "quite competitive today."⁷² In fact, cable access accounts for a mere 2% of the ISP market;⁷³ cable modem service only recently passed the one million customer mark, as opposed to more

68. See McConnell, *supra* note 61 (describing the legislation).

69. See Patricia Fusco, *Consumer Groups Speak Out in Portland Oregon/AT&T Franchise Case*, INTERNETNEWS.COM (Sept. 16, 1999), at http://www.isp-planet.com/news/consumer_groups.html.

A cable modem subscriber can also choose to utilize an ISP. The ISPs fear, however, that subscribers will drop service with the traditional ISP since most of its services (essentially, everything except the proprietary services offered by ISPs like America Online) will already be provided by the cable-modem companies' Internet provider.

70. See CONSUMER ACTION & CONSUMER FEDERATION OF AMERICA, TRANSFORMING THE INFORMATION SUPERHIGHWAY INTO A PRIVATE TOLL ROAD: THE CASE AGAINST CLOSED ACCESS BROADBAND INTERNET SYSTEMS 58-74 (1999), at <http://www.consumerfed.org/bbreport.pdf>; CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, & MEDIA ACCESS PROJECT, WHO DO YOU TRUST? AOL AND AT&T . . . WHEN THEY CHALLENGE THE CABLE MONOPOLY OR AOL AND AT&T . . . WHEN THEY BECOME THE CABLE MONOPOLY? 11-23 (2000), at <http://www.consumersunion.org/pdf/aol.pdf>; HARRY M. SHOOSHAN III ET AL., STRATEGIC POLICY RESEARCH, MACABLE.COM: CLOSED V. OPEN MODELS FOR THE BROADBAND INTERNET 17-30 (1999), at <http://www.opennetcoalition.org/news/macable10-15-99.pdf>.

71. See Speta, *supra* note 64, at 77-90; BROADBAND TODAY, *supra* note 61, at 32-46; Comcast Cablevision of Broward County, Inc. v. Broward County, Florida, 2000 WL 1741740, at *13 (S.D. Fla. 2000) (finding that "the harm the [cable open access] ordinance is purported to address appears to be non-existent"); Ku, *supra* note 64, at 119. Even those who disagree with the FCC's wait-and-see approach admit that the harms are somewhat speculative. See, e.g., Mark Lemley & Lawrence Lessig, Ex Parte Statement In re: Application for Consent to the Transfer of Control of Licenses Media One Group, Inc. to AT&T Corp., CS Docket No. 99-251, ¶ 54 ("We simply do not know enough to know how sensitive the innovation of the Internet is to changes in this competitive architecture.").

72. Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecomm., Inc., Transferor to AT&T Corp., Transferee, 14 F.C.C.R. 3160, 3206 ¶ 93 (1999).

73. See NATIONAL TELECOMM. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE 38 (1999).

than forty million for traditional dial-up ISPs.⁷⁴ Cable Internet service, in other words, lacks not only a dominant market position but also any current ability to limit competition in the ISP market.⁷⁵ Moreover, it is by no means clear that cable modems will pose the harms that competing ISPs fear. For one thing, cable modem service may not be the wave of the future; competing modes of transmission might prove preferable.⁷⁶ Telephone companies have developed digital subscriber line ("DSL") service for telephone wires, which has broadband capabilities.⁷⁷ Many think that DSL will overwhelm cable Internet service in popularity.⁷⁸ ISPs have access to those wires, so if DSL is the dominant player, then cable's exclusive arrangements with proprietary ISPs may mean little. Furthermore, satellite and fixed wireless providers (as well as more exotic technologies⁷⁹) are gearing up for broadband service and may overwhelm both cable modems and DSL.⁸⁰ Finally,

74. See Patricia Fusco, *Cable Access Providers Top Million Customer Milestone*, INTERNETNEWS.COM (Aug. 2, 1999), at http://www.internetnews.com/isp-news/print/0,1089,8_172801,00.html; BROADBAND TODAY, *supra* note 61, at 32.

75. See BROADBAND TODAY, *supra* note 61, at 23-24.

76. See Jon Healey, *Demand for Data: More, More, Faster, Faster Fiber Optics Light the Way for Rapid Growth of the Internet*, SAN JOSE MERCURY NEWS, May 4, 1999, at 1F, available at <http://www.mercurycenter/news/indepth/docs/data050499.html>; Dana Blankenhorn, *The Sharks Circle*, INTELLECTUALCAPITAL.COM (July 29, 1999), at <http://www.intellectualcapital.com/issues/issue261/item5893.asp>; P. William Bane & Stephen P. Bradley, *The Light at the End of the Pipe*, SCI. AM., Oct. 1999, at 110; Andrzej R. Pach & Zdzislaw Papir, Editorial, *Broadband Access Copper Technologies*, IEEE COMM. MAG., May 1999, at 58; John Skoro, *LMDS: Broadband Wireless Access*, SCI. AM., Oct. 1999, at 108.

77. See, e.g., BROADBAND TODAY, *supra* note 61, at 20-21; John Borland, *Bells Step Up Net Services to Compete with Cable*, CNET NEWS.COM (Oct. 20, 1999), at <http://news.cnet.com/news/0-1006-200-920161.html>.

78. See, e.g., Press Release, Cahners In-Stat Group, *DSL Poised To Overthrow Cable in Global Broadband Battle* (Feb. 28, 2000) available at http://www.instat.com/pr/2000/tx0002sp_pr.htm; ISP-Planet Staff, *ISPs' Rollout of DSL Leave Predictions in the Dust*, INTERNETNEWS.COM (Dec. 3, 1999), at http://www.isp-planet.com/news/cahners_dsl_rollout.html; Paul Roche, *Why DSL Will Win the Broadband-Access Battle*, ZDNET NEWS (Apr. 17, 2000), at <http://www.zdnet.com/zdnn/stories/comment/0,5859,2551062,00.html>.

79. See Andrew J. Glass, *Atlanta Tech: National Players Locked in Fight over 'Fat Pipe'*, ATLANTA J. & CONST., Sept. 15, 1999, at D1 (stating that "several firms are working on technology they claim would allow the existing electrical grid to be used to send data, voice or video signals at speeds that would leave the current cable modem or telephone-based systems in the dust").

80. See, e.g., Dan Gillmor, *Delivering Fiber Speeds Without Needing the Wires*, SAN JOSE MERCURY NEWS, Mar. 14, 2000, available at <http://www.mercurycenter.com/sutech/columns/gillmor/docs/dg031400.htm>; David Barboza, *New Alliance Will Promote Wireless Access to Internet*, N.Y. TIMES, Oct. 26, 1999, at C2; Nora Macaluso, *Report: Wireless to Dominate Web by 2001*, E-COMMERCE TIMES (Apr. 11, 2000), at <http://www.ecommercetimes.com/news/articles2000/000411-3.shtml>; Joshua L. Kwan, *Sprint to Launch High-Speed Wireless Net Access for Home Users*, SAN JOSE MERCURY NEWS, Oct. 23, 2000, available at <http://www0.mercurycenter.com/svtech/news/front/docs/sprint102400.htm>; Gerry Blackwell, *Broadband Now — The Wireless Way*, INTERNETNEWS.COM (Dec. 1, 1999), at http://www.isp-planet.com/technology/wireless_reselling.html; Katie Hafner, *No Cable? No D.S.L.? Try Satellite*, N.Y. TIMES, Nov. 23, 2000, at G1; Price Colman, *EchoStar Ramps Up Data Delivery*, BROADCASTING & CABLE, Aug. 24, 1998, at 47; Clint Boulton, *Cisco Leaps*

even absent regulation the cable modem providers (spurred, in all likelihood, by customer preferences) may well decide to allow different ISPs to provide service to their customers.⁸¹ The relevance of all this is that the harms that could give rise to a substantial or important government interest have not yet arisen.⁸² Such harms are predictive rather than actual.

III. SUPREME COURT RESPONSES TO PREDICTIVE HARMS

The Supreme Court has tended not to distinguish predictive harms from other kinds of harms, and indeed other kinds of legislative findings. At the same time, the Court has not been consistent about the degree of deference that it applies to legislative assertions of harm. I think these two phenomena are related, and that a distinction between current and predictive harms will provide a better basis for determining how to treat each.

into *Broadband Fray*, INTERNETNEWS.COM (Oct. 26, 1999), at http://www.internetnews.com/article/%2C1087%2C8_225991%2C00.html; BROADBAND TODAY, *supra* note 61, at 21-22; Corey Grice, *The Next Wave in Fast Net Access*, CNETNEWS.COM, July 28, 1999, at <http://news.cnet.com/news/0-1004-201-343783-0.html>.

81. See Speta, *supra* note 64; BROADBAND TODAY, *supra* note 61, at 44-46; Advanced Services Order, *supra* note 65, at ¶¶ 93-101.

A number of such agreements have already been announced (although the degree to which the spur was the threat of proactive legislation, instead of customer preferences, is not clear). For instance, Time Warner has reached agreements with Earthlink and Juno (both Internet Service Providers not affiliated with Time Warner) that allow each to offer Internet service to Time Warner's cable Internet customers over Time Warner's cable Internet lines, and Comcast has reached a similar agreement with Juno. See Saul Hansell, *Time Warner Makes Access Deal With Earthlink*, N.Y. TIMES, Nov. 21, 2000, at C1, available at <http://www.nytimes.com/2000/11/21/technology/21TIME.html>; James Evans, *Earthlink, Time Warner Reach Broadband Deal*, THE INDUSTRY STANDARD, Nov. 20, 2000, available at <http://www.thestandard.net/article/display/0,1151,20315,00.html>; Alec Klein, *Time Warner, Earthlink Reach Deal*, WASH. POST, Nov. 21, 2000, at E1, available at <http://washingtonpost.com/wp-dyn/articles/A46686-2000Nov20.html>; *Time Warner to Let Internet Provider Use Cable System*, N.Y. TIMES, Aug. 1, 2000, at C2; *Time Warner, Juno Make Deal*, NEWSDAY, Aug. 1, 2000, at A45; Peter S. Goodman & Alec Klein, *Comcast, Juno Strike Net Access Deal*, WASH. POST, Nov. 29, 2000, at E4, available at <http://washingtonpost.com/wp-dyn/articles/A1566-2000Nov28.html>; Thor Olavsrud & Jim Wagner, *Juno, Comcast Form Open Access Pact*, INTERNETNEWS.COM, at http://www.isp-planet.com/news/juno_comcast.html.

82. See BROADBAND TODAY, *supra* note 61, at 23-30, 32-39 (noting nascence of cable modem service, dominance of narrowband service, and surfeit of other broadband options that might prove preferable to cable modem service); Ku, *supra* note 64, at 120 (stating that, "while the market for Internet access may have the potential to become uncompetitive at some point, any conclusion that it is or will become so soon is both premature and speculative"); Jason Riley, *Faster Web Access Coming (One Day) to a Home near You*, WALL ST. J., July 14, 1999, at A23 (noting that advocates of open access to cable modems "are acting on assumptions that could prove false"); William E. Kennard, *How to End the World Wide Wait*, WALL ST. J., Aug. 24, 1999, at A18 (emphasizing the uncertain future development of the broadband market and stating that "[w]e cannot regulate against problems that have yet to materialize in a market that has yet to develop"); McConnell, *supra* note 61, at 12 (quoting U.S. Representative Zoe Lofgren as stating, of cable modems' market position, that "[t]o say 1% [market share] is a monopoly is preposterous," and U.S. Representative Martin Meehan as saying that unbundling of cable modem service "seems premature at this point").

There are two different responses that the Court has had to legislative findings in the First Amendment context, and they are in some tension with each other. The first is a general (i.e., not specific to the First Amendment) principle of deference to legislative factfinding. The Court has emphasized legislatures' (and in particular Congress's) greater institutional competence — their expertise, factfinding capabilities, etc.⁸³ — in positing that courts owe deference to legislative findings.⁸⁴ This has arisen in a number of cases not involving the First Amendment,⁸⁵ but also has been intimated in the First Amendment context.⁸⁶ The second strain is specific to the First Amendment: the Court has expressed an unwillingness to defer to legislative factfinding. For example, in *Landmark Communications, Inc. v. Virginia*⁸⁷ the Court emphatically stated that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.”⁸⁸

Some Supreme Court First Amendment opinions simply adopted this second position.⁸⁹ Other cases, though, invoked both traditions and attempted to create a coherent whole.⁹⁰ An early attempt at such a combination was *Columbia Broadcasting System, Inc. v. Democratic National Committee* (“CBS”).⁹¹ There, the Court stated that legislative findings were subject to “great weight,” but “[t]hat is not to say we

83. Institutional competence is discussed at greater length *infra* Part VII.A.

84. See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) (“When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.”).

85. One example is *Rostker v. Goldberg*, 453 U.S. 57, 72-74 (1981) (deferring to Congress's judgments about the propriety of excluding women from the draft).

86. *Walters* is an example of such apparent implicit deference. Its language on deference to legislative findings occurred in the context of its rejection of a due process claim, 473 U.S. at 320-34, but its subsequent brief discussion of the First Amendment claim in the case treated the latter claim as inseparable from the due process claim, *id.* at 335.

87. 435 U.S. 829 (1978).

88. *Id.* at 843.

89. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (quoting and relying upon the statement from *Landmark Communications*); *FCC v. League of Women Voters*, 468 U.S. 364, 388 n.18 (1984) (same).

90. The same is true for lower courts that are faced with the unenviable prospect of trying to determine what standard the Supreme Court applies. Different lower courts have devised diverging approaches to the deference owed to legislative findings in the First Amendment context. Some seize on one strand or the other, see, e.g., *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1221 (8th Cir. 1997) (emphasizing deference), whereas others, following the lead of cases like *Turner I*, simply articulate the importance of both deference and independent judgment, and then try to muddle through somehow, see, e.g., *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995).

91. 412 U.S. 94 (1973).

'defer' to the judgment of the Congress."⁹² The opinion then immediately followed up by stating: "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem."⁹³ The apparent balance was that the Court would not defer to the legislature, but it would find the legislature's views weighty and useful.

The two strains arose again in *Turner*, but this time with a different casting of the balance. In *Turner I*, the Court began its discussion of deference by saying that "courts must accord substantial deference to the predictive judgments of Congress,"⁹⁴ emphasizing that "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here."⁹⁵ But the Court went on to state:

That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law." This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.⁹⁶

The Court thus dealt with the same tension between deference and independent review, and, as in *CBS*, tried to mediate between the two. There was a difference, however; although *Turner I*'s standard was less than pellucid,⁹⁷ it did indicate that deference would be appropri-

92. *Id.* at 102-03.

93. *Id.* at 103.

94. *Turner I*, *supra* note 7, 512 U.S. at 665 (1994).

95. *Id.* at 665-66 (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)).

96. *Id.* at 666 (internal citations omitted) (quoting *Sable Communications, Inc. v. Virginia*, 492 U.S. 115, 129 (1989), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 820, 843 (1978)).

97. Some of the Court's terminology was lifted from other contexts, so its application to legislative findings is somewhat opaque. For instance, "substantial evidence" is a term of art in administrative law, where it describes the review that courts give to agency determinations of fact in formal adjudications. Before *Turner*, the Court had never attempted to apply that standard to legislative findings; and, to add to the confusion, the Court disclaimed any attempt at actually requiring Congress to compile a record, as an administrative agency must. Moreover, the standard, even as applied to administrative law, is fairly muddy; the classic statement is that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). On this issue, and other ambiguities in the *Turner* test, see Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162, 1166-70 (1997).

ate. The Court not only would pay careful attention to the legislature's views, but also would give them substantial deference.

After the remand in *Turner I*, the Court took another crack at characterizing its approach to legislative findings, and it appeared to tilt further away from independent review. The Court stated that its "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'"⁹⁸ Gone was any reference to, or suggestion of, the Court's "independent judgment," or independent review more generally. In its place were statements like the following:

The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress' findings and conclusions, including its findings and conclusions with respect to conflicting economic predictions.⁹⁹

The larger significance of *Turner I* and *Turner II*, for my purposes, is that the Court did not reveal any consideration of the possibility that the predictive harms it was facing might appropriately be treated with greater suspicion than current harms would be treated. The Court clearly considered the relevant harms to be predictive ones, referring repeatedly to the fact that the asserted harms to broadcast had not yet occurred and that the legislative assertions of such harms were therefore predictions.¹⁰⁰ But the Court did not articulate any greater wariness about reliance on such predictions, or suggest that they raised different issues. Instead, the Court offered general arguments in favor of deference. In fact, if anything the Court suggested that greater deference for predictive harms might be appropriate; insofar as it distinguished predictions, it offered the distinction as an additional justification for deference. Thus, in *Turner I* the Court's first supporting statement after its pronouncement of deference was that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable."¹⁰¹

98. *Turner II*, *supra* note 7, 520 U.S. at 195 (emphasis added) (quoting *Turner I*, *supra* note 7, 512 U.S. at 666).

99. *Turner II*, *supra* note 7, 520 U.S. at 199.

100. See *Turner I*, *supra* note 7, 512 U.S. at 665-67; *Turner II*, *supra* note 7, 520 U.S. at 185, 188, 191, 195-96, 199, 204, 207, 211.

101. *Turner I*, *supra* note 7, 512 U.S. at 665 (citing *FPC v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 29 (1961) and *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978)). The notion of deference to forecasts was initially articulated in the context of ordinary economic regulation and later was extended, without any suggestion or discussion of the difference that the First Amendment might make, to speech regulation. The original source was *Transcontinental Gas*, which, as the case name might suggest, involved

Turner I did offer one glimmer of a move toward greater wariness about predictions: the Court emphasized that “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’ It must demonstrate that the recited harms are real, not merely conjectural.”¹⁰² In *Turner II*, however, the “not merely conjectural” part of the formulation fell out of the equation (in fact, all forms of the word “conjecture” were banished entirely), and the “real” was de-emphasized as well.¹⁰³

This was an important road not taken, as some forms of predictions are different from other harms, and we should recognize those differences. The key lies in the Supreme Court’s own language about “real, not merely conjectural” harms. The Supreme Court ignored the import of these words, and I think that was a mistake, because predictive harms are conjectures, and that should make us wary. We must look closely at the significance of the predictive element — the very element that the Court glossed over. Once we see these as predictions, rather than findings of existing fact, we not only see that they bear less resemblance to ordinary factfinding than we may have supposed, but also that they bear more resemblance to other sorts of predictions than we may have imagined at first blush.

IV. DISTINGUISHING PREDICTIVE HARMS FROM OTHER FINDINGS

The previous section raises an obvious question: What is the difference between predictive harms and other kinds of findings? Isn’t legislation filled with predictions, and isn’t even reliance on a current

gas regulation and had nothing to do with the First Amendment. In the course of reviewing a challenge to such economic regulation, the Court stated: “[W]e think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.” 365 U.S. at 29. In *National Citizens Committee for Broadcasting*, this language crossed over to the First Amendment context. 436 U.S. at 814 (“[C]omplete factual support in the record for the [FCC’s] judgment or prediction is not possible or required; ‘a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.’” (quoting *Transcontinental Gas*, 365 U.S. at 29)); see also *Turner II*, *supra* note 7, 520 U.S. at 196 (quoting this language from *National Citizens Committee for Broadcasting* as justifying deference to forecasts). The Court thus ended up applying the same principle of deference in speech and non-speech contexts. This Article, of course, contends that the two contexts should be treated differently.

102. *Turner I*, *supra* note 7, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

103. The two relevant appearances of the word “real” in *Turner II* are noteworthy. In recapitulating *Turner I*, the Court referred to the question on remand of whether there was a “real harm.” *Turner II*, *supra* note 7, 520 U.S. at 195. But in presenting its resolution of that question, *Turner II* stated that “[w]e have no difficulty in finding a substantial basis to support Congress’ conclusion that a real *threat* justified enactment of the must-carry provisions.” *Id.* at 196 (emphasis added).

harm a prediction of sorts, such that there is no reason to treat predictive harms differently?

It is true that legislation involves predictions. Most saliently, there are three basic predictions that are implicit, and sometimes explicit, in the context of judicial review of legislation for constitutional purposes: the legislation will alleviate the harm at which it is aimed; it will not have excessive spillover effects on other activities; and other, less intrusive legislative options will do less good and/or more bad. The first prediction essentially compares the legislation to the existing state of affairs before the legislation was passed and asks whether the legislation will actually mitigate the problem that it is designed to mitigate. The second asks whether the means chosen are broader than necessary to mitigate the problem. And the third prediction compares the legislation to other, hypothetical worlds that would be created if other legislation was passed.

