

**ACADEMIC LEGAL  
WRITING:  
LAW REVIEW ARTICLES,  
STUDENT NOTES,  
SEMINAR PAPERS, AND  
GETTING ON LAW REVIEW**

*by*

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*with foreword by*

**JUDGE ALEX KOZINSKI**  
U.S. Court of Appeals for the Ninth Circuit

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*To my beloved wife and sons,*

*Leslie Pereira,  
Benjamin Pereira Volokh, and  
Samuel Pereira Volokh*

\*



## ABOUT THE AUTHOR

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA, where he teaches free speech law, Religion Clauses law, criminal law, and academic legal writing. Before going into teaching, he clerked for Ninth Circuit Judge Alex Kozinski and for Justice Sandra Day O'Connor.

Since 1995, he has written over 50 law review articles and over 80 op-eds in publications such as the *Harvard Law Review*, *Yale Law Journal*, *Stanford Law Review*, *Wall Street Journal*, *New York Times*, *Washington Post*, *New Republic*, and many others. He also wrote *The First Amendment and Related Statutes*, a textbook from Foundation Press, and has since 2002 operated a daily Web log called *The Volokh Conspiracy* (<http://volokh.com>). Before going into law, he published over a dozen technical articles in computer magazines. He has been a member of the American Heritage Dictionary Usage Panel since 2005.

The article he wrote while in law school, *Freedom of Speech and Workplace Harassment* (UCLA L. Rev. 1992), has been cited in over 170 academic works and in 14 court cases; this seems to make it the student article from the 1990s and 2000s that has been most cited by academic works. A 2002 survey by University of Texas law professor Brian Leiter listed Volokh as the third most cited professor among those who entered law teaching after 1992 (with 810 citations in law reviews at the time).

In Spring 2006, he participated anonymously (and, he's glad to report, successfully) in the *UCLA Law Review* write-on competition, to better hone the advice that he gives in the "Getting on Law Review" chapter. His pain is your gain.



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## FOREWORD, BY JUDGE ALEX KOZINSKI

A few years ago I interviewed a candidate for a clerkship. He had record-breaking grades from a name-brand law school and his recommenders sprinkled their letters with phrases like “Kozinski clone” and “better even than you.” This kid was hot.

His interview went well, and I had pretty much made up my mind to hire him on the spot, when I popped a fateful question: “So, have you decided on the topic for your law review note?”

“It’s done,” the candidate replied. And, with a flourish, he pulled an inch-thick document from his briefcase and plopped it on my desk. Impressed, I picked it up and read the title page: “The Alienability and Devisability of Possibilities of Reverter and Rights of Entry.”

After making sure this wasn’t a joke, I started wondering why someone would write a piece on such an arcane topic. Maybe this kid wasn’t so smart after all. I decided I had better read the piece before making a hiring decision.

After the applicant left, his article sat on the corner of my desk like a brick. Every so often, I’d pick it up, leaf through it and try to read it, but with no success. It was well-written enough; the sentences were easy to understand and followed one another in seemingly logical fashion. But the effort was pointless because the subject matter was of absolutely no interest to me. Instead, my mind wandered to doubts about the author. How did he come to write on such a desiccated topic? Under that veneer of brilliance, was there a kook trying to get out? Could I really trust his judgment as to the countless sensitive issues he would have to confront during his clerkship? Would he constantly aim for the capillary and miss the jugular?

It is difficult to overstate the importance of a written paper for a young lawyer’s career, especially if the piece is published. Grades, of necessity, are somewhat grainy and subjective; is an A- that much better than a B+? Letters of recommendation can be more useful, but they still rely on someone else’s judgment, and they often have a stale booster quality about them. Words like “fabulous” and “extraordinary” lose their force by dint of repetition—though “Kozinski clone” is still pretty rare.

A paper is very different. It is the applicant’s raw work product, unfiltered through a third-party evaluator. By reading it, you can person-

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ally evaluate the student's writing, research, logic and judgment. Are the sentences sleek and lithe or ponderous and convoluted? Does he lay out his argument in a logical fashion, and does he anticipate and refute objections? Is the topic broad enough to be useful, yet narrow enough to be adequately covered? Is it persuasive? Is it fun to read? Writing a paper engages so much of the lawyer's art that no other predictor of likely success on the job comes close. A well-written, well-researched, thoughtful paper can clinch that law firm job or clerkship. It is indispensable if you aim to teach.

Published student papers can also be quite useful and influential in the development of the law. A few law review notes and comments become classics cited widely by lawyers, courts and academics. Many more provide a useful service, such as a solid body of research or an important insight into a developing area. Most, however, are read by no one beyond the student's immediate family and cause hardly an eddy among the currents of the law.

Why do so many published student papers fail in their essential purpose? (The same question might well be asked about non-student academic writing.) The simple answer is that most students have no clue what to write about, or how to go about writing it. Finding a useful and interesting topic; determining the scope of the paper; developing a thesis and testing its viability; avoiding sudden death through pre-emption; and getting it placed in the best possible journal—these are among the tasks that most students aren't trained to perform. My applicant, smart though he was, went off track because no one showed him where the track was or how to stay on it. Many students make the same mistake every year.

This book fills a void in the legal literature: It teaches students how to go about finding a topic and developing it into a useful, interesting, publishable piece. It gives detailed and very helpful instructions for every aspect of the writing, research and publication process. And it comes from the keyboard of someone who has authored articles on a dizzying variety of legal topics and is widely regarded as one of the brightest lights in legal academia.

But I digress.

I pondered the fate of my applicant for some weeks and never did get myself to read more than a few lines of his dreary paper. Finally I called and offered him a clerkship with a strong hint—not quite a condition—that he drop the paper in the nearest trash can and start from scratch. I explained to him what was wrong with it, and what a success-

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ful paper should look like. “You can do whatever you want,” I told him, “but if you should have the misfortune of getting this dog published, it will only drag you down when you apply for a Supreme Court clerkship or a position as a law professor.”

