STRICT JUDICIAL SCRUTINY

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The history and practice of strict judicial scrutiny are widely misunderstood. Historically, the modern strict scrutiny formula did not emerge until the 1960s, when it took root simultaneously in a number of doctrinal areas. It did not clearly originate in race discrimination cases, as some have suggested, nor in free speech jurisprudence, as Justice Harlan once claimed.

Although strict scrutiny is widely assumed to be "strict in theory, but fatal in fact," judicial practice in applying it has been complex, even conflicted. There are at least three identifiable versions of strict scrutiny, all subsumed under the same label. The result is uncertainty and sometimes confusion about which version the U.S. Supreme Court will apply in which cases.

Some of the confusion arises from the strict scrutiny test's vague and ambiguous terms, which leave critical questions unanswered. Seeking answers to those questions through normative rather than doctrinal inquiry, this Article argues that the strict scrutiny test is best understood as mandating a proportionality inquiry. At least when challenged regulations would at best reduce risks or incidences of harm, rather than extirpate them completely, courts applying strict scrutiny must ask whether the benefits justify the costs in light of regulatory alternatives that would trench less deeply on constitutional rights but also be less effective in promoting their goals.

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INTRODUCTION

The words "strict judicial scrutiny" appear nowhere in the U.S. Constitution. Neither is there any textual basis, nor any foundation in the Constitution's original understanding, for the modern test under which legislation will be upheld against constitutional challenge only if "necessary" or "narrowly tailored" to promote a "compelling" governmental interest.[1] Nonetheless, strict scrutiny—a judicially crafted formula for implementing constitutional values[2]—ranks among the most important doctrinal elements in constitutional law. This test governs challenges under the Equal Protection Clause to

1. *E.g.*, Johnson v. California, 543 U.S. 499, 505 (2005); Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

2. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (emphasizing the importance of judicially developed tests in implementing constitutional values).

statutes that discriminate on the basis of race or other "suspect" classifications.[3] It provides "the baseline rule"[4] under the First Amendment for assessing laws that regulate speech on the basis of content,[5] as well as for scrutinizing content-based exclusions of speakers from public fora[6] and of the press from criminal trials.[7] In the domain of due process, the U.S. Supreme Court insists that statutes that restrict the exercise of "fundamental" rights can survive only if necessary to promote compelling governmental interests.[8] The same rule applies in cases involving fundamental rights under the Equal Protection Clause,[9] including those presenting challenges to majority-minority voting districts the design of which was predominantly driven by race-based concerns.[10] Statutes that impose substantial burdens on freedom of association are also analyzed under the compelling interest test.[11] Prior to 1990, so were substantial burdens on the free exercise of religion, though the Supreme Court effected a major retrenchment in *Employment Division v. Smith*.[12] Under *Smith*, generally applicable laws that only incidentally burden the free exercise of religion no longer receive strict scrutiny.[13] Nonetheless, strict scrutiny continues to apply to statutes that single out religiously motivated conduct for governmental regulation.[14]

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3. *E.g.*, *Johnson*, 543 U.S. at 505 (classifications based on race); Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (classifications based on alienage).

4. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring in part and dissenting in part).

5. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813–14 (2000); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

6. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); United States v. Kokinda, 497 U.S. 720, 726–27 (1990) (plurality opinion); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981).

7. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982).

8. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Reno v. Flores, 507 U.S. 292, 301–02 (1993).

9. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

10. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995); Shaw v. Reno, 509 U.S. 630, 643–44 (1993).

11. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 591–92 (2005); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 91–92 (1982).

12. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

13. *See Smith*, 494 U.S. at 882–89.

14. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (noting that the *Smith* analysis fails to apply when the regulation at issue is neither neutral nor generally applicable).

Given the sweep and importance of the modern strict scrutiny formula, one naturally wonders about its origins and purposes. Where did it come from? When? Why? What exactly do its central terms mean? What is a compelling interest, and how are such interests identified? What does it mean for a statute or regulation to be narrowly tailored? Despite their evident importance, questions such as these have attracted surprisingly little attention. Although the modern strict scrutiny formula applies widely, its origins are generally unknown, its interpretation is more varied than is often recognized, its ultimate aims are disputed, and its conceptual presuppositions are widely misunderstood.

Seeking to shed light on all of these topics, this Article looks broadly at the history and practice of strict judicial scrutiny—by which I mean the formulaic test demanding that statutes be narrowly tailored to compelling governmental interests, as distinguished from less sharply articulated notions that some statutes should trigger searching judicial review of an otherwise unelaborated nature. Among my central conclusions are these:

First, the modern strict scrutiny test is of relatively recent origin, having developed only in the 1960s. Strikingly, however, when the modern formula began to evolve, it made nearly simultaneous appearances in multiple corners of constitutional law. As this pattern would suggest, strict judicial scrutiny—which is a generic constitutional test capable of broad application—rose to prominence as the solution to a generic problem confronting the Warren Court. That problem involved the crafting of formulas to protect "preferred" or fundamental rights that were too important to be enforced only by a rational basis test, but that the Supreme Court could not reasonably define as wholly categorical or unyielding. Only in the 1960s did the Court come fully to grips with this problem, which had been building since the collapse of the *Lochner*[15] era and the Court's earliest, incipient efforts to protect preferred rights (such as those identified in the famous *Carolene Products*[16] footnote) much more aggressively than others. To count as a solution to the problem, a doctrinal structure needed, among other things, to impose discipline, or at least the appearance of discipline, on judicial decisionmaking and thus to escape the taint both of *Lochner*esque second-guessing of legislative judgments and of flaccid judicial "balancing." When conjoined with highly deferential rational basis review of regulation of ordinary liberties, the strict scrutiny formula fit the bill. It furnished

15. Lochner v. New York, 198 U.S. 45 (1905).

16. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that although economic regulatory legislation would ordinarily receive only rational basis review, a different test might apply to legislation within specific constitutional prohibitions such as those of the Bill of Rights, to legislation restricting the political process, and to legislation discriminating against "discrete and insular minorities").

a determinate-looking structure that made invalidation of particular statutes seem driven by doctrinal necessity. At the same time, it held out the promise that well-drawn statutes to protect vital governmental interests could survive.

Second, the Supreme Court adopted the strict scrutiny formula as its generic test for the protection of fundamental rights without reaching agreement about the precise nature of the inquiry that courts should use in applying it. In the absence of such agreement, subsequent practice reveals three distinguishable versions of strict judicial scrutiny, all conducted pursuant to the same form of words. One stringent version allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms. Another, which views legislation as appropriately suspect when likely to reflect constitutionally forbidden purposes, aims at "smoking out" illicit governmental motives. A third version of strict scrutiny, partly belying the test's name, is not terribly strict at all and amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right. With three distinguishable tests subsumed under the same formula, it could perhaps go without saying that strict scrutiny imposes less discipline on the Court than it would like to suggest. To put the point more sharply, individual Justices tend to vary their applications of strict scrutiny based on their personal assessments of the importance of the right in question.