Although the formulation of these predictions comes from the world of judicial review (more particularly, strict scrutiny¹⁰⁴), these predictions are — or should be if the legislature is acting in good faith — inherent in the legislative process. Even if the legislature never actually articulates them, they are part and parcel of legislation. Passage of legislation entails a prediction that the statute will alleviate the harm to which the legislation responds. The legislature may not explicitly so state, but it is implicit in the passage of the statute; the legislature is acting, presumably, because it sees a problem and has devised a legislative response that, it predicts, will mitigate that problem. Similarly, where constitutional interests are at stake, a relevant question is whether the statute will affect constitutional rights that are not part of the harm to be eliminated; this, too, is a prediction about the impact of the legislation. And in cases involving constitutional interests legislatures are also likely to make — and courts will require under heightened scrutiny — a prediction that other, less intrusive forms of regulation would not have the same beneficial effects as would the legislation that was actually passed.¹⁰⁵ Again, this is a prediction about a state of affairs under a legal regime — here, the hypothetical regimes that would be created by various alternatives.

104. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126-27 (1989); *Boos v. Barry*, 485 U.S. 312, 321-29 (1988).

105. In cases involving strict scrutiny, the existence of a less restrictive alternative will usually be fatal to the challenged statute. See, e.g., *Sable Communications*, 492 U.S. at 130-31. In cases involving heightened but not strict scrutiny (such as content-neutral regulatory and commercial speech contexts), the existence of a less restrictive alternative is not fatal, but it does cast doubt on the statute's satisfaction of the tailoring requirement. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (stating that other options, "all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the challenged provision] is more extensive than necessary"); *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989).

To be sure, these predictions usually have significant elements of law and policy. When a legislature implicitly (or explicitly) contends that a given enactment will achieve the legislature's goals, contained within that proposition is the legislature's choice of a particular goal. A prediction that there will not be an excessive effect on other rights includes a notion of what would be excessive. Similarly, an assertion that no less restrictive alternative would be equally effective entails an implicit measuring stick of what constitutes effectiveness. But the predictions also have a significant factual element. Once the legislature determines what it wants to achieve, there is still the factual question of whether its legislation will actually advance that goal, and whether another route would advance it further. The legislature, in other words, is also making an old-fashioned factual prediction regarding what will actually happen under a particular legal regime.

It may be difficult for courts to determine how to deal with the legal and policy determinations. Factors such as the perceived gap in democratic accountability might lead courts to be wary about second-guessing a legislature, but by the same token great deference would eviscerate the courts' role. More relevant for my purposes, it may be difficult to separate the factual elements of a prediction from the policy and legal elements. A question like the one of fit — is this legislation tailored to the problem at hand — has such a massive overlay of legal and policy elements that it is difficult to ask the factual question without bringing in policy and legal considerations.

But courts in fact deal with such problems frequently, particularly in administrative law contexts where determinations of law, fact, and policy may be bound up in a single decision but nonetheless must be separated for purposes of judicial review because each is subject to a different standard of review.¹⁰⁶ The factual predictions may be hard to identify, but at least in theory they lay discoverable within these combined determinations.

Arguably, legislation entails another prediction as well — that the harm that the legislation seeks to minimize will not go away on its own as quickly and as fully as it would via effective legislation, and thus the legislation is responding to a real harm. That is, one might argue that what really matters is not whether the proffered harms existed last year, or the day that the legislation was passed, or, most significantly,¹⁰⁷ on the day that the final appellate court rules on the constitutionality of the relevant piece of legislation, but instead whether those

106. See, e.g., *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974) ("The Secretary's task . . . contains 'elements of both a legislative policy determination and an adjudicative resolution of disputed facts.' Although in practice these elements may so intertwine as to be virtually inseparable, they are conceptually distinct and can only be regarded as such by a reviewing court." (internal citations omitted) (quoting *Mobil Oil Corp. v. FPC*, 438 F.2d 1238, 1257 (1973))).

107. On the reason why this is the most significant date, see *infra* note 109.

harms will exist in the future, and that in this sense all harms are equally predictive. Is there any difference between these existing harms and what I am calling predictive harms?¹⁰⁸

It is important to focus on what is being predicted about current harms — namely, that a currently existing harm will not go away on its own as quickly and fully as it would have without effective legislation. All we are assuming, then, is that a harm that arose in the existing legal environment will tend to continue at least for some period of time unless the legal environment is changed, or that, even if the harm would have gone away on its own at some point, the legislation (assuming that the legislation is effective, which is a separate prediction) will likely send it to an earlier grave. There may be occasions when these predictions are unfounded. The best example that comes to mind would be legislation enacted in 1999 that limited speech about the Y2K bug in order to allay then-existing fears that the Y2K bug would wreak havoc on January 1, 2000. The legislation addresses an existing harm — a palpable, demonstrable concern on the part of millions of people. It just so happens that this concern involved an event on a date certain in the future (thereby giving us an opportunity to create a hypothetical under which a currently existing harm will go away on its own). So, if a litigant brought a declaratory and/or injunctive action against this legislation, and the court heard the case such that it was ready to issue its opinion in very late December, the court might fairly say that the legislation responded to a current harm that would go away on its own absent any (further) implementation of the legislation, so that no existing harm could justify the legislation.¹⁰⁹

108. It is worth noting that this raises a question of temporal perspective. When a court issues retrospective relief, it obviously is examining facts that have already been established; future changes to those facts presumably are irrelevant to the matter of retrospective relief. When a court issues prospective relief, changes in the facts will be relevant; if a party brings forward evidence that facts have changed such that the prospective relief is no longer justified, it seems incumbent upon the court to alter its relief. But most litigation challenging the constitutionality of a statute seeks declaratory relief, which has at least the appearance of being concerned solely with the present. If so, then perhaps in declaratory actions we would not care about the future existence (or nonexistence) of any fact, but rather would focus exclusively on its present status. This vision of declaratory relief seems too crabbed, however. Of course the present is the central focus of any declaratory relief, but any disposition will have an effect on the future as well. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEXAS L. REV. 269, 276-80 (1999).

109. Some readers may wonder about a different possibility — namely that the government uses this Y2K legislation to clamp down on speech even after January 1, 2000 despite the passing of the justification for the legislation, and a suit challenging the legislation reaches a court in 2000 (or thereafter). Insofar as the court relied on a legislative finding (in 1999) of a then-current harm, wouldn't this also be a case of the predictive element of a current fact no longer being valid, and yet being treated as a current fact? The answer to that question is yes, insofar as a court relied on that finding. But, as I discussed at some length in Benjamin, *supra* note 108, it is troubling for a court — including an appellate court — to rely upon outdated findings. If a party brings forward strong evidence indicating that a finding is no longer valid in a case involving prospective relief, a court should reconsider that finding,

This is not necessarily the only potential example. The problem is that we are trying to determine how often a problem will go away just as quickly without legislation as with it; and once the legislation is implemented, we will never know what would have happened without the legislation. But it seems likely that the frequency of such spontaneous dissipation on the same schedule with or without effective legislation is fairly small (unless we believe that most legislation is superfluous — and the massive costs of lobbying for those backing proposed legislation would seem to indicate otherwise).

Predictive harms, meanwhile, contain the same predictions as current harms (namely, that the relevant harm will not go away without legislation as quickly and fully as it would with effective legislation) plus the further prediction that the harm will arise in the first place. That is, rather than assuming only that an existing harm will not be subject to the same speed and extent of diminution on its own, the legislation assumes that a harm that has not yet managed to arise under the existing legal regime will do so and that the harm will not be subject to the same speed and extent of diminution on its own. This additional predictive element seems to significantly increase the uncertainty. To put the point a bit differently, our only prediction with respect to an existing harm is that effective legislation could shorten or diminish its reign of terror (*vis-à-vis* its duration and severity absent legislation). With predictive harms, we must not only predict that, but also that a harm that does not currently exist will arise in the first place — a prediction about which we are likely to have much less confidence.

One way of looking at this issue is to ask whether we would care, in a case involving declaratory and/or injunctive relief, if the proffered harm that formed the basis of the injunction had never actually occurred. We would care, because the absence of the occurrence of the harm would deprive us of confidence that the harm would ever arise. If, on the other hand, the harm had occurred, then we would have existence proof that the harm was not just a nice theory but instead was a real concern. In both cases, we would be dealing in probabilities — the probability of an existing harm continuing to exist versus the probability of a harm that had never existed coming into existence — but the differences in those probabilities would be quite great.

There is also a different distinction between what I am calling current and predictive harms. As I mentioned above, the predictive element in current harms is an unavoidable aspect of the legislative (and judicial) process. Whenever a legislature acts on a harm, the legislature implicitly or explicitly assumes that the harm will exist without

rather than simply rely on it. *See id.* at 314-27. Accordingly, the relevant final date for the predictive element of a finding of current harm is not the date on which the legislation is passed, but rather the date on which the final appellate court issues its final ruling.

the legislation longer than it will exist with the legislation. No matter how long the legislature waits before it acts, and no matter how long a court deliberates before it issues its opinion, there is no getting around this predictive element of legislation. What I am calling predictive harms, however, stand on a different footing. Legislating before a harm appears is not inherent in the legislative process and is avoidable.

This brings us back to the three basic legislative predictions with which I began this discussion — that the legislation will achieve its goals, that it will not adversely affect other rights, and that a less restrictive alternative would not do a better job. How, if at all, are they different from predictive harms?¹¹⁰

With respect to the other predictions entailed in legislation, delaying¹¹¹ implementation of the legislation will not give us any additional information: the predictions either never will be borne out (the hypothetical prognostications about the effects of alternate forms of legislation), or they will be borne out only once the legislation goes into effect. With respect to predicted harms, however, there is a way that we can test the predictions to see if they are accurate, but such testing requires that the legislation not go into effect. Once the legislation is implemented, we cannot know whether the harm would actually have arisen. Thus, we can gain greater information about the extent of the harms, and we can do so through delaying implementation.

This, in turn, highlights the way that a prediction of harm is a linchpin for other determinations. If the legislation goes into effect before a harm arises, and the harm does not arise, there are two possible explanations: first, the harm would have arisen, but the legislation prevented that harm; or, second, the harm would never have arisen, and therefore the legislation's effectiveness is unclear. The first sce-

110. One might be tempted to answer that one difference is that predictive harms are a necessary precondition to a legislature validly legislating in the first place. If there is no possible harm, then there is nothing to which the legislature need respond. It is true that we do not even get to the question of the effectiveness of legislation or of possible alternatives if there is no cognizable harm to be addressed via legislation. The existence of a harm is a prerequisite for these other considerations, not only as a matter of the formulation of the judicial tests (which begin by asking what harm the legislature is responding to), but more importantly as a matter of logic; the effectiveness of legislation presumes that there is something appropriate to legislate about in the first place.

This distinction is of quite limited significance, however. Although the existence of a harm is logically prior to the existence (and therefore effectiveness) of legislation, all of these elements (a harm, effective legislation, tailoring, and the absence of less intrusive alternatives) are necessary preconditions to valid legislation that infringes upon free speech rights. One may come before the others, but all are ultimately necessary. Thus one could also say that the direct alleviation of a harm is also a *sine qua non* of legislation, a hurdle every bit as significant as the requirement of a harm in the first place.

111. We should see invalidation of legislation as delaying its implementation, because courts should revisit their old opinions when the facts change — here, when the predicted harms actually arise. See *infra* notes 143-47 and accompanying text.

nario would vindicate both the prediction of harm and the prediction that the legislation would alleviate that harm. The second scenario would demonstrate the falsity of the prediction of harm and tell us nothing about the effectiveness of the legislation. But we could never know which scenario was the accurate picture.¹¹² Thus, allowing the legislation to go into effect before a harm arises also deprives us of an ability to judge another crucial element of the legislation — namely, whether it actually alleviates the relevant harm.

V. A PRESUMPTION AGAINST PREDICTIVE HARMS

The previous sections indicate that predictive harms are different from other kinds of predictions, and from current harms, most notably in that they are avoidable in the legislative context in ways that other findings are not. But that still leaves the question of the circumstances under which we *should* avoid them; just because they are avoidable does not mean that avoidance is necessarily the right course.

We can posit a basic answer to that question: we should avoid reliance on predicted harms (i.e., wait until they become actual harms) where the expected value of such avoidance is greater than the expected value of waiting.¹¹³ Of course, it is difficult to draw that line, but that is always the case in constitutional law, in light of the incommensurabilities. The real problem is that this answer is at such a high level of generality that it is not terribly useful. Thus the question is how we flesh out that calculus.

112. An old joke involves a person chanting in the middle of New York City. A passerby asks the chanter why he is chanting. He replies: "To protect New York from the Bengal tigers" (or some other species not found in New York). The passerby says: "But there are no Bengal tigers in New York." To which the chanter replies: "See? My chants are working."

113. We can put the calculus in equation form. Indeed, Judge Posner has suggested an equation that would apply to First Amendment issues more generally. His is a modification of the familiar $B < P \times L$ formula (where B is the burden, or cost, of the regulation, P is the probability of the harm that the regulation is intended to avoid, and L is the magnitude of that harm). He separates B into two components — V (for "value"), the social loss from suppressing valuable information, and E (for "error"), the cost of error. Meanwhile, he discounts L to present value, because the harm from allowing the relevant speech may not be incurred for several years. "With these adjustments, the . . . formula becomes $V + E$ less than $P \times L / (1 + i)^n$, where n is the number of periods between the utterance of the speech and the resulting harm and i is an interest or discount rate which translates a future dollar of social cost into a present dollar." Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *SUFFOLK U. L. REV.* 1, 8 (1986); see also John E. Lopatka & Michael G. Vita, *The Must-Carry Decisions: Bad Law, Bad Economics*, 6 *SUP. CT. ECON. REV.* 61, 86-87 (1998). This equation is interesting, but it is not clear that it advances our inquiry beyond the verbal formulation offered in text. Ultimately, we are measuring the costs (to First Amendment interests) of enforcing a statute immediately versus the costs (in the forms of cognizable harms) of waiting. The equation may give a false sense of precision, because these two sets of considerations are not really commensurate.

A. Which Harms?

We can begin with a basic question: For what sort of harms might there be a value to waiting? The obvious answer is harms for which we do not have sufficient information now but likely will later. That is, we should treat as a separate category harms that are predictive but verifiable/falsifiable.

The first issue is whether a harm has already arisen that would justify this legislation. A harm is predictive if we have not reached whatever level of injury we ordinarily require in order to say that a cognizable harm exists in nonpredictive contexts. In the examples from Section II, the problem was that there was no basis for saying that the absence of must-carry, or the absence of a broadband "open access" rule, had resulted in an important or substantial harm in the world at the time of adjudication (or, in the case of broadband access, today).¹¹⁴ There is obviously no bright-line rule for determining when this threshold is crossed. It is difficult to determine exactly where the tipping point lies, such that the existing injuries now constitute a cognizable harm, without reliance on future developments of worse injuries. And of course there can always be further proof; we can have one more study or analysis, which will add to our corpus of knowledge. But at some point we have enough. Although we could add another study, we feel that we have enough information to say that there are current injuries flowing from the conduct covered by the regulation that satisfy the relevant standard — "important," "compelling," etc. These are thorny matters, but they are the sort of legal determinations that courts make all the time; courts look at the evidence of injury to determine whether it justifies the relevant piece of legislation.¹¹⁵ In fact, that is a core legal issue that all courts address in every case. So, though determining exactly when a harm exists is difficult, it is nothing new.

If there is not sufficient evidence of a current harm, then the harm is predictive. But waiting still does not make sense if we will also lack sufficient evidence in the future. Thus a second, related, element is whether or not it is the sort of harm that is verifiable/falsifiable, and therefore for which more time will give us more information.¹¹⁶ In the examples above, further experience with broadcast television, and with ISPs, will tell us more about the degree to which they suffer from

114. See *supra* note 109.

115. Cf. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596-97 (1993) (discussing the level of confidence needed to satisfy a court about the admissibility of a scientific assertion).

116. Cf. KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 37 (5th ed. rev. 1989) (emphasizing the importance of the "falsifiability, or refutability, or testability" of a system).

cable television and cable modems, respectively. There is, in other words, a benefit to waiting in terms of additional information and thus proof of harm.

But that will not always be the case. For some assertions, it is hard to imagine what new evidence could prove. An example would be the assertion that "exposure to religion helps children." The problem is that many things — here, the development of children — are so overdetermined that we can have little confidence that we can ever satisfactorily separate out a factor. We could imagine studies that might give us useful information, but the confidence level created by these studies still would probably be fairly low. One way of looking at this is that these "predictive harms" bleed into policy and legal judgments. We could try to come up with some evidence to demonstrate whether prolonged exposure to television programming makes for a politically inactive citizenry, and studies could add texture to our judgments and thereby enhance our ability to answer the question, but ultimately this seems like the sort of zeitgeist judgment that is not meaningfully provable.¹¹⁷ As a result, even though this may be a "predictive harm" in the literal sense of the words, it is also a harm for which no more proof will be coming, so there is no point in waiting. It may be — and assuredly will be — difficult to determine whether the harm actually exists, but the harm is not predictive in the sense that predictions ordinarily can be tested and thus can await confirmation or disproof. Additional time gives us nothing, so the underlying concern about "predictive harms" — namely, that they are precipitous because they await clarification — does not obtain.

On the other hand, some assertions seem eminently provable. Will DVD players displace VHS players? Admittedly, we may never achieve certainty on this question, but, with more information, we could answer the question with enough evidence of displacement that it would be sufficient to satisfy our threshold for what constitutes a cognizable harm.¹¹⁸ Although it is virtually impossible to categorically rule out an alternative explanation for any phenomenon, we can reach an answer with a sufficient level of probability to leave us confident in the answer.¹¹⁹ With harms that deal with the shape of industries or the

117. See, e.g., GEORGE COMSTOCK, *THE EVOLUTION OF AMERICAN TELEVISION* 9 (1989) (noting that "there are . . . some questions that are difficult or impossible to confront directly in any sound way by available methods and techniques").

118. See generally Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998).

119. See Barry L. Shapiro & Marc S. Klein, *Epidemiology in the Courtroom: Anatomy of an Intellectual Embarrassment*, in 1 PHARMACOEPIDEMIOLOGY 87, 98 (Stanley A. Edlavitch ed., 1989) ("Both science and law seek to determine what *probably* occurred based on *all* of the relevant evidence When that degree of conviction has been reached, we are prepared to say that a hypothesis has been 'proven.'").

absorption of new technologies, our knowledge *ex post* will be much greater than our knowledge *ex ante*.¹²⁰

As with the issue of when current injuries are sufficient, this question of provability involves a matter of line-drawing, with the usual difficulties that line-drawing presents at the margins. Just as there is a continuum of harms, but at some point a court must determine whether there is sufficient harm to justify a piece of legislation, so too there is a continuum of verifiability, but at some point a court must determine whether a particular prediction is verifiable or not. (And, in fact, this is exactly the sort of determination that the Supreme Court directed courts to make, and that courts as a result routinely make, in deciding whether to admit proffered scientific testimony.¹²¹) Both determinations are difficult, but both seem necessary in identifying a category of harms for which waiting for further developments might be appropriate.¹²²

B. *Costs of Relying on Predictive Harms*

That still leaves the question, though, of what sort of benefit there may be to waiting (or, if you prefer, the cost of considering legislation

120. See *Developments in the Law — The Law of Cyberspace*, 112 HARV. L. REV. 1575, 1656 (1999) (arguing that lawmakers should adopt a “wait-and-see” strategy regarding regulatory restraints on rights-management technologies, because we will know more about the potential harms of such technologies after they are developed).