The applicant gratefully accepted the advice. He chucked the “Possibilities of Reverter” paper and went about developing a new topic. Some months later, he produced a dynamite piece that became one of the seminal published articles in a developing area of the law. Eventually, he did clerk for the Supreme Court and has since become a widely respected and often quoted legal academic. His name is Eugene Volokh.



## INTRODUCTION

A good student article can get you a high grade, a good law review editorial board position, and a publication credit. These credentials can in turn help get you jobs, clerkships, and—if you're so inclined—teaching positions. The experience will hone your writing, which is probably a lawyer's most important skill. Likewise, a good article written while you're clerking or in your early years as a practicing lawyer can impress employers (academic and otherwise) and clients.

And your article may influence judges, lawyers, and legislators. Law is one of the few disciplines where second-year graduate students write (not just cowrite) scholarly articles; and these articles are often taken seriously by others in the profession. Lawyers read them, scholars discuss them, and courts—including the U.S. Supreme Court—cite them.

Occasionally, student articles and articles by young practicing lawyers have a huge impact. Here are a few examples, limited to student articles published since 1990 (there are many others from the 1980s and before):

- Janet Hoeffel's student article, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant* (Stan. L. Rev. 1990), has been cited by over 90 academic works and over 25 cases.
- Victor J. Cosentino's student article, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions* (Cal. Western L. Rev. 1990), has been cited by 10 academic works and 19 cases.
- Kevin Werbach's student article, *Looking It Up: Dictionaries and Statutory Interpretation* (Harv. L. Rev. 1994), has been cited by 110 academic works and 10 cases.
- Mark Filip's student article, *Why Learned Hand Would Never Consult Legislative History Today* (Harv. L. Rev. 1992), has been cited by over 85 academic works and 10 cases.
- Rachel Godsil's student article, *Remedying Environmental Racism* (Mich. L. Rev. 1991), has been cited by over 140 academic works.
- Bradley Karkkainen's student article, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction* (Harv. J.L. & Pub. Pol'y 1994), has been cited by over 115 academic

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works.

- Jim Ryan’s student article, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment* (Va. L. Rev. 1992), has been cited by over 100 academic works.
- Chris Ford’s student article, *Administering Identity: The Determination of “Race” in Race-Conscious Law* (Cal. L. Rev. 1994), published by the *California Law Review* (a top 10 journal) while Ford was a student at a different law school, has been cited by over 95 academic works.
- Your author’s student article, *Freedom of Speech and Workplace Harassment* (UCLA L. Rev. 1992), has been cited by over 170 academic works and 14 cases.

As you can see, influential pieces aren’t limited to general-purpose journals; consider the *Harvard Journal of Law and Public Policy* piece. Nor are they limited to articles written by students at top 10 law schools—consider the Cal Western article, which is the second most-cited-by-courts article on the list.

And the influence of student law review articles isn’t limited to a few high-impact pieces. Courts cite student articles at the rate of at least about 500 citations per year. This means over 1/8 of all court citations to law review articles are to student-written articles, and a typical student article is about 40% as likely to get cited as a typical non-student article—an excellent rate for student work. Law review articles appear to cite student articles at the rate of about 15,000 per year.

Top 10 journals do get a disproportionate share of the cites—but over 70% of the court citations in a sample that I’ve examined (the about 500 citations in 2006) came from non-top-10 journals, over 50% come from non-top-25 journals, and over 10% came from specialty journals (including those at many schools below the top 10). The sample included at least five cites each to the general journals at American, Arizona, Baylor, Georgia, Indiana, North Carolina, St. John’s, Temple, the University of Washington, and Wisconsin.

Writing an article, whether as a law review note, as an independent study project, or as a side project in your first years in practice, is also one of the hardest things you will do. Your pre-law-school writing experience and your first-year writing class will help prepare you for it, but only partly. It’s not easy to create an original scholarly work that contributes to our understanding of the law.

Seminar papers tend to be less ambitious and less time-consuming,

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in part because they don't have to be publishable. But they too help improve your writing—and if you invest enough effort into writing them, you can then easily make them publishable, and get extra benefit from your hard work.

In this book, I try to give some advice, based on my own writing experience and on discussions with others, for you to combine with other advice you get. These ideas have worked for me, and I hope they work for you.

Different parts of this book relate to different stages of your project. If you're just trying to get on law review, I suggest that you read Part IX, which is all about getting on law review, and Part IV, which is about writing. If you're writing a Note, seminar paper, or article, I suggest that you:

1. Start by reading Part I, about law review articles generally, and Part X, on academic ethics.
2. Read the short Part II as well, if you're writing a seminar term paper.
3. Once you identify a potential topic, read Part III, on research, and Parts V.A–V.F and V.J–V.K, on using evidence correctly. If you also plan to use survey evidence, read Part V.G, and if you plan to use other social science evidence, read Parts V.H–V.I.
4. When you're ready to start writing—which I hope you will be, soon—read Part IV.
5. As you get close to the end of your first draft, consider rereading Part I again, to see how you can improve your article in light of what you've learned while you were writing it.
6. If you're a law journal staffer or editor, read Parts V and VI to help you understand how to better cite-check others' articles, as well as how to better write your own.
7. When you're ready to publish the article, or publish the seminar paper that you've turned into a publishable article, read Parts VII and VIII.

For more advice, read Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers* (2000); Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. Pitt. L. Rev. 149 (1984); and Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. Rev. 445 (1986).

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## I. ARTICLES AND STUDENT NOTES: THE BASICS

### A. *The Initial Step: Choosing a Claim*

Good legal scholarship should make (1) a claim that is (2) novel, (3) nonobvious, (4) useful, (5) sound, and (6) seen by the reader to be novel, nonobvious, useful, and sound.\*

This is true whether the author is a student, a young lawyer, a seasoned expert, or an academic. I will sometimes allude below to student authors (since I expect that most readers of this book will be students), for instance by discussing grades or faculty advisors. But nearly all of this book should apply equally to other aspiring academic writers.

