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Secondary Legislation

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SECONDARY LEGISLATION

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ABSTRACT

When legislative bodies seek to solve problems, they do so in one of two ways: either they create entirely new regulatory frameworks that contain novel solutions and outcomes, or they expand existing statutory provisions by applying them in a different way. Increasingly, legislatures are employing the latter approach to tackle today's problems with yesterday's statutory solutions. This creative process of amending, expanding, and transferring outdated statutes to address current issues is called secondary legislation, and it poses unique challenges for existing constitutional law. This is so because the existing standards for determining when a law violates fundamental rights fail to account for the existence of secondary legislation, instead measuring the constitutional validity of an enactment based solely on the text before the court. As such, in weighing the constitutionality of a secondary statute, courts fail to consistently consider the historical meaning and application of predecessor enactments.

This Article explores the concept of secondary legislation by examining the ways in which legislatures repurpose existing law and by questioning how the legislative recycling process fits within modern constitutional jurisprudence. Focusing on the governmental interests at stake when a legislative body borrows from old laws to create new ones, as well as the tailoring or nexus that is required when a legislature departs from a prior legislative tradition, this Article argues that the three primary constitutional tests—strict scrutiny, intermediate scrutiny, and rational basis review—should be adjusted to account for the modern-day secondary legislation phenomenon.

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I. INTRODUCTION

When legislative bodies seek to solve problems, they do so in one of two ways: either they create entirely new regulatory frameworks that contain novel solutions and outcomes, or they expand existing statutory provisions by applying them to new situations in a different way. The former approach most commonly arises when either the perceived problem or the cause of the problem is new and when the legislative solution is the first attempt at addressing the issue. Many of the laws regulating technology fall into this category,[1] as do laws regulating the environment,[2] public health,[3] and gender identity.[4] As society advances and creates unique problems—or comes to recognize problems for the first time that it previously ignored—legislative bodies must respond with brand new laws, written entirely from scratch.

More commonly, however, legislatures attempt to tackle today's problems with yesterday's statutory solutions. I call this type of legislative action *secondary legislation*. Legislatures adopt secondary legislation when they amend, alter, or manipulate existing laws to apply them in a new way rather than drafting entirely original legislation to solve a current problem. This may occur when the legislature observes that a law currently on the books has proven insufficient at curtailing a particular societal issue and, as a result, needs to be tightened or strengthened through a different style of enforcement. Take, for example, the expansion of criminal penalties for drug dealing that were enacted during the 1980s. The possession and sale of illegal narcotics had already been criminalized, but the government responded to perceived increases in drug use and addiction by simply amending the prison sentences associated with existing legislation rather than enacting new legislation to

1. *See, e.g.*, Reno v. Amer. Civil Lib. Union, 521 U.S. 844, 857-58 (1997) (describing the Communications Decency Act, Congress's first attempt to regulate content on the Internet).

2. For example, although now repealed, for a time the city of Raleigh, North Carolina banned new garbage disposal installations to protect the city's sewer systems from kitchen grease. *See* Adam Hochberg, *Raleigh, NC Bans New Garbage Disposals*, NAT'L PUB. RADIO (March 17, 2008, 6:00 AM), http://www.npr.org/templates/story/story.php?storyId=88382453.

3. For instance, several cities have implemented so-called "sin taxes" on sugary sodas in an effort to discourage their consumption. *See, e.g.*, Karen Kaplan, *Berkeley Sees a Big Drop in Soda Consumption After Penny-Per-Ounce 'Soda Tax*,' LOS ANGELES TIMES (Aug. 23, 2016, 4:20 PM), http://www.latimes.com/science/sciencenow/la-sci-sn-soda-tax-works-20160823-snap-story.html.

4. For example, the state of North Carolina recently enacted the Public Facilities Privacy and Security Act, known as the "bathroom bill," in response to federal regulations that had the practical impact of requiring schools to permit students to use the bathroom that corresponds to their gender identity. *See* Franciscan Alliance, Inc. v. Burwell, 227 F.Supp.3d 660, 661 (D. N. Tex. 2016) (describing and later enjoining Health and Human Services Department regulation that expanded Title IX discrimination protection to gender identity); *see also* Public Facilities Privacy & Security Act ("House Bill 2"), 2016 N.C. Sess. Laws 3 (repealed 2017). The North Carolina law bans all individuals from using a public restroom that does not correspond to their biological gender. *Id.*

address the problem.[5]

Focusing on the government's interest at both points in time—initial adoption and amendment—reveals some interesting observations. For example, as the "war on drugs" example demonstrates, the government's interest in addressing the target issue (in this case, combatting drug addiction and abuse) tends to be relatively static over time. Stated another way, the underlying rationale supporting both the initial and amended laws tends to be, at its root, the same.[6] As a result, when old laws are updated to address new problems, the government's motivation in adopting the law seemingly transfers between the primary and secondary legislation.

Secondary legislation may also be adopted, however, when the basis for the initial law and the basis for the secondary law are different or even incongruous. Unlike the government's interest in expanding its drug laws, in this instance the mere convergence of a legislative solution is not in and of itself indicative of an identical governmental motive. What works to solve one problem might also work to solve another, even though the problems themselves are disparate and unique and even though the interest the government seeks to advance is different. For example, governments frequently require licenses to participate in certain occupations—cosmetology and lawyering, for example[7]—but the reasons why these professions are regulated are vastly different.[8]

The practice of adopting secondary legislation by recycling old laws and by expanding, altering, or adjusting them in some way can therefore be broken down into several categories: (1) transferred secondary legislation, (2) combined secondary legislation, and (3) expanded secondary legislation.

In the first category, *transferred secondary legislation*, a legislature

5. According to the Drug Policy Alliance, the number of people incarcerated for nonviolent drug offenses in the United States rose from 50,000 in 1980 to over 400,000 by 1997. *See A Brief History of the Drug War*, DRUG POLICY ALLIANCE, (last visited Feb. 6, 2019), http://www.drugpolicy.org/issues/brief-history-drug-war.

6. While the outward rationale for adopting stricter drug laws appeared to be the "war on drugs," some scholars and commentators have noted that the drug policy laws of the 1980s and 1990s were in some sense racially motivated. *See, e.g.*, Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1141-43 (Spring 2014) (discussing racial disparities in drug enforcement and sentencing data).

7. *See, e.g.*, K.R.S. 317A.020(2) (Kentucky law requiring a license to practice cosmetology, esthetic practices, and nail technology); Ky. Sup. Ct. R. 2.010 (Kentucky rule requiring a license to practice law and setting forth eligibility requirements for a law license).

8. Consider, for example, the legislative response to the fish pedicure, a treatment where the client's feet are submerged in a pool of water containing fish which eat dead skin. *See* Vong v. Aune, 328 P.3d 1057, 1058 (Ariz. Ct. App. 2014) (describing fish pedicure procedure). The State of Arizona applied its existing sanitation laws to prohibit fish pedicures in nail salons. *Id.* Other states have followed suit. Philip Shishkin, *Ban on Feet-Nibbling Fish Leaves Nail Salons on the Hook*, WALL ST. J. (Mar. 23, 2009), https://www.wsj.com/articles/SB123776729360609465.

may take an existing statute meant to address one type of problem and use it to address a different one. This occurs, for example, when occupational licensing schemes are applied to new professions, e.g. requiring Uber drivers to obtain commercial driving licenses similar to taxi cab drivers.[9] In this circumstance, the government's interest in regulating the new problem may not exactly mirror its interest in creating the legislative solution initially. With respect to Uber and taxi drivers, for example, the desire to ensure transportation safety exists in both contexts,[10] but the concerns around the migration of individual automobile insurance to part-time commercial use of a vehicle and the government's interest in ensuring proper background checks of moonlighting drivers and vehicles are unique to Uber.[11] As a result, in cases of transferred secondary legislation, there may not be a perfect nexus between the government's concern and the legislative solution it employs.