This distinction maps unevenly onto the most famous distinction between facts, namely the legislative/adjudicative fact distinction. Legislative facts “do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion,” whereas adjudicative facts are those “pertaining to the parties and their businesses and activities.” 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12:3, at 413 (2d ed. 1979); see also FED. R. EVID. 201 advisory committee’s note (“Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.”). Adjudicative facts will almost always be provable. The examples in the text, however, would probably be better understood as legislative facts (although this is far from clear, and in fact highlights the difficulties in application of the legislative/adjudicative distinction). Once one moves beyond paradigmatic examples there is wide disagreement — even between Kenneth Davis, who originated the distinction, and the Reporter for the Federal Rules of Evidence, who adopted the distinction for Rule 201. See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5103 (2d ed. 1987). What I am talking about arguably are “legislative facts” in the sense that they often will extend beyond a specific course of action between parties. But insofar as some treat the term “legislative facts” as focusing on facts that are really unprovable policy judgments, such a category would not include what I am calling predictive harms.

121. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) (stating that “a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested”).

122. This focus has some overlap with the concerns that motivated Judge Posner in *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998), but he was focusing on the good that empirical work could do. I am focusing on some less obvious ways that it might actually be implemented.

while the harm is speculative). When we are confronted with predictive but provable harms, why should we want to wait?

1. *Current Constitutional Abridgement Versus Potential Harm*

We can begin by focusing on an obvious but important point: We are positing a situation in which a statute currently infringes upon a constitutional right in order to stave off a problem that may arise in the future, and it is not necessary that such an imbalance exist. That is, we are relying on a predictive harm in infringing upon a constitutional right even though we could wait for the harm actually to arise. In light of these considerations, a general proposal presents itself: we should be warier about legislation premised on such predictive harms than we are of legislation premised on existing ones.

Why the extra wariness? First, there is the problem of current rights sacrificed for no good reason. Courts and commentators often focus on the problems of legislatures acting in bad faith. A central reason why we worry about bad faith is that the legislature's findings might be a false predictor. The presumption of regularity that we might normally accord to legislative findings would seem inappropriate where we have reason to doubt the legislature's reliability. What if legislative findings are a false predictor not because of bad faith but instead because the future is unknowable and the legislature may be Chicken Little? In such a situation, many of the same concerns should arise for purposes of review of the legislation. We might be allowing the legislature to infringe upon constitutional rights without an adequate basis for doing so.

Second, if we are going to treat predictive harms the same as current harms, we may create an incentive for quick action on the part of a legislature desirous of a particular regulation whether or not the harms that would satisfy a court (and that, presumably, should motivate the legislature) materialize. The legislators know that harms sufficient to satisfy a court may not arise, so they might act when they can just rely on predictions. That is, a legislature that wanted to regulate would do so when the harms were merely predictive, knowing that nothing would be lost by doing so (because the review would be the same) but something important might be gained — namely the constitutionality of legislation that might not end up being constitutional if the legislature delayed and the harm never arose in the way that the legislature feared/hoped.

This suggests that, when fundamental constitutional rights are in the balance, the uncertainty of predictive harms should trouble us. The point of heightened scrutiny is that courts should look carefully at legislative determinations to see if the legislature is trammeling upon constitutional interests without a good reason to do so. But where a court makes that determination based on its predictions, or on its re-

view of the legislature's predictions, it necessarily is speculating based on incomplete information. Where constitutional rights are dear, we should be wary about letting them be infringed based on skimpy information, and therefore potentially invalid speculation.

2. *Avoiding a Second-Best*

But, one might respond, the implementation of heightened scrutiny responds to this concern to some extent. Courts will examine closely the basis for these speculations. Courts do not blindly defer to the legislature when it makes these predictions. If the legislature does not compile a substantial record in support of its predictions, courts will review those predictions quite closely; if the legislature does compile such a record, the court is more likely to accord some deference to the legislature's expertise but still will make sure that there is a strong basis in the record for the legislature's determination.¹²³ Either way, the court is attempting to ensure that the prediction has significant indicia of reliability. Such careful review does not, of course, eliminate the guesswork that is entailed by speculation, but it is a second-best.

The problem is that it is clearly second-best: no amount of *ex ante* confidence-building measures will give us as much information as an *ex post* determination of what actually happened. The best way to reduce the uncertainty of predictions is to wait until events unfold such that they are no longer predictions. Regularizing the prediction process will likely reduce errors, but they will still be predictions, often with a substantial degree of uncertainty.

Fine, a reader of the foregoing might respond, we have reason to be worried about uncertainty when constitutional rights are at stake. Unfortunately, as this Article has noted, legislation is filled with such predictions; if we tried to get rid of all of them, there would never be any legislation at all.¹²⁴ In particular, the only way we will be able to test a prediction that legislation will achieve its goals is if the legislation goes into effect, and we will never be able to test whether other, hypothetical forms of regulation would have worked better. So the "second-best" may be all that we are able to achieve without totally upending the legislative process, and thus may be the best.

It is true that we can never eliminate predictions: some element of speculation is unavoidable. But the role for predictions can be mini-

123. *Turner II* seems to create such a regime. See Ken Bamberger, Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312 (1998).

124. If courts decided to strike down all legislation that was based on uncertainty, no legislation would pass muster. If courts instead decided to uphold all legislation that was based on uncertainty, then they would eviscerate judicial review.

mized, and such minimization is preferable to the alternative of heightened scrutiny of those predictions *ex ante*.

C. *Free Speech Considerations*

Concerns about precipitous legislation are particularly great in the First Amendment context. In light of the perceived centrality and fragility of free speech in a republic,¹²⁵ courts have evinced a strong desire to confine prospective limitations on speech.

We see this concern reflected in the dim judicial view of prior restraints. Courts are quite hostile to prior restraints on speech, employing a presumption against them and sharply distinguishing them from post-publication penalties.¹²⁶ A number of commentators have addressed the question why we might prefer criminal prosecutions after the fact to a policy of enjoining the speech activity beforehand. Part of the answer may be the collateral bar rule, under which a person who violates an injunction can be held in contempt even if the injunction was invalid.¹²⁷ In an ordinary criminal prosecution, the defendant may assert the invalidity of the statute as a defense, but the application of the collateral bar would eliminate that option.¹²⁸ But other considerations also play a role.¹²⁹ In particular, commentators and the Supreme Court have emphasized the greater knowledge that one can have about the effects of publication after the fact.¹³⁰ Because

125. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980) (arguing that free speech is a representation-reinforcing right that is central to democratic governance, and accordingly such a right should be jealously protected from legislatures who might be acting without proper regard for that role).

126. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714-15 (1931) (striking down prior restraint while noting the availability of post-publication penalties); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (invalidating prior restraint and emphasizing the difference between prior restraints and post-publication judgments).

127. See Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 552-53 (1977).

128. Cf. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (noting situations in which the collateral bar rule would not apply, such as "where the injunction was transparently invalid or had only a frivolous pretense to validity").

129. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 48-49 (1998); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 503-12 (1970).

130. In *Southeastern Promotions, Ltd. v. Conrad*, the Supreme Court stated that:

The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

prior restraints are predictive in that no harm has yet occurred, prior restraints present a danger of "adjudication in the abstract."¹³¹ Courts' wariness about such restraints avoids precipitous action.

Concerns about future activity also motivate the overbreadth doctrine, which is squarely focused on the future chilling effect of an enactment. Ordinarily, an individual has no standing to litigate the rights of third persons, and facial challenges will be successful only if all applications of the statute would be invalid.¹³² The overbreadth doctrine applies different rules in the First Amendment context. Even if a law applies to both protected and unprotected speech, with the result that some of its applications (i.e., to unprotected speech) are constitutional, a litigant can bring a facial challenge to the statute.¹³³ Furthermore, even if the law is constitutionally applied in a particular case (and even if the litigant could be regulated under a narrower law), a litigant will be able to assert the rights of those against whom enforcement would be unconstitutional.¹³⁴ The upshot of the overbreadth doctrine is that courts consider *potential*, rather than actual, infringements of free speech rights, thus raising the specter of adjudication in the abstract that troubles us in the prior restraint context.

The explanation for this seeming inconsistency is that we are privileging future free speech rights over future limits on free speech. We reject adjudication in the abstract in the prior restraint context because allowing prior restraints would mean prospective limitations on speech. We allow such adjudication in the overbreadth context because the doctrine effectively restrains prospective limitations on speech. In each case, we are looking into an uncertain future. The First Amendment leads us to reach different conclusions about the propriety of possibly precipitous rulings, based on the understanding that our preference in speculation should be in favor of free speech rights.

This importance of avoiding restrictions on free speech rights arises in other areas as well. For instance, it is manifested in the notion that even a temporary intrusion on First Amendment interests constitutes an irreparable injury. In *Elrod v. Burns*,¹³⁵ the Supreme Court

420 U.S. 546, 558-59 (1975); see also Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 49-54 (1981); cf. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 66-70 (1984) (arguing that adjudication in the abstract can sometimes occur in criminal prosecutions after publication).

131. Blasi, *supra* note 130, at 49.

132. See *United States v. Raines*, 362 U.S. 17, 21 (1960) (on third-party standing); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (same); *United States v. Salerno*, 481 U.S. 739 (1987) (on facial challenges).

133. See *NAACP v. Alabama*, 357 U.S. 449 (1958).

134. See *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

135. 427 U.S. 347 (1976).

held that a preliminary injunction would be appropriate where "First Amendment interests were . . . threatened . . . at the time relief was sought [because the] loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."¹³⁶ Also relevant is the Supreme Court's emphasis on factual accuracy in considering the constitutionality of laws that restrict First Amendment interests. First Amendment jurisprudence is heavily fact-based, relying on the actual impact of speech, and speech regulation, on people and institutions.¹³⁷ In light of this fact-specificity, courts have emphasized the importance of accuracy in factfinding and, relatedly, independent appellate review of facts in a variety of contexts.¹³⁸

As I noted above,¹³⁹ the Supreme Court has struggled with the application of these principles to legislative findings of fact, sometimes deferring, sometimes exercising independent judgment, and sometimes claiming to do both. The importance of accuracy and the avoidance of abstract adjudications might suggest a different approach, however: awaiting real evidence of harm where waiting may produce more information and thus avoid a guessing game about the existence of any injuries.¹⁴⁰ Reliance on predictive but provable harms would

136. *Elrod*, 427 U.S. at 373.

137. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557, 567 (1995) ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace . . ."); Benjamin, *supra* note 108, at 273-75; Bamberger, Note, *supra* note 123.

138. See, e.g., *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984) (applying independent review of lower court factual findings, in order "to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser v. Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennkamp v. Florida*, 328 U.S. 331, 335; see also *One, Inc. v. Olesen*, 355 U.S. 371; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372. We must 'make an independent examination of the whole record,' *Edwards v. South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (ellipses in original)).

139. See *supra* Part III.

140. Arguably, this is consistent with *City of Boerne v. Flores* 521 U.S. 507 (1997), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). In those cases, the Court found that Congress had failed to put forward evidence that would justify its reliance on section 5 of the Fourteenth Amendment. The same problem would exist here: Congress would have legislated without a sufficient factual background for doing so. One way of understanding *Boerne* in particular is that Congress legislated precipitously; if Congress believed that interferences with religion were likely, it should have waited for them to occur and *then* legislated. Just as the situation might have been different if Con-

push our wary approach to existing harms to a presumption against them. The principle, then, would be that in free speech cases where evidence of harm is insufficient to support a piece of legislation but could be made sufficient with additional information, it would be presumptively inadequate to support the legislation. With more information, legislatures and courts could dramatically reduce their uncertainty and cross a threshold of sufficiency of information;¹⁴¹ and where First Amendment interests are at issue, it seems incumbent upon them that they do so.¹⁴²

An important implication of this formulation bears emphasis: a judicial decision to prohibit implementation of a statute based on the statute's reliance on predictive harms should not prejudice a different decision in the future once the harms arise.¹⁴³ This goal could be achieved by a court temporarily enjoining the relevant statute, with the explicit understanding that it will adjudicate the issue finally if the predicted harms actually arise.¹⁴⁴ This approach seems unsatisfying,

gress had waited longer before passing RFRA, so, too, might it be different in the case of predictions.

141. Minimizing uncertainty does not, of course, mean eliminating it. When we abstract from the experience of several states in trying to figure out what would work in the nation, we have some uncertainty that the same conditions will prevail there. When we try to figure out the U.S. population, there is some guesswork. *See, e.g.,* Deborah Jones Merritt, *Constitutional Fact And Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1293 n.25 (1999). But our movement (and presumption) should be toward reducing uncertainty. And, more importantly, at some point courts will have enough information in hand to be able to say that the current evidence supports the legislation. Such a decision is difficult to make, because the amount of information will be on a continuum. *See supra* notes 114-116 and accompanying text. But there should be a presumption in favor of courts refusing to allow implementation of legislation unless that quantum exists. Thus, we may never know to a moral certainty, but at some point we have enough information to make a considered judgment; we could still gain more information, but at some point we cross the threshold between not having enough information and having enough.

142. A reader might wonder whether this presumption is simply another way of saying that we should apply strict scrutiny to legislation containing predictive harms. The major flaw in this view is that the presumption involves only one part of the many elements of judicial scrutiny of a statute. All of the other ways that strict scrutiny applies (e.g., requiring a compelling rather than substantial or important interest, requiring a greater degree of tailoring) would not apply to cases of predictive harms (unless, of course, the legislation would be subject to strict scrutiny even if the harms were not predictive). In addition, the fact that there is a presumption against legislation based on predictive harms does not mean that the weight of that presumption will be the same as it would be in the context of strict scrutiny. The point of this section is that there should be a greater wariness about legislation based on predictive harms, and that wariness translates into a reversal of the ordinary presumption in favor of legislation; but that does not mean that the presumption will have the same force as the presumption arising from the interference with fundamental rights that gives rise to strict scrutiny. *See also infra* Part VII.E.

143. A decision to uphold a statute that is based on predictive harms will effectively prejudice any future developments, because we will never be able to know if the harm would have developed. This is one of the reasons why delaying implementation of these statutes makes sense in the first place.

144. For this proposal to work, the relevant court would have to be willing to consider the new factual developments once they occurred — an updating process that courts, espe-

though, because the harm may never arise, leaving the “temporary” injunction in place into the indefinite (and, presumably, infinite) future without a judicial order or opinion. Temporary relief should be just that, and it is problematic for it instead to become an indefinite way station for matters on which courts do not want to slam the door. Courts can achieve much the same result without distorting their procedures, and therefore, more honestly, simply by adjudicating the matter in the first instance and, if they invalidate the statute because the harms are predictive but provable, doing so without prejudice to future litigation if the harms actually arise. This approach has a significant advantage in that it more explicitly allows the legislature to reconsider and modify its legislation if the harms do not emerge as the legislature expected. Once the legislation is invalidated, the ball is more clearly back in the legislature’s court.

This approach might at first blush seem inconsistent with a notion of precedent, but I believe, on the contrary, that it is commanded by the notion of precedent. If the underlying facts change in a case involving prospective relief (including the invalidation of a statute), the opinions that rest on those facts must be reconsidered.¹⁴⁵ It seems intolerable to entrench a given result that is no longer supported by the facts on the ground just because an earlier incarnation of that (or another) court, when faced with different facts, understandably came to a different conclusion. We can call the second opinion an overruling of the prior case, a reconsideration of it, a distinguishing of it, or anything else that strikes our fancy, but the bottom line must be that the new facts stimulate a fresh look at the statute. In the case of predictive harms, therefore, the coming to fruition of the predicted facts would clearly constitute such a change, so the appropriate treatment of such a case is a new consideration of the matter.¹⁴⁶ Such “springing constitutionality” raises tricky procedural issues, but they should be sur-

cially appellate courts, might find discomfiting. I believe, however, that such updating is incumbent upon courts, even though it may be inconvenient. *See Benjamin, supra* note 108, at 369-71.

145. *See id.* at 276-80.

146. In a number of contexts the Supreme Court has endorsed the principle that changes in underlying facts can produce a change in the legal rule that flows from those facts. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion) (suggesting that overruling can be appropriate when “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (“Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice . . . the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”); *Abie State Bank v. Bryan*, 282 U.S. 765, 772 (1931) (“[A] police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation.”). Unfortunately, the Court’s actions have not been so clear, in that it has never squarely reconsidered one of its cases on this basis. *See Benjamin, supra* note 108, at 283-85.

mountable.¹⁴⁷ The result, then, is that an invalidation of a statute on the grounds that it relies on predictive harms should only delay implementation of a statute until such time as the harm arises.

There is a related corollary proposition: just as the invalidation of a statute relying on predictive harms should not prejudice the constitutionality of the statute once the harms arise, so too should it not limit the legislature's ability to pass new legislation once the harm arises. This point arises from *Reno v. ACLU*,¹⁴⁸ the Internet indecency case. In that case, the Supreme Court stated, as one of its reasons for subjecting Internet regulation to stricter scrutiny than broadcast regulation, that broadcast has a history of government regulation and has been regulated since its inception, whereas the Internet has no comparable history of regulation.¹⁴⁹ This creates a somewhat perverse incentive for legislatures — regulate a medium in its infancy or lose your chance to regulate at all. This is particularly troubling when harms do not currently exist and instead are predictive, as legislatures have an added incentive to legislate precipitously even if they think that, all other things being equal, waiting is the more prudent course; all other things will not be equal if waiting means forfeiting the right to regulate. Moreover, it puts added pressure on courts, in that striking down a given enactment might prejudice a legislature's ability to pass a similar enactment at a later date. Courts may feel obliged to approve precipitous legislation, not because it is justified but because a contrary ruling would limit the legislature's options for the future. Simply stated, we must also abandon the suggestion in *Reno v. ACLU* that, if the legislature fails to legislate, it may lose its opportunity to do so. Waiting on the sidelines should not hurt the legislature. We simply have to get rid of the notion that legislatures forbearing from legislating creates any sort of a judicial presumption against future legislation.

VI. OVERCOMING THE PRESUMPTION

The discussion above suggests that there is a significant value to waiting for provable predictive harms to come to fruition when First Amendment interests are at issue. We have reason to distinguish such harms from existing harms, and to treat the former with greater suspicion. Thus, assuming that courts defer to legislative findings of existing harm and thereby presume their validity, the costs of allowing legislation based on provable predictive harms should lead us to a different stance, namely a presumption against legislative reliance on them.

147. *See id.* at 285-86.

148. 521 U.S. 844 (1997) (striking down statutory restrictions on the transmission of indecency to minors and the display of patently offensive messages in a manner available to minors).

149. *Id.* at 868-69.

There remains, though, a crucial question: under what circumstances might that presumption be overcome? To put the point differently, under what circumstances might the expected value of relying on such harms overcome the expected value of waiting?

An obvious answer, at a high level of generality, would be that the presumption can be overcome if the costs of waiting for a harm to arise are unusually high. That is, there may be situations in which the cost of waiting is prohibitive, and arguably this changes the calculus. What would make the costs of waiting particularly high? If, by the time the harm comes to pass, the costs of legislating have increased dramatically, or the benefits of legislating have decreased. What we are worried about is that the changes will be extremely difficult, perhaps impossible, to repair, so that waiting for the harm to arise concomitantly means waiting until it is too late for the legislature to act.

Even at that level of generality, the statement is contestable. A skeptic might instead suggest that there should be an irrebuttable presumption against legislation containing predictive harms. After all, the fact that a harm may be unusually costly does not change the reality that legislation is limiting constitutional interests where no current harm exists. Costliness, in other words, does not change the imbalance (between current infringements and future harms) that motivated the rejection of predictive harms in the first place. At the same time, though, it does dramatically affect the attractiveness of the proffered alternative — namely, that the legislature simply enact the legislation after the harm arises. The skeptic might persist, arguing that the fact that a legislature might never be able to legislate to stop a problem does not mean that we have to allow legislation at a time when we otherwise would not.¹⁵⁰ That is, even assuming that the problem is so clearly irreparable that, once the harm exists, no satisfactory legislation could be passed, we still might reply that this is the cost of having a robust First Amendment, and that there are some things that a legislature simply will not be able to stop.