Third, and relatedly, the Supreme Court has never given analytical clarity to the strict scrutiny formula's central concepts of compelling governmental interests and narrow tailoring. Although it is widely recognized that courts must determine the "level of generality"[17] at which constitutional rights should be defined—for example, whether the recognized right to marriage includes homosexual as well as heterosexual marriage—the Court has largely ignored parallel questions involving the generality with which governmental interests should be specified. For instance, in a case in which the government attempts to justify a challenged statute as necessary to protect national security, is the pertinent interest a general one in national security overall or a narrower interest in achieving the kind or degree of enhancement of national security that a challenged measure might plausibly achieve? A similar question could be asked in any case in which the government asserts a compelling interest in protecting children: protecting how many children from precisely what? The Court has given no clear answer.

17. *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (framing the question of whether an asserted right is fundamental in terms of a discussion of levels of generality of rights previously identified as fundamental).

The Court's employment of the terms "necessity" and "narrow tailoring" conceals a further ambiguity: If a challenged statute is necessary to promote a compelling governmental interest in the sense that nothing else would do as well, should the statute still be invalidated if it is not narrowly tailored in the sense that it employs admittedly overbroad, prophylactic restrictions? An example, discussed below,[18] would come from a prophylactic measure designed to protect national security in a context in which no more narrowly tailored restrictions on individual rights would so effectively reduce the risk of a calamitous terrorist strike. Astonishingly, after roughly forty years of experience with the strict scrutiny formula, the Court seems never to have resolved the question of when, if ever, overinclusive prophylactic statutes could be upheld on the ground that they are necessary to promote compelling interests.

Fourth, despite the Supreme Court's efforts to separate the questions whether the government has asserted a compelling governmental interest and whether legislation satisfies a narrow tailoring requirement, the application of strict scrutiny frequently involves a joint, simultaneous assessment of ends and means. Especially in cases in which challenged governmental regulations would serve to reduce risks of harm rather than eliminate them—as, for example, in the case of measures designed to thwart terrorism or to avoid the harms that sexually explicit speech may cause children—courts almost inescapably ask an all-things-considered question: Is a particular infringement of constitutional rights, measured by its nature and scope, justifiable in light of the benefits likely to be achieved and the available alternatives?

Fifth, by looking at how the modern strict scrutiny regime developed and how it has changed, and at which questions the narrowly-tailored-to-a-compelling-interest formula answers and which it leaves open, we can learn a number of general lessons about judge-made constitutional doctrine. Although courts craft doctrine with particular aims in mind, doctrinal formulas can thereafter survive even when their original purposes have faded—as has happened to some extent with strict judicial scrutiny. But if doctrinal formulas acquire a life of their own, they can never achieve more than limited autonomy, for courts inevitably apply doctrine in purposive ways. However banal, this point is an important one. Probably in common with many other doctrinal formulas, strict scrutiny developed partly as a device of judicial self-discipline, but judicial self-discipline is always imperfect and fraught with ambivalence, as the history and practice of strict judicial scrutiny unmistakably teach.

The Article begins with historical analysis. Part I traces the rise of the modern version of strict scrutiny during the 1960s as an innovation of the

18. *See infra* Part V.C.1.d.

Warren Court. Before the 1960s, the idea had emerged that some constitutional rights deserve more protection than others, or appropriately trigger heightened judicial scrutiny, but no workable formula had emerged to implement this general idea. Part II offers an answer to the puzzle of strict scrutiny's emergence at the particular time when it did emerge. Part III briefly explores the history of strict judicial scrutiny since the 1960s. It explains how the emergence of various "intermediate" forms of scrutiny has altered the pragmatic meaning of strict scrutiny, which was once defined largely by its dichotomous opposition to rational basis review, but also charts the continuing significance of the narrowly-tailored-to-a-compelling-interest test. Part IV argues that despite generic incantations of the strict scrutiny formula, there are at least three versions of the test that reflect divergent understandings of its underlying nature or purposes. Part V probes the puzzles and ambiguities that are latent in the strict scrutiny formula's operative terms.

I. ORIGINS

In modern constitutional law, the term "strict scrutiny" refers to a test under which statutes will be pronounced unconstitutional unless they are "necessary" or "narrowly tailored" to serve a "compelling governmental interest."[19] When unpacked, the formula makes two main demands that I treat as definitive in tracing strict scrutiny's historical evolution. First, where strict scrutiny applies, the burden falls on the government to defend challenged legislation by demonstrating that it serves a compelling interest. When the modern formula developed, the demand for a compelling interest contrasted with a background assumption that legislation would ordinarily be upheld as long as rationally related to any legitimate state interest.[20] Today, the requirement of a compelling interest also contrasts with an intermediate form of scrutiny under which the government, in defending challenged legislation, must point to an interest that is "important."[21] Within this hierarchy, compelling interests stand at the top. The overall doctrinal structure presupposes that such interests are not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.

19. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005); Miller v. Johnson, 515 U.S. 900, 920 (1995).

20. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729–32 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–89 (1955); Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 246–47 (1941).

21. *See infra* notes 176–180 and accompanying text.

The second defining requirement of the modern strict scrutiny test is that legislation must be "narrowly tailored" to or "necessary" to protect a compelling governmental interest. The ideas of narrow tailoring and necessity are complex in their own right, as I explain in Part V. For now, what matters is that both are legal terms of art that demand an especially tight connection between challenged legislative means and the ends they are intended to promote. As with the compelling interest requirement, the pragmatic meaning of the demand for narrow tailoring or necessity emerges from contrasts. Most challenged legislation will be upheld as long as it is even rationally related to a legitimate governmental interest; intermediate scrutiny demands a "substantial" relationship between ends and means. As with the compelling interest requirement, strict scrutiny's demand for narrow tailoring or necessity is the most stringent made by any doctrinal test of constitutional validity.