#### 1. The claim

##### a. Your basic thesis

Most good works of original scholarship have a basic thesis—a claim they are making about the world. This could be a *descriptive* claim about the world as it is or as it was (such as a historical assertion, a claim about a law’s effects, a statement about how courts are interpreting a law, or the like). It could be a *prescriptive* claim about what should be done (how a law or a constitutional provision should be interpreted, what new statute should be enacted, how a statute or a common-law rule should be changed, or the like). It could also be a combination of both a descriptive claim and a prescriptive one. In any case, you should be able to condense that claim into one sentence, for instance:

1. “Law X is unconstitutional because ....”
2. “The legislature ought to enact the following statute: ....”
3. “Properly interpreted, this statute means ....”
4. “This law is likely to have the following side effects ....”
5. “This law is likely to have the following side effects ..., and therefore should be rejected or modified to say ....”
6. “Courts have interpreted the statute in the following ways ...,

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\* I am indebted for much of this formulation to Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 Yale L.J. 2065, 2083 (1991).

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and therefore the statute should be amended as follows ....”

7. “Several different legal rules are actually inconsistent in certain ways, and this inconsistency should lead us to ....”
8. “My empirical research shows that this legal rule has unexpectedly led to ..., and it should therefore be changed this way ....”
9. “My empirical research shows that this law has had the following good effects ..., and should therefore be kept, or extended to other jurisdictions.”
10. “Viewing this law from a [feminist/Catholic/economic] perspective leads us to conclude that the law is flawed, and should be changed this way ....”
11. “Conventional wisdom that ... is wrong, because ....”

So a few examples:

1. “The ban on paying for organs to be transplanted violates patients’ constitutional rights to defend their lives.” This fits in genre #1 discussed above.
2. “Punishing citizens for failing to report crimes that they observe may sometimes discourage reporting, because people who fail to report promptly will realize they’ve committed a crime and will thus be reluctant to talk to the police later.” Genre #4.
3. “Courts often favor the more religious parent over the less religious parent in child custody decisions, and this violates the Establishment Clause.” Genre #8, because it contains a potentially novel descriptive claim (about what courts do) as well as a prescriptive claim.
4. “Though many people assume that liberal Justices have broader views of free speech than conservative Justices, it turns out that Justice Kennedy has the broadest view of free speech, Justice Breyer has the narrowest, and the other Justices fall in between without a clear liberal-conservative pattern.” Genre #11.

Capturing your point in a single sentence helps you focus your discussion, and helps you communicate your core point to the readers. Moreover, many readers will remember only one sentence about your article (especially if they only read the Introduction, as many readers do). You need to understand what you want that sentence to be, so you can frame your article in a way that will help readers absorb your main point.

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b. The descriptive and the prescriptive parts of the thesis

The most interesting claims are often ones that combine the descriptive and the prescriptive, telling readers something they didn't know about the world—whether it's about what courts have done, how a legal rule changes people's behavior, or why a rule has developed in a particular way—but also suggesting what should be done. The descriptive is valuable because many people are more persuadable by novel facts than by novel moral or legal arguments. The prescriptive is valuable because it answers the inevitable “so what?” question that many practical-minded readers will ask whenever they hear a factual description, even an interesting one.

You can certainly write an article that's purely prescriptive or purely descriptive (though see Part I.A.8.d, p. 36 for a discussion of one sort of descriptive piece that you might want to avoid). Combining the prescriptive and the descriptive, however, tends to yield a more interesting and impressive article. So, as you're developing your claim, try to look both for novel, nonobvious, useful, and sound descriptive assertions and for novel, nonobvious, useful, and sound prescriptions.

Thus, for instance, say that you are writing about freedom of speech and hostile public accommodation harassment law, under which courts and administrative agencies award damages when proprietors of public accommodations allow speech that creates a racially, ethnically, religiously, or sexually hostile environment for some patrons. You could just use First Amendment precedents and First Amendment theory to analyze the hostile public accommodation environment rules, and explain why they should be preserved, changed, or repealed (the prescriptive dimension).

But if you could find cases, including perhaps hard-to-discover administrative agency decisions, that show that there's a real problem, and that hostile public accommodations environment law is indeed restricting potentially valuable speech (the descriptive dimension), your argument would be stronger. It would better persuade readers that your proposal is useful, since many readers might otherwise be skeptical that there's a problem to be solved. It would help you more concretely present your prescriptive argument. And even if the readers disagree with, skim over, or forget your prescriptive argument, they might still find value in your novel descriptive observations—and give you credit for making these discoveries.

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### c. Identifying a problem

To get to a claim, you must first identify a problem, whether a doctrinal, empirical, or historical one, in a general area that interests you; the claim will then be your proposed solution to that problem. Some tips:

1. Think back on *cases you've read for class* that led you to think “this leaves an important question unresolved” or “the reasoning here is unpersuasive.”
2. Try to recall *class discussions* that intrigued you but didn't yield a well-settled answer.
3. Read the *questions that many casebooks include* after each case; these questions often identify interesting unsolved problems. Look not just at the casebook that you used yourself, but also at other leading casebooks in the field.
4. Read *recent Supreme Court cases* in fields that interest you, and see whether they leave open major issues or create new ambiguities or uncertainties.
5. Ask *faculty members* which parts of their fields they think have been unduly neglected by scholars; some (though not all) of the professors you ask may even suggest specific problems.
6. Ask *practicing lawyers* which important unsettled questions they find themselves facing.
7. Check the *Westlaw Bulletin (WLB)*, *Westlaw State Bulletin (WSB-CA, WSB-NY, and such)*, and *Westlaw Topical Highlights (WTH-CJ, WTH-IP, and such)* databases. These databases summarize noteworthy recent cases, in one paragraph each; many such cases contain legal developments that might prove worth analyzing.
8. Read Heather Meeker's *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 Utah L. Rev. 917.
9. Read *legal Weblogs that specialize in the field you're interested in*. Bloggers often post about interesting new cases that pose thorny, unresolved problems.
10. Think back on your *pre-law-school experience*, whether academic, professional, or personal. Can you tie interesting things

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you learned there to some legal question? For instance, did your undergraduate history classes teach you about some fascinating but underdiscussed past legal controversies? Do you know something about a foreign country that can help you do comparative law work dealing with the law of that country?