Such an approach would seem to make too much of the arguments marshaled against legislation based on predictive harms. There may be categories of legislation that are so troubling that we should impose an insuperable hurdle against them. We might have that attitude, for instance, about legislation that prohibits people or parties from engaging in core republican activities (such as political speech or voting) based on their adherence to an unpopular political belief or religion. Perhaps

150. The Supreme Court has made a roughly analogous point in the context of standing doctrine: there may be some situations in which no one has constitutional standing to challenge a particular governmental action, so federal courts should not be swayed by the argument that they should grant standing to the party with the most plausible standing claim in order to ensure that the case gets heard. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”).

our inference of an improper motive is so strong in such situations that our presumption against the relevant legislation could not be overcome by any other factors. One could take the same attitude about predictive harms; First Amendment absolutists might argue that proactive speech regulation should fall into the same category, because speech is simply too precious, and legislatures too craven, to allow for regulation before a harm has occurred. But such a vision would need to rely on arguments different from, and more sweeping than, those put forward in this Article. Simply stated, we could be absolutists about future harms, but that is a much higher standard to meet. The free speech principles I discussed above support the proposition that we should hesitate before allowing free speech rights to be infringed based on a future harm, but they do not indicate that proactivity could never be justified. After all, even in the context of an “ordinary” presumption of invalidity under strict scrutiny, the presumption against prohibited legislation can be overcome.¹⁵¹ Indeed, one of the justifications for delay is that the legislation can be enacted later. If that is a chimerical proposition (because the phenomenon would be sufficiently entrenched that it was irreparable), then one of the bases for this Article’s position would be negated.

A. *Two Guideposts*

Assuming, then, that the costs of waiting are relevant, the question is what level of costs should concern us. This obviously is a question of degree, but we can begin with a couple of guideposts. First, we should reject any definition of such costs that would find virtually all plausible costs insufficient. Such a definition would turn our presumption against legislation based on predictive harms into a de facto prohibition, and that seems untenable for the reasons discussed above. Even if relatively few situations would meet whatever threshold we adopt, there should be some realistic level of costs that would, in fact, satisfy it. The problem with this guidepost is that it does not eliminate many formulations; we can concede the sufficiency of costs that would arise in some situations (e.g., many people will be killed) — and thereby avoid the problem of an irrebuttable presumption — without eliminating many formulations.

A second guidepost does more work. The correlative of the proposition detailed above is that we should reject any definition that would find unacceptably high costs of waiting in virtually all plausible situations. The problem here is that such a definition would negate the point established thus far — that we should not as a matter of course allow legislation based on predictive harms if it will abridge current

151. The Supreme Court has been at pains to make just this point in the context of racial classifications. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

First Amendment rights. If our definition of the costs of waiting includes all realistic situations, then the presumption is meaningless. In such a situation, we would simply be treating predictive harms the same as current harms, and thus ignoring our concerns about the dangers presented by predictive harms.

This second proposition has greater significance, because some formulations of costs of waiting would, indeed, apply to almost all situations. For instance, one might point to the power of the present in shaping the future. The argument would be that, once an event gets going, it is harder to stop. This is the nature of momentum (or, if you prefer, inertia). Thus, for example, one might be tempted to argue that, once a set of events occur, the people and institutions who benefit from that occurrence have a vested interest in its continuation, and may now (because of their income from these new developments) have sufficient resources to successfully block any attempt at ending the status quo. After the pattern (here, of no regulation) begins, it takes on a force of its own — especially as the parties that lose this fight will lose revenue and therefore clout on Capitol Hill. Striking down attempts to regulate at time T1, in other words, prejudices us against regulation at time T2.

This is a serious consideration, but if we allow it to justify predictive legislation, then we are right back in the unsatisfying position where we began — with legislatures having the ability to infringe upon First Amendment interests even though nothing has yet happened that would justify that legislation. The exception, in other words, would swallow the rule.

The same is true of another possible cost of delaying implementation of a statute — namely that, even if the legislature acts immediately upon seeing the harm, there likely will be some slippage and thus hardship for any people or entities who suffered the harm. Once again, this is a serious concern. A rule that requires an existing harm does impose some costs, and those costs may be borne by those who would have benefited from an earlier implementation of the legislation. But letting that overcome our presumption would gut it.

This statement may seem unsatisfactory; perhaps we should not worry so much about the presumption being gutted. If there are any costs to waiting, of whatever sort, why shouldn't those costs overwhelm the presumption, whether those costs arise only occasionally or every time? There is of course no ineluctable rejoinder to this question; we are talking about the striking of a balance. But we should instead focus on the other side of the equation, on the fact that allowing the legislation means we will lose the chance of finding out whether the legislation was in fact justified. Upholding legislation based on predictive harms entails the costs associated with allowing legislation that potentially responds to no harms. Once the legislation is implemented, we will never know if the harms would have arisen, or if the

legislation directly alleviated those harms. In light of the costs in terms of freedom of speech, the economic costs associated with harms that will exist for some short period of time — a length of time that can be minimized by a vigilant legislature — seem to be outweighed.

These two guideposts still leave us with a wide range of costs. In pursuing the inquiry a bit further, it makes sense to break down the costs into two components: likelihood and severity. After all, with respect to any given development (here, a continuation of the status quo), there are a host of possible outcomes, but some are more severe than others, and some are more likely than others. In many instances, the relationship is likely to be inverse. For instance, it is impossible to rule out the possibility that, with respect to any given law, no matter how trivial the law might seem to be, its invalidation would cause the decline of the American polity into a state of utter chaos — the end of the world as we know it. After all, the future is unknowable, and we may be blissfully (but unfortunately) unaware that the invalidation of a law prohibiting the sale of filled milk¹⁵² will produce a sudden and immediate freak virus that will kill eighty percent of Americans in a matter of days. Luckily, such an outcome seems exceedingly unlikely.¹⁵³ On the other hand, the possibility that (to stick with the filled milk example) some people will pay more for their milk is quite likely,¹⁵⁴ but the seriousness of the problem that this creates is fairly low.

The difficulty, of course, is that some costs will not be dismissed so easily, because their severity would be significant and their likelihood seems nontrivial. Drawing a line is a tricky proposition, because the potential costs are going to run the gamut. More specifically, the costs are on a continuum, with no clear firebreaks. The problem, as occurs so often in law, is that we have to determine when a trigger has been tripped — which is, in this case, when the presumption flips. So even if we wanted to have a sliding scale based on severity and likelihood, we are confronted with a firebreak: When is the presumption overcome? And this inquiry itself is imbedded in, and a major element of, a larger on/off switch — namely, whether the legislation is constitutional or unconstitutional. For better or worse, we have to draw a line at some level of costs.

152. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (upholding legislation prohibiting the shipment in interstate commerce of filled milk).

153. Or so the filled milk purveyors would have us believe.

154. That is, after all, the (often intended) result of prohibitions on certain kinds of milk; those who are able to sell milk find that they can command a higher price for their product because the supply has been reduced.

B. *Likelihood of Irreparable Harm*

The one that strikes the balance well, in my view, would set the threshold for severity at harms that would be extremely costly — so costly that once such a harm appeared, it either could not be repaired or could be repaired only through massive expenditures. The harm, in other words, would combine severity and difficulty of reversal such that it would be effectively irreparable substantial harm. As to probability, such a harm would not have to be inevitable, but nor would a small chance be sufficient. The trigger would be a likelihood of such harm.¹⁵⁵ The standard, then, would be that only if there were a likelihood of effectively irreparable substantial harm would the presumption against legislation based on predictive harms be overcome.

Where do I get this from, and where does it lead? It picks up on one of the central standards for the granting of preliminary injunctive relief — namely, whether the plaintiff will suffer an irreparable harm if the injunction is not issued.¹⁵⁶ The test for injunctive relief effectively determines whether a given legal outcome will be imposed immediately or will be delayed, and a roughly analogous inquiry seems appropriate here.¹⁵⁷ Although the standard for preliminary injunctions varies somewhat depending on the precise situation and the court, the general approach is that, for an injunction to be appropriate, the

155. As I discussed above, there is a balance between likelihood and severity, and it bears noting here that there may be some unusual cases in which the probability is substantial, but less than a likelihood, and the harm is extremely severe (e.g., the end of the world as we know it). In such situations, the severity might be so great that it would seem appropriate that the test outlined above be satisfied. In light of the probable rarity of such cases, however, I will use the term “likelihood” as a convenient shorthand (as, I suspect, courts do as well). *See infra* note 158.

156. *See* 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2948 (2d ed. 1995); *see also id.* § 2948.1, at 139 (“Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm . . .”). *But cf.* DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 111-18 (1991) (arguing that courts have failed to apply rigorously the requirement of irreparable injury).

157. The four traditional factors in the test for injunctive relief are instructive. They are:

- (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
- (2) the state of the balance between this harm and the injury that granting the injunction would inflict on the defendant;
- (3) the probability that the plaintiff will succeed on the merits; and
- (4) the public interest.

WRIGHT ET AL., *supra* note 156, § 2948, at 133. The formulation I have proposed effectively encompasses both of the first two factors, as they look at the harms to both sets of actors (i.e., infringements upon First Amendment interests versus the harms of delaying implementation of the statute) and the costs of each. Because the balance is so struck, it seems to encompass the fourth factor as well; the “public interest” concern might be a separate consideration in most private lawsuits (where this test usually arises), but it is at the forefront here. That leaves only the third factor, which has no real application to the situations addressed in this Article.

threatened harm should be substantial and irreparable. And, as to probability, “[t]here must be a likelihood that irreparable harm will occur.”¹⁵⁸

The calculus involved in my proposed test for predictive harms also arises frequently in a related First Amendment context, namely prior restraints. There is a strong presumption that prior restraints are invalid, but that presumption can be overcome if a grave and irreparable injury seems inevitable absent the prior restraint.¹⁵⁹ That is, there

158. *Id.* § 2948.1, at 153; *see also id.* § 2948.1, at 139 (stating that “[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm”); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (emphasizing that injunctive relief requires “a likelihood of substantial and immediate irreparable injury”) (internal quotations omitted); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 531 (1987) (rejecting a request for injunctive relief based on the fact that the alleged irreparable injury was not probable).

Environmental law provides a useful counterpoint. Some courts and commentators, emphasizing the decades-long lag time between events taken today and future effects on the environment, have suggested that some very serious environmental harms need not be likely in order to be the basis of an injunction. *See, e.g., Ethyl Corp. v. EPA*, 541 F.2d 1, 24-25 (D.C. Cir. 1976); Gregory D. Fullem, Comment, *The Precautionary Principle: Environmental Protection in The Face of Scientific Uncertainty*, 31 WILLAMETTE L. REV. 495 (1995); James E. Hickey, Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL L.J. 423 (1995). This “precautionary principle” has its detractors. *See generally* Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996); Jonathan H. Adler, *More Sorry than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, 35 TEX. INT’L L.J. 173 (2000). But assuming that this is a wise approach with respect to some environmental dangers, a different set of considerations seems applicable to the predictive harms on which I am focusing. First, there is little reason to expect that the sort of harms on which I am focusing — harms that are essentially economic — will have any significant lag time. Second, even if environmental harms were indistinguishable from the ones on which this Article focuses, there would still be reason to treat the two categories differently: because of the applicability of the First Amendment to the speech regulations on which I am focusing, our ordinary presumption in favor of legislation is flipped. The very uncertainty that leads courts and commentators to err on the side of safety (i.e., environmental protection) should similarly lead us, in the First Amendment context, to err on the side of protecting speech interests.

That said, even in the context of speech regulation, there may be situations in which a predictive harm is improbable but so severe that even running a relatively small risk is simply too great a danger. As I noted in the text, courts state that they require likelihood of a harm in the injunctive context. I strongly suspect, however, that they would apply a more precautionary approach where the harm is extremely grave and thus would accept a merely substantial chance; and I think such a principle is appropriate. Thus I (and I suspect the courts) use the term “likelihood” even though a more accurate (but prolix) version might be “likelihood except in unusual cases where a harm is particularly severe, in which case a substantial chance might suffice.”

159. *See, e.g., Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 569 (1976) (rejecting a prior restraint because the probability of harm “was not demonstrated with the degree of certainty our cases on prior restraint require”); *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (noting that a prior restraint is prohibited unless direct, immediate, and irreparable harm to the nation or its people would result); *id.* at 726-27 (Brennan, J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 733-34 (1931); *In re King World Prods.*, 898 F.2d 56, 59-60 (6th Cir. 1990); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476 (5th Cir.

are some harms that are so likely (approaching certainty) and so great and irreparable that even a prior restraint on them is permissible.¹⁶⁰ This is an extraordinarily high hurdle, which reflects the aversion to prior restraints.¹⁶¹ The aversion to predictive harms is similar in kind but weaker in degree; the same sort of concerns motivate us, but our fears will not be as great. Thus, the proposed standard of effective irreparability is a watered-down version of both halves (likelihood and severity) of the threshold for permitting prior restraints.

What will this test entail? For one thing, it would involve a distinction between harms based on their correctability. If the invalidation of a piece of legislation is likely to be the proximate and but-for cause of serious psychological or physical harms to a set of persons, repairing them will be difficult, if not impossible. We can have no confidence that future actions will undo, or truly compensate for, the harms that individuals suffer. We can offer monetary compensation for such harms, but that is a clear second-best. The loss of an arm, or the psychological cost inflicted by seeing one's parents murdered before one's eyes, seems truly irreparable. A classic example would be the revelation of troop movements during a war.¹⁶² Another example would be the revelation of the secrets to making a hydrogen bomb.¹⁶³ (Note that, with respect to this latter case in particular, once the knowledge has been released it is too late to do anything about it or to mitigate the harm.) This is information that is so potent, and so dangerous in the wrong hands, that its dissemination will quite possibly directly harm scores of people.

1980) (en banc) (“[A] prior restraint is only justified in exceptional circumstances and by a showing of direct, immediate and irreparable harm.”).

160. Somewhat similar considerations also arise in other First Amendment contexts. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”). In the years since Justice Holmes issued his opinions in *Schenck* and *Abrams*, the Court has brought more speech under the protection of the “clear and present danger” test, see, e.g., *Nebraska Press Ass’n*, 427 U.S. 539, and in the context of incitement has constructed even higher hurdles to prosecution, see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that advocacy may be proscribed only where the relevant speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

161. See, e.g., *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996); *TRIBE*, *supra* note 18, § 12-36, at 1045-46 (noting the narrowness of the Supreme Court’s exceptions to the rules prohibiting prior restraints).

162. See *Near*, 283 U.S. at 716.

163. See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979).

We can contrast this with harms that are more straightforwardly economic.¹⁶⁴ In *Turner*, what if the must-carry statute had been invalidated based on the Court's wariness about the prediction of broadcasters going out of business in appreciable numbers, and in the ensuing months the broadcasters *had*, indeed, gone out of business? If Congress then passed the must-carry legislation again, it seems quite likely that, soon after the legislation was passed, the broadcasters would be back in business and back to the position that they formerly occupied. Their absence from the airwaves for a matter of months might have weakened their competitive position a bit, but the advantages conferred by must-carry would likely put them back in a strong position (that is, after all, the point of must-carry). There might have been some intervening changes in the ownership of the broadcasters (except for the wise ones who believed that new legislation would be passed and would now be upheld), but that would be a relatively small consideration.

But what about the people who suffered stress from their pecuniary losses, or who lost their jobs (even if only temporarily) and suffered serious psychological damages as a result? These are potential costs, but they have the same problem as the danger that delaying implementation will make future legislation harder to pass: these sorts of potential harm will occur whenever there is any delay between the arising of a harm and a legislature's response to it, and at least some small delay seems inevitable. As a result, allowing these harms to qualify would again have the effect of the exception swallowing the rule.

The line is difficult to draw; it is hard to know when a harm becomes sufficiently unusual and large that it avoids this problem of overwhelming our presumption. In this way, it is somewhat analogous to another difficult aspect of line-drawing, namely determining when an activity substantially affects interstate commerce. In *United States v. Lopez*,¹⁶⁵ Justice Breyer's dissent marshaled hundreds of sources indicating that guns in schools could affect interstate commerce.¹⁶⁶ The problem, as the majority opinion suggested, is that this reasoning could be applied to almost any conceivable activity; but if nothing is outside the interstate commerce power, then there are no limits on the legislative power (and most of the remainder of Article I, Section 8 becomes surplusage).¹⁶⁷ So, though it may be difficult to draw the line

164. *Cf.* *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J.) (finding that speculative economic harms were not sufficient to overcome the presumption against prior restraints).

165. 514 U.S. 549 (1995).

166. *Id.* at 631-44 (appendix to the opinion of Breyer, J., dissenting).

167. *See id.* at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional

in determining exactly what affects interstate commerce, we can and should reject any definition of interstate commerce that would encompass essentially all legislation within it. This may seem analytically backwards — we are rejecting a theory of commerce not because there is no plausible commercial hook but because its effects seem undesirable — but there is much to commend the approach. After all, a clever lawyer can always say that “[f]or want of a nail the kingdom was lost,”¹⁶⁸ and soon we may find ourselves with an interpretation that seems inconsistent with basic constitutional principles. So instead, we conclude that, if we are to have any constraints on the legislative power, we must reject theories of commerce that would sweep so broadly. I am suggesting the same thing here; it will be difficult to draw the lines, but any definition of “irreparable” harms that will be universal sweeps too broadly.

That still leaves the question of when economic harms might be sufficiently great as to meet this standard of irreparability. For many economic injuries, putting the harmed parties in a position similar to the one they would have been in if the legislation had been upheld at time T1, rather than time T2, would not seem to be too difficult; as was discussed above, the must-carry regime is a good example. But there may well be situations in which economic injuries become so entrenched that they are effectively irreparable. The concern is often couched in terms of network effects, or path dependence. The idea is that some patterns, once established, become very difficult to displace. Path dependence is thus the condition obtaining when initial developments (e.g., how to design and control a network) will have a significant impact on later developments (e.g., how the network is used) by rendering some otherwise attractive later developments unlikely because of the cost of starting anew.¹⁶⁹ Particular concern arises over

authority under the Commerce Clause to a general police power of the sort retained by the States.”).

168. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 425 (1990) (discussing “for want of a nail” reasoning in the context of commerce power). The entire rhyme is as follows:

For want of a nail, the shoe was lost,
For want of the shoe, the horse was lost,
For want of the horse, the rider was lost,
For want of the rider, the battle was lost,
For want of the battle, the kingdom was lost,
And all for the want of a horse-shoe nail!

MOTHER GOOSE'S NURSERY RHYMES 191 (Walter Jerrold ed., Alfred A. Knopf Inc. 1993) (1903).

169. See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488-500 (1998); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-62 (1996). Roe gives as an example of path dependence a winding trail that fur traders use through some woods (winding, in his example, because of a wolves' den):

the possibility of inefficient lock-in. If a company makes a superior product and thus gains customers, the fact of it gaining those customers will not cause us much concern without an assumption of lock-in. After all, they may simply be gravitating toward the best product, with the expectation that they will move to a better product from another company once that becomes available. The fear involving network effects, however, is that people or institutions will become "locked in" to a particular approach, because they have invested in it and/or because everyone else has invested in it, such that they will remain even though the product or network is inferior to various alternatives.¹⁷⁰ Everyone agrees that there can be path dependence (e.g., that where the earliest travelers first cut a path may end up being the location of a future road); there is less agreement, however, that a less efficient path can be locked in via path dependence (e.g., where the road that the earliest travelers laid is worse than the alternatives but nonetheless gets accepted by everyone).¹⁷¹ Insofar as there can be inefficient lock-

Travelers continued to deepen and broaden the road even after the dangerous sites were gone. Industry came and settled in the road's bends; housing developments went up that fit the road and industry. Local civic promoters widened the path and paved it into a road suitable for today's trucks.

It is time to resurface the road. Should today's authorities straighten it out at the same time? They see no reason to raze the factories and housing developments that arose on the path's bends and may not even bother to consider straightening it out. Today's road, dependent on the path taken by the trader decades ago, is not the one that the authorities would lay down if they were choosing their road today. But society, having invested in the path itself and in the resources alongside the path, is better off keeping the winding road on its current path than paying to build another.

Roe, *supra*, at 643. In Roe's example, the path chosen seems less efficient than the alternative (a straight road) would have been. The degree to which such inefficient lock-in occurs is a matter of some dispute, and it is not necessarily entailed by the concept of path dependence. Among a series of possibilities that might be similarly attractive in the abstract (e.g., should a road be built 100, 1000, or 10,000 feet north of the woods), an earlier decision (e.g., 1000 feet) will render the other options less attractive.

170. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 817 (1998) ("Rather than systematic competition generating an efficient equilibrium solution among various technologies, path dependence permits a technology that obtained an accidental advantage to become locked-in to an inefficient equilibrium.").