Today, the strict scrutiny test, defined by its insistence on compelling interests and narrow tailoring, might appear to be a foundational element of constitutional law, dictated by the Constitution's text or applied since the formative years of judicial review. The truth is otherwise.[22] Apart from a passing reference to "strict scrutiny" in *Skinner v. Oklahoma*[23] in 1942, the Supreme Court did not again use the term until the 1960s, when it also began to insist that certain challenged statutes could be upheld only if necessary or narrowly tailored to promote compelling governmental interests. Meanwhile, the Court had spoken of applying "the most rigid scrutiny" to race-based classifications in *Korematsu v. United States*.[24] Perhaps more importantly, the Justices had suggested that infringements of "preferred" constitutional rights would be more closely scrutinized than infringements of others.[25] In cases before the 1960s, however, the Court had not developed the formulaic narrowly-tailored-to-a-compelling-interest test that we call strict scrutiny today.

The origins of this formula and its proliferation throughout constitutional law are neither well known nor easily traced. Justice Kennedy has described the strict scrutiny formula as having migrated from equal protection

22. *See* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 3–4 (2005) (tracing historical practices of judicial review leading to the development of strict judicial scrutiny and noting that the notion of standards of review only emerged in the twentieth century).

23. 316 U.S. 535 (1942). Striking down an Oklahoma statute that authorized sterilization of certain repeat criminal offenders, the Court stated that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwillingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Id.* at 541.

24. 323 U.S. 214, 216 (1944).

25. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

to First Amendment cases.[26] By contrast, Justice Harlan, in the 1964 case of *McLaughlin v. Florida*,[27] referred to "[t]he necessity test" as having "developed to protect free speech against state infringement" and sought to explain why it "should be equally applicable in a case involving state racial discrimination."[28] A case could also be made that the modern strict scrutiny test originated either in the Free Exercise Clause case of *Sherbert v. Verner*,[29] decided in 1963, or in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*[30] in 1965, in which he concluded that a Connecticut statute forbidding the use of contraceptives by married couples violated the Due Process Clause.[31] As the diversity of possible origins suggests, to assume that the strict scrutiny test sprang spontaneously into existence in a single case or doctrine would be a mistake. Instead, and more interestingly, the modern formula evolved simultaneously in a number of doctrinal areas—and, intriguingly, did so within less than a decade. Before the 1960s, there was no strict scrutiny as we know it today. By the end of the decade, it dominated numerous fields of constitutional law.

A. Doctrine Involving Race-based Classifications

Among the strands of doctrine forming the early history of strict judicial scrutiny, one involved race-based classifications under the Equal Protection Clause and, in cases challenging actions by the federal government, under the Due Process Clause of the Fifth Amendment. The background history is complex. In an 1880 decision in *Strauder v. West Virginia*,[32] the Supreme Court sweepingly proclaimed that the purpose of the Equal Protection Clause was to ensure that "no discrimination shall be made against [blacks] by law because of their color."[33] *Strauder*'s facts, however, allowed it to be distinguished in subsequent cases. *Strauder* involved the exclusion of blacks from jury service. Within nineteenth-century legal thought, the right to serve on a jury was at least plausibly classifiable as a "fundamental" or "civil" right, different in kind

26. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring); *see also* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 3 n.1 (2000) (asserting that "the formal concept of strict scrutiny developed in the area of equal protection").

27. 379 U.S. 184 (1964).

28. *Id.* at 197 (Harlan, J., concurring).

29. 374 U.S. 398 (1963).

30. 381 U.S. 479 (1965).

31. *See id.* at 480, 485–86.

32. 100 U.S. 303 (1880).

33. *Id.* at 307.

from more ordinary and "social" rights.[34] In a case involving rights in the latter, nonfundamental category, *Plessy v. Ferguson*[35] held in 1896 that states could employ race-based classifications as long as they were "reasonable" and "enacted in good faith for the promotion for [sic] the public good, and not for the annoyance or oppression of a particular class."[36] As is well known, *Plessy* authorized a regime of "separate but equal"[37] that persisted until *Brown v. Board of Education*[38] in 1954.

In *Brown* itself, the Supreme Court held that "in the field of public education the doctrine of 'separate but equal' has no place,"[39] because "[s]eparate educational facilities are inherently unequal."[40] By so framing its conclusion, *Brown* stopped short of ruling that all race-based classifications trigger strict scrutiny.[41]

To be sure, a companion case to *Brown*, *Bolling v. Sharpe*,[42] hinted at broader implications. In language that anticipates the modern approach, the Court said that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions"[43] and thus, the Court added, are "constitutionally suspect."[44] As authority for this proposition, the Court cited its 1944 decision in *Korematsu v. United States*,[45] which also included language that can be seen as anticipating what we would now call strict scrutiny. In reviewing a World War II military order excluding all persons of Japanese descent from designated areas of the West Coast, Justice Black began the Court's opinion by declaring—without citation of precedent—that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny."[46] But Black's analysis belied his words. Having promised searching review, he

34. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 12–17, 56–58 (1955); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 235 n.95 (1991).

35. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

36. *Id.* at 550.

37. *Id.* at 552 (Harlan, J., dissenting).

38. 347 U.S. 483 (1954).

39. *Id.* at 495.

40. *Id.*

41. Indeed, a reader of *Brown* could easily have concluded that "separate but equal" accommodations could continue "with respect to common carrier and public recreational facilities." Paul G. Kauper, *Segregation in Public Education: The Decline of* Plessy v. Ferguson, 52 MICH. L. REV. 1137, 1154–55 (1954).

42. 347 U.S. 497 (1954).

43. *Id.* at 499.

44. *Id.*

45. *Id.* at 499 n.3.

46. *Id.* at 216.

upheld the exclusion order on the basis of no evidence except what Justice Jackson, writing in dissent, termed the "unsworn, self-serving statement, untested by any cross-examination," of the general who had ordered the exclusion.[47]

When *Bolling* is read in light of *Brown* and *Korematsu*, it becomes impossible to say that the doctrine requiring that all race-based classifications must fail unless necessary to promote compelling governmental interests began in 1954.[48] It would surely also be misleading to say that the Court began applying strict scrutiny in *Korematsu*,[49] which upheld a race-based classification based on uncertain evidence, even though *Korematsu* contains language that would later be cited to support the modern form of strict scrutiny review.

In the evolution of constitutional doctrine, perhaps the biggest step toward the modern test in race discrimination cases came in *McLaughlin v. Florida*[50] in 1964. *McLaughlin* involved a challenge under the Equal Protection Clause to a Florida statute that forbade the habitual occupation of a room at night by "[a]ny negro man and white woman, or any white man and negro woman, who [were] not married to each other."[51] *McLaughlin* pronounced all race-based classifications "constitutionally suspect," quoting *Bolling*,[52] and "subject to the most rigid scrutiny," quoting *Korematsu*.[53] Laws embodying race-based classifications could be upheld, the Court said, "only if . . . necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[54] From the modern formulation, only the demand for a compelling state interest was missing—a requirement that a Supreme Court majority first formally articulated in a race discrimination case in 1984 in *Palmore v. Sidoti*.[55]

Intervening between *McLaughlin* and *Palmore*, however, was *Regents of the University of California v. Bakke*,[56] in which Justice Powell's controlling opinion, much of which was joined by no other Justice, expressly applied

47. *Id.* at 245 (Jackson, J., dissenting).