Look for a problem that's big enough to be important and interesting but small enough to be manageable.

#### d. Looking for claims when you're in class

If you're thinking ahead about writing an article a semester or two from now, look for claims when you're in class, especially a class you really enjoy. The key here is to face class like a scholar rather than like a normal law student.

Your coursework will often bring you up against ambiguity, vagueness, and contradiction, whether in cases, statutes, or constitutional provisions. You'll also read arguments that you realize are shallow, circular, or speculative.

The natural reaction for many lawyers and law students is to try to evade these problems. We pretend that a case announces a clear rule even though it's full of mushy terms that are often indeterminate in application. We learn the standard arguments, however conclusory they might be, so we can repeat them on the exam. We ignore the five different approaches courts have taken and instead just assume they fit in the "majority" and "minority" rules that the casebook gives you.

This approach may actually be good enough for succeeding (most of the time) in class, and even for succeeding in many tasks as a lawyer. Many cases that you'll face as a lawyer will involve only one of the several competing rules—the one that's well-settled in your jurisdiction—or will trigger a rule's clear core rather than its vague periphery. And even when a governing precedent is based on a circular argument, it's still the governing precedent, so the flaws in its justification often won't need to detain you.

But if you are a would-be scholar, even a temporary scholar who just wants to write an article or two while in law school, you should take a different approach. You should seek out ambiguity, vagueness, contradiction, glibness, circularity, and unsupported assumptions. They give you the opportunity to shine by doing better.

So if you find these flaws in the materials you're studying, look

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more closely. Check the notes following the case to see if they point to articles discussing the flaws. Maybe those articles cover the field, but maybe they themselves are inadequate, and just give you more food for thought. Ask the professor whether he thinks the topic seems worth writing about, or whether it has already been done to death. And enjoy and focus closely on those discussions that other students view as most unsatisfying: They are the natural foundation for your own work.

### e. Checking with your law school's faculty

Once you've tentatively chosen a problem, run it by your faculty advisor. Your advisor will probably know better than you do whether there's already too much written on the subject, or whether there's less substance to the problem than you might think.

Also talk to other faculty members at your school who teach in the field, even if you don't know them. Most are happy to spend a few minutes helping a student.

Even if you're no longer a student, you should still be able to draw on your law school's faculty: Professors feel some obligation to help alumni, especially those who they think will eventually try to go into teaching. If you feel uncomfortable approaching a faculty member whom you don't know, ask another professor whom you do know to introduce you (in person or electronically).

### f. Keeping an open mind

Do your research with an open mind. Be willing to make whatever claims your reading and thinking lead you to.

Also be willing to change or refine the problem itself. Remember that your goal is to find whatever problem will yield the best article. Don't feel locked into a particular problem or solution just because it's the first one you thought of.

### g. Identifying a tentative solution

Decide what seems to be the best solution to the problem. For the descriptive part of your claim, the best solution is just the most plausible explanation of the facts (facts about history, about the way the law has been applied, about the way people behave) that you've uncovered.

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For the prescriptive part, the best solution could be a new statute, a new constitutional rule, a new common law rule, a new interpretation of a statute, a new enforcement practice, a novel application of a general principle to a certain kind of case, or the like. This will be your *claim*: “State legislatures should enact the following statute ...” “Courts should interpret this constitutional provision this way ...” “This law should be seen as unconstitutional in these cases ..., but constitutional in those ...”

Test your solution against several factual scenarios you’ve found in the cases, and against several other hypotheticals you can think up. Does the solution yield the results that you think are right? Does it seem determinate enough to be consistently applied by judges, juries, or executive officials? If the answer to either question is “no,” change your solution to make it more correct and more clear. (I discuss this “test suite” process further in Part I.A.5, p. 21.)

The solution doesn’t have to be perfect: It’s fine to propose a rule even when you have misgivings about the results it will produce in a few unusual cases. But candidly testing your solution against the factual scenarios will tell you whether even you yourself find the solution plausible. If you don’t, your readers won’t, either.

## 2. Novelty

### a. Adding to the body of professional knowledge

To be valuable, your article must be novel: It must say something that hasn’t been said before by others. It’s not enough for your ideas to be original to you, in the sense that you came up with them on your own—the article must add something to the state of expert knowledge about the field.

In practice, the best bet is to find a topic that has not been much written on. The second best option is to at least find a claim that hasn’t been made before, even if many others have made other claims related to the topic. But if you really want to reach a conclusion that others have already covered (e.g., race-based affirmative action is or is not constitutional, the death penalty is or is not proper, and the like), that too could work: You just need to make sure that your claim coupled with your basic rationale is novel.

For instance, say you want to criticize obscenity law. Many people

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have already argued that obscenity law is unconstitutional because it interferes with self-expression, or because it's too vague. You shouldn't write yet another article that makes the same point.

But a new test for what should constitute unprotected obscenity might be a novel proposal (and might even be useful, if you argue that state supreme courts should adopt it even if the U.S. Supreme Court doesn't, see Part I.A.4.b, p. 18). So would a proposal that obscenity law should be entirely unconstitutional, if you've come up with a novel *justification* for your claim: For instance, the claim that "obscenity laws are unsound because, as a study I've done shows, such laws are usually enforced primarily against gay pornography" may well be novel. (This claim and the others I mention below are just examples. I don't vouch for their correctness, or recommend that you write about them.)