In the second category, *combined secondary legislation*, legislatures pull portions of scattered regulations together into a single, comprehensive bill meant to address a different subject. This occurred, for instance, when Congress enacted the Adam Walsh Child Protection and Safety Act, which was designed to strengthen federal laws that protect against and punish child exploitation and abuse.[12] Prior to the passage of the Adam Walsh Act, one federal law prohibited the possession and distribution of child pornography and another required sex offenders to register civilly, but these provisions were not necessarily perfectly linked with a common purpose in a single bill.[13] The Adam Walsh Act closed this gap by providing comprehensive legal regulations applicable to all stages of sex offense cases, from pretrial release through sentencing.[14] In this circumstance, the government's interest in regulating sex offenses against children supported both the initial scattered enactments and the

9. *See* Harriet Taylor, *Uber and Lyft are Getting Pushback from Municipalities All Over the US*, CNBC (Sept. 2, 2016), http://www.cnbc.com/2016/09/02/uber-and-lyft-are-getting-pushback-from-municipalities-all-over-the-us.html.

10. *See, e.g.*, Jason Snead, *Taxicab Medallion Systems: Time for a Change*, THE HERITAGE FOUNDATION (Dec. 10, 2015), https://www.heritage.org/transportation/report/taxicab-medallion-systems-time-change (describing health, safety, and welfare regulations of taxicab industry).

11. Owain James, *Uber and Lyft are Lobbying States to Prohibit Location Regulation*, MOBILITY LAB (July 24, 2018).https://mobilitylab.org/2018/07/24/uber-and-lyft-are-lobbying-states-to-prohibit-local-regulation/ (summarizing bases for local regulation of ride-sharing services and applications).

12. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended at 34 U.S.C. §§ 20911-20932 (2012)).

13. *See* United States v. Tom, 565 F.3d 497 (8th Cir. 2009) ("Congress enacted the Adam Walsh Act in order to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, and to promote Internet safety. Its legislative history makes clear that the Act was designed to be a comprehensive bill to address the growing epidemic of sexual violence against children and to address loopholes and deficiencies in existing laws.") (internal citations omitted).

14. *See, e.g.,* United States v. Gardner, 523 F.Supp.2d 1025, 1027-28 (N.D. Cal. 2007) (describing bail conditions component of Adam Walsh Act); *Tom*, 565 F.3d at 499-500.

subsequent combined law.[15]

Third, with *expanded secondary legislation*, legislators may take an existing statute intended to address a specific problem and expand or amend it in some way to further target the same problem. The expansion of sex offender registration laws to require online disclosure and to prohibit residences near schools provides a prime example of this category,[16] as do the increasing restrictions tied to firearm licensure.[17] In all of these instances, legislatures enacting secondary legislation are not functioning in a vacuum, but instead inherit the benefit (or the burden) of the history, application, and outcomes of the initial statutory scheme. When operating in this category, governmental regulation tends to compound and expand upon itself, becoming progressively more pervasive in its application to daily life.

This expanding legislative power is not necessarily, in and of itself, problematic. Depending on one's view on the proper role of government, legislation should in theory be responsive to current societal problems and should be adapted to reflect the values, knowledge, and understanding of modern society.[18] The fact that legislative bodies may update, revise, or amend old laws to make them more relevant to current events may in some sense be a necessary function of the legislature.

Where a concern arises, however, is how the judicial branch approaches secondary legislation that impacts constitutional rights.[19] Because the judicial branch acts as an important check of legislative power,[20] it is crucial that the courts properly adjudicate the validity of

15. *See Tom*, 565 F.3d at 516 (discussing habits of child pornographers who use online distributions methods).

16. *See, e.g.*, Does #1-5 v. Snyder, 834 F.3d 696, 698 (6th Cir. 2016) (describing history of Michigan sex offender registration laws, which were amended multiple times over two decades to include an increasing array of restrictions).

17. *See, e.g.*, N.Y. PENAL LAW § 400.00(3)(a) (requiring New York residents to apply for a handgun license in the city or county of their residence); Rules of the City of New York Title 38 (setting forth restrictions on handgun licensing, including requirement that individual seek only a place-based permit, allowing handgun possession at that specific location, or a carry permit, allowing only transport in public, but not both). The constitutionality of the New York City licensing scheme will be considered by the Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 139 S. Ct. 939 (Jan. 22, 2019) (granting petition for certiorari).

18. For a discussion of how the seemingly obvious point that legislatures should respond to contemporary problems might be the subject of contested debate, see Robert F. Blomquist, *Overinterpreting Law*, 116 PENN. ST. L. REV. 1081 (2012).

19. Of course, legislatures enact statutes that do not touch upon constitutional rights all the time. For example, laws that prohibit speeding, regulate the provision of employer retirement plans, set sales tax rates, or define the duties and responsibilities of various government agencies typically do not encroach upon or impact constitutional rights. While secondary legislation certainly occurs in these contexts, this Article is concerned solely with secondary laws that burden constitutional rights and are therefore infinitely more likely to wind up being subject to judicial review.

20. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803); Zivotofsky v. Clinton, 566 U.S. 189, 198 (2012) ("At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged

both initial and secondary legislation, particularly where fundamental rights are at stake.[21] Yet the various tests that have developed for assessing the constitutionality of a challenged statute do not explicitly account for the fact that secondary legislation derives from prior statutory enactments whose constitutionality is not challenged. This is a problem. Courts cannot fulfill their constitutional obligation to review and, in appropriate cases, strike down legislative action if they do not accurately take into account the legislative process.

When a court assesses the constitutionality of a particular law, it does so by weighing, with varying degrees of scrutiny, the government's interest in solving a problem against the burden imposed by the regulation.[22] Where a fundamental right is at issue, for example, courts ask whether the government has a compelling interest in addressing the perceived problem and whether the regulation is the least restrictive means possible of achieving the government's objective.[23] In cases involving lesser or less obvious rights, courts merely require that the statute rationally advance a legitimate government interest.[24] In none of these instances does the court expressly weigh whether the initial legislative regimes would have been sufficient to solve the problem being addressed by the secondary legislation, how the government's interest has morphed or changed between the initial and secondary legislation, or why the problem persists despite the government's prior efforts to address it.[25] Rather, every piece of secondary legislation, at least insofar as it is analyzed under the existing constitutional framework, is treated on the same footing as its predecessors if challenged in court. As such, courts rarely assess, at least not explicitly, whether prior versions of a statute were efficacious or what advantage new enactments further over prior enactments.[26] Instead, by making use of existing constitutional standards,

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to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.") (citation omitted).

21. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (discussing fundamental nature of right to marry).

22. *See, e.g.*, Judd Matthews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 836-37 (2011).

23. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).

24. *See* City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

25. This is not to say that some industrious or forward-thinking courts do not occasionally take into account the full scope of legislature's motive in a particular case. They do. *See, e.g.*, Does #1-5 v. Snyder, 834 F.3d 696, 705-06 (6th Cir. 2016) (comparing current Michigan sex offender registration law to its predecessor for purposes of determining whether statue was punitive, and therefore barred by the Ex Post Facto Clause, or civil in nature). But, as will be discussed later in this Article, the basic tests promulgated by the Supreme Court for assessing the legality of legislation restricting constitutional rights do not explicitly require lower courts to consider the legislature's migrating or merged motivation.