48. *See* Klarman, *supra* note 34, at 316 (asserting that "the Court did not . . . embrace a presumptive ban on racial classifications until the 1960s").

49. *But see* Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (asserting that the strict scrutiny standard "was first enunciated in *Korematsu*").

50. 379 U.S. 184 (1964).

51. *Id.* at 184 (internal quotation marks omitted) (quoting FLA. STAT. ANN. § 798.05 (repealed 1969)).

52. *Id.* at 192 (internal quotation marks omitted) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

53. *Id.* (internal quotation marks omitted) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

54. *Id.* at 196.

55. 466 U.S. 429 (1984).

56. 438 U.S. 265 (1978).

what he called "strict"[57] or "the most exacting scrutiny"[58] to gauge the permissibility of an affirmative action program. A case could thus be made that the first application of strict scrutiny in a race case involved affirmative action.

Bakke aside, Justice Kennedy presumably had *McLaughlin* in mind, and possibly also *Bolling* and *Korematsu*, when he claimed that the modern version of strict scrutiny had emerged in cases involving race discrimination and had migrated to First Amendment doctrine. But that claim obviously cannot be judged without looking at developments in other areas.

B. Free Speech Cases

As I have noted already, Justice Harlan's concurring opinion in *McLaughlin* defended the Supreme Court's application of a test—which he termed "[t]he necessity test"—that he described as having emerged in prior cases "to protect free speech."[59] In fact, free speech cases in the years prior to *McLaughlin* divided into two categories, of which Justice Harlan drew attention only to one. The cases cited by Justice Harlan had established that speech is a right of special importance and had ruled, accordingly, that broad restrictions would not be permitted if narrower ones would adequately protect the government's interests.[60] In these cases, the Court seldom if ever made a formal demand that a regulation be necessary to promote a valid state interest, as Justice Harlan implied. Nonetheless, he fairly summarized the cases' import: Free speech decisions prior to *McLaughlin* had required that

57. *Id.* at 290.

58. *Id.* at 300.

59. 379 U.S. at 197 (Harlan, J., concurring).

60. *See id.* (citing NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307–08 (1964) (remarking that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly"); McGowan v. Maryland, 366 U.S. 420, 466–67 (1961) (Frankfurter, J., concurring) (stating that a statute that "furthers both secular and religious ends," but does so by means that unnecessarily promote religion, should be declared unconstitutional); Saia v. New York, 334 U.S. 558, 562 (1948) (requiring that instrumentalities of public speech "be controlled by narrowly drawn statutes"); Martin v. City of Struthers, 319 U.S. 141, 147 (1943) (stating that the distribution of information "can so easily be controlled by traditional legal methods . . . that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas"); Thornhill v. Alabama, 310 U.S. 88, 96 (1940) (directing courts to "weigh the circumstances and appraise the substantiality of the reasons advanced in support of" regulations that abridge First Amendment freedoms (internal quotation marks omitted)); Schneider v. New Jersey, 308 U.S. 147, 161–62, 164 (1939) (same)). On the history of the narrow tailoring and related requirements in First Amendment jurisprudence, see Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969), and Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. (forthcoming), *available at* http://ssrn.com/abstract=934795.

restrictions of speech satisfy what would today be regarded as the necessity or narrow tailoring prong of the strict scrutiny test.[61] But those decisions said nothing about compelling governmental interests.

In the other subcategory of free speech cases, to which Justice Harlan did not cite, the Supreme Court had begun before *McLaughlin* to articulate a position that would eventually evolve into the compelling interest prong of strict scrutiny. In the 1958 case of *Speiser v. Randall*,[62] the Court pointed expressly to the absence of any "compelling" state interest to justify its ruling that California could not maintain a scheme for assigning tax exemptions "which must inevitably result in suppressing protected speech."[63] The Court again applied a compelling interest test in *NAACP v. Button*,[64] decided in 1963, in which it held that a Virginia statute barring lawyers' solicitation of clients could not constitutionally be applied to the National Association for the Advancement of Colored People (NAACP) on the ground that "only a compelling state interest . . . can justify limiting First Amendment freedoms."[65] Indeed, *Button* also prefigured the modern narrow tailoring requirement when it stated: "Broad prophylactic rules in the area of freedom of expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[66]

When the various strands of free speech doctrine are seen in conjunction, it is certainly fair to say that before the 1964 *McLaughlin* decision, First Amendment free speech cases had begun to develop both a vocabulary and a set of doctrinal ideas that would shortly coalesce into the modern strict scrutiny test. Some free speech cases anticipated the necessity or narrow tailoring prong, and others anticipated the compelling interest requirement. In *Button*, the Supreme Court had even begun to bring the two together, though still without employing all of the vocabulary by which modern strict scrutiny is defined.

C. Freedom of Association Cases

Although Justice Harlan spoke indiscriminately in *McLaughlin* of "free speech cases" that had established the "necessity" test, one of the cases that

61. *See McLaughlin*, 397 U.S. at 197 (Harlan, J., concurring) (arguing that the "statute has not been shown to be necessary to the integrity of the [relevant] law, assumed *arguendo* to be valid, and that necessity, not mere reasonable relationship, is the proper test").

62. 357 U.S. 513 (1958).

63. *Id.* at 529.

64. 371 U.S. 415 (1963).

65. *Id.* at 438.

66. *Id.* (citations omitted).

he cited involved freedom of association: the 1958 decision in *NAACP v. Alabama ex rel. Patterson*.[67] If anything, by the time the Court decided *McLaughlin* in 1964, it had come closer to the modern strict scrutiny formulation in freedom of association cases than in cases involving direct restraints on speech. In several cases during the 1950s, majority opinions had insisted that only a "compelling" interest could justify burdens on freedom of association, albeit in cases in which the Court actually applied a relatively deferential balancing test and found no constitutional violation.[68] But the Court gave a more robust interpretation of the compelling interest requirement in two 1960 decisions: *Bates v. City of Little Rock*,[69] which held unconstitutional a demand that an Arkansas branch of the NAACP divulge its membership list, and *Shelton v. Tucker*,[70] which similarly invalidated an Arkansas statute requiring teachers to file annual reports listing all organizations to which they belonged.[71] *Bates* further anticipated the modern strict scrutiny formula by saying that even if a compelling governmental interest existed, the Court would need to examine whether there was a "reasonable relationship" between a statute that burdened free association and the compelling interest that the statute purportedly promoted.[72]

The Supreme Court echoed *Bates*'s language and approach in several subsequent cases, including *Gibson v. Florida Legislative Investigation Committee*,[73] decided in 1963. As had *Bates*, *Gibson* found no constitutionally sufficient justification for a requirement—imposed by the Florida legislature—that the NAACP disclose the names of its members.[74] Again echoing *Bates*, *Gibson* also probed the connection between the state's ends, whether compelling or

67. 357 U.S. 449 (1958).

68. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 127 (1959) (citing Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)); Uphaus v. Wyman, 360 U.S. 72, 81 (1959).

69. 361 U.S. 516 (1960).

70. 364 U.S. 479 (1960).

71. Interestingly, the petitioners' brief in *Shelton* included language anticipating the modern strict scrutiny test: "[T]he statute does not meet the constitutional test of imposing the narrowest restriction on individual freedom that is necessary to meet the supposed evil." Brief for Petitioners at 10, *Shelton*, 364 U.S. 479 (1960) (Nos. 14, 83), 1960 WL 98558. A Westlaw search of briefs for U.S. Supreme Court cases before 1970 that contain "compelling" in the same sentence as "interest," and also contain a variation of the words "narrow" or "necessary," produced over 250 hits, but of these, only the brief in *Shelton* proposed a test close to the modern strict scrutiny formula.

72. *Bates*, 361 U.S. at 525.

73. 372 U.S. 539 (1963).

74. *See id.* at 540–41 (describing the order for the National Association for the Advancement of Colored People (NAACP) to produce its membership list); *id.* at 557 (finding no compelling governmental interest).

not, and the means that it had chosen to promote those ends.[75] To justify its demand for information, the *Gibson* Court said, the state must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[76]

D. Free Exercise Doctrine

If the Supreme Court came close to applying the modern requirements of strict scrutiny in *Gibson*, it achieved comparable proximity in *Sherbert v. Verner*, a 1963 case under the Free Exercise Clause. Sherbert lost her job for refusing to work on Saturday, the Sabbath of her Seventh-day Adventist faith. When she applied for unemployment compensation, the South Carolina Employment Security Commission denied her claim on the ground that her unemployment was voluntary. In response, Sherbert claimed that by denying her unemployment benefits because she engaged in conduct mandated by her religion, the state violated the Free Exercise Clause.[77] In an opinion by Justice Brennan, the Supreme Court agreed with Sherbert. By denying unemployment benefits, Brennan reasoned, the state imposed a "substantial infringement" on Sherbert's free exercise of her religion.[78] Such an infringement, he wrote, could be justified only by "some compelling state interest" coupled with a demonstration that "no alternative forms of regulation would combat" the evils that the state sought to prevent "without infringing First Amendment rights."[79] This formulation does not employ the precise language now associated with strict scrutiny, but it includes the modern test's central conceptual elements: It insists that the government cannot infringe First Amendment rights without demonstrating an unusually powerful justifying interest and without further showing that its restriction is necessary or narrowly tailored to promote that interest.

E. Fundamental Rights Under the Equal Protection Clause

The first Supreme Court case to use the term "strict scrutiny" in anything like the modern sense was *Skinner v. Oklahoma*, a 1942 decision under the Equal Protection Clause. *Skinner* arose from a state statute providing for the mandatory sterilization of some, but not other,

75. *See id.* at 546–50.
76. *Id.* at 546.
77. *See* Sherbert v. Verner, 374 U.S. 398, 399–402 (1963).
78. *See id.* at 406–09.
79. *Id.* at 406–07.

three-time felons.[80] Writing for the Court, Justice Douglas appeared to assume that the statute could survive the highly deferential rational basis review normally applied under the Equal Protection Clause. But mere rational basis review was inappropriate, the Court suggested, because the challenged statute infringed upon the right to procreate—"one of the basic civil rights of man" that was "fundamental to the very existence and survival of the race."[81] In place of rational basis review, "strict scrutiny of the classification which a State makes in a sterilization law is essential," the Court said, "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[82]

Although *Skinner* was a potentially pathbreaking decision, the Court did not pause to specify what "strict scrutiny" entailed, nor did subsequent cases give sustained attention to the identification of fundamental rights that might trigger strict scrutiny under the Equal Protection Clause for another two decades.[83] During the mid-1960s, however, the Court began to emphasize the fundamental character of the right to vote.[84] Then, in 1969, the Court first explicitly held in *Shapiro v. Thompson*[85] that all classifications bearing on the distribution of fundamental rights trigger strict scrutiny. *Shapiro* is the case in which the modern version of strict scrutiny made its first unambiguous appearance in a Supreme Court majority opinion.

At issue in *Shapiro* was the constitutionality of state laws establishing a one-year waiting period before new residents could collect welfare. Writing for the Court, Justice Brennan held that the challenged statutes operated as penalties on the "fundamental" right to travel and that "any classification which serves to penalize the exercise of [a fundamental constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest,

80. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (citing OKLA. STAT. ANN. tit. 57, § 171 (1935)).

81. *Id.* at 541.

82. *Id.*

83. The Court relied in part on the importance of the right to appeal a criminal conviction in requiring the state to furnish a free trial transcript to indigent defendants in *Griffin v. Illinois*, 351 U.S. 12 (1956), and in holding that the state must appoint counsel for indigent defendants pursuing a first appeal granted as a matter of statutory right in *Douglas v. California*, 372 U.S. 353 (1963). But neither the plurality opinion in *Griffin* nor the majority opinion in *Douglas* characterized the right in issue as "fundamental," or described its analysis as the application of "strict scrutiny."

84. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

85. 394 U.S. 618 (1969).

is unconstitutional."[86] In support of this proposition, Justice Brennan offered a "*cf.*" citation to *Skinner v. Oklahoma*, *Korematsu v. United States*, *Bates v. Little Rock*, and *Sherbert v. Verner*.[87]

Less than two months after *Shapiro*, the Supreme Court substantially repeated its formulation of the strict scrutiny test in *Kramer v. Union Free School District No. 15*,[88] a case involving voting rights under the Equal Protection Clause. Because the right to vote was fundamental, the Court said, it "must determine whether the exclusions [of some from the opportunity to vote] are necessary to promote a compelling state interest."[89] With the decisions of *Shapiro* and *Kramer* in 1969, if not before, strict scrutiny had assumed its modern doctrinal form: To satisfy strict scrutiny, the government must demonstrate a compelling interest, and it must further show that a challenged statute or regulation is either necessary, narrowly drawn, or narrowly tailored to protect that interest.