171. The prime example of inefficient lock-in has long been the traditional (QWERTY) typewriter keyboard, which is thought to be a less efficient layout than others (notably, the Dvorak system). Two researchers, however, have argued that the QWERTY keyboard layout is no less efficient (and that the tests putatively showing otherwise were polluted by tester bias and inappropriate samples). More generally, they contend that path dependence will rarely "lock in" significantly less efficient outcomes. See generally S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-in, and History*, 11 J.L. ECON. & ORG. 205 (1995); S.J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J.L. & ECON. 1 (1990); S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, J. ECON. PERSP., Spring 1994, at 133. Others contend that inefficient lock-in may frequently occur. See, e.g., Thomas A. Piraino, Jr., *An Antitrust Remedy for Monopoly Leveraging by Electronic Networks*, 93 NW. U. L. REV. 1, 14-20 (1998). Perhaps the most commonly held view is that inefficient lock-in can occur if the initial path is a bit less efficient, but that if the initial path is much less efficient it will be jettisoned. See Roe, *supra* note 169, at 643-44 (noting that "[o]ccasionally, the path-dependent road becomes so costly that a society rips it up and builds a new one"); James B. Speta, *Tying, Essential Facilities, and Network Exter-*

in, however, it might well satisfy the standard of effective irreparability. That would seem to present a case where the costs of waiting are particularly great. This evinces the difficulty of generalizing about possible examples: we would need to look carefully at the potential danger of lock-in and the costs that it might impose; in some cases, they may be sufficient, and in other cases not.¹⁷² This highlights the ways that the substantive line is hard to administer. But right now courts are avoiding drawing it at all, and that is much worse.¹⁷³

VII. WHAT ROLE SHOULD DEFERENCE PLAY?

The discussion thus far has elided an important question: How should courts deal with situations in which the likelihood and severity of a particular problem are contested, because the relevant court and legislature disagree?

Deference is crucial here. If a court invalidates legislation based on predictive harms unless those harms would likely be effectively irreparable, but, in determining the likelihood of irreparability, defers to legislative predictions of irreparable harm, then the shift advocated in this Article may make relatively little difference. It would make some difference, insofar as the relevant court required the legislature to make that prediction, and insofar as the legislature took the requirement of a finding seriously.¹⁷⁴ A legislature acting in good faith would have to confront the likelihood of irreparability, whereas the current regime (as represented by *Turner*¹⁷⁵) would not place any emphasis on that consideration. The impact of this new consideration would de-

nalties: A Comment on Piraino, 93 NW. U. L. REV. 1277, 1279 (1999) (arguing that an inferior standard may become entrenched, “[b]ut these barriers are not insurmountable, and proponents of new network standards have a variety of devices — such as initial, below-cost pricing — to entice consumers to commit to a new network”).

172. Lemley and McGowan highlight this difficulty in their article *Legal Implications of Network Economic Effects*, *supra* note 169. They argue that the dangers posed by network effects defy generalization and must be examined on a case-by-case basis in specific areas of law and specific industries.

173. See *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (“We can never forecast with certainty; all prophecy is a guess, but the reliability of a guess decreases with the length of the future which it seeks to penetrate. In application of such a standard courts may strike a wrong balance; they may tolerate ‘incitements’ which they should forbid; they may repress utterances they should allow; but that is a responsibility that they cannot avoid. Abdications are as much a failure of duty, as indifference is a failure to protect primal rights.”); see also Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 149-67 (arguing that the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997), erroneously stated that equally effective less restrictive alternatives to the Communications Decency Act were available, and that the Court thereby ducked the important question of how much of a reduction in effectiveness was compelled by application of the First Amendment).

174. The possibility that the legislature would simply make such a finding in bad faith, and in all cases, is discussed *infra* at notes 147-49.

175. See *supra* Part III.

pend, however, on the degree to which the legislature took its duty seriously. If the legislature acted in bad faith, the only significance of this Article's proposal would be that courts would rubber-stamp a different unjustified legislative assertion (instead of a prediction of harm, a prediction of irreparable harm). The discussion above, in other words, does not change the fact that deference matters a great deal. So what is the appropriate level of deference to legislative predictions of irreparability?

A. *Institutional Competence*

Questions about deference are not new, of course; they arise in a variety of contexts. The most common, and widely accepted, way of responding to them is to look to institutional competence.¹⁷⁶ The idea is to examine the type of decision at issue and the available institutions, and then determine which institution is better equipped to make the decision. In the context of judicial review of a statute, if courts are the better decisionmakers, then the court, on review, should decide the issue, rather than defer to the legislature. On the other hand, if the legislature is better positioned to make the decision, then the court should defer to that legislative expertise.

This suggests a comparative analysis. Indeed, one of the key insights of recent scholarship on institutional competence is that it is not terribly useful to focus on a single institution. Even if that institution does not do a good job, perhaps it does a better job than any other institution, and thus should be the relevant decisionmaker. An institution's absolute weakness, in other words, is relatively unimportant; what matters is its comparative strength or weakness.¹⁷⁷ This Section suggests a modification of that insight: comparative abilities are important, but in some contexts the absolute competence is important as well.

1. *Factfinding Capabilities*

Other commentators have already discussed some of the advantages of legislatures and courts when it comes to factfinding. By and large, courts have limited control over their dockets, and no ability to

176. See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); Christopher L. Eisgruber, *The Most Competent Branches*, 83 GEO. L.J. 347 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

177. See, e.g., KOMESAR, *supra* note 176, at 3-7.

initiate an inquiry into matters that interest them.¹⁷⁸ Moreover, when an issue does come before a court, the information coming to the court is generally limited to that which interested persons and groups provide.¹⁷⁹ Legislatures, on the other hand, can choose to investigate matters as they see fit, and they can invite comments from anyone that they believe might have something of interest to present. Legislatures can call on many different sources of information housed within the legislative branch, such as committee staffs that specialize on a particular set of issues and, at the federal level, standing research bodies like the Congressional Research Service (a large research agency designed specifically to provide accurate research to members of Congress) and the Congressional Budget Office.¹⁸⁰ In addition, legislatures can choose to contact hordes of entities outside the legislative branch, including think tanks and academic societies (not to mention advocacy groups that collect information). And, of course, they can hear from individuals and entities who might have valuable information. These latter sets of groups are not obliged to respond absent a legislative subpoena, but experience (and the vast number of entities that have legislative liaison offices) suggests that they are only too willing. In contrast, courts, as has been frequently noted and sometimes lamented, have relatively few resources under their control.¹⁸¹ Not only are the issues they will face controlled by the cases that individuals happen to bring, but also the sources of information are similarly limited. Judges' only standing army is a few law clerks, and the vast majority of the information they receive is from self-selected interested parties.¹⁸² Judges can seek information from disinterested parties,¹⁸³

178. These statements — and indeed all the characterizations of courts in this discussion — generally describe the litigation process; but these are generalizations only, and there are some exceptions. For instance, judges have on occasion seized a more active role in shaping the litigation before them. See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

179. See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 38-51 (1977); Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 296-97 (1963).

180. See, e.g., WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 59-60, 195, 275 (3d ed. 1989).

181. See Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A. J. 587, 590 (1976); Frederick K. Beutel, *Some Implications of Experimental Jurisprudence*, 48 HARV. L. REV. 169, 180-81 (1934).

182. See Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 10-17 (1986).

183. Perhaps the best recent example is from the breast implant litigation. Judge Pointer in Alabama convened a panel of four independent experts to evaluate the current evidence regarding the causal connection between silicone and immune system disorder. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, Master File No. CV 92-P-10000-S (N.D. Ala. May 30, 1996) (order no. 31 establishing National Science Panel), available at <http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm>; *id.* (N.D. Ala. June 13, 1996) (order no. 31B confirming appointment of National Science Panel), available at <http://www.fjc.gov/BREIMLIT/>

but such procedures are ad hoc and, in part for that reason, fairly cumbersome.

These considerations have led some commentators to suggest that, for instance, legislatures have a greater capability to make findings on broad, contested issues of fact.¹⁸⁴ Legislatures can draw on the expertise of their many research supports to canvass the experts they deem appropriate, and thus end up with a better chance of receiving views from a wide and representative range of expert opinion. Courts, on the other hand, are more likely to hear from the fringes — the experts that each side chooses. After all, experts who testify at trial are chosen by the parties. It stands to reason that one important criterion in the parties' choices would be the degree to which the expert would back up the parties' contentions; and, all other things being equal, the more skewed the expert's position toward the hiring party, the better. So courts' information is likely to be from the ends of the bell curve, rather than the middle, and this may lead to a weaker ability to find broad scientific facts.¹⁸⁵ Courts, on the other hand, might be thought to do a better job on narrower findings. Judicial procedures, particularly those that allow for direct and cross examination, might give courts an advantage in teasing out specific facts. Witnesses are on the spot in a way that they usually are not in a legislative hearing, and perhaps information that they divulge will therefore be more revealing.¹⁸⁶

This does not end the analysis in ordinary cases, of course, because the question is whether legislatures' putative greater ability to find broad facts is overcome by factors that may cloud its vision to the extent that courts, even with admittedly fewer, and weaker, resources, may produce better factfinding. One of the central insights of public choice theory is that the performance of an institution often does not match its potential competence.¹⁸⁷ Members of institutions may pursue their own interests, and those of the institution, rather than a recognizable version of the "public interest," with the result that we may have less confidence in their actual undertakings than we do in their

ORDERS/orders.htm; Thomas M. Burton, *Top Judge in Breast-Implant Case Calls on Doctors to Hear Evidence*, WALL ST. J., July 22, 1997, at B6; see also *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996) (granting a motion to exclude testimony of plaintiff's expert witnesses after considering the findings of an appointed panel of independent experts from several different scientific disciplines).

184. See, e.g., HOROWITZ, *supra* note 179, at 33-56, 294-98.

185. See generally Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181.

186. See FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 204-06 (4th ed. 1936).

187. See DENNIS MUELLER, *PUBLIC CHOICE II* 1 (1989) (defining public choice as "the economic study of nonmarket decision making, or simply the application of economics to political science").

theoretical abilities.¹⁸⁸ This is a familiar debate, and I will not replay it here.¹⁸⁹ Suffice it to say that the issue revolves around the question whether features of the legislative process such as the democratic responsiveness entailed in elections make legislators subject to capture by powerful groups that serve their members' interests, and whether courts are likely to be as clouded by their own institutional interests.¹⁹⁰ The fear is that, though legislators have the resources to enable them to answer a factual question accurately, they will in fact seek a politically expedient or personally remunerative finding, rather than an accurate one, thus rendering any advantage in ability valueless in terms of the outcome of their decision.¹⁹¹ Judges, meanwhile, do not depend on any constituencies for their continued employment and are thought to focus more directly on the right question — namely, whether a finding is in fact accurate.¹⁹²

188. See, e.g., William F. Shughart II, *Public-Choice Theory and Antitrust Policy*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* 7, 9 (Fred S. McChesney & William F. Shughart II eds., 1995) ("The model of public choice insists that the same rational, self-interest-seeking motives that animates human action in ordinary markets be applied to decision making in the public sector as well. The assumption that *all* individuals, in or out of government, pursue their own self-interests is the fundamental tenet of public choice.").

189. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962) (arguing that legislative decisionmakers act in their own self interest and discussing the legislative acts that result).

190. See generally R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).

191. See generally JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973) (utilizing public choice assumptions about legislative self-interest to develop a systematic account of legislatures' actions); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATURES: A THEORY OF POLITICAL MARKETS* (1981) (same).

192. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 520-21 (4th ed. 1992) (noting the value of judges' "aloof disinterest" in the outcome of cases). This does not necessarily mean that judges are insulated from their private interests so much as that their private interests may more closely comport with public interests. Assuming, for example, that their private interest is in their reputation and esteem among their colleagues and litigants, those interests might be fairly closely aligned with the public interest. See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 *PUB. CHOICE* 107, 129 (1983) (suggesting that judges tend to seek to maximize their prestige among litigants).

Of course some would say that the insulation of the courts from democratic constraints renders their judgments more suspect, and others would dispute that they are insulated from the democratic process in the first place. Although a full discussion of these issues is beyond the scope of this Article, perhaps a brief note is in order. As to the former point, the counter-majoritarian difficulty might legitimately raise concerns about the role of courts in invalidating democratically enacted legislation (although, as Matt Adler points out, the "democratic process" is not as democratic as this vision seems to assume, see Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 *U. PA. L. REV.* 759 (1997)), but here I am focusing on the narrower question of who is likely to find facts more accurately, on the assumption that in at least some cases judicial invalidation of legislation is permissible. As to the suggestion that judges are not as insulated as we may believe: that may be true, but the point is a comparative one, and it seems clear that federal judges are less subject to the constraints of the ballot box (and the fund-

2. *Beyond Factfinding*

This analysis is useful for my purposes but incomplete. Factfinding is valuable for making predictions, but it is hardly sufficient. Predictive harms are not simply a matter of gathering facts; one must attempt to move from what we currently know into a guess about future events. These are not findings so much as forecasts. The situation is further complicated by what is required of these predictions. Remember that it is not enough for the legislature to say, for instance, that a competitor will be harmed. Rather, the legislature must point to a harm that rises to the level of "important" or "substantial" — a harm to the public interest (usually to competition).¹⁹³ Furthermore, it must then find that the cost of waiting will be particularly high (i.e., that the harm will be effectively irreparable). These are akin to the sort of projections of economic developments that we associate with antitrust law, where economic theories loom large. The predictions are best understood as applied economic theory/market forecasting: Will, for instance, the power of cable television lead to broadcast networks being squeezed out of the market? If so, will the broadcasters suffer irreparable harm? In answering those questions, a supple understanding of the facts on the ground is probably necessary, but it will not get you very far without an economic theory behind it. (Once it occurs, then you can more easily argue that the validity of the premises has been established.) We are asking not only for predictions, but for predictions in the form of economic theory.

So who is likely to be better at these predictions, legislatures or courts? We could start with familiarity, on the theory that an entity that routinely makes such predictions is likely to hone its techniques and thereby do a better job than an entity that rarely makes such predictions. At first blush, this might seem to give the edge to legislatures. After all, predictions of serious harm should be, and with any luck are, central to any legislative decision to act in the first place. Admittedly, legislatures might not routinely make predictions of irreparable harm, but they are in the business of making predictions more generally. The problem with this reasoning is that courts make these sorts of predictions all the time, as well. In deciding whether or not to grant temporary relief to one party or another, courts utilize a balancing test a critical element of which is the likelihood that either party will suffer irreparable harm during the pendency of the case.¹⁹⁴ Courts make this

raising and politicking imperatives that it entails) than are legislators. I should note, however, that the point has more power in states where judges run for election; although such races usually are not as blatantly political as legislative elections, the position of judges is much closer to that of legislators in jurisdictions with regular, contested judicial elections.

193. See *supra* text following note 28.

194. See *supra* notes 156-58 and accompanying text.

determination quite frequently — whenever injunctive relief is requested — and it is quite similar to the sort of prediction on which this Article focuses. This test is also used specifically in the First Amendment context. Prior restraints on the publication of First Amendment material are disfavored in the law, but the presumption against prior restraints can be overcome if there is a showing of irreparable harm.¹⁹⁵ The threshold in prior restraint cases may be extraordinarily high, but the underlying predictive question is the same — how much harm will occur if the speech is allowed to continue.

When we move beyond familiarity to look more directly at what makes for a good prediction and therefore who will do it better, we come to an immediate difficulty: we do not know what makes for accurate predictions of this sort. A determination about relative accuracy (i.e., whether courts or legislatures will do a better job of predicting) is thus undercut by the more serious problem that we can have little confidence about absolute accuracy. We might reasonably guess that the people or institutions who are likely to be the most accurate in predicting irreparable harm are those who have a solid grasp of historical and current facts, a supple understanding of the theories and developments that might help to identify future trends, and the intelligence to pick out the important elements and combine them into a powerful prediction. This would give us reason to prefer that a given entity engage in factfinding (which, as I noted above, seems to be a *sine qua non*), have access to important research and theories, and be filled with intelligent members. That sounds wonderful, but it is stated at such a high level of generality that it does not get us very far. Both legislatures and courts engage in factfinding, have access to research and theoretical developments, and claim to be populated with relatively intelligent people.¹⁹⁶ We could try to be more specific — say, by looking to who has the best database on particular historical trends — but that requires a set of assumptions that amount to little more than guesswork (here, that those historical trends are good predictors of the future). It is difficult to have confidence that any particular formula for predictions (other than the very general one listed above) makes for accuracy.

Predictions are never a matter of simply extrapolating from past events, because too many variables can lead to changes in future behavior. This problem is likely to be particularly acute in fields in which

195. See *supra* notes 159-61 and accompanying text.

196. I am not aware of any serious studies comparing the intelligence of legislators and judges, but I suspect that many Americans, and many readers, have their own sense of the answer to this question, albeit one based in most cases on anecdotal evidence and potentially clouded by bias. Cf. Frank B. Cross, *Institutions and the Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1537-45 (2000) (arguing that judges, like legislators, are chosen for political and ideological reasons, and that there is little basis for assuming that the former are better equipped to engage in constitutional analysis than the latter).

the predictive harms will arise — developing areas like telecommunications and the Internet that combine human interactions with future technological change. Forecasting human patterns in a stable field is difficult enough, but forecasting the future development of technological innovation and absorption by those humans makes ordinary human interactions seem easy by comparison. In such circumstances, there may not be much of a track record on which we can draw, and past events may tell us less than we hope about the future.¹⁹⁷

Research on the accuracy of predictions bears this out. There are no useful studies on the accuracy of legislative and judicial predictions of the sort at issue in this Article. The literature on legislative and judicial predictions tends to focus on questions very different from the predictive harms of irreparability on which I am focusing (e.g., predictions that a particular criminal will engage in the same criminal activity if released¹⁹⁸) and thus is not terribly helpful for our purposes. There is, though, research that focuses on somewhat analogous questions and thus provides us with some guidance. One analogous area of study is the rate of technological and scientific innovation and absorption. Given the relevance of technological development to the predictions that are likely to be at the center of proactive legislation, these studies may provide some useful insights. Unfortunately, researchers who have studied the issue have come to wide agreement that technological and scientific innovation and absorption is essentially impossible to predict, because it is not linear but rather is full of “leaps ahead, feedback loops, and sudden and unexpected lacunae.”¹⁹⁹ Another analogue is economic forecasting — in particular, projections of company- and industry-specific growth and development. Such predictions are fairly close to the ones that interest me in this Article, because they incorporate (and often turn on) projections regarding the ability of a product or industry to exploit a market, harm its competitors, etc. Again, the news on the accuracy front is not terribly encouraging: studies of these

197. For instance, just because Microsoft arose and obtained a hammer-lock on operating systems for personal computers does not mean that the next creator of a killer OS will achieve similar dominance.

198. See, e.g., Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33 (1997); Douglas Mossman, *Dangerousness Decisions: An Essay on the Mathematics of Clinical Violence Prediction and Involuntary Hospitalization*, 2 U. CHI. L. SCH. ROUNDTABLE 95 (1995); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984).

Other commentators have focused on other sorts of predictions, but, again, the emphasis has been on more individualized predictions. See, e.g., Eric Chevlen, *The Limits of Prognostication*, 35 DUQ. L. REV. 337 (1996) (discussing the limited usefulness of medical statistics in making predictions of survival outcome for individual patients).