26. *See, e.g.*, NW Enterprises, Inc. v. City of Houston, 352 F.3d 162 (5th Cir. 2003) (evaluating constitutionality of amended and expanded adult business zoning restrictions without regard to whether initial buffer zones were sufficient to ameliorate perceived secondary effects of such businesses).

courts directly assess only whether the *current* version of the law is sufficiently justified and appropriately crafted to achieve its objective, meanwhile disregarding what came before the current version of the law.[27]

This approach to secondary legislative regulations creates distinct problems for constitutional jurisprudence. First, by analyzing secondary legislation without regard for initial enactments, courts implicitly elevate and give undue weight to the government's interest in solving the problem. This is so because, under the interest prong of the various constitutional tests, courts take into consideration the legislative history documenting the existence of a problem, but do not weigh whether the government's previous legislative attempts have ameliorated or intensified the current governmental concern. In other words, nowhere in the analysis is the government required to demonstrate why its compelling, substantial, or reasonable interest persists despite prior attempts to address the problem. As a result, the government's interest is given too much deference and too little scrutiny, creating the possibility that a previously sufficient interest will be used to justify ever-expanding regulation over time. Second, by analyzing the nexus between a secondary enactment and the potentially inflated interest without regard to the history of the prior enactments, courts give the legislative branch too much power to experiment with the regulation of fundamental rights.[28] Indeed, at no point in the analysis is the government required to prove the efficacy of its prior enactments or to be held accountable for why they did not work. Rather, courts merely focus on the present legislation, without regard for the fuller history that led to its passage.

The Supreme Court has, to some extent, implicitly acknowledged this issue without giving any indication as to how its traditional constitutional frameworks should flex and bend when encountering secondary legislation. Consider, for example, *Whole Women's Health v. Hellerstedt*, in which the Court weighed whether a Texas law requiring certain surgical center standards and the presence of a hospital transfer agreement for licensed abortion clinics imposed an undue burden on the right of a female to obtain an abortion.[29] The law was not the state's first attempt to regulate abortion access; its predecessor required that abortion clinics

27. The Supreme Court acknowledged as much in *Shelby County, Ala. v. Holder*, 570 U.S. 529, 536 (2012), when it said of the Voting Rights Act: "the Act imposes current burdens and must be justified by current needs."

28. The Supreme Court has acknowledged instances in which it gives legislatures a free pass to experiment with the regulation of activities involving protected constitutional freedoms. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 439 (2002) (observing that, in addressing the secondary impacts of sexually oriented businesses, "municipalities must be given a reasonable opportunity to experiment with solutions") (internal citations omitted).

29. 136 S. Ct. 2292, 2300-01 (2016).

have a working agreement, rather than a formal contract, with a nearby hospital to provide care in emergencies.[30] In determining whether the new law imposed an undue burden, the Court limited its inquiry to the sufficiency of the legislative history supporting the new law.[31] Significantly, in striking down the transfer agreement requirement, the Court observed that "there was no significant health-related problem that the new law helped to cure."[32] It thus focused on the period of time when the initial law was in effect but before the secondary legislation was adopted to assess the government's interest. Because the government could not demonstrate that a threat to women's health persisted in the face of the predecessor law, the Court held that the new transfer agreement provision was unjustified and unconstitutional.[33]

The Court's opinion in *Whole Women's Health* reveals why courts should expressly acknowledge a challenged law's status as a secondary enactment before assessing its constitutionality. Of particular note is the Court's implicit requirement that the government address efficaciousness before imposing a more burdensome restriction on protected constitutional rights. Because the Texas law already in effect was apparently effective at protecting women's health and minimizing emergencies, there was no new problem for the state to solve.[34] As *Whole Women's Health* reveals, secondary legislation must therefore address a new, persisting, or intensified problem to be valid, but the Court's constitutional framework fails to expressly incorporate this requirement.[35]

Against this backdrop, this Article explores the concept of secondary legislation and how the various constitutional tests should be adapted to address the secondary regulatory phenomenon. Part I of the Article discusses the concept of secondary legislation, both generally and categorically, and offers concrete examples of how legislatures expand, amend, amalgamate, and recycle old legislation to solve new problems. Part II of the Article then discusses the various levels of constitutional scrutiny that apply to legislative enactments, including the variants of strict scrutiny, intermediate scrutiny, and rational basis review that exist in different constitutional contexts. Part III questions how secondary legislation fits into the existing constitutional tests, paying special attention to the interest and tailoring prongs, and proposes adjustments to

30. *Id.*

31. *Id.* at 2300-04.

32. *Id.* at 2311.

33. *Id.* at 2314 ("The record contains nothing to suggest that [the new abortion law] would be more effective than pre-existing Texas law at deterring" risky or unlawful abortions).

34. *Id.*

35. *See, e.g., Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1668-69 (2015) (discussing compelling government interest in restricting judicial campaign solicitations based on underinclusiveness and overinclusiveness but without regard to the novelty of the problem being addressed).

the constitutional standards that serve to take the history of a secondary piece of legislation into account. Part IV includes context-specific examples of how the revised constitutional standards would work when applied to secondary legislative efforts and observes areas in which the Supreme Court has already implicitly followed these revised standards. The Article concludes that the government interest test should be applied with greater scrutiny in cases of secondary legislation and that the tailoring test should include an efficacy component that weighs the impact of prior legislation.

II. CATEGORIES OF SECONDARY LEGISLATION

The process by which modern-day legislation is drafted, vetted, debated, adopted, and enacted is complex and at times confusing.[36] In today's legislative environment, no law comes into fruition—whether it is proposed at the federal, state, or local level—without going through a number of back-and-forth drafts, committee hearings, and likely stakeholder reviews.[37] The procedure can become even more complicated when the approval of two chambers is required, each of which may vote to add or subtract provisions of the bill.[38] The result is a tangled web of moving parts, all of which must come together to form consensus in order for a proposed statute to become effective law.

Perhaps because of the complexity of the current legislative process, legislatures do not always start from scratch in tackling a particular problem or issue. Rather, legislatures frequently borrow from predecessor statutes, in both overt and nontransparent ways, to restructure regulatory regimes. In this way, secondary legislation functions as the statutory corollary to judicial common law. In the same way that case-based jurisprudence is constantly expanding and building upon itself,[39]

36. For an interesting and informative discussion of the formalities of how a bill becomes law and the little-known "enrolled bill" doctrine, see Ittai Bar-Simon-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 GEO. L.J. 323 (2009). Ronald Krotoszynski also set forth a detailed analysis of the Congressional law-making process and the constitutional requirements that govern it in *Deconstructing Deem and Pass: A Constitutional Analysis of the Enactment of Bills by Implication*, 90 WASH. U. L. REV. 1071, 1087-92 (2013).

37. *See, e.g.*, *How Laws are Made and How to Research Them*, https://www.usa.gov/how-laws-are-made (last visited Feb. 10, 2019).

38. *See, e.g.*, Alan Lowenthal, *How a Bill Becomes Law*, https://lowenthal.house.gov/legislation/bill-to-law.htm (last visited Feb. 8, 2019) (describing conference committee process following passage of non-identical bills by the House and Senate).