F. Strict Scrutiny Under the Due Process Clause

Not until 1973, in *Roe v. Wade*,[90] did the Supreme Court apply the narrowly-tailored-to-a-compelling-interest formula in a case involving a right deemed fundamental under the Due Process Clause.[91] By 1973, however, the elements of the compelling interest test were established in other areas; *Roe* simply imported it into the domain of substantive due process.

Although *Roe* was the first Supreme Court majority opinion to apply strict scrutiny in a substantive due process case, an earlier concurring opinion at least arguably played a pioneering role in formulating strict scrutiny's canonical requirements. The first articulation of the strict scrutiny test that is wholly consonant with formulations that have survived into the twenty-first century came in 1965 in a concurring opinion in *Griswold v. Connecticut*,[92] which held that a Connecticut statute forbidding the use of contraceptives could not be enforced against married couples. In a convoluted majority opinion, Justice Douglas held that the statute violated a right of privacy contained in the "penumbra" or "penumbras" of one or more provisions of the Bill of Rights.[93] For Douglas, the idea that the Due Process Clause

86. *Id.* at 634.
87. *Id.*
88. 395 U.S. 621 (1969).
89. *Id.* at 627.
90. 410 U.S. 113 (1973).
91. *See id.* at 162–64.
92. 381 U.S. 479 (1965).
93. *See id.* at 484–86.

protected substantive liberties remained tainted beyond redemption by the judicial practices of the *Lochner* era.[94] Given a choice between *Lochner* and penumbras, Douglas chose penumbras.[95]

Justice Goldberg's concurring opinion took a different tack. Breaking with Douglas's reasoning, Goldberg argued that the Due Process Clause, as interpreted in light of the Ninth Amendment,[96] protected certain "fundamental" rights, that "marital privacy" numbered among them, and that the states may not abridge fundamental liberties without making a showing now associated with strict judicial scrutiny: "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. The law must be shown necessary, and not merely rationally related to, the accomplishment of a permissible state policy."[97]

G. A Historical Summing Up

As should now be clear, if one asks when, where, or in which case the modern strict scrutiny test first emerged, the question has no obvious answer. But to seek the precise origins of the formula that today defines strict scrutiny is almost surely to pursue the wrong question. Before 1960, what we would now call strict judicial scrutiny—that is, inquiries into whether infringements on constitutional rights are necessary or narrowly tailored to promote compelling governmental interests—did not exist. There were precursors, but the precursors took varied linguistic forms as the Court worked out the demands that strict scrutiny today expresses. By the end of the 1960s, by contrast, the narrowly-tailored-to-a-compelling-interest formula had not only become sharply defined, but also assumed a dominant importance in diverse fields of constitutional law. When the pattern is viewed as a whole, the striking phenomenon is that the Supreme Court, which had not used

94. *See* Lochner v. New York, 198 U.S. 45 (1905) (invalidating a statute forbidding employment in a bakery for more than sixty hours a week or ten hours a day), *overruled by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

95. *See Griswold*, 381 U.S. at 481–82 ("Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation . . . ." (citation omitted)). For an analysis of Justice Douglas's penumbra approach, see David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R-C.L. L. REV. 7, 27–37 (1999).

96. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

97. *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring) (citation and internal quotation marks omitted) (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

compelling interest tests before, began during the 1960s to develop tests in varied doctrinal areas that foreshadowed the modern compelling interest test and that would be replaced by that single formula before the decade's end.

II. EXPLAINING THE RISE OF THE STRICT JUDICIAL SCRUTINY TEST

The rise of the modern strict scrutiny formula demands explanation. It is not a timeless feature of constitutional law, but rather a judicially developed device[98] of relatively recent origin that even now could be abandoned by the Supreme Court at any time.

A. The Emergence of Preferred Rights

The modern strict scrutiny test arose as a device to implement, or as the constitutional complement to, a closely related phenomenon of more primary significance: the Supreme Court's solidifying commitment to a jurisprudential distinction between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or "preferred" liberties entitled to more stringent judicial protection.[99]

Before the collapse of the *Lochner* era in the late 1930s, the Supreme Court appears not to have understood constitutional adjudication as requiring standards of review in the modern sense. Through most of constitutional history, the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other.[100] Within "Classical legal thought," as Duncan Kennedy has termed it, these spheres did not overlap;[101] the Court did not view itself as weighing or accommodating competing public and private interests, but instead as applying boundary-defining techniques that rendered

98. *See generally* FALLON, *supra* note 2 (describing the role of judicially developed tests that implement constitutional values but do not directly reflect constitutional meaning).

99. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 295–96, 401–02 (2d ed. 1997); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 58–59 (1966); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 10 (1972) (describing education as a "preferred fundamental interest[ ]").

100. *See* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 6–8 (1980) (noting that the prevailing "legal consciousness" of the era from 1850 to 1940 presupposed the existence of institutional actors, each of which "had been delegated . . . a power . . . which was absolute within but void outside its sphere," with courts having the responsibility to prevent any institution from usurping power outside its proper sphere); White, *supra* note 22, at 44–46 (describing the emergence of judicial boundary tracing).

101. Kennedy, *supra* note 100, at 7.

its analysis "an objective, quasi-scientific one."[102] Insofar as the Court was engaged in conceptual or quasi-scientific analysis for which the judiciary possessed a special competence, its assumptions afforded no justification for greater or lesser degrees of deference to other institutions' judgments concerning where the boundaries lay.[103]

By the beginning of the *Lochner* era, the conceptual presuppositions of classical thought were already under strain as a result of the Court's recognition that assertions of legislative authority must be "reasonable" to come within the boundaries of the states' "police power,"[104] which courts enforced through the Due Process Clause. To modern eyes, inquiries into the reasonableness of legislation look like the application of a standard of review, but the Court still appears not to have understood its analysis in this way.[105] Rather than viewing reasonableness as a standard of review that could be contrasted with other available standards, or as reflecting a judicially developed gloss on constitutional language, the Court apparently regarded it as a definitional requirement of valid exercises of the police power. Accordingly, although the *Lochner* era's most characteristic reasonableness inquiries involved economic regulatory legislation, the Court frequently framed its analysis in the same terms when assessing the constitutionality of legislation that restricted the exercise of speech[106] or

102. *Id.*

103. *See* White, *supra* note 22, at 3–4 ("[F]rom *Marbury v. Madison* to *United States v. Carolene Products Co.* [in 1938], the Court essentially subjected all challenged decisions of other branches to the same standard of review" (footnotes omitted)).