199. Bruce L.R. Smith & Claude E. Barfield, *Contributions of Research and Technical Advance to the Economy*, in TECHNOLOGY, R&D, AND THE ECONOMY 1 (Bruce L.R. Smith & Claude E. Barfield eds., 1996).

predictions have cast doubt on their accuracy, particularly when industries or markets are in a stage of growth or development.²⁰⁰ Forecasts by managers who worked within a company were slightly more accurate than forecasts by outsiders (usually financial analysts), but this is far from encouraging, as legislatures and courts are of course outsiders.²⁰¹

This should not surprise us. These are the sorts of predictions on which well-remunerated companies filled with experts specialize, and even they, by their own admission, are frequently wrong.²⁰² They are also the sorts of matters on which billion-dollar companies will make divergent bets, in the form of their investment in planned future developments. Some pan out and others do not, but relatively few people and companies have had the foresight to back the right predictions with any degree of reliability.²⁰³

On a more anecdotal level, in recent years — and particularly as the year 2000 approached — a number of people and publications took the time to look back on predictions of economic and technological developments that were made in the recent past (sometimes by them).²⁰⁴ These predictions were all over the map, and a distressingly

200. See, e.g., Elroy Dimson & Paul Marsh, *An Analysis of Brokers' and Analysts' Unpublished Forecasts of UK Stock Returns*, 39 J. FIN. 1257, 1281-83 (1984) (finding a low correlation between the prior and future forecast accuracy of analysts); John S. Poole, *Management Forecasts: Do They Have a Future in Corporate Takeovers?* 42 SW. L.J. 765, 805-07 (1988); Gregory Waymire, *Additional Evidence on the Accuracy of Analyst Forecasts Before and After Voluntary Management Earnings Forecasts*, 61 ACCT. REV. 129, 130-32 (1986); Ronald M. Copeland & Robert J. Marioni, *Executives' Forecasts of Earnings per Share Versus Forecasts of Naïve Models*, 45 J. BUS. 497, 503-06 (1972).

201. See, e.g., James D. Cox, *Insider Trading Regulation and the Production of Information: Theory and Evidence*, 64 WASH. U. L.Q. 475, 481-82 nn.17-18 (1986) (noting that the error rate of management forecasts was slightly less than that of outside analysts); Russell M. Barefield et al., *Accuracy of Management and Security Analysts' Forecasts: Additional Evidence*, 7 J. BUS. RES. 109, 113-15 (1979) (same); William Ruland, *The Accuracy of Forecasts by Management and by Financial Analysts*, 53 ACCT. REV. 439, 445-47 (1978) (same); Bikki Jaggi, *Further Evidence on the Accuracy of Management Forecasts Vis-à-Vis Analysts' Forecasts*, 55 ACCT. REV. 96, 96-101 (1980) (same).

202. Technology forecasting agencies' optimistic (and probably unrealistic) claim is that 70% of their predictions are accurate. See Jim Frederick, *The Virtual Science of High-Tech Forecasting*, N.Y. TIMES, Dec. 19, 1999, § 6 (Magazine), at 70.

203. The problems of inaccuracy are by no means limited to these categories of experts. More general studies of experts' predictions have also found disappointing accuracy levels. See generally Colin F. Camerer & Eric J. Johnson, *The Process-Performance Paradox in Expert Judgment: How Can Experts Know So Much and Predict So Badly?*, in TOWARD A GENERAL THEORY OF EXPERTISE 195 (K. Anders Ericsson & Jacqui Smith eds., 1991) (reviewing studies finding underwhelming accuracy rates among many different kinds of experts, including academics, accountants, doctors, and psychologists); PAUL E. MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE* (1954). As Camerer and Johnson succinctly state, "experts know a lot but predict poorly." Camerer & Johnson, *supra*, at 196.

204. See, e.g., *We Woz Wrong*, THE ECONOMIST, DEC. 18, 1999, at 47; Scott Rosenberg, *The Wrong Stuff: In the Future, Predictions of the Future Will Be As Off-Base As They've Been in the Past*, SALON (Jan. 7, 2000), at <http://www.salon.com/tech/col/rose/2000/01/07/>

high percentage proved to be wrong. The predictions seemed reasonable, perhaps inevitable, at the time that they were made, yet they did not pan out. And, perhaps worse, the reasons for their inaccuracy are unclear.

The problem, simply stated, is that being a good factfinder is probably helpful, but it is not sufficient — it does not necessarily make one a good theorist about future developments. Who will do a good job between the legislature and the courts in applying economic theory to future developments? It seems hard to say, in part because the track record of just about *everyone* who makes such predictions (including those who are paid lots of money for them) is so spotty. And part of the reason we lack a clear sense of what makes for a better prediction is that we do not know what makes for reliable predictions and thus have no reason to have confidence that anyone will make these predictions accurately.

There is yet an additional cause for concern. Studies have found that people have confidence in their own predictions that far exceeds their accuracy, and thus they overestimate their ability to accurately gauge the likelihood of future events.²⁰⁵ Even frequent predictors often overestimate their accuracy.²⁰⁶ And significantly, this applies to experts, who are “often wrong but rarely in doubt.”²⁰⁷ Across a wide

wrong predictions; Virginia Postrel, *Surprise, Surprise! Uncertainty is an Essential Ingredient of Progress*, WALL ST. J., Jan. 1, 2000, at R16; Lee Gomes, *Entertainment World Has Flawed Crystal Ball: Conflicting Napster Predictions Evoke Errors in Foretelling Impact of VCR, Digital Tape*, WALL ST. J., June 20, 2000, at B1; Kenneth L. Fisher, *Bet Against the Experts*, FORBES, Apr. 19, 1999, at 406; Alan M. Tuerkheimer & Stuart A. Vyse, *The Book of Predictions: Fifteen Years Later*, SKEPTICAL INQUIRER, Mar./Apr. 1997, at 40; Nicholas Petreley, *Making Predictions Is Easy, Particularly If Some Kind of Death Is Involved*, INFOWORLD, Nov. 9, 1998, at 126; Robert Kuttner, *What Do You Call an Economist with a Prediction? Wrong*, BUS. WK., Sept. 6, 1999, at 22; J. SCOTT ARMSTRONG, *LONG-RANGE FORECASTING: FROM CRYSTAL BALL TO COMPUTER* (2d ed. 1985); cf. Lee Sigelman et al., *Inside Dopes? Pundits as Political Forecasters*, 1 PRESS/POLITICS 33 (1996) (finding that 50.1% of 757 predictions made by panelists on the McLaughlin Group proved to be correct, and that in no subject area of these predictions was the panelists' accuracy rate higher than 55%).

205. See, e.g., Robert P. Vallone et al., *Overconfident Prediction of Future Actions and Outcomes by Self and Others*, 58 J. PERSONALITY & SOC. PSYCHOL. 582 (1990); David Dunning et al., *The Overconfidence Effect in Social Prediction*, 58 J. PERSONALITY & SOC. PSYCHOL. 568 (1990); Sarah Lichtenstein & Baruch Fischhoff, *Do Those Who Know More Also Know More About How Much They Know?*, 20 ORG. BEHAV. & HUM. PERFORMANCE 159 (1977); see also MARK BOVENS & PAUL 'T HART, *UNDERSTANDING POLICY FIASCOES* 8 (1996).

206. This may be related to hindsight bias — the tendency of people to view past events as inevitable and thus easily predictable ex ante. Insofar as people tend to overestimate the degree to which the past is predictable (as studies on the hindsight bias indicate), they may also be inclined to overestimate the predictability of the future. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Baruch Fischhoff, *Hindsight Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288 (1975).

207. Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 412 (1992) (internal quotation marks omitted).

range of disciplines, experts (and other frequent predictors) have an inflated sense of the accuracy of their predictions.²⁰⁸ Experts attempt to make accurate predictions of future probabilities, and they feel confident about those predictions; but frequently that confidence is misplaced, and particularly so with respect to predictions concerning fields that lack a long and consistent history.²⁰⁹ Moreover, both experts and ordinary individuals tend, even in hindsight, to justify their confidence by overestimating their accuracy.²¹⁰ Experts will often misremember an inaccurate prediction, or defend an incorrect prediction by saying that it "almost occurred," or that it still will happen in the future and is simply taking longer than they had originally ex-

This has also been said of lawyers. See Robert P. Casey, *The Pope John Paul XXIII Lecture*, 44 CATH. U. L. REV. 821, 822 (1994) ("Most lawyers are — what is the expression? — often wrong, but never in doubt.").

208. See, e.g., John B. Kidd, *The Utilization of Subjective Probabilities in Production Planning*, 34 ACTA PSYCHOLOGICA 338 (1970) (finding that engineers are overconfident in their predictions); Mary Ellen Hynes & Erik H. Vanmarcke, *Reliability of Embankment Performance Predictions*, in MECHANICS IN ENGINEERING 367, 371-73 (Donald E. Grierson et al. eds., 1976) (finding that expert engineers are prone both to make mistakes and to be overconfident about their accuracy); Jay J.J. Christensen-Szalanski & James B. Bushyhead, *Physicians' Use of Probabilistic Information in a Real Clinical Setting*, 7 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 928 (1981) (finding overconfidence among physicians); LEE B. LUSTED, AMERICAN COLLEGE OF RADIOLOGY COMM. ON EFFICACY STUDIES, A STUDY OF THE EFFICACY OF DIAGNOSTIC RADIOLOGIC PROCEDURES: FINAL REPORT ON DIAGNOSTIC EFFICACY 104-05 (1977) (same); Carl-Axel S. Staël von Holstein, *Probabilistic Forecasting: An Experiment Related to the Stock Market*, 8 ORG. BEHAV. & HUM. PERFORMANCE 139 (1972) (finding overconfidence among securities analysts); Stuart Oskamp, *Overconfidence in Case-Study Judgments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 287 (Daniel Kahneman et al. eds., 1982) (finding overconfidence among clinical psychologists); MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION (1990) (finding overconfidence among negotiators); Arnold C. Cooper et al., *Entrepreneurs' Perceived Chances for Success*, 3 J. BUS. VENTURING 97, *passim* (1988) (finding overconfidence among entrepreneurs). As Griffin and Tversky note, the main exception to this widespread phenomenon of overconfidence among experts and other frequent predictors is weather forecasters, "who receive immediate frequentist feedback and produce realistic forecasts of precipitation." Griffin & Tversky, *supra* note 207, at 412; see also Sarah Lichtenstein et al., *Calibration of Probabilities: The State of the Art to 1980*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 306, 309-11, 322 (Daniel Kahneman et al. eds., 1982).

209. See Lichtenstein et al., *supra* note 208; Willem A. Wagenaar & Gideon B. Keren, *Does the Expert Know? The Reliability of Predictions and Confidence Ratings of Experts*, in INTELLIGENT DECISION SUPPORT IN PROCESS ENVIRONMENTS 87 (Erik Hollnagel et al. eds., 1986) (finding overconfidence in predictions among several different kinds of experts, including lawyers); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 758 (2000).

210. Disturbingly, those who are least competent suffer from the greatest miscalibration of their abilities. And, even after seeing their mistakes, these people's wild overestimates of their abilities diminished only very slightly. See Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121 (1999). Those who are more competent, on the other hand, tend to underestimate their accuracy (though their degree of miscalibration is less than the least competent individuals' miscalibration). See *id.*; see also Lichtenstein & Fischhoff, *supra* note 205.

pected.²¹¹ As a result, even if a predictor has confidence in the accuracy of her prediction of the likelihood of some future harm occurring, that does not mean that we should share her confidence.

This is a long way of saying that we have little basis for preferring legislatures to courts, or vice versa, in the realm of the sort of predictive harms on which this Article is focusing.²¹² The problem is even

211. See generally Philip E. Tetlock, *Theory-Driven Reasoning About Plausible Past and Probable Futures in World Politics: Are We Prisoners of Our Preconceptions?*, 43 AM. J. POL. SCI. 335 (1999); Baruch Fischhoff & Ruth Beyth, *"I Knew It Would Happen": Remembered Probabilities of Once-Future Things*, 13 ORG. BEHAV. & HUM. PERFORMANCE 1 (1975).

212. This discussion focuses on courts making findings regarding irreparable future harms versus legislatures doing so. There is, however, another possibility: the court or legislature could delegate the making of such findings to a third party. As for courts, some state courts may have a limited ability to do this under state law, but federal courts would have a difficult time pursuing this option, as non-Article III actors cannot exercise judicial authority, and simply transferring the case to another court would not change anything for purposes of the analysis in the text. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion). The more obvious, and much more common, delegators are legislatures, and the common delegates are administrative agencies.

It is difficult to generalize about courts or about legislatures, but it is even more difficult to generalize about agencies, as they vary so greatly in so many ways. See, e.g., William F. Fox, Jr., *Understanding Administrative Law* 8-18 (3d ed. 1997) (noting the wide variety of agencies and functions performed by them). Nonetheless, as with courts and legislatures, there is a substantial literature on the institutional competence and possible public choice limitations applicable to administrative agencies. See, e.g., Terry M. Moe, *The Positive Theory of Public Bureaucracy*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 455 (Dennis C. Mueller ed., 1997); Stephen P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998). To summarize briefly: as to institutional competence, the advantages that apply to legislatures are also thought to apply to agencies; indeed, one rationale for having agencies is to permit greater competence than is possible within a legislature. Although the head (or heads) of an agency may not be an expert, agencies usually have significant research capabilities. Like legislatures, agencies can choose to conduct investigations (though their purview is narrower than that of a legislature), can seek input from their staffs, and can solicit comments from other entities. Their capability to engage in fact finding may be compromised by a narrowly drawn frame of reference (e.g., an agency whose only mission is to focus on a particular industry might make findings specific to that industry that fail to take into account factors that affect the economy more generally), but a specificity of focus may also enhance expertise within a particular field. Accordingly, agencies generally get fairly high marks on institutional competence grounds. Indeed, the cases that *Turner I* cited as supporting deference to legislative predictions, see note 84 and accompanying text, had actually involved deference to agency expertise. See *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) (stating that "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency"); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) (quoting this statement from *Transcontinental Gas*). Public choice considerations, however, are a different matter entirely. The theory of capture (whereby a powerful entity effectively controls the entity that regulates it) grew out of studies of agency behavior. A number of factors contribute to this concern — to name just a few, the facts that agencies usually have a somewhat narrow focus, that agency officials often come from, and plan to return to, the industry that they regulate, and that agencies usually operate below the public's radar. These factors help to produce both regulatees whose power vis-à-vis a given agency is much greater than that of broader consumer interests and agency personnel who have the opportunity to maximize their own interests at the expense of the public interest.

Why not say more? Because the point noted in the text about predictions is not limited to courts and legislatures but instead applies to all predictors: we do not know what makes for accurate predictions, and there is little reason for confidence that anyone will do a good

worse, however: for many of these predictions, we have no reason to believe that either courts, legislatures, or any other predictors are likely to be accurate — despite the confidence that they, or we, may have in their predictions. Where, then, should this lead us?

B. Redundancy

The answer seems to go back to our baseline. If we have no reason to prefer a world without the proposed legislation, then we might just go with one entity or the other. But where we have reason to privilege the status quo (i.e., to reject proposed legislation), we might want to place the hurdle higher.

Such a raising of a threshold in a way that prefers a class of outcomes arises frequently in law. Often, it is because we have reason to prefer the status quo as a default. A classic example is a twelve-person criminal jury, with unanimity required. There is nothing ineluctable about a requirement of unanimity, and some jurisdictions do not require it.²¹³ Indeed, we could have a rule that provided for conviction on any given count as long as a single juror thought it appropriate. The higher we raise the threshold percentage of jurors required for conviction, the lower the number of convictions.²¹⁴ This would presumably mean that fewer innocent people would be convicted,²¹⁵ but it also would likely mean that a higher number of guilty defendants would not be convicted.²¹⁶ Raising the percentage of jurors who are required

job in making these predictions. As a result, bringing agencies into the mix adds little to the analysis. We are still left with no reason to believe that anyone will do a particularly good job, and it does not really matter whether that “anyone” includes one player or one thousand.

213. See J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1494 (1996) (noting that Oregon and Louisiana utilize nonunanimous juries in criminal cases); see also Jere W. Morehead, *A “Modest” Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 933-45 (1998).

214. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 460-61 (1966).

215. This proposition is not logically required. One might imagine that juries will always be unanimous anyway, so that requiring one or twelve to agree will make no difference; or that juries are likely to be counter indicators (i.e., they are more likely to convict the innocent than the guilty, and more likely to acquit the guilty than the innocent), and that those who would be convicted in split verdicts are more likely to be guilty than those who are convicted in unanimous verdicts. The first proposition seems flatly false, as an empirical matter, given all we know about splits within juries. The second proposition seems exceedingly unlikely; moreover, if true it would suggest that we should abolish the jury system altogether, as even a random system would be more accurate in determining guilt.

216. The incidence of outright acquittal might also be low (because of the unanimity requirement), but hung juries would be more common. See Richard A. Primus, *When Democracy is not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1417 & n.2 (1997) (noting that unanimity favors defendants and reduces convictions, in part because after any given nonunanimous outcome (i.e., hung juries), there is some possibility that the prosecutor will decide not to retry the case).

to agree²¹⁷ thus tends to raise the n in the phrase “[i]t is better to let n guilty men go free than have one innocent man convicted.”²¹⁸ Simply stated, a higher percentage of jurors means that we will have fewer false positives (convicted innocent defendants) but more false negatives (guilty defendants who are not convicted).²¹⁹ Why might we prefer such a state of affairs? Because we have reason to privilege an outcome — nonconviction.

This can also arise in non-constitutional contexts. The Senate’s internal rules requiring a supermajority to end a filibuster privilege the status quo.²²⁰ Other supermajority rules prefer more particular substantive outcomes, such as the rule adopted by the House of Representatives in 1995 mandating a three-fifths vote to pass a tax rate increase.²²¹ Michael Rappaport and John McGinnis, meanwhile, have argued for a different kind of legislative supermajority rule — one that would apply not to taxes but instead to spending.²²² Their reasoning is

217. Raising the number of jurors also tends to depress conviction rates. See Robert H. Miller, Comment, *Six of One is not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 670-74 (1998); MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 15-16 (1977). The Supreme Court concluded in *Williams v. Florida*, 399 U.S. 78 (1970), that there was no empirical support for differences between 6- and 12-member juries, but the Court’s treatment of the relevant studies left much to be desired. See Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18 (asserting that, in *Williams v. Florida*, “the law’s confrontation with some relatively simple empirical questions was simply an embarrassment”).

218. See generally Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997) (collecting the many different numbers for n in that statement from different sources, and finding that the number ranges from 1 to 100).

219. See, e.g., Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 41 (1997) (noting that “when convicting, quorum rule juries did so with less confidence that they were correct than was true of juries deciding under a unanimous rule”).

Many commentators have adopted the terminology of statistics to identify false positives and false negatives, calling the former “Type I” errors and the latter “Type II” errors. See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1504 (1999). Commentators often distinguish between such errors, and there is an extensive literature applying the distinction in a variety of fields. See, e.g., Posner, *supra* (discussing Type I and Type II errors in the context of evidence law); Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996) (discussing these errors in the context of securities law).

220. S. DOC. NO. 104-1, 104th Cong., Sen. Rule XXII (1995). Indeed, the constitutional requirement of Presidential approval of legislation (or a legislative supermajority for an override) and the constitutional requirement that the House and Senate pass the same piece of legislation in order for it to become law implement a redundancy principle. See also *infra* text following note 245.

221. H.R. DOC. NO. 103-342, House Rule XXI(5)(c), at 652-58 (1995), amended by H. Res. 5, 105th Cong. (1997).

222. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); see also Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705 (1997).

that public choice problems lead legislatures to have a systemic bias in favor of increasing spending; the way to counter-balance, in their view, is to require that a supermajority of legislators agree to raise taxes. Most decisions would still be made by a simple majority, but some situations in which we have reason to be mistrustful of a straight majority requirement would instead be subject to the supermajority rule.

There are myriad other possible examples of such rules. When appellate courts impose a high burden on complaining parties before they will overturn a decision of a trial judge, they are privileging, as a default, the trial judge's actions. Invalidation of a statute on constitutional grounds could require a supermajority of Justices, or the ordinary majority of the Supreme Court plus the legislature.²²³ Before the Civil War, some Southern states argued that federal decisions could be applied to them only if they concurred; that, too, is a form of supermajority rule, here in the form of required redundancy. Procedures that entrench the status quo by making change more difficult are just another form of these rules — here, preferring the status quo as a default on the assumption that it will be preferable to the changes that would otherwise occur.²²⁴

These examples of redundancy/supermajority arise when, in effect, we want to drive down the number of false positives at the likely expense of more false negatives. Why would we ever do this? Put simply, because we expect that without redundancy/supermajority rules the percentage of false positives would be too high. As a result, we raise the threshold for finding positives as high as our default preference takes us. The difficulty, of course, is that this relies on two considerations that are difficult to quantify and impossible to justify (in the sense of showing that all other answers are inferior) — namely, how many false positives we will have at any given level of redundancy/voting requirement, and where we want to set the bar for such false positives (i.e., how strong is our preference for our default). We are left with our own sense of what threshold seems about right, even though it seems a fool's task to try to argue that one threshold is, in some meaningful sense, "better" than another. After all, how do we know what is the appropriate threshold of accuracy for criminal juries, and thus the n in the " n guilty men" formulation?