39. To be fair, those who approach common law with a natural law perspective, and who believe that judges merely describe and name laws that already existed as an innate component of human virtue, may not see a resemblance between statutory creation and judicial common law. For a more detailed discussion of this philosophy and the ways in which it may depart from the theory of secondary legislation espoused in this Article, *see* John Hart Ely, *Democracy and Distrust*, Chap. 1 and 3 (1981). *See also* Robert P. George, *In Defense of Natural Law* (1999).

the broad array of federal, state, and local laws grows, broadens, deepens, and changes over time in a variety of categorical ways.[40]

Understanding the reasons why a legislative body may elect to amend existing laws rather than draft new ones, as well as the ways in which legislatures borrow from other laws in the legislative process, is critical to fully considering the impact of the secondary legislation phenomenon. Three general types of secondary legislation exist: transferred, combined, and expanded. Each type is characterized by a different relationship between the initial enactment and the secondary law, leading to unique observations about the government's interest for the secondary legislation.

A. Transferred Secondary Legislation

Transferred secondary legislation exists when a legislative body transfers an existing statute or regulation that applies in one context to an entirely different set of circumstances. In these instances, the legislature may expand the existing statutory scheme to apply to a wider group of people, companies, or situations, or may adopt a new statute, carbon copied from the old one, that applies to the expanded issue. By way of example, in the wake of crowdsourced transportation apps like Uber and Lyft, municipalities have explored the possibility of requiring crowdsourced drivers to obtain commercial driver licenses or to follow existing taxi cab regulations.[41] Another example, although administrative rather than legislative in nature, is the Federal Aviation Administration's recent expansion of the unmanned aircraft system registration requirement to include small unmanned aircraft, popularly known as drones.[42]

In cases of transferred secondary legislation, the government's interest in the initial law and the target of the second law may or may not be the same. In the case of Uber drivers, for example, it is likely that the same concern for passenger and roadway safety that supported the initial commercial driver's license law also supports requiring special licenses for crowdsourced drivers.[43] But the government has additional interests in regulating Uber—namely the potential gap in insurance coverage when

40. Viewing the body of legislative enactments this way, as a web and not a strand, begs the questions: why does our judicial system treat a statute as a stand-alone regulation, rather than in the context in which it was adopted, when exercising its judicial review function? Why are statutory laws not treated by the courts in the same expansive way as common law? These questions drive the discussion of constitutional test revision in Section IV, *infra*.

41. *See* Taylor, *supra* note 9.

42. 14 C.F.R. § 48.1 (requiring registration of drones with the Federal Aviation Administration effective Dec. 16, 2015).

43. *See* Snead, *supra* note 10.

private vehicles are used for part-time commercial purposes and the desire to promote fair competition between market participants[44]—that depart from its interests in regulating the taxi cab industry. Similarly, when the FAA transferred its prior unmanned aircraft requirement to drones, it was likely acting to protect the safety and shared use of common airspace.[45] But, given the rapidly increasing recreational and commercial use of drones and the lack of a robust study of its potential dangers, the FAA was likely also seeking to discourage drone ownership in the short term until a full legislative solution could be debated and implemented. The FAA may also have been acting to protect the privacy interests of people on the ground, whose activities and likenesses may, unbeknownst to them, be recorded by drones, a wholly unique interest from the reasons supporting the regulation of aviation more broadly.[46]

As the Uber and drone examples demonstrate, it is not difficult to envision scenarios in which the governmental interest furthered by an initial enactment is not the same as the government's interest in transferring an existing law to a new problem. As such, the mere fact that initial legislation is transferred to a secondary concern tells us very little about the nature of the government's interest in the second statute. The source of that information would be limited to the legislative record around the transferred enactment, rather than embedded in the initial legislation itself.

B. Combined Secondary Legislation

Combined secondary legislation exists when a legislative body pulls portions of different existing laws that target or relate to the same problem and combines them into a single bill that comprehensively addresses that problem. This approach largely tracks the legislature's perception of the severity of the issue being targeted. As the problem grows in severity over time, so does the required legislative response. While at first laws about other topics may contain only minor regulations that apply in narrow circumstances, amalgamating these disparate, scattered statutory provisions eventually leads to the conclusion that the problem warrants a

44. *Our View: Uber Should Follow Taxicab Rules*, IOWA CITY PRESS-CITIZEN (Apr. 1, 2016, 2:38 PM), https://www.press-citizen.com/story/opinion/editorials/our-view/2016/04/01/uber-iowa-city-should-follow-taxicab-rules/82520654/.

45. *See, e.g.*, *The FAA's Drone Rules Are Effective Today*, FED. AVIATION ADMIN., https://www.faa.gov/news/updates/?newsId=86305 (summarizing FAA Part 107 regulations on non-recreational use of drones).

46. For a full discussion of how drones operate and place individual privacy rights at risk, see Jeramie D. Scott, *Drone Surveillance: The FAA's Obligation to Respond to the Privacy Risks*, 44 FORDHAM URB. L. J. 767 (2017), and Matthew Koerner, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1169 (2015).

more targeted focus. The legislature then acts to combine the scattered provisions into a comprehensive law.

This process was exemplified when Congress enacted the Adam Walsh Act, a broad bill designed to more precisely define and punish offenses related to child exploitation and pornography.[47] Prior to enacting the Act, Congress already prohibited certain criminal offenses related to child sex abuse and child victimization, and also required a narrow range of sex offenders to sign onto a national registry as a collateral consequence of their convictions, but through two different provisions of the United States Code. Reacting to the highly-publicized abduction and murder of 6-year-old Adam Walsh,[48] Congress enacted a single piece of legislation, which included expanded criminal penalties and collateral consequences, designed to punish sex offenses against children in a more comprehensive and serious way.[49]

Unlike transferred secondary legislation, combined secondary legislation reveals at least some information about the government's interest in both the old and new laws. First, because the initial legislation contained only smaller subparts of the comprehensive bill, one can assume that the initial law was supported by a narrower governmental interest. In addition, because the legislature has acted to combine smaller regulations into a larger, more focused enactment, it is also fair to assume that the government's interest is stronger or more emergent with respect to the secondary legislation than it was with the prior enactments. These observations are displayed in the Adam Walsh Act, which was enacted to address a heightened concern for protecting children following several highly publicized cases involving child victims.[50]

In the case of combined secondary legislation, the persistence of the underlying issue in the face of the government's initial enactment reveals something significant about the government's ongoing interest. Because additional combined legislation is necessary, in the government's view, to combat the underlying problem the legislature is trying to solve, the adoption of a new law signals to some extent that previous legislative approaches were ineffective. The serious sex offenses against children

47. Adam Walsh Child Protection And Safety Act Of 2006, H.R. 4472, 109th Cong. (2d Sess. 2006); *see also Adam Walsh Child Protection and Safety Act Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/a/adam-walsh-child-protection-and-safety-act/ (last visited Feb. 10, 2019).

48. Adam Walsh's father John was a prominent proponent of the expanded legislation. He created and starred in the popular television show "America's Most Wanted" to raise awareness of crimes against children and to increase apprehension of sex offenders. Meg Grant, *John Walsh, Host of 'America's Most Wanted,' on What He's Learned from Life and Loss*, AARP THE MAGAZINE (Aug./Sept. 2013), https://www.aarp.org/entertainment/television/info-08-2013/john-walsh-americas-most-wanted.html (last visited May 20, 2019).

49. United States v. Tom, 565 F.3d 497, 499 (8th Cir. 2009).

50. *Id.*

that formed the impetus for the Adam Walsh Act are a prime example. In that case, Congress's previous attempts to deter the sex abuse of children by implementing criminal penalties and a public registry were not effective at eliminating child abuse altogether. As a result, when adopting combined secondary legislation, the government maintains an ongoing interest at least in part because its predecessor solutions were ineffective.