104. *See* Lochner v. New York, 198 U.S. 45, 56 (1905) (asserting that "there is a limit to the valid exercise of the police power by the State," or else "the Fourteenth Amendment would have no efficacy," and that "the question necessarily arises" for the courts whether an exercise of the police power is "fair, reasonable, and appropriate").

105. *See* Kennedy, *supra* note 100, at 9–14 (explicating the majority and dissenting opinions in *Lochner* as reflecting the assumptions of classical legal thought); *see also* White, *supra* note 22, at 58 (observing that, "[f]rom one perspective," the Court's role in freedom of contract cases was one of "boundary tracing").

106. Although the Supreme Court articulated a "clear and present danger" test in *Schenck v. United States*, 249 U.S. 47, 52 (1919), it continued to apply a reasonableness test in other cases with First Amendment overtones, including *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923), which struck down a state law that prohibited the teaching of foreign languages to young children, and *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), which invalidated a statute requiring parents to send their children to public schools. *See generally* Thomas v. Collins, 323 U.S. 516, 531 (1945) (citing *Meyer* and *Pierce* as establishing that "[t]he First Amendment gives freedom of mind the same security as freedom of conscience"). In *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969), Justice Brandeis's concurring opinion appeared to assimilate the clear and present danger test at least partly to a reasonableness inquiry: "[T]here must be reasonable ground to fear that serious evil will result . . . . [And t]here must be reasonable ground to believe that the danger apprehended is imminent." *Id.* at 376 (Brandeis, J., concurring).

religion[107] or that drew lines on the basis of race.[108] As appears obvious from a modern perspective, the demands of reasonableness can be—and were—understood more or less stringently, even by different judges or Justices in the same case.[109] Results were far from predictable: The Court upheld more legislation than it found invalid.[110] Seldom if ever, however, did either Court majorities or dissenting Justices suggest that whereas some exercises of the police power were within the boundaries of state authority as long as they were reasonable in the independent judgment of the courts, others should be subjected to more or less exacting scrutiny.[111]

By 1937, *Lochner*-style reasonableness review of economic regulatory legislation had become practically and politically untenable, in part because the classical assumption that clear, apolitical boundaries separated the sphere of governmental powers from that of private rights had ceased to be credible.[112] In a series of decisions that would shape constitutional doctrine for decades to come, the Court, beginning in 1937, famously and emphatically abandoned its previous approach to economic regulatory legislation[113] in favor of a far more deferential rational basis review.[114] As it did so, however, two closely related questions loomed. First, would all claims of constitutional right

107. Throughout the *Lochner* era, the Court adhered to the categorical approach of *Reynolds v. United States*, 98 U.S. 145, 166 (1879), which held that although the Free Exercise Clause protected belief, it did not protect conduct. Within this framework, the only possible protection against laws that impinged on the free exercise of religion came from the reasonableness test applied under the Due Process and Equal Protection Clauses.

108. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78, 85–86 (1927) (holding that school officials did not violate equal protection by requiring a child of Chinese ancestry to attend "a school which receives only colored children"); Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71, 77 (1910) (permitting segregated railway cars and stating that "[r]egulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable"). According to Michael Klarman, *Korematsu* was almost entirely unprecedented in its declaration that race-based discriminations were categorically "suspect," and even in *Korematsu*, Klarman writes, "the Court actually applied its most deferential brand of rationality review." Klarman, *supra* note 34, at 232.

109. *See* Kennedy, *supra* note 100, at 12 (noting that, in *Lochner*, the majority opinion and Justice Harlan's dissent "employ[ed] exactly the same conceptual structure").

110. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2, at 567 n.2 (2d ed. 1988).

111. *See* White, *supra* note 22, at 3 (noting that it would be "misleading" to describe the Court's approach to judicial review as reflecting a particular level of scrutiny "because no other levels of scrutiny existed").

112. *See id.* at 65 (reporting that, by the 1930s, "the increasingly refined doctrinal distinctions that the Court had fashioned . . . appeared on the brink of collapse" and "provided additional evidence of their ideological character to the Court's critics").

113. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–99 (1937).

114. *See, e.g.*, Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 246 (1941) ("We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.").

henceforth trigger no more than an all but meaningless rational basis inquiry? Second, if not, would the otherwise discredited *Lochner* style of inquiry—premised on the notion that there are conceptual limits to legislative powers that courts have a distinctive capacity to ascertain through quasi-scientific legal reasoning—persist unaltered in pockets of constitutional law?

Even as the Supreme Court made unequivocal its rejection of *Lochner*, it first tentatively and then more pointedly reserved the possibility that some rights might merit more judicial protection than economic liberties. In a celebrated footnote in the *Carolene Products* case,[115] Justice Stone cited the rights listed in the Bill of Rights, rights crucial to the operation of the political process, and the right of "discrete and insular minorities" to be free from discrimination as leading candidates to trigger "exacting judicial scrutiny."[116] Other cases shortly signaled the Court's developing position by insisting that a narrower range of rights—the First Amendment rights of speech, association, and religion—enjoyed a "preferred position" and thus merited solicitous judicial protection.[117]

As a historical matter, the Court's first reference to rights occupying a preferred position came in *Jones v. City of Opelika*[118] in an opinion by Chief Justice Stone, the author of the *Carolene Products* footnote, that was first published as a dissent but then adopted as the opinion of the Court following a rehearing.[119] "The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out," Chief Justice Stone wrote.[120] "On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position."[121] The Court echoed the language of "preferred position" in *Murdock v. Pennsylvania*[122] in 1943 and again in *Marsh v. Alabama*[123] in 1946: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion,

115. 304 U.S. at 152 n.4.

116. *Id.*

117. *See also* Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1182 (1959) (arguing that "the first amendment should hold a 'preferred position' within the hierarchy of constitutional values"). *See generally* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 327–42 (1996) (discussing "the preferred position interlude" in the development of free speech doctrine).

118. 316 U.S. 584 (1942).

119. *See id.* at 608 (Stone, C.J., dissenting). After the rehearing, the Court adopted the dissenting opinion. Jones v. City of Opelika, 319 U.S. 103, 104 (1943) (per curiam).

120. *Jones*, 316 U.S. at 608.

121. *Id.*

122. 319 U.S. 105 (1943).