What if you've chosen your topic and your basic rationale, and, four weeks into your research, you find that someone else has said the same thing? No need to despair yet.

### b. Making novelty through nuance

Often you can make your claim novel by making it more nuanced. For instance, don't just say, "bans on nonmisleading commercial advertising should be unconstitutional," but say (perhaps) "bans on nonmisleading commercial advertising should be unconstitutional unless minors form a majority of the intended audience for the advertising." The more complex your claim, the more likely it is that no one has made it before. Of course, you should make sure that the claim is still (a) useful and (b) correct.

Some tips for making your claim more nuanced:

1. Think about what special factors—for instance, government interests or individual rights—are present in some situations covered by your claim but not in others. Could you modify your claim to consider these factors?
2. Think about your arguments in support of your claim. Do they work well in some cases but badly in others? Perhaps you should limit your claim accordingly.
3. For most legal questions, both the simple "yes" answer and the simple "no" tend to attract a lot of writing. See if you can come up with a plausible answer that's somewhere in between—"yes" in some cases, "no" in others.



### 3. Nonobviousness

Say Congress is considering a proposed federal cause of action for libel on the Internet. You want to argue that such a law wouldn't violate the First Amendment.

Your claim would be novel, but pretty obvious. Most people you discuss it with will say, "you're right, but I could have told you that myself." Libel law, if properly limited, has repeatedly been held to be constitutional, and many people have already argued that libel law should be the same in cyberspace as outside it. Unless you can explain how federal cyber-libel law differs from state libel law applied to cyberspace, your point will seem banal.

Claims such as that one, which just apply settled law or well-established arguments to slightly new fact patterns, tend to look obvious. Keep in mind that your article will generally be read by smart and often slightly arrogant readers (your professor, the law review editors, other people working in the field) who will be tempted to say "well, I could have thought of that if I'd only taken fifteen minutes"—even when that's not quite true.

You can avoid obviousness by adding some twist that most observers would not have thought of. For example, might a federal cyber-libel law be not just constitutional, but also more efficient, because it sets a uniform nationwide standard? Could it be more efficient in some situations but not others? Could it interact unexpectedly with some other federal laws? Making your claim more nuanced can make it less obvious as well as more novel.

If you can, describe your claim to a faculty member who works in the field (besides your advisor), an honest classmate who's willing to criticize your ideas, and a lawyer who works in the field. If they think it's obvious, either refine your claim, or, if you're confident that the claim is in fact not obvious, refine your presentation to better show the claim's unexpected aspects.

### 4. Utility

You'll be investing a lot of time in your article. You'll also want readers to invest time in reading it. It helps if the article is useful—if at least some readers can come away from it with something that they'll find professionally valuable. And the more readers can benefit from it,

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the better.

### a. Focus on issues left open

Say you think the U.S. Supreme Court's *Doe v. Roe* decision is wrong. You can write a brilliant piece about how the Court erred, and such an article might be useful to some academics. But *Doe* is the law, and unless the Court revisits the issue, few people will practically benefit from your insight.

You should ask yourself: How can I make my article more useful not just to radically minded scholars, but also to lawyers, judges, and scholars who aren't interested in challenging the existing Supreme Court caselaw here? One possibility is to identify questions that *Doe* left unresolved—or questions that it created—and explain how they should be resolved in light of *Doe*'s reasoning, along with the reasoning of several other Supreme Court cases in the field. Such an article would be useful to any lawyer, scholar, or judge who's considering a matter that involves one of these questions.

### b. Apply your argument to other jurisdictions

Say *Doe* holds that a certain kind of police conduct doesn't violate the Fourth Amendment. This makes *Doe* binding precedent as to the Fourth Amendment, but only persuasive authority as to state constitutions, because courts can interpret state constitutions as providing more protection from state government actors than the federal constitution does.

The claim "state courts interpreting their own state constitutional protections should reach a different result" is therefore more useful than just "the Court got it wrong." Judges are more likely to accept the revised claim, lawyers are more likely to argue it, and academics are more likely to build on it. Your article will still be valuable to scholars who are willing to challenge the Court's case law, but it will also be valuable to many others.

### c. Incorporate prescriptive implications of your descriptive findings

You can make a valuable contribution to knowledge just by uncover-

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ing some important facts: historical facts, facts about how judges or other government officials are applying a law, facts about how people or organizations react to certain laws, and so on. But your contribution would be still more valuable, and more impressive, if your claim also said something about how these findings are relevant to modern debates. You could come up with your own prescription based on the findings, or you could just explain how your findings might be relevant to others' prescriptive arguments, even if you don't endorse those arguments yourself.

Practical-minded people who read a purely descriptive piece will often ask "so what?" If you answer this question for them, you'll increase the chances that they'll see your work as useful. Don't do this if it's too much of a stretch: If there are no clear modern implications of your findings about 14th century English property law, you're better off sticking just with your persuasive historical claims rather than adding an unpersuasive prescriptive claim. But if you see some possible prescriptive implications, work them in.

#### d. Consider making a more politically feasible proposal

Say your claim is quite radical, and you're sure that few people will accept it, no matter how effectively you argue. For instance, imagine you want to urge courts to apply strict scrutiny to restrictions on economic liberty—a step beyond *Lochner v. New York*. You may have a great argument for that, but courts probably won't be willing to adopt your theory.

Think about switching to a more modest claim. You might argue, for instance, that courts should apply strict scrutiny to restrictions on entering certain professions or businesses. This would be a less radical change, and you can also support it by using particular arguments that wouldn't work as well for the broader claim.

Maybe courts will still be unlikely to go that far. Can you argue for a lower (but still significant) level of scrutiny? Can you find precedents, perhaps under state constitutions, that support your theory, thus showing your critics that your theory is more workable than they might at first think?

Or perhaps you could limit your proposal to strict scrutiny for laws that interfere with the obligation of contracts, rather than for all economic restrictions. Here you have more support from the constitutional

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text, a narrower (and thus less radical-seeming) claim, and perhaps even some more support from state cases: It turns out that state courts have interpreted the contracts clauses of many state constitutions more strictly than the federal clause.