C. Expanded Secondary Legislation

Expanded secondary legislation, the most common and easiest to identify form of secondary legislation, exists when the legislature amends existing laws in a way that broadens their scope or application. In this regard, expanded secondary legislation is the most straight-forward type of secondary legislation because it arises with respect to a single statutory enactment, and both the initial and secondary legislation are codified in an identical location in the legislative code.[51] The legislative body merely takes an existing law already on the books and alters or amends its provisions to make it more relevant to contemporary problems. In such instances, the governmental interest underlying the amendments is typically obvious and very closely aligned with the interest that justified enacting the law in the first place. But it is possible that the government's interest has not really intensified, as was the case in *Whole Women's Health*, and that the government is merely relying upon the same set of facts that justified its initial enactment to support increasingly burdensome regulation.

One recent example of this type of legislation lies in the expanding licensing and regulatory requirements for gun ownership.[52] As high-profile mass shootings have been on the rise, certain states and municipalities have sought to restrict the types of firearms eligible for individual ownership, have lengthened wait periods and purchase conditions for gun ownership, and have tightened laws that disallow certain individuals from owning or possessing guns.[53] In these cases, the government's interest in expanding gun regulation is not difficult to discern. Prior to the era of modern mass shootings, governmental bodies still regulated firearm possession, although through less stringent

51. Our system and study of law at least implicitly acknowledge the importance of this legislative trajectory because it is tracked by digital research databases like Westlaw and Lexis and is reported in the USCA. For an example, search for "18 USC 2257" in Westlaw and scroll to the bottom of the legislative text to see a listing of the various amendments to the statute over time.

52. For a survey of handgun licensing laws and their justifications, see GIFFORD LAW CENTER, https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/licensing/ (last visited Feb. 16, 2019).

53. *Id.*

regulatory schemes.[54] They did so presumably to protect the public from the misuse of dangerous weapons, an interest they still seek to further in restricting firearm ownership to a higher degree. While the interest may intensify or morph slightly over time, in instances of expanded secondary legislation, the government purports to pursue a substantially similar interest in both its initial and secondary activities.

But it is equally possible that the government may seek to expand existing legislation without any new impetus at all. Take, for example, adult business zoning. It is not uncommon for municipalities to enact zoning laws that require adult bookstores and strip clubs to be located only in certain confined areas of town or to maintain a specified buffer zone from sensitive zones like schools, churches, and residences.[55] But, at certain times, cities will either increase the buffer zone distance requirement or expand the range of businesses they consider as adult in nature without any change of circumstance on the ground.[56] As this example illustrates, legislatures will at times amend a law despite the fact that the law is working well at addressing the initial underlying concern.

D. The Interplay of the Categories of Secondary Legislation

Secondary legislative action need not be cabined into a single subcategory. Rather, secondary legislation often involves a combination of one or more of the approaches discussed above. A prime example is the Adam Walsh Act, a combined secondary law, in which Congress also amended many of the provisions in the new law, making the law an example of expanded secondary legislation.[57] However, determining the categorical composition of a particular secondary law is important for assessing how the law would be analyzed under the three primary paradigms guiding judicial review of the legislative branch. This is particularly true in terms of identifying the nature of the government's interest in its various legislative enactments.

With transferred secondary legislation, the government's interest is likely not identical between the initial and subsequent law. With combined and expanded secondary legislation, the government's interest is likely similar between the two laws, with the interest in the subsequent law being heightened in part because the government's prior solutions

54. *See* Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137 (2001) (summarizing historical trends in gun regulation from colonial times to modern day).

55. *See, e.g.*, For the People Theaters of N.Y., Inc. v. City of New York, 79 N.E.3d 461, 464 (N.Y. 2017) (describing New York City regulation of adult businesses).

56. *Id.*

57. *Adam Walsh Child Protection and Safety Act Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/a/adam-walsh-child-protection-and-safety-act/ (last viewed Feb. 10, 2019).

proved to be ineffective at mitigating the societal problem at issue. But the Supreme Court's tests for analyzing the constitutionality of Congressional legislation treat transferred, combined, and expanded secondary legislation on identical footing with initial legislation, thereby failing to take into account the full picture of the government's asserted interest.

III. JUDICIAL SCRUTINY OF LAWS IMPACTING CONSTITUTIONAL RIGHTS

When courts assess the constitutional validity of statutes that infringe upon constitutional rights, they almost always do so by balancing, *inter alia*, two key components: (1) the government's interest in restricting the right (the "interest prong"), and (2) the degree of fit or tailoring between the regulation and the government's stated interest (the "tailoring prong"). The strength of the right at stake and the nature of the government's restriction of the right dictate the rigor of the analysis.

A. Strict Scrutiny and Fundamental Rights

Courts employ strict scrutiny—which operates as a presumption of unconstitutionality—in cases where either a fundamental right is violated, or the law strikes an unjust balance involving members of a suspect class.[58] Strict scrutiny analysis requires that the law be justified by a compelling government interest of the highest order and that the interest is achieved in the most narrowly tailored way possible. Examining the courts' treatment of key fundamental rights reveals important observations about the point in time at which the government's interest is assessed. Without regard to the secondary nature of legislation impacting the right at stake, courts typically look solely to the legislative record for the challenged enactment and not any predecessor legislation to determine the constitutionality of the law at issue.

1. First Amendment Right of Free Speech

Laws that violate the various rights enumerated in the First Amendment[59] are only constitutional if they survive strict scrutiny.[60] In the context of free speech, laws must not ban or act as a prior restraint on expression on the basis of its content and must also necessarily advance a compelling government interest and be the least restrictive means of

58. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2008).

59. For example, the rights to speech and assembly.

60. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (requiring strict scrutiny for all content-based restrictions on speech).

advancing that interest to survive constitutional review.[61] As a result, at the outset, it is critical to determine the precise nature of the government's interest in suppressing speech and whether the government is pursuing a content-based agenda in limiting expression.

As discussed above, laws restricting free speech are rarely written from scratch. Rather, Congress and its sister legislatures in the states tend to borrow from old solutions—licensing laws, criminal prohibitions, and the closure of quasi-public speech forums, to name a few—to address current perceived problems in the free speech marketplace. One instructive case on this point is *United States v. Stevens*.[62] At issue in *Stevens* was the constitutionality of a federal law that criminalized the creation, sale, or possession of certain depictions of animal abuse.[63] The law was passed primarily to target the sale of so-called "crush videos," which sexualize the torture of animals by depicting women in high heels slowly crushing animals to death, but Stevens was prosecuted for selling dogfighting videos online.[64] Both the crushing of animals and dogfighting were illegal in all fifty states, evidence of the universal belief that the abuse of animals inflicts intolerable harm.[65]

In attempting to justify the law, the government in *Stevens* argued in favor of what the Court termed a "startling and dangerous" proposition: that depictions of animal cruelty, while not historically excluded from the protections of the First Amendment, could now be wholly excised from free speech coverage.[66] The government equated expressions of animal cruelty to other categories of speech, like child pornography and obscenity, that are so lacking in societal value as to fall outside the protection of the Constitution.[67] And, more broadly, the government suggested that the value of any particular category of expression—not just depictions of animal abuse, but any speech deemed by the government to be unlawful—could be balanced against is harm to society to assess the scope of the First Amendment.[68]

Given its parallels to bans on child pornography and obscenity, Congress's prohibition of depictions of animal cruelty was, in effect, a piece of transferred secondary legislation. By arguing that the identical balancing and historical tests that justified other laws banning speech applied equally to crush videos, the government was in a sense relying

61. *See, e.g.*, United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 813 (2000); United States v. Alvarez, 132 S. Ct. 2537 (2012).

62. 559 U.S. 460 (2010).

63. *Id.* at 464.

64. *Id.* at 465-66.

65. *Id.* at 466.

66. *Id.* at 469-70.