The rationale for redundancy applies here as well. First, we have reason to privilege, as a default, invalidation of legislation that infringes upon First Amendment interests and is based on predictive harms. Second, we have little confidence in the competence of a legis-

223. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139-44 (1893); cf. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

224. See John Harrison, *The Fiscal Powers and the 1930s: Entrenchment*, 41 WM. & MARY L. REV. 295, 295-308 (1999).

lature, court, or anyone else in making the decision whether our presumption against such legislation is overcome (i.e., whether there is a likelihood of irreparable substantial harm). In light of the high risk of error, and the rights at stake, we should choose a regime that requires a greater level of agreement than we would require in ordinary cases. Such a heightened threshold probably will increase the number of false negatives, but it should decrease the number of false positives.

How might this be achieved? One obvious option is intra-institutional redundancy. Perhaps the easiest option to implement would take its cue from cases on independent appellate review of certain First Amendment rulings. In *Bose Corporation v. Consumers Union of United States, Inc.*,²²⁵ the Supreme Court ruled that the First Amendment altered the ordinary rules of deference to factfinders, displacing deferential with independent review. The finder of fact in that case (the district court) had concluded that Consumers Union had made a statement with actual malice, because an article it published contained a false statement of fact and the author's testimony about his intended meaning was not credible. Ordinarily, such findings of fact would be subject to appellate review for clear error.²²⁶ The Supreme Court held, however, that because the case implicated First Amendment interests the Court should engage in independent review of the district court's findings.²²⁷ Subsequent to *Bose*, the question has arisen whether its rule of independent review applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment. A split has developed on this question.²²⁸ Some courts have held that appellate courts should make an independent examination of the whole record in all cases involving First Amendment claims.²²⁹ Other courts have held that, because the *Bose* standard is designed to protect First Amendment rights, de novo review is appropriate only where the trial court has rejected a First Amendment claim.²³⁰ This second line of cases employs a redundancy principle. These courts have adopted a rule of review that is intended to decrease the chances that constitutionally pro-

225. 466 U.S. 485 (1984).

226. See FED. R. CIV. P. 52(a); *Bose*, 466 U.S. at 498-99.

227. See *Bose*, 466 U.S. at 499, 510-11.

228. See *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981, 981-82 (1988) (White, J., dissenting from denial of certiorari) (noting a split among the lower courts).

229. See *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987); *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 897 (5th Cir. 1985); *Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266, 270-71 (Colo. 1997).

230. See *Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985); *Brown v. K.N.D. Corp.*, 529 A.2d 1292, 1295-96 (Conn. 1987).

tected speech will be erroneously punished by providing, in effect, that free speech interests will not be limited unless both the trial court and appellate court agree that the limitation is appropriate. If either court finds in favor of First Amendment interests, then those interests will trump. Such redundancy probably decreases false positives (situations in which First Amendment rights are improperly infringed), but may well increase false negatives (situations in which First Amendment rights should be limited but are not).

This approach easily could be applied to the predictions at issue here. The rule could be that, where legislation relies on predictive harms, an appellate court will defer to a lower court that invalidates such legislation but will engage in *de novo* review of a ruling that upholds it. As I discussed above, this or any level of redundancy is assailable.²³¹ But application of this post-*Bose* approach has the advantage of having been applied in a related First Amendment context, and of increasing the hurdle to predictions without making it insuperable.

The argument for intra-institutional redundancy will be strongest when we have reason to privilege the status quo and little confidence in anyone's absolute accuracy, but one institution has an advantage relative to all the others. In such circumstances, it makes sense to require redundancy (to counter the insufficiently high absolute accuracy), and to place all the relevant decisions within the entity that will do the best job, relatively speaking. Here, however, we not only have insufficiently high absolute accuracy, but also little reason to prefer one entity over another. In such circumstances, another choice presents itself (and might be preferable): inter-institutional redundancy.

Intra-institutional judicial redundancy gives the legislature little incentive to focus on the predictive harm, and the irreparable damage it might do. If courts do not defer to legislative findings, there seems little point in the legislature building a record, or even singling out the issue. The failure to give a legislature an incentive to build a record may be suboptimal. Although factfinding is not sufficient to create an accurate prediction, it will usually be valuable. Insofar as giving the legislature an incentive to engage in factfinding makes such factfinding more likely, the result should be a more accurate legislative prediction. The court could thus build on a better record, and that might even have potential advantages relative to the court's own capabilities. The gains from the creation of legislative findings would not be sufficient to suggest deference (because of the weak absolute accuracy and our lack of confidence that a legislature with a factual record will do a better job than a court with a factual record), but they may be worth pursuing. It also bears noting that this sort of redundancy will be

231. Why not require this redundancy plus a supermajority of appellate court judges? Why not require that two different trial court judges hear the case separately, with each being required to uphold the legislation in order for it to be valid?

available whenever legislation is challenged, whereas intra-institutional redundancy is premised upon the pursuit of an appeal. Intra-institutional redundancy, in other words, requires that parties expend the additional costs of an appeal in order to gain the benefit of two different entities making the appropriate predictions.

The regime crafted by *Turner II* provides an incentive for legislatures to create extensive factual records, by indicating that review of statutes with such records will be more deferential than review of statutes without them: If the legislature makes findings of fact, the court will defer to those findings; if the legislature fails to make findings of fact, the court will not defer to the legislature's implicit judgment that the finding exists but rather will engage in independent review.²³² My argument here is that, when predictive harms are at issue, each element of that dichotomy should be ratcheted up: if the legislature makes findings, then the court applies its own independent judgment; if the legislature fails to make findings, then the legislation should be invalidated. We could thus achieve the same incentive, without involving the deference that would seem unwarranted, via inter-institutional redundancy. That is, we could say that, in order for a statute predicated on predictive harms to be upheld, both the legislature and the court must conclude that there is a likelihood of irreparable substantial harm. Because of the dangers presented by predictive harms, the skepticism would be knocked up a peg.

The advantage of such a system over intra-institutional redundancy is that each branch will have an incentive to make its own determinations, thus bringing to bear the benefits that each branch has to offer. In any given case, we do not have any reason to prefer one set of decisionmakers to another, because it is difficult to say that one set of decisionmakers is using better (i.e., more accurate) tools than the other, and we do not have any reason for confidence in either decisionmaker. But we do know that each institution engages in a somewhat different inquiry, and that each institution is a necessary element (the legislature must pass the statute, and the judiciary must review it when it is challenged); and we have every reason to give both institutions an incentive to consider the legislation, and the predictions on which it is predicated, as carefully as possible.

C. *Objections*

How, one might ask, is this different from a simple rule of no deference to legislative findings? The difference is that, with a no deference rule, the court would ignore what the legislature did no matter what it did; here, by contrast, the legislature's making, or failing to

232. See *supra* note 123.

make, findings is significant. And where the rubber hits the road is that, even if the court were inclined to believe that the harm would be irreparable, it should nonetheless invalidate the statute and thus send it back to the legislature if the legislature failed to make the same findings itself. The idea is that, when a legislature passes a law, we should want both institutions to agree that it would avert an unusually costly problem down the road. The reason to prefer such redundancy to deference is that we can have greater confidence when the legislature has given its input than when a court is on its own. Requiring inter-institutional redundancy is a way of seeking the wisdom of different branches with different techniques, backgrounds, etc. My proposal simply recognizes that difference.²³³

One possible objection to this redundancy approach is that it may seem inconsistent with the dignity of legislatures. Courts would be effectively requiring legislatures to make findings — something that might be appropriate to require of administrative agencies but seems inappropriate to require of legislatures. On one level, this is true: courts would be telling legislatures that factual findings are a precondition for legislation based on predictive harms to pass constitutional muster. Insofar as this is a concern, it would argue for intra-institutional redundancy, rather than inter-institutional redundancy. On the other hand, the real source of the indignity would seem to be the distrust of legislation based on predictive harms in the first place. Once we have a category of legislation that will be struck down absent unusual circumstances, we are paying relatively scant respect to the legislative process.

Furthermore, the Supreme Court has effectively imposed similar burdens on legislatures in other contexts. In *Califano v. Goldfarb*,²³⁴ the Court reviewed a provision that automatically provided survivor's benefits in the Social Security system to a widow, but provided such benefits to a widower only if his deceased wife had provided at least half of his support. The Court had previously upheld somewhat similar distinctions, such as a Florida law that granted widows, but not widowers, an annual \$500 property tax exemption,²³⁵ in light of the eco-

233. It is true, of course, that this proposal shares with ordinary independent review (also known as second-guessing the legislature) the fact that the courts will be considering the relevant statute after the legislation has been passed. We can call this "second-guessing the legislature," but it also ensures that there is independent review by both branches. After all, the President's decision to sign or veto a law comes after Congress has acted. It may be accurate to describe the President's action as "second-guessing," but it would also be accurate to describe it as crucial, and constitutionally authorized, independent review by a separate branch of government.

234. 430 U.S. 199 (1977).

235. *Kahn v. Shevin*, 416 U.S. 351 (1974).

conomic disadvantages faced by women.²³⁶ In *Goldfarb*, however, the Court refused to apply the compensatory rationale of these earlier cases because in the legislative record “nothing whatever suggests a reasoned congressional judgment that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers.”²³⁷ In this way, the Court “stress[ed] the absence of appropriate congressional support as a factor negating constitutionality.”²³⁸

Other instances are analogous. One example is the regime in *Turner*.²³⁹ More broadly, when the Court applies a clear statement rule, it has the effect of requiring a form of redundancy. When a court requires a clear legislative statement that the legislature intends a particular result before the court will reach an issue (i.e., the natural reading of the statute would indicate that the legislature intended to cover a given activity, but the court instead requires a clear statement of such intent because of the importance/sensitivity of the activity that would be covered), this effectively requires a particular legislative assertion — a statement that clearly reveals the legislature’s desire to extend its legislation to the relevant activity. Only if the legislature includes a clear statement will the court make a determination as to whether application of the legislation to the relevant activity would be constitutional.²⁴⁰ Additionally, in *United States v. Lopez*,²⁴¹ the Court suggested that it would not uphold legislation that had no obvious connection to interstate commerce absent findings from Congress that the activity covered by the statute actually affected interstate commerce.²⁴² The Court did not require such findings (much less suggest

236. *See id.* at 354-55; *see also* *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding a lenient attrition standard for female naval officers as compensating for the fact that, because women were excluded from certain forms of service and from combat, they faced greater difficulties in building a record supporting a promotion).

237. *Goldfarb*, 430 U.S. at 214.

238. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 725 (1996).

239. *See supra* notes 94-99 and 123 and accompanying text.

240. *See, e.g.,* *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992). Admittedly, if the legislature fails to make a clear statement the legislation is not struck down but instead simply is not applied to that activity. But there is no real substantive difference between that outcome and simply striking down, but severing, the portion of the statute that applies to the protected activity without prejudice to a reconsideration once the magic words (here, a clear statement) are included. As in the redundancy example, the legislature is given a choice: fail to use the required words and the legislation will not apply to the activity that you want to cover; use those words and we will then make our own judgment as to whether the legislation is constitutional.

241. 514 U.S. 549 (1995).

242. *Id.* at 562-63.

that such findings, by themselves, would establish a sufficient effect on interstate commerce),²⁴³ but it did emphasize their absence in striking down the legislation.²⁴⁴ Significantly, Congress could avoid that stricture by passing legislation that more obviously affected interstate commerce. The same is true here: a legislature that wanted to pass legislation without bothering with findings could rely instead on current harms rather than predictive ones.²⁴⁵ In fact, the legislature would have a further option, because the invalidation would just be temporary until the predicted harms actually materialized. The invalidation that would occur in the initial litigation would be a temporary state of affairs until more information could be amassed. Contrast this with invalidation on Commerce Clause grounds, which presumably lasts until fundamental changes in the economy take place such that events that do not substantially affect commerce come to have such an effect.

As these examples might suggest, we can see this requirement of redundancy in the context of the larger issues of separated government. One way of understanding our constitutional structure is that it is all about inter-institutional redundancy. After all, in order for liability to be imposed on any individual all three branches must agree to move forward: the legislature must pass the statute (and overcome a presidential veto if he disagrees); the executive must execute the law and bring a prosecution under it; and the judiciary must convict. Even for statutes permitting a private cause of action (and thereby arguably cutting the executive out, at least in part), the legislature must pass the statute and the judiciary must find it permissible. Implicit in the passage of legislation is, or should be, the legislative judgment that the legislation is justified, which here would mean that it prevents an irreparable harm. The inter-institutional redundancy element merely requires the legislature to make that implicit judgment explicit. Or, to put the point a bit differently, the redundancy inherent in legislation is redundancy at a high level of generality; a legislature might enact legislation on a set of bases very different from the bases on which the

243. *See id.* If there was any doubt on this point, the Court erased it in *United States v. Morrison*, 120 S. Ct. 1740 (2000). In that case the Court struck down a section of the Violence Against Women Act of 1994 despite the Act's inclusion of numerous findings asserting a connection between violence against women and interstate commerce. *See id.* at 1752 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

244. *See Lopez*, 514 U.S. at 562-63; *see also* Frickey, *supra* note 238, at 723-38 (discussing *Lopez*, and drawing this comparison between *Lopez* and *Goldfarb*); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2239 & nn.254-55 (1998) (noting the absence of congressional findings in *Lopez*).

245. Even as to current harms, the statute would be on much stronger footing if the legislature made findings. *Cf. Turner II*, *supra* note 7, 520 U.S. at 180; *see supra* notes 94-99 and 123 and accompanying text. This highlights both the importance of findings in other contexts and the way in which my proposal is merely ratcheting up the current approach to existing findings. *See supra* text accompanying note 232.

court upholds it. In situations like this one, we have reason to want agreement not only on the legislation, but also on some more specific elements of that legislation. So my proposal is merely moving the inter-institutional redundancy already inherent in judicial review, and the separation of powers itself, to a greater level of specificity.

But one might complain, does that give legislatures too much credit? What if they are just a bunch of political hacks who will make any finding necessary to get the legislation they favor implemented, whether or not they actually believe that finding? That *is* a vision of legislation that casts aspersions on the dignity of the legislature, but of course that does not make it untrue. I happen to believe that it will sometimes be true, but that, at least at the margin, some legislators who might support legislation will not in good conscience sign on to a finding that the harm they are predicting and then preventing is one that would be effectively irreparable. But if that vision of legislators as averring irreparability in bad faith is true in all cases rather than some, then the proposed redundancy would simply function as a *de facto* independent judicial review of those predictions; and, of course, such independent review would be vital and necessary, because by hypothesis the legislative findings were cooked. Certainly, the worst of all possible worlds with a dissembling legislature is for courts to give any deference to legislative pronouncements. This proposal would avoid any such deference.

We can also turn the question around and ask whether this regime gives too much credit to courts. This Article has spoken as if standards of review matter. Some people might argue that rules of deference are just smoke and mirrors, because a court will “defer” to a legislative finding that it thinks is correct and will “exercise independent judgment” when it does not think the finding is correct. The elaborate scheme that I have proposed, in other words, might seem naive; on this theory, courts will defer only to what they already believe. This critique taps into a long-standing debate about the degree to which judges actually apply the standards to which they profess to be bound, but I believe that it is particularly vulnerable here because there is a strong contender for existence proof of the importance of the level of deference in these cases. It is of course impossible to prove, but it appears that the result in *Turner II* would have been different absent the deference that the plurality found to be appropriate. The substantive case for the predictive harms in *Turner* was weak. The legislative record contained numerous flaws and inconsistencies. Indeed, Justice O'Connor had a field day in dissent dissecting, and mocking, the evidence that Congress assembled.²⁴⁶ The plurality did not suggest that Congress's economic analysis was remotely persuasive, and in fact

246. See *Turner II*, *supra* note 7, 520 U.S. at 235-49 (O'Connor, J., dissenting).

went out of its way to avoid endorsing Congress's views and instead merely said that Congress's conclusions were "reasonable."²⁴⁷ The decisive factor for the plurality appeared to be its willingness to defer, as opposed to the dissent's unwillingness to do the same.²⁴⁸

D. *Looking Directly at the Probabilities*

The emphasis in this Article on false positives and false negatives raises another question. Remember that a central distinction between current and predictive harms is one of probability — that predictive harms are less likely to arise than are current harms to remain until the legislation is implemented. If a major difference between current and predictive harms is that one seems much more probable than the other, then why not simply have courts directly ask the question of probability, rather than use the distinction between predictive and current harms as a proxy? That is, given that some current harms conceivably may dissipate on their own as quickly as they would with legislation (remember my Y2K example from above²⁴⁹) and that some predictive harms may be exceedingly likely, why not let courts directly ask the question of the probability of a harm occurring and thus allow them to take such outliers into account? Wouldn't that be better than using the procrustean approach of a categorization based on current versus predictive harms that may well contain a few false positives and a few false negatives?

Such an approach is in some ways similar to the one I am proposing. Its big difference is one that seems difficult to justify based on the arguments presented here. We can begin by thinking about this proposal in the context of predictive harms. The change with this approach would be that, rather than look at whether a harm is predic-

247. There were many situations in which the plurality in *Turner II* was at pains to distance itself from Congress's judgments and in fact indicated a wariness about accepting Congress's judgments absent the deference that it showed. See *id.* at 210-11 (conceding that "the record . . . contains evidence to support a contrary conclusion," but emphasizing that "[t]he question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress."); *id.* at 211 ("Although evidence of continuing growth in broadcast could have supported the opposite conclusion, a reasonable interpretation is that expansion in the cable industry was causing harm to broadcasting."); *id.* at 212 ("While these phenomena could be thought to stem from factors quite separate from the increasing market power of cable (for example, a recession in 1990-1992), it was for Congress to determine the better explanation.").

248. See also Comment, *supra* note 97, at 1173 ("The result in *Turner II* would not have been the same without 'considerable deference.' . . . The Court was palpably unpersuaded by Congress's economic analysis, which leaped over inconsistencies in the record. The difference between the plurality and the dissent is simply whether deference could, or should, bridge the gap." (internal citations omitted)).

249. See *supra* note 109 and accompanying text.

tive, the court would determine how probable the harm was. The probabilities of a harm arising are, of course, already a central part of the irreparability determination that this Article proposes. But, a skeptic might respond, the difference in the two approaches is that a harm that may be fairly likely but not terribly severe will not be stopped by the test of effective irreparability, whereas a direct focus on the probability of the harm would catch those harms. If that is our concern, the question creates its answer: for these harms are, by hypothesis, not likely to be severe, so the cost of waiting for them to develop is not high. With respect to such likely but not terribly frightening harms, we would just be waiting for them to develop. If we are particularly worried about the specter of such harms, we could adjust the irreparability test to be triggered for any harm that is exceedingly likely (and thus probability would serve as a basis for allowing the harms, as this hypothetical suggests), but that takes us back to our balance regarding free speech interests. In light of our concerns about the importance and fragility of free speech rights, and of accurate decisionmaking in delineating those rights, we have reason not to be so inclusive in delimiting the category of harms that justify regulation. Allowing regulation as long as some harm is quite likely would allow effectively any regulation. The approach advocated here would draw the balance differently, which probably would lead to a greater number of false negatives (harms that would be costly but nonetheless would continue because both branches did not agree that they would be costly), but the reason for that is concern about the underlying free speech rights in the first place.