If you really want to make the radical claim, go ahead—you might start a valuable academic debate, and perhaps might even eventually prevail. But, on balance, claims that call for modest changes to current doctrine tend to be more useful than radical claims, especially in articles by students or by junior practitioners. By making a more moderate claim, you can remain true to your basic moral judgment while producing something that's much more likely to influence people. Many legal campaigns are most effectively fought through small, incremental steps.

- e. Make sure the argument doesn't unnecessarily alienate your audience

You should try to make your argument as appealing as possible to as many readers as possible. You can't please everyone, but you should avoid using rhetoric, examples, or jargon that unnecessarily alienates readers who might otherwise be persuadable.

For instance, say that you're writing an article on free speech, and in passing give anti-abortion speech as an example. If you call this "anti-choice" speech, your readers will likely assume that you bitterly oppose the anti-abortion position. Some pro-life readers might therefore become less receptive to your other, more important, arguments; and even some pro-choice readers may bristle at the term "anti-choice" because they see it as an attempt to make a political point through labeling rather than through argument. If you're pro-choice, imagine your reaction to an article that in passing calls your position "anti-life"—would this make you more or less open to the article's other messages?

Avoid this by using language that's as neutral as possible. Right now, for instance, "pro-choice" and "pro-life" seem to cause the fewest visceral reactions; most terms have some political message embedded in them, but these seem to have the least, perhaps because repeated use has largely drained them of their emotional content. But in any case, find something that is acceptable both to you and to most of your readers.

The same goes for terms like "gun lobby," "gun-grabber," "abortion-

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ist,” “fanatic,” and the like. You may feel these terms are accurate, but that’s not enough. Many readers will condemn these terms as attempts to resolve the issue through emotion rather than logic, and will therefore become less open to your substantive arguments. Likewise, if you’re analogizing some views or actions to those of Nazis, Stalinists, the Taliban, and the like, you’re asking for trouble unless the analogy is extremely close.

Try also to avoid using jargon that will confuse those who are unfamiliar with it, or that will unnecessarily label your work (fairly or unfairly) as belonging to some controversial school of analysis. If you have to use the jargon because you need it to clearly explain your theory, that’s fine. But if you’re writing an article on a topic that doesn’t really require you to use a specialized method such as law and economics, literary criticism, or feminist legal theory, then stay away from the terms characteristic of those disciplines. Replacing such terms with plain English will probably make your article clearer and more accessible, and will avoid bringing in the ideological connotations that some people associate with these terms.

Likewise, try to include some arguments or examples that broaden your article’s political appeal. If you are making a seemingly conservative proposal, but you can persuasively argue that the proposal will help poor people, say so. If you are making a seemingly liberal proposal, but you can persuasively argue that the proposal fits with tradition or with the original meaning of the Constitution, say that.

You should of course be willing to make unpopular arguments, if you need them to support your claim; that’s part of the scholar’s job. And if you really want to engage in a particular side battle, you might choose to bring it up even if you don’t strictly have to. But in general, don’t weaken your core claim by picking unnecessary fights.

## 5. Soundness: prescriptive claims

### a. Test suites

When you’re making a prescriptive proposal (whether it’s a new statute, an interpretation of a statute, a constitutional rule, a common-law rule, a regulation, or an enforcement guideline), it’s often easy to get tunnel vision: You focus on the one situation that prompted you to write the piece—usually a situation about which you feel deeply—and ignore other scenarios to which your proposal might apply. And this can

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lead you to make proposals that, on closer examination, prove to be unsound.

For instance, say you're outraged by the government's funding childbirths but not abortions. You might therefore propose a new rule that "if the government funds the nonexercise of a constitutional right, then the government must also fund the exercise of the right"; or you might simply propose that "if the government funds childbirth, it must fund abortions," and give the more general claim as a justification. But you might not think about the consequences of this general claim—when the government funds public school education, it would also have to fund private school education (since that's also a constitutional right), and when it funds anti-drug speech, it might also have to fund pro-drug speech.

Your argument, at least at its initial level of generality, is thus probably wrong or at least incomplete. But focusing solely on your one core case keeps you from seeing the error.

One way to fight these errors is a device borrowed from computer programming: the *test suite*. A test suite is a set of cases that programmers enter into their programs to see whether the results look right. A test suite for a calculator program, for instance, might contain the following test cases, among many others:

1. Check that  $2+2$  yields 4.
2. Check that  $3-1$  yields 2.
3. Check that  $1-3$  yields  $-2$  (because the program might work differently with positive numbers than with negative ones).
4. Check that  $1/0$  yields an error message.

If all the test cases yield the correct result, then the programmer can have some confidence that the program works. If one test yields the wrong result, then the programmer sees the need to fix the program—not throw it out, but improve it. Such test suites are a fundamental part of sound software design. Before going into law, for instance, I wrote a computer program that had 50,000 lines of test suites for its 140,000 lines of code.

You can use a similar approach for testing legal proposals. *Before* you commit yourself to a particular proposal, you should design a test suite containing various cases to which your proposal might apply.\*

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\* See, e.g., Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L.

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Assume, for instance, that you are upset by peyote bans that interfere with some American Indian religions. The government has no business, you want to argue, imposing such paternalistic laws on religious observers. You should design a set of test cases involving requests for religious exemptions from many different kinds of paternalistic laws, for instance:

1. requests for religious exemptions from assisted suicide bans, sought by doctors who want to help dying patients die, or by the patients who want a doctor's help;
2. requests for religious exemptions from assisted suicide bans, sought by physically healthy cult members who want help committing suicide;
3. requests for religious exemptions from bans on the drinking of strychnine (an example of extremely dangerous behavior);
4. requests for religious exemptions from bans on the handling of poisonous snakes (an example of less dangerous behavior);
5. requests for religious exemptions from bans on riding motorcycles without a helmet (an example of less dangerous behavior, but one that—unlike in examples 3 and 4—many nonreligious people want to engage in).<sup>1\*</sup>

Then, once you design a proposed rule, you should test it by applying it to all these cases and seeing what results the proposal reaches.