67. *Id.*

68. *Id.*

upon its interests in the initial legislation to support the transferred secondary legislation. But the Court emphatically rejected this proposition.[69] The Court refused to separate that speech which is constitutionally protected from that speech which is not covered by the First Amendment solely on the basis of a cost-benefit analysis.[70] While the Court acknowledged that speech which is categorically unprotected generally lacks serious value and inflicts serious harm, it noted that those qualities were descriptive, rather than objective.[71] Moreover, the Court declined to carve out a new category of unprotected expression, despite the government's invitation to do so.[72]

By cabining its inquiry to the government's interest in the transferred legislation, the Court missed an opportunity to engage in a comparative analysis of the asserted compelling interest, weighing the interest in the secondary legislation against the interest in the original legislation. The Court rejected the government's attempt to impose a cost-benefit analysis on the right of free expression,[73] thereby skirting the question of whether the stated legislative purpose in removing offensive expression regarding animal abuse from the public discourse was compelling. Had the Court instead weighed the interest underlying the initial child pornography legislation—the protection of children from revictimization as images of their sexual abuse spread from possessor to possessor—against the interest in prohibiting depictions of animal abuse, which was limited to the promotion of sanitized public communication, the Court likely would have reached the same result, but in a manner that acknowledged the existence of secondary legislation.

2. Voting Rights

Citizens of the United States arguably have a fundamental right to vote in public elections,[74] yet it is undeniable that voting discrimination against people of color persists even today.[75] Congress attempted to remedy the undeniably rampant historical racial discrimination in voting when it adopted the Voting Rights Act of 1965.[76] One provision of the Act required states which utilized a reading test, good moral character standard, or other voting barrier that imposed a disparate impact on racial

69. *Id.*

70. *Id.* at 470-72.

71. *Id.*

72. *Id.*

73. *Id.*

74. U.S. Const. amend XV.

75. Shelby County v. Holder, 570 U.S. 529, 536 (2013) ("voting discrimination still exists; no one doubts that").

76. *Id.* at 537.

minorities to submit to additional federal regulation of its election processes.[77] Under those regulations, the offending states were not permitted to make changes to their elections procedures without federal preclearance from either the Attorney General or a three-judge panel in Washington.[78] The preclearance provision expired in five years, but was renewed by Congress in 1970 for five years, in 1975 for seven years, in 1982 for 25 years, and in 2006 for another 25 years.[79] A county located in Alabama, a historically offending state subject to the preclearance requirement, sued to invalidate the 2006 extension.[80]

The Court considered the question in *Shelby County, Ala. v. Holder*.[81] In assessing the constitutionality of the Act, the Court clearly understood its secondary nature, heavily discussing the voting discrimination problems that supported the adoption of the Act in the first place.[82] But the Court did something interesting in weighing the validity of the 2006 extension against the original justification for the Act in 1965. It noted, first, that the Act had appeared to all but eliminate racial disparity in voting: "Nearly 50 years later, things have changed dramatically . . . In the covered jurisdictions, voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[83] The Court attributed these advancements to the Act, an achievement Congress itself acknowledged when it passed the 2006 extension.[84]

77. *Id.*

78. *Id.* at 537-38.

79. *Id.* at 538-39.

80. *Id.* at 536, 539.

81. *See id.*

82. *Id.* at 537-39, 545-46. The Court had previously upheld the Voting Rights Act against a constitutional challenge in 1966 after it was initially enacted. South Carolina v. Katzenbach, 383 U.S. 301 (1966). The *Shelby County* Court described that ruling as follows:

> In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." Several States had enacted a variety of requirements and tests "specifically designed to prevent" African–Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." Shortly before enactment of the Voting Rights Act, only 19.4 percent of African–Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites. In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."

Shelby County, 570 U.S. at 545-46 (internal citations omitted).

83. *Shelby County*, 570 U.S. at 547.

84. *Id.* at 548 ("There is no doubt that these improvements are in large part *because of* the Voting

Given that the Act had proven to be efficacious, the Court then required the government to demonstrate that it had an ongoing interest in eliminating voting discrimination when it adopted the 2006 law. The Court therefore implicitly segregated the government's interest in its initial enactment and the government's interest in the expanded secondary legislation.[85] Because the government could demonstrate no ongoing compelling interest in light of the original Act's success, the 2006 extension was declared unconstitutional.[86]

The Court's decision in *Shelby County* provides a roadmap for how and why constitutional scrutiny should expressly acknowledge the secondary legislation phenomenon. Governments will attempt from time to time to rely upon outdated evidence and old solutions to solve current problems, if they exist, or to justify heavy-handed legislation based on improper regulatory motives. The Court's existing constitutional tests simply do not account for this phenomenon, although they should.

B. Intermediate Scrutiny

When laws target a class that is not race-based, but is derived from a historically suspect classification,[87] or when laws do not ban but merely burden the exercise of a fundamental right,[88] courts apply intermediate rather than strict scrutiny. Under intermediate scrutiny, the government need only maintain a substantial, rather than a compelling, interest and enact a law that is narrowly tailored to further that interest.[89] In addition, when laws restrict free expression, the government must also show that sufficient alternative avenues for the presentation of speech must remain after the regulation is enforced.[90]

Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.") (emphasis in original); *Id*. at 547 ("Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006.").

85. I categorize the 2006 extension as expanded secondary legislation because, as the Court observed, it extended the initial coverage period significantly and imposed additional burdens on historically offending states. *See id.* at 549.

86. *Id.* at 551-53. Notably, the Court rejected the government's attempt to rely upon solutions derived from data collected in 1965 to justify identical and expanded solutions in 2006. *Id*. ("Coverage today is based on decades-old data and eradicated practices…. But history did not end in 1965 . . . Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.").

87. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (describing intermediate test for gender discrimination under the Fourteenth Amendment equal protection clause).

88. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (establishing intermediate scrutiny test for time, place, and manner restrictions on speech).

89. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989).

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

1. Lesser Speech Restrictions[91]

a. Time, Place, and Manner Analysis

In contrast to laws that ban or criminalize speech on the basis of its content, which are presumptively unconstitutional, laws that merely seek to regulate the delivery of free speech in some lesser way are reviewed with intermediate and not strict scrutiny. Known as time, place, and manner restrictions, these types of laws are constitutional if they are content-neutral, advance a substantial governmental interest, are narrowly tailored to that address that interest, and keep open ample alternative channels of communication.[92] In this context, the reduced burden on the government to demonstrate a substantial rather than a compelling interest makes it more likely that the interest used to justify a challenged regulation will be derivative of the initial justification. It is therefore critical that courts separate original legislation from secondary legislation to appropriately identify the vitality of the government's current objective.

In a typical time, place, and manner case, the government's asserted interest is unrelated to the expression at issue.[93] For example, in *United States v. O'Brien*, the seminal First Amendment case on intermediate scrutiny, the government argued that its interest in issuing and maintaining records related to the draft supported its prosecution of a man who destroyed his draft card in protest.[94] The objective of the law, if the government was to be believed, therefore had very little to do with prohibiting speech, but instead was focused solely on the administration and efficiency of the draft. This is dissimilar from laws that ban speech outright, which the government typically attempts to justify by reference to the categorical lack of value of the speech itself.[95]

Given the potential that the government may engage in the pretextual censorship of unpopular speech by relying upon a justification that is unrelated to speech, it is critical that courts correctly pinpoint the interest that is actually advanced by a particular piece of legislation. When secondary time, place, and manner legislation is added to the mix, that observation matters all the more.

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91. The term "lesser speech restrictions" refers to governmental regulation of speech that does not amount to an outright ban and is therefore reviewed under an intermediate scrutiny test. *See, e.g., Ward*, 491 U.S. 781.