We can also look at the other half of the probability proposal, which is that courts would examine current harms to see if they were likely to go away of their own accord as quickly as they would with legislation. Such an approach has its attractions, as it would eliminate the proxy role for current harms and let courts ask directly whether the harm had a high probability of spontaneous dissipation. But it would thereby involve bigger changes to the courts' approach to harms than the arguments in this Article would seem to support. As I noted above, currently the common (although not universal) judicial approach to existing harms in free speech cases is that courts give some deference to the legislative determination that they exist (and, implicitly, would not self-destruct without legislation as quickly and as fully as they would be destroyed by effective legislation).²⁵⁰ Such an approach may raise various concerns, but for purposes of this Article, I have accepted it and instead have focused on why, assuming this deference to existing harms, we might want to have a different rule for

250. The determination of whether the legislation is effective is a separate question. The first question is what sort of harm exists, and to answer that question we would ask whether effective legislation might end it earlier. *See supra* text accompanying note 109.

predictive ones. The proposed focus on probability would effectively eliminate that deference in all situations; the court would determine the probability of destruction for every harm.²⁵¹ That may be desirable, but such an ending of deference would not rely simply on the arguments in this Article. Still, this might be the only tenable approach (rather than a permissible, though not compelled, one) if we thought that there were likely to be numerous instances in which current harms would go away on their own as quickly without legislation as with it. The problem is that we cannot say this with any confidence. It is hard to imagine, in fact, many current harms that would go away on their own as quickly as they would with effective legislation aimed at stopping them. There will be some,²⁵² but not so many that the distinction here between current and predictive harms, though admittedly in some ways artificial, is untenable.

If I am correct about the paucity of current harms that will dissipate on their own as quickly as they would with effective legislation, then courts' determination of probabilities in all cases would be quite costly. Presumably, any court (or other decisionmaker) that seeks to determine the probability of a harm occurring, or continuing to occur, in the future begins by gathering data about the state of the world, adds whatever additional information seems important for purposes of prediction, and then creates a forecast of future harm. Determining whether a harm currently exists would be part of the process of as-saying the state of the world — and would usually be the easy part. The difficult assignment, as I discussed in Section A(2), is figuring out what material one needs in addition to the current state of affairs, locating that additional material, and combining everything into a prediction. My proposal is that courts undertake the first part of the first stage (determining whether the harm currently exists) in all cases; and only if the harm does not exist would the court then go to the trouble of making its probability determination. The idea is that the benefit of courts directly examining the probability of a current harm dissipating is likely to be low. The costs, meanwhile, would be fairly high: Courts would have to invest substantial additional resources into making

251. The court could defer to these legislative determinations of probability, but that would destroy the advantages of redundancy as a check on the legislature in the first place.

In theory, the court could ask this question consistent with deference to the legislature: the legislature would make a determination of the probability of the harm continuing, and then the court would determine the probability of the legislature being right in its estimation. But a judicial determination of the probability that the legislature accurately made its own probability determination would seem to be little different from a direct judicial determination of probability. For events where the courts deemed the actual probability to be low, if the legislature considered the probability to be high, then the court would not defer; the court would only defer if it agreed that the event's probability was high.

252. My Y2K example is the best that I can think of.

these determinations.²⁵³ An approach that excludes current harms from the searching consideration of probabilities advocated in this Article has the obvious problems attendant to such rules (in particular, a rigidity that does not allow for exceptional cases), but it has the advantage of obviating an inquiry that is likely to be quite costly relative to its benefit.

E. *Unprovable Harms*

We can now return to another issue related to this Article. Among predictive harms affecting First Amendment interests, the focus has been on those that are provable. What about those that are unprovable? The presumption against provable predictive harms flowed in part from the fact that invalidating these statutes would allow courts, and the legislature, to see whether the harm materialized. With respect to unprovable harms, there is no such advantage to waiting, and that eliminates a central element of the argument for a presumption against unprovable harms. Moreover, because the reason to prefer redundancy is that we have cause to privilege the status quo, the lack of a presumption against legislation containing unprovable harms would thus appear to undercut the argument for redundancy.

But for many unprovable harms that will not be the end of the story. These harms will generally be unprovable because they do not deal with matters like economic forecasts about which we can gain more information over time, but instead with more ineffable concerns that are not so easily charted. Such concerns will not be subject to graphs and calculations, because they are likely to be value judgments. And such value judgments will correlate quite closely with content-based, rather than content-neutral, legislation.²⁵⁴ That is, harms that are based on value judgments about what is good for society will usually arise in contexts in which the legislature is preferring one type of programming over another, because it is "good" (and therefore to be encouraged) or it is "bad" (and to be discouraged).²⁵⁵

The relevance of this correlation is that content-based speech regulation is subject to a presumption of invalidity (and, indeed, subject to strict scrutiny).²⁵⁶ So, although the route identified here for provable harms does not apply to unprovable ones, many, indeed

253. And even after doing so the court would make predictions in which we could not have great confidence. *See supra* Part VII.A.2.

254. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

255. *See* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1726-30 (1995).

256. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

most, such harms will nonetheless be part of legislation that is subject to a presumption of invalidity.

That there is a presumption against the legislation as a whole does not, however, necessarily rule out deference to the legislature on the factual question of whether these unprovable harms will in fact arise. Even with such a presumption, we might conclude that legislatures will do a good job of making the relevant predictions, and a better job than courts would, and thus that the predictive finding should be for the legislature to make. After all, the reason why redundancy makes sense in the context of provable predictive harms is that our confidence in anyone's predictions is not high (and inter-institutional redundancy is a viable option insofar as we do not have reason to believe that one entity will do a better job than another). So, do the arguments for redundancy apply here as well?

We can begin by noting that the questions should be the same: again, we would want to know whether invalidating this legislation will be sufficiently costly that it should overcome our presumption against it. As in the context of provable harms, that entails determining the costs of waiting — specifically, the likelihood and severity of an irreparable harm. We might draw the balance a bit differently in the context of strict scrutiny, perhaps employing a somewhat heavier presumption against the legislation and thus having a higher threshold for the combination of likelihood and severity that will overcome the presumption. But the factors to be balanced would be the same.

Difficulty arises when we try to evaluate whether any institution will make sufficiently accurate findings about these unprovable harms that we do not need to drive down the false positives via redundancy, and whether one institution will do a better job than another. The same problems that apply to predictions of provable harms apply to predictions of unprovable harms — namely, that we have no reason for confidence in anyone's predictions. We have no good data on what makes for accurate predictions or who does them particularly well. In fact, the situation for unprovable harms is a bit worse. With respect to provable harms, it is conceivable that we could build up a sufficiently large database of accurate and inaccurate predictions from the past to allow us to identify particular factors that enhanced accuracy, or particular entities that do an unusually good job. But unprovable harms, by definition, cannot be verified. Thus the track record will always be a matter of speculation.

So what level of scrutiny do we apply to predictions the accuracy of which we know little or nothing about? As was the case for provable harms, the answer goes back to our presumption. If we have a presumption in favor of such legislation, then absent evidence that the legislature is likely to do a poor job of determining the likelihood of irreparable but unprovable harm, the arguments for redundancy would not apply. But the opposite presumption would change the de-

fault: in the absence of evidence that the legislature will do a satisfactory job of making its prediction, we should require redundancy. The legislature is making a determination about which we can have little confidence, and our presumption tells us to err on the side of decreasing the potential false positives at the possible expense of false negatives.

This does not answer the question of whether we should prefer intra-institutional to inter-institutional redundancy or vice versa. The absence of useful data on comparative accuracy undermines our ability to make a reasoned choice. Will a legislature or a court do a better job of determining what poisons the minds of small children, or whether an uplifting message really will produce more virtuous citizens? Does the electoral process make legislators better, or worse, at such determinations? What about a judge's ability to look witnesses in the eye? Any answer would be guesswork. But the discussion above does suggest that we should prefer redundancy in one form or another. Thus, for somewhat different reasons, the approach to unprovable harms will often be similar to, if not the same as, the approach to provable harms: redundancy, with two different entities having a crack at the question; and only if both find that the harm is likely to arise should the legislation be approved.

VIII. APPLICATION TO THE OTHER PREDICTIONS

This Article thus far has focused on predictions of harm in support of speech regulations. But, as I discussed in Part IV, there are other predictions that are implicit in the consideration of regulation, and speech regulation in particular — predictions that the legislation will directly alleviate the (presumably existing) harm, that it will not have excessive effects on other activities, and that less intrusive alternatives would not serve the legislature's goals as well. What do the concerns raised in this Article tell us about those predictions, and what should we do about them?

When it comes to predictions of effectiveness, fit, and the preferability of the chosen method to the alternatives, a presumption against relying on those predictions would apply to all legislation: such predictions are unavoidable, and thus any presumption against relying on them would presumably be folded into the standard of review applied to all cases.²⁵⁷ This does not mean, however, that we have no reason to be concerned about the factual element of these predictions. The general constitutional and First Amendment considerations discussed above with respect to predictions of harm are not limited to predictions of harm. The logic of that reasoning would seem to extend to

257. Arguably, indeed, the standards of review do take into consideration the predictive elements inherent in every piece of legislation.

these other predictions as well. The question is, given that these predictions exist in every piece of legislation, how do the considerations discussed in this Article apply to them?

A. *Predictions of Legislative Effectiveness and Fit*

The first two predictions are that the legislation will have the desired effect — that is, that it will directly alleviate the harm that the legislature seeks to minimize — and that it will not have negative spillover effects. If we wanted to get more information about these predictions, what might we do? The obvious answer is that we might want to test the predictions. The problem is that we can obtain such information only if the legislation goes into effect, which will occur if the legislation is enacted and passes muster in the first place.

Should a desire for more information lead courts to uphold (or legislatures to pass) legislation so that it can be implemented and we can discover if it performs as advertised? The answer is no, for several reasons. First, we are talking about predictions that are inherent in every piece of legislation. Thus this presumption would significantly loosen the standard of review not just in some special cases that contained a prediction, but in all cases.²⁵⁸ Second, and relatedly, the whole point of heightened scrutiny is that we have reason to be wary about the legislation in the first place. Where the interests that will be infringed are fundamental constitutional rights, courts should not be in the business of blithely approving legislation to see if it works. This is particularly clear in the First Amendment context, where a series of doctrines reflect a concern that free speech should not be infringed either lightly or precipitously.²⁵⁹ It would be a perversion of these principles to use the always-present predictive aspect of legislation as a basis to water down a First Amendment test.

But this does not mean that this element of predictiveness (i.e., that the legislation will alleviate the problem, and not infringe upon other constitutional interests) has no significance for purposes of legislative or judicial review. The background presumption that I have suggested in this Article — that we should prefer testing predictions with subsequent reality to relying solely on the predictions *ex ante* — can operate here. Where legislation has gone into effect, legislatures should monitor their enactments so that they can repeal any that have not had the desired impact or have had inappropriate spillover conse-

258. We could try to avoid this problem by singling out for validation only those cases in which we have serious doubts about the prediction, but that would entail giving a preference, for purposes of review, to precisely the legislation to which we should be the most hostile. If we have good reason to doubt that the legislation will achieve its purposes, that should strengthen the case for invalidation.

259. *See supra* Part V.C.

quences. And courts should be ready and willing to hear a new case alleging that the legislation has not, in actuality, alleviated the harms as it was supposed to and/or has limited other rights that were not part of the relevant harm. What this means is that a court that upholds a statute not only can but should be prepared to reject its precedent if a party brings forward evidence that the prediction did not pan out as expected in actual practice.

This is central to the legitimacy of courts. Given that they are relying on predictions that may not turn out to be accurate, they must be willing to reconsider their decisions when such inaccuracies arise. (It often will not be easy to determine when that has happened, but that is a matter of finding the right evidence; the principle remains that, where the legislation turns out not to be effective, a ruling premised on such effectiveness must be reconsidered.) This principle is a corollary to the one discussed in Part V that a court should reconsider its invalidation of a statute predicated upon predictive harms if the predictions actually pan out. Both principles are a subset of the broader proposition that changes in the factual assumptions and conclusions that form the underpinning of a legal conclusion merit a reconsideration of that legal issue.²⁶⁰ It is also analogous to something that the Supreme Court has expressed a willingness to do — reconsider a rule that it creates (as opposed to a statute passed by the legislature) if that rule proves to be unworkable or impracticable in actuality.²⁶¹ The implementation is different, but the principle is the same. If a court crafts a holding in an attempt to resolve an issue or mitigate a problem (which holding is, of course, a prediction of effectiveness and practicability), and the court's rule turns out not to have the expected salutary effects, then the court should be prepared to reject that rule and devise another. Similarly, if a court approves of legislation based on a prediction about the effects of the legislation and those effects do not actually occur, then the court should take that new development into consideration and examine the statute anew, with no deference to the previous (and now falsified) prediction of effectiveness.

B. *Predictions of No Effective Alternatives*

Some of what I discussed above also applies to predictions about the absence of effective alternatives. If, for instance, a legislature rejects a less intrusive alternative in enacting a speech regulation on the assumption that it would be less effective, and that alternative later proves to be at least as effective, the legislature should repeal the ex-

260. See *supra* notes 145-47 and accompanying text; see also Benjamin, *supra* note 108, at 275-87.

261. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543-47 (1985); *Swift & Co. v. Wickham*, 382 U.S. 111, 115-16, 124-28 (1965); see also *supra* note 146.

isting legislation and replace it with the less intrusive alternative. Similarly, if a court dismisses an alternative that avoids constitutional problems because it would be unworkable, and it later proves to be workable, then the legislation should be reconsidered.

But the prediction of no effective alternatives is trickier, because often the alternatives are hypotheticals that have not been implemented. We will not be able to test the prediction that the chosen path is better than the alternatives if those alternatives are forms of legislation that are never enacted. With the predictions of effectiveness and fit, our experiment is based on seeing the legislation in action, as those predictions do not rely on the nonpreferability of alternatives. But this prediction does rely on alternatives. How can we test the alternatives to see if they are preferable?

A possibility would be for the legislature to have trial runs, *seriatim*, of each of several alternative pieces of legislation. One problem is the mechanism through which this would be achieved if the legislature proved unwilling; a court could either attempt to require such trial runs or could simply wait a year or so before invalidating each new piece of legislation, but the former would be far too intrusive and the latter would seem an insupportable manipulation of the judicial process. Assuming that the legislature were willing to engage in such trials (or that we overcame our concerns about courts creating them), bigger problems would await. Because the populace would know that these were short-term trial runs, they might not modify their actions in response to the legislation in the same way as they would if the legislation were permanent. And insofar as people did respond to the legislation, the serial dislocation and compliance costs attendant to each new piece of legislation would seem prohibitive.

The more obvious option would be to run the trials not *seriatim* but rather simultaneously in different areas. This, then, suggests a different approach, one that is familiar to all students of federalism: the states as laboratories of democracy.²⁶² If several states (or other subnational units²⁶³) attempted each of the various alternatives, we could gain a lot of information from the implementation of those alternatives and thereby render our predictions about the effectiveness of

262. See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397-400 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 *passim* (1996); DAVID OSBORNE, *LABORATORIES OF DEMOCRACY* 2-3 (1990). The origin of the term is often attributed to Justice Brandeis. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

263. Some legislation is passed on county-wide or city-wide basis. Other legislation is in the form of interstate compacts. See, e.g., Federal Agricultural Improvement and Reform Act of 1996 § 147, 7 U.S.C. § 7256 (Supp. II. 1996) (approving the creation of an interstate dairy compact). For convenience, I will use the term "states" to encompass these different units.

those alternatives much closer to statements of fact (as long as the collections of states seemed representative).²⁶⁴

This suggests that an interest in testing the prediction regarding alternatives should push courts toward greater hostility to nationally uniform legislation, and greater solicitude toward legislation on the state level, than the courts otherwise would have. Implementation of federal legislation will not tell us anything about the various alternatives, but implementation of state legislation will.²⁶⁵

This may seem troubling to those who consider Congress to be superior to state legislatures, especially if that superiority is thought to flow from Congress's greater capacity to gather and distill facts in making difficult determinations.²⁶⁶ But insofar as Congress has superior abilities, it can enact the plan for alternative systems and give authority to states as an aspect of "cooperative federalism," or can simply design the alternative systems itself and then designate which states will be subject to each.²⁶⁷ Congress, in other words, can still play a central role. In any event, the larger point is that my formulation does not necessarily entail an absolute preference for legislation applied at the state level, but rather simply posits that the ability to experiment with alternatives is an advantage, and that advantage applies to legislation that is not nationally uniform. In some situations there may be reasons to prefer federal uniformity that outweigh the benefits of state experimentation.²⁶⁸ Similarly, the advantages of state experimentation do not necessarily suggest more favorable judicial review for state rather than nationally uniform legislation, but rather that, whatever review one would ordinarily give to each, it be hardened for federal legislation and/or softened for state legislation. If for other

264. In fact, such studies have been undertaken in examining the effects of different states' approaches to, for example, term limits and campaign finance legislation. See Michael J. Malbin & Gerald Benjamin, *Legislatures After Term Limits*, in *LIMITING LEGISLATIVE TERMS* 209 (Gerald Benjamin & Michael J. Malbin eds., 1992); Gary F. Moncrief et al., *For Whom the Bell Tolls: Term Limits and State Legislatures*, 17 *LEGIS. STUD. Q.* 37 (1992); Robert Dreyfuss, *Reform Beyond the Beltway: States as Laboratories of Clean Money*, *AM. PROSPECT*, May-June 1998, at 50; Ruth S. Jones, *State Public Financing and the State Parties*, in *PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS* 283 (Michael J. Malbin ed., 1980).

265. For a discussion of related benefits to such experimentation at the subnational level, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998).

266. See, e.g., Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *HARV. L. REV.* 1131, 1175-83 (1999).

267. One example of such cooperative federalism is the Public Utility Regulatory Policies Act of 1978, which created a national policy encouraging the use of alternate energy sources but allowed states to experiment with how to foster the growth of such sources. 16 U.S.C. § 824a-3(b) (1994). On cooperative federalism, see Daniel L. Rubinfeld, *On Federalism and Economic Development*, 83 *VA. L. REV.* 1581 (1997).

268. See Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 *VAND. L. REV.* 1 (1999).

reasons one had a strong preference for subjecting federal legislation to more lenient judicial review, that preference still might not be overcome. When, however, the benefits of national uniformity are not so overwhelming, the response to predictive harms — namely, that we should test the assertion that they will come to pass — should apply *mutatis mutandis* to possible alternatives, prodding us to test the assertion that less restrictive alternatives are not available.

CONCLUSION

Changes in the information industries have defied a lot of predictions over the years. Some developments that seemed inevitable never panned out. Others that no one expected rose from obscurity to prominence. This should not surprise us. Economists, technologists, legislators, and even law professors may devise sophisticated and careful models and formulae, but the complexities of actual events often do not lend themselves to such prior mapping.²⁶⁹ How should we respond when we have reason to believe that a harm will arise in a speech-related industry if the government does not act now? One possibility is for the government to move proactively to shape events before a harm occurs. Another is to wait and see if the harm develops. In this Article, I advocate a presumption in favor of the latter approach as an application of a principle of humility in the face of uncertainty.

But we can apply a humility principle only if we have a baseline or default position. After all, the injunction “[f]irst, do no harm” provides little guidance unless we can identify what the “do no harm” position is.²⁷⁰ The baseline reflected in this Article’s treatment of proactive legislation is a product of two elements. First, predictions are an unsatisfactory alternative to actual events in determining the likelihood of a harm existing. Second, the First Amendment privileges a status quo without regulation. Remove either of these factors, and the default position changes. When both exist, though, our baseline produces a strong presumption against proactive legislation. And that baseline,

269. As a wise man — apparently either Niels Bohr or Yogi Berra — once said, “It is very difficult to make an accurate prediction, especially about the future.” See Henry T. Greely, *Trusted Systems and Medical Records: Lowering Expectations*, 52 STAN. L. REV. 1585, 1591 & n.9 (2000) (noting a dispute over whether Yogi Berra or Niels Bohr is rightly credited with this sentiment).

270. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) (suggesting that, in the fast-changing world of telecommunications, judges should heed the admonition, “‘[f]irst, do no harm’” (quoting the Hippocratic Oath)); *id.* at 787 (Kennedy, J., concurring in part and dissenting in part) (“Justice Souter recommends to the Court the precept, ‘First do no harm.’ The question, though, is whether the harm is in sustaining the law or striking it down.” (internal citation omitted)); see also Kennard, *supra* note 82 (stating that, in refraining from mandating that cable Internet companies open up their lines to competing ISPs, the FCC is “following advice as old as Western civilization itself: First do no harm — a high-tech Hippocratic Oath”).

combined with a lack of confidence that courts or legislatures (or anyone else) will make accurate predictions, counsels against deference and in favor of redundancy. Thus, even on functionalist grounds, a rather formal approach seems appropriate: When speech regulation is at issue, we should require cash on the barrelhead rather than promises of future payment.