#### b. What you might find by testing your proposals

What information can this testing provide?

1. *Error*: You might find that the proposal reaches results that even you yourself think are wrong. For instance, suppose that your initial proposal is that religious objectors should always get exemptions from paternalistic laws. Thinking about test case 2 might lead you to doubt that proposal, and conclude that people should not be allowed to help physically healthy people commit suicide. The proposed rule, then, would be unsound.

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& Pub. Pol'y 283, 336 (2001), for an example of one such test suite that the student used while writing her article, and eventually incorporated into the published version.

\* The numbered notes in this book are endnotes, which start at p. 293. They generally contain supporting evidence for assertions in the text, or citations to other sources.

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What can you do about this?

a. You might think that the proposal yielded the wrong result because it didn't take into account countervailing concerns that may be present in some cases—for instance, the special need to prevent a voluntarily assumed near-certainty of death or extremely grave injury, rather than just a remote risk of harm. If this is so, you could *modify* the proposed test, for instance by *limiting its scope* (for example, by including exception for harms that are likely to be immediate, grave, and irreversible).

b. Another possibility is that the insight that led you to suggest the proposal—in our example, the belief that there should be a religious exemption from peyote laws—is better explained by a *different rule*. For instance, as you think through the test cases, you might conclude that your real objection to the peyote ban is that it's factually unjustified (because peyote isn't that harmful), and not that it's paternalistic. You might then *substitute* a new rule: courts should allow religious exemptions from a law when they find that the religious practice doesn't cause any harm, whether or not the law is paternalistic.

2. *Vagueness*: You might find that the proposal is unacceptably vague. Say that the proposal was that religious objectors should be exempted from paternalistic laws when “the objectors' interest in practicing their religion outweighs the government's interest in protecting people against themselves.” In the peyote case, this proposal might have satisfied you, because it was clear to you that the government's interest in protecting people against peyote abuse was weak. But as you apply the proposal to the other cases, you might find that the proposal provides far too little guidance to courts—and might therefore lead to results you think are wrong. This could be a signal for you to *clarify* the proposal.

3. *Surprise*: You might find that the proposal reaches a result that you at first think is wrong, but then realize is right. For instance, before applying the proposal to the test suite, you might have assumed that religious objectors shouldn't get exemptions from assisted suicide bans. But after you think more about this test case in light of your proposal, you might conclude that your intuition about assisted suicide was mistaken.

You should keep this finding in mind, and *discuss it in the article*: It may help you show the value of your claim, because it shows that the proposal yields counterintuitive but sound results.



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4. *Confirmation*: You might find that the proposal precisely fits the results that you think are proper. This should make you more confident of the proposal's soundness; and it would also provide some examples that you can *use in the article* to illustrate the proposal's soundness (as Part I.B.3.c, p. 58, discusses).

### c. Developing the test suite

How can you identify good items for your test suites? Here are a few suggestions:

1. *Identify what needs to be tested*. The test suite is supposed to test the proposed legal principle on which the claim is based. Sometimes, the claim is itself the principle: For instance, if the proposal is that “the proper rule for evaluating requests for religious exemptions from paternalistic laws is [such-and-such],” you would need a set of several cases to which this rule can be applied.

But sometimes the claim is just an application of the principle: For instance, the claim that “religious objectors should get exemptions from peyote laws” probably rests on a broader implicit principle that describes which exemption requests should be granted. If that's so, then you should come up with a set of cases that test this underlying principle. One case should involve peyote bans but the others shouldn't.

2. Each test case should be *plausible*: It should be the sort of situation that might actually happen. It's good to base it on a real incident, whether one drawn from a reported court decision or a newspaper article. You need not precisely follow the real incident, and you may assume slightly different facts if necessary—the goal is to have the reader acknowledge that the case *could* happen the way it's described, not that it necessarily has happened. But you should make sure that any alterations still leave the test case as realistic as possible.

3. The test suite should *include the famous precedents* in this field. This can help confirm for you and the readers that the proposal is consistent with those cases—or can help explain which famous cases would have to be reversed under the proposal.

4. At least some of the cases should be *challenging for the proposal*. You should identify cases where the proposal might lead to possibly unappealing results, and include them in the test suite. Skeptical readers, including your advisor, will think of these cases eventually. Identifying the hard cases early—and, if necessary, revising the proposal in light of

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them—is better than having to confront them later, when changing the paper will require much more work.

5. The test cases should *differ from each other* in relevant ways, since their role is to provide as broad a test for the claim as possible. If you are testing a claim about paternalistic laws, for instance, you shouldn't just focus on drug laws, or just on paternalistic laws aimed at protecting children. You should think of many different sorts of paternalistic laws, and choose one or two of each variety.

6. The cases should yield *different results*. For instance, if your proposed rule judges the constitutionality of a certain type of law, you should find some laws that you think should be found unconstitutional, some that you think should be found constitutional, and some whose constitutionality is a close question.

7. The cases should involve incidents or laws that appeal to as many *different political perspectives* as possible. Say that you are a liberal who wants to argue that the Free Speech Clause prohibits the government from funding viewpoint-based advocacy programs. You might have developed this view because you think the government shouldn't be allowed to fund anti-abortion advocacy, and your proposal will indeed reach the result you think is right in that case.

But what about advocacy programs that liberals might favor, such as pro-recycling advocacy, or advertising campaigns promoting tolerance of homosexuality? It would help if the test suite included such cases, plus generally popular programs such as anti-drug advertising, or programs that even small-government libertarians might like, such as advocacy of respect for property rights (for instance, anti-graffiti advocacy). This wide variety of test cases will help show you whether the proposal is indeed sound across the board, or whether even you yourself would, on reflection, oppose it.