92. United States v. O'Brien, 391 U.S. 367 (1968).

93. Of course, this must be the case, because laws that target expression because of their content run the risk of being invalidated as impermissibly content-based. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

94. 391 U.S. 367, 377-78 (1968).

95. *See, e.g.*, United States v. Stevens, 559 U.S. 460 (2010).

b. Eminent Domain

Although not a variant of intermediate scrutiny *per se*, the governmental interest required to support a taking of private property for a public use approximates the substantial governmental interest portion of the intermediate scrutiny test. In the context of property takings, the government may not appropriate physical or personal property for its own use.[96] Where the government does take private property, it must both offer just compensation to its owner and act in pursuit of a public purpose.[97] Whether a government's asserted objective is a sufficiently public purpose to justify a taking is substantially similar to the question of whether a government's interest is sufficiently substantial to burden a fundamental right.

The Court's opinion in *Kelo v. City of New London*[98] offers a prime example. At issue in *Kelo* was the taking of private residences and other investment properties, none of which were blighted or in serious disrepair, to facilitate a Connecticut town's economic development plan.[99] In concluding that the plan constituted a public purpose, the Court credited the legislative body's determination that removing the homes and replacing them with commercial businesses was in the municipality's best interests.[100] In so doing, the Court acknowledged that legislative solutions change over time as conditions in society and on the ground change as well.[101] "Viewed as a whole, our jurisprudence has recognized that the needs of society . . . have evolved over time in response to changed circumstances."[102]

Times indeed change, and the law sometimes changes with them. In such circumstances, the courts should recognize that current legislation is derivative of its predecessors and should consider the full slate of legislative action in determining whether a law is constitutional.

IV. CONSTITUTIONAL SCRUTINY OF SECONDARY LEGISLATION

Despite the Supreme Court's apparent understanding that laws should be responsive to current, not prior, problems, the existing tests for

96. Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324 (2002).

97. U.S. Const. amend. V; Penn Central Transp. Corp. v. New York City, 438 U.S. 104, 124 (1978).

98. 545 U.S. 469 (2005).

99. *Id.* at 475-76.

100. *Id.* at 483-84 (noting that the city's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference").

101. *Id*. at 482.

102. *Id.*

measuring the constitutional validity of a statute fail to take into account the full history and complexity of secondary legislation. More specifically, in considering whether government regulations violate a constitutional right, courts consistently apply an identical level of scrutiny to initial and subsequent regulations without taking into account previous regulatory activity. This is true regardless of whether the court is applying strict or intermediate scrutiny or deferential rational basis review.

A. Governmental Interest Test

Regardless of whether a statute implicates strict or intermediate scrutiny or lesser rational basis review, the first task a court must undertake in considering a statute's constitutionality is to determine the nature of the government's interest. The court asks: What is it the government is looking to accomplish? What concern does the government have and what is the basis for that concern? It is essential that the interest be properly defined, because the interest prong is the benchmark against which the remaining constitutional standards—and the tailoring prong in particular—are assessed.

This task proves difficult enough in cases where the government approaches the legislation in question with a fresh brush. Indeed, competing schools of thought have arisen on the question of statutory intent and the respective roles that legislative history, societal context, critical legal theory, the competing meaning of language, and the text of the statute itself play in determining why a legislative body chose to enact a particular law.[103] But the task is all the more complicated when the question of legislative intent involves two or more separate legislative records, supporting two or more separate pieces of legislation, as is the case with secondary legislation. Perhaps because it may be difficult to determine what role the legislature's intent in adopting a predecessor statute should play, if any, in defining the government's interest in a secondary law, courts have never articulated an interest test that accommodates secondary legislation.

This is problematic. Because secondary legislation, particularly of the combined and expanded varieties, arises almost always from an intensified or heightened governmental response, there is a risk that courts will view the second law to be more justified than it actually is. This is so because the government may attempt to use, as it did in *Shelby County*, the full legislative record from both the initial and secondary enactments

103. For a comprehensive overview of the various schools of thought in the field of statutory interpretation, see Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 Minn. L. Rev. 387 (Dec. 2007).

to justify its interest.[104] Without identifying the derivative status of the new legislation, courts may be too quick to accept the government's vast body of evidence without questioning whether the secondary law is truly supported by its history.

More importantly, in some instances, secondary legislation may only be necessary or desirable because the government's initial attempt to solve the problem was not successful. When this is the case, the government does not retain a heightened or more serious interest in addressing the underlying problem than supported its initial enactment, although it may argue that it does. Rather, the necessity of secondary legislation merely demonstrates that the government was ineffective in its first solution. But it is easy to confuse this failure with a more emergent need to act. The government may appear justified in its need to respond with a more burdensome regulation, when in reality all it needs to do is to try something different, not something more.

In other instances, the government may attempt to rely upon the exact set of facts and circumstances that justified its initial enactment in adopting more burdensome regulations. This occurs most frequently, as it did in the *Shelby County* voting discrimination case, in the case of expanded secondary legislation.[105] In the absence of new evidence demonstrating that there is a necessity for additional legislation, the government's interest should be deemed insufficient, given that its initial solution appears efficacious. After all, if the government has been effective at solving the problem, it maintains no ongoing interest in regulating the conduct or behaviors that caused the problem in the first place. Therefore, the Court's implicit holding in *Shelby County*—that the government must justify continuing interests at each enactment of secondary legislation—should be explicitly applied in similar cases addressing First Amendment, due process, and other protected constitutional rights.

One approach to the secondary legislation problem would be to require courts to assess the strength of the government's interest based on the entirety of the legislative record for both the initial and secondary enactments. Where the initial legislative solution failed, courts should say so. Where the initial legislative solution was supported by a different or more robust interest, courts should say so as well. In fact, the Supreme Court implicitly employed a similar approach with respect to abortion rights in *Whole Women's Health v. Hellerstedt*, a case questioning the constitutionality of a Texas law requiring abortion providers to maintain

104. *See* Shelby County v. Holder, 570 U.S. 529, 565 (2013) (Ginsburg, J., dissenting) ("After considering the full legislative record . . . .").

105. *See, e.g.*, *id.* at 559 (Roberts, C.J., majority opinion).

hospital transfer agreements.[106] In *Whole Women's Health*, the Court rejected the notion that the state of Texas retained a sufficiently compelling interest in keeping abortions healthy and safe in light of the fact that it had previously amended its laws to restrict abortion access. In other words, because the state was unable to show that a mortality risk persisted even after more stringent regulations were enacted, the state lacked a sufficiently compelling and *new* interest to justify its secondary legislation.

As a result, efficacy should be a necessary component of the government interest inquiry. Where the government has previously legislated to solve a problem, and the challenged enactment is merely secondary to that initial legislation, the government's interest is necessarily tethered to the success or failure of its previous initiative.

B. Tailoring Test

The phenomenon of secondary legislation also makes it difficult to accurately assess the degree of tailoring, or the nexus, between the government's stated interest and the burden of the right at stake. An efficacy component also addresses this particular problem as well. More specifically, before determining whether the new law promotes the government's interest in a constitutionally justifiable way, courts should consider the prior law and its impact on the issue that the government was initially attempting to address. Rather than questioning whether the secondary law is tailored to the government's newly asserted interest, courts should instead focus on the degree to which the prior law was effective.

Take, for example, the regulation of Uber drivers, which is derivative of pre-existing regulations of taxi drivers. Prior to the existence of Uber and other crowdsourced transportation services, local governments routinely required special licenses of taxi cab drivers.[107] To test the efficacy of these regulations, government entities licensing taxis could presumably draw upon their experience, anecdotal evidence, and data, if available, to demonstrate a nexus between licensing programs and improved passenger safety. Requiring new regulations of Uber drivers to be justified by the government's own experience in licensing cab drivers ensures that secondary legislation is appropriately and narrowly tailored to the government's objective.

106. 136 S. Ct. 2292 (2016).

107. *See, e.g.*, ATLANTIC CITY, N.J., CODE OF ORDINANCES § 233-2 (imposing strict licensing and operational regulations upon owners and drivers of taxi cabs).

V. SAMPLE CASE STUDY

A hypothetical scenario based on real-life regulation is illustrative of how a more comprehensive view of secondary legislation is appropriate. Municipalities frequently adopt zoning regulations designed to keep sexually oriented businesses away from sensitive uses in the community (i.e. schools, residences, and places of worship). Because the right to disseminate erotic expression is protected by the First Amendment, cities may only adopt such laws when they are targeting the documented secondary effects of adult businesses and not the content of the material sold inside.[108] In demonstrating that it is targeting the secondary effects of adult businesses and not punishing them for their expression, cities are permitted to rely upon evidence from other jurisdictions showing that crime rates, property values, and neighborhood cleanliness are negatively impacted by the presence of these businesses.[109] It is impermissible, however, for municipalities to act solely out of a desire to prevent an adult business from opening its doors in their town.[110]

To protect their citizens from the perceived secondary effects of sexually oriented establishments, cities frequently adopt buffer zones that prohibit such businesses from operating within a specified number of feet of sensitive uses.[111] It is not uncommon for cities to later expand the distance requirement, at times to be responsive to changing physical landscapes on the ground. For example, shifting residential patterns might necessitate expanding a 1,500-foot buffer zone to a 2,500-foot buffer zone to ensure that adult businesses are not congregating where people tend to live.[112]

Contemplate a scenario, however, where a municipality expands its buffer zone absent any factual support. For example, consider that the city of Anytown adopted an ordinance in 1995 that prohibited adult businesses from operating within 1,500 feet of churches, schools, and residences. In doing so, it relied upon studies from other jurisdictions demonstrating that crime rates increase and property values decrease in

108. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

109. *See, e.g.*, Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003) (discussing permissibility of reducing crime and stabilizing property values as justifications for adult business zoning ordinance); World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186 (9th Cir. 2004) (identifying pornographic litter and public lewdness as secondary effects of adult businesses the government is permitted to regulated consistent with the First Amendment).

110. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

111. *See, e.g.*, For the People Theaters of N.Y., Inc. v. City of New York, 79 N.E.3d 461, 464 (N.Y. 2017) (describing New York City buffer zone ordinance, which required adult uses to locate no closer than 500 feet from enumerated incompatible uses).

112. *See, e.g., Phillips v. Borough of Keyport*, 107 F.3d 164, 169 (3d Cir. 1997) (describing legislative history of local reduction of adult business buffer zone from 500 feet to 300 feet).

areas that are immediately adjacent to strip clubs. Fast forward to 2001, when three new council members who comprise a majority of the council are elected. The new council members review the identical studies presented to the Anytown council in 1995 and conclude that the initial buffer zone was insufficient to protect the public from the secondary effects of adult uses. The Anytown council therefore passes a new ordinance requiring adult businesses to locate more than 5,000 feet from sensitive uses.[113]

If the expanded buffer zone faces constitutional challenge, how should the courts apply intermediate scrutiny to the 2001 ordinance? Can Anytown demonstrate that it retains a substantial interest in targeting the secondary effects of adult businesses based solely on the 1995 legislative record, or is it required to submit additional proof that an expanded buffer zone was needed in 2001? Must Anytown show that its 1995 ordinance was ineffective at addressing the identified secondary effects before expanding its legislation to be more heavy-handed? And how are the courts to determine if the 2001 ordinance is narrowly tailored, given that Anytown clearly felt a less rigorous regulation was sufficient to solve the problem in 1995?

This example illustrates the unique conundrums that arise when courts assess the constitutionality of secondary legislation and the ways in which the government interest and tailoring prongs of the three forms of constitutional scrutiny can be tweaked to produce a more comprehensive treatment of legislative validity. In some instances, the modified approach will result in legislation being struck down that previously would have been upheld, but in others it will result in legislation remaining in full force where it may have been declared unconstitutional.

Critics of this approach may argue that adjusting the interest and tailoring prongs of constitutional scrutiny for secondary legislation places too high a burden on the government to justify both its current and prior enactments. But, considering the previously-asserted government interest and the efficacy of the prior regulation may actually make it more likely that a statute will be upheld in its secondary form. This is particularly true where the first legislative attempt at regulation results in a statute being struck down and where the legislature adopts a more tailored secondary law. Take, for example, the Child Pornography Prevention

113. This hypothetical is based upon a similar fact pattern that occurred in New York City. In 1995, the city adopted an adult business zoning regulation based on a study that highlighted the depressed conditions in Times Square, purportedly caused by the presence of seedy strip clubs and adult bookstores in the area. In 2001, the city expanded its 1995 ordinance to include a broader range of businesses, including those which dedicated less than 40 percent of their floor space or business purpose to adult entertainment. The City relied upon no new evidence of secondary effects to justify the expanded 2001 ordinance. The validity of that enactment is currently facing constitutional attack in federal court. *See* 689 Eatery Corp. v. City of New York, No. 1:02-cv-4431 (S.D.N.Y. filed Jun. 12, 2002).

Act, which was declared unconstitutional by the Supreme Court in *Ashcroft v. Free Speech Coalition*.[114] Following the *Free Speech Coalition* decision, Congress amended its law to more narrowly define the range of suspected or possible child pornography to be targeted, and this law was upheld as constitutional.[115] As a result, proper adjudication of the government interest and tailoring prongs of the various constitutional tests is more, and not less, likely to generate legislative enactments that both solve contemporary problems while also respecting individual rights.

VI. CONCLUSION

In today's complex legislative world, rarely is a law drafted and enacted completely from scratch. Rather, the practice of creating secondary legislation by amending, expanding, combining, and transferring old laws into new ones has become the legislative norm. Yet our system of judicial checks and balances has failed to adjust to this new standard and still maintains constitutional tests that were created to adjudicate only first legislative attempts to solve problems. These tests are largely unworkable when called upon to address a tangled legislative web in which statutes morph and broaden into one another over time, as is the case with secondary legislation. This is particularly true when courts attempt to assess the government's interest in adopting new legislation derived from prior enactments and supported by a potentially new goal. This is also true with respect to a court's tailoring inquiry, which examines the effectiveness of a challenged secondary law without regard to the efficacy of its predecessors.

In assessing the constitutionality of secondary legislation, courts should expand their interpretation of the government interest and tailoring prongs to include the full legislative and pragmatic history of the prior laws on which the secondary law rests. Indeed, secondary legislation does not arise in a vacuum, and nor should its scrutiny. Instead, judicial review should look to the complete legislative history of a secondary enactment, with its infinite benefits and lessons, to determine the law's viability.

The Supreme Court implicitly employed this approach in its recent voting discrimination and abortion rights decisions, but without intentionally adjusting its stated constitutional tests for analyzing restrictions on fundamental rights. Given its propensity to weigh the past against the present, the Court should amend the standards for constitutional review to outwardly embrace a law's secondary status and

114. 535 U.S. 234 (2002).

115. *See* United States v. Williams, 535 U.S. 285, 290-91 (2008) (upholding constitutionality of PROTECT Act amendments to Child Pornography Prevention Act).

adjust its analysis accordingly.