8. In particular, think about *the policy arguments and the private or government interests on both sides*, and find cases in which different arguments or interests are more or less implicated. Say, for instance, you are writing about how state constitutional rights to bear arms should be interpreted. The obvious test cases would focus on situations in which citizens want to defend themselves, and the government wants to prevent criminal misuse of guns.

But what about laws aimed not at preventing crime but at preventing suicide or accidents? What about citizens who are concerned not just about access to guns, but about privacy—for instance, citizens who want

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to carry guns concealed rather than openly because they don't want to reveal their actions to everyone, or citizens who don't want their gun ownership or their concealed carry license disclosed in public records? Add test cases that involve laws which implicate these special concerns.

#### d. Particular problems to watch out for

A proposal can be unsound in many ways, but a few ways are particularly common.

#### i. Excessive mushiness

Be willing to take a middle path, but beware of proposals that are so middle-of-the-road that they are indeterminate. For instance, if you're arguing that single-sex educational programs should be neither categorically legal nor categorically illegal, it might be a mistake to claim that such programs should be legal if they're "reasonable and fair, and promote the cause of equality." Such a test means only what the judge who applies it wants it to mean.

Few legal tests can produce mathematical certainty, but a test should be rigorous enough to give at least some guidance to decision-makers. Three tips for making tests clearer:

1. Whenever you use terms such as "reasonable" or "fair," ask yourself what you think defines "reasonableness" or "fairness" in this particular context. Then try to substitute those specific definitions in place of the more general words.
2. When you want to counsel "balancing," or urge courts to consider the "totality of the circumstances," ask yourself exactly what you mean. What should people look for when they're considering all the circumstances? How should they balance the various factors you identify? Making your recommendation more specific will probably make it more credible.
3. If possible, tie your test to an existing body of doctrine by using terms of art that have already been elaborated by prior cases (though this approach has its limits, as the next subsection discusses).

Thus, "single-sex educational programs should be legal if they have been shown in controlled studies to be more effective than co-ed programs" is probably a more defensible claim than "single-sex educational

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programs should be legal if they're reasonable." Instead of an abstract appeal to "reasonableness," the revised proposal refers to one specific definition of reasonableness—educational effectiveness—that seems to be particularly apt for decisions about education. It's still not a model of predictability, but it's better than just a "reasonableness" standard.\*

Note how test suites can help you find and fix this problem. If you apply a proposal to your test cases, and find that it often doesn't give you any definite answer, you'll know the proposal is too vague. Once you discover this, you can ask yourself "what do I think the results in these cases should be, and why?" Answer this question, incorporate the answer into your original proposal, and you'll have a more concrete claim.

### ii. Reliance on legal abstractions

"Reasonableness" at least sounds as vague as it is; other terms, such as "intermediate scrutiny," "strict scrutiny," "narrowly tailored," and "compelling state interest," seem clear but in reality have little meaning by themselves. To the extent that, say, strict scrutiny of content-based speech restrictions provides a relatively predictable test, the predictability comes from the body of caselaw that tells you which interests are compelling and what narrow tailoring means, and not from the phrase "narrowly tailored to a compelling state interest." The terms "strict scrutiny" and "narrowly tailored to a compelling state interest" aren't the test—they are just the names of the test.

Thus, a proposal such as "gun control laws should be examined to see if they are substantially related to an important government interest [i.e., intermediate scrutiny]" doesn't really mean much by itself. To be helpful, the proposal must explain which interests qualify as important and what constitutes a substantial relationship.

Nor is it enough just to say "the courts should borrow the intermediate scrutiny caselaw from other contexts." The intermediate scrutiny tests differ in different contexts, both on their face and as applied. Intermediate scrutiny in sex classification cases, for instance, has a reputation for being a very demanding test, while intermediate scrutiny of

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\* Some people argue that very flexible tests are actually better than seemingly more rigid ones; if you share this view, you might reject my approach here. Remember, though, that many readers will rightly worry about how your vague test will actually work out in practice. For your article to be convincing, you must either make the test more determinate or persuade these readers to accept its indeterminacy.

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restrictions on expressive conduct has generally proven to be deferential; and if you look closely at the elements of the two tests, you'll find that they differ significantly, and for good reasons (since the underlying constitutional concerns animating the tests are different). Similarly, intermediate scrutiny in commercial speech cases was fairly deferential in the mid-1980s, but became much more demanding in the 1990s and early 2000s, all the while being called "intermediate scrutiny."

The solution is, in Justice Holmes's phrase, to "think things not words."<sup>2</sup> Rather than relying on words such as "substantially," "important," or "intermediate," explain which interests may justify the restriction and which may not. Explain when restrictions should be allowed to be overinclusive or underinclusive and when they should not be. Explain when courts should demand empirical evidence that the law serves its goals and when they can rely on intuition. Of course, you may not be able to cover all possible situations, and in some cases where the question is close, your test may properly leave things ambiguous. But the more concrete your proposal, the better.

Note again how test suites can help you identify this problem and refine your claim: Just as in the previous subsection, applying your proposed test to a set of concrete problems can help you see whether it has substance or is just words.

#### iii. Procedural proposals that don't explain what substantive standards are to be applied

Procedural proposals can be useful: It's often impossible or politically impractical to design the right substantive rule up front, so the best we can do is set up the procedures that will make it more likely that the right rule will eventually emerge. The Constitution itself, for instance, was intended to protect liberty largely through procedural structures, such as bicameralism, separation of powers, and the like. If you genuinely think that the right answer to your problem is better procedures, you should propose that.

But remember that courts and administrative judges, unlike legislatures, are generally required to apply a substantive rule, even if a vague one. It's not enough just to set forth procedures through which these bodies act—if your proposal asks such entities to review something, it has to tell them what rule they should apply.

Thus, say that you want to limit speech restrictions imposed on