123. 326 U.S. 501 (1946).

as we must here, we remain mindful of the fact that the latter occupy a preferred position."[124] The Court also insisted that First Amendment rights merit stringent judicial protection in Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*[125]:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.[126]

Although decisions such as *Marsh* and *Barnette* reached famously speech-protective results, their methodology was generally one of balancing free speech interests against competing governmental interests, as Justice Black explicitly stated in the language from *Marsh* quoted above. Obviously, however, balancing could take more or less speech-protective forms. In deploying a balancing methodology to protect speech rights during the 1940s, Justices disposed to protect speech in a relatively vigorous way held the upper hand.[127] Then, in 1949, Justices Murphy and Rutledge died, to be replaced by Justices Clark and Minton. With this change of personnel, the balance of power shifted, and in a number of cases the Court began to balance more deferentially.[128]

In a concurring opinion in *Kovacs v. Cooper*[129] in 1949, Justice Frankfurter, who had dissented in *Barnette*, attempted to debunk an appeal to the First Amendment's "preferred position" as relying on no more than a "mischievous phrase."[130] Consistent with that view, he called for strong judicial deference to legislative judgments even in free speech cases. Frankfurter's stance in *Kovacs* was not isolated. In *Dennis v. United States*,[131] a majority of the Justices adopted deferential postures in rejecting First Amendment objections to the conviction of leaders of the American Communist Party. Similarly, Justice Frankfurter wrote for the majority in *Beauharnais v. Illinois*,[132] which upheld a group libel statute, and in

124. *Id.* at 509; *see also Murdock*, 319 U.S. at 115 ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").
125. 319 U.S. 624 (1943).
126. *Id.* at 639.
127. *See* Stephen A. Siegel, The Death and Rebirth of the Clear and Present Danger Test 18–20 (Aug. 2006) (unpublished manuscript, on file with author).
128. *See id.* at 20–28.
129. 336 U.S. 77 (1949).
130. *Id.* at 90 (Frankfurter, J., concurring).
131. 341 U.S. 494 (1951).
132. 343 U.S. 250 (1952).

Kingsley Books, Inc. v. Brown,[133] which sustained a prior restraint against the distribution of obscene materials. In neither case did the Court apply exacting review.

As the 1950s wore on, debate within the Supreme Court assumed a new coloration. Although a majority of the Court continued to apply a balancing methodology, the Justices most committed to protecting speech rights adopted the mantra that First Amendment guarantees were "absolute."[134] Yet there was never a majority for the idea of First Amendment absolutism. By the end of the decade, academic commentators had no doubt that the Warren Court regarded some rights as more "preferred"[135] than those protected only by rational basis review or that it applied a "double standard" depending on the right at stake.[136] But the Court still lacked sharply edged doctrinal formulas for protecting most preferred rights, even under the First Amendment. Moreover, in the domain of free speech, in particular, it was clear that balancing, in the end, was no more protective of speech than the Justices were prepared to make it in particular cases.[137]

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133. 354 U.S. 436 (1957).

134. *See* Konigsberg v. State Bar, 366 U.S. 36, 61 & n.10 (1961) (Black, J., dissenting) (stating that "the very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control," and collecting authorities that support this view); *see also* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 245–52 (discussing opposing theories of First Amendment interpretation).

135. *See, e.g.*, McKay, *supra* note 117 (describing the emergence of the primacy of First Amendment rights during the 1930s, 1940s, and 1950s).

136. *See* Gunther, *supra* note 99, at 37; Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 40–41.

137. Apart from free speech cases, the crystallizing commitment of the Warren Court to a substantially two-tiered scheme of constitutional rights—with some protected only by rational basis review, which scarcely amounted to any review at all, while others received more stringent protection—also rang through the Court's "incorporation" decisions, which sought to determine which provisions of the Bill of Rights were sufficiently "fundamental" to have been made applicable against the states by the Fourteenth Amendment. *Compare, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 162–166, 166 n.1 (1968) (Black, J., concurring) (advocating incorporation), *with id.* at 171–73 (Harlan, J., dissenting) (disputing the notion that the Fourteenth Amendment incorporates the entire Bill of Rights). For further commentaries on the incorporation debates, see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). Specifically at stake in the incorporation debates was whether some rights deserved more judicial protection against possible infringement by the states than did others. *See* White, *supra* note 22, at 65–68 (noting the importance of incorporation cases to the Supreme Court's development of tiers of judicial scrutiny).

B. Constitutional Architecture

Though it is customary to speak of "the Warren Court" as a unitary phenomenon, there was no clearly dominant liberal bloc during the 1950s or in the early 1960s.[138] The most readily identifiable liberals—Chief Justice Warren and Justices Black, Douglas, and Brennan—lacked a consistent fifth vote. That situation changed in 1962 when Justice Frankfurter retired, to be replaced by Arthur Goldberg, who was succeeded by Abe Fortas.[139] With the advent of Justice Goldberg, doubts no longer persisted about whether the Court was committed to enforcing "preferred rights" pursuant to a "double standard." It was. The remaining questions were: Which rights occupy the preferred category, and by what standard or standards of review should those preferred rights be protected?

In response to the second of these questions, the Warren Court's empowered liberal majority proceeded on a largely ad hoc basis. In the First Amendment area, for example, the Court developed and applied a diversity of tests applicable to specific types of cases. To take one notable example, *New York Times Co. v. Sullivan*[140] held that false and defamatory speech about public officials enjoys First Amendment protection unless uttered with knowledge that the speech was false or with reckless disregard for the truth.[141] Similarly, *Brandenburg v. Ohio*[142] laid down a test of constitutional permissibility that was unique to the specific problem with which it dealt: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[143] The Warren Court's famously pathbreaking decisions involving the constitutional rights of criminal suspects were also typically ad hoc in their approach, not governed by any recurrent formula, and frequently laid down categorical rules that required no further assessment of competing interests.[144]

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138. *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 10–12 (1998).

139. *See id.*; LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 211–12 (2000).

140. 376 U.S. 254 (1964).

141. *Id.* at 279–80.

142. 395 U.S. 444 (1969) (per curiam).

143. *Id.* at 447.

144. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (enforcing a categorical right to be free from compelled self-incrimination); Douglas v. Alabama, 380 U.S. 415 (1965) (upholding a right to confront adverse witnesses); Gideon v. Wainright, 372 U.S. 335 (1963) (holding that all felony defendants have a right to appointed counsel if they cannot afford a lawyer). For a general discussion of categorical requirements in constitutional law, see Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006).

But the Court's evolving approach also included an important generic component in the form of strict scrutiny, which it began to apply in a widening range of contexts in which it wished to define rights relatively broadly—as it could not easily have done if it were to lay down a flatly categorical prohibition—and in which it had no other significantly rights-protective test ready at hand. In contrast with most other doctrinal tests that the Warren Court developed, strict scrutiny was capable of adaptation on an almost generic basis to protect relatively broadly defined rights that the Court thought merited strong, but less than absolute, protection. As the earlier face-off between free speech absolutists and balancers had revealed, the view that all properly preferred rights were wholly unyielding seemed unduly rigid, while an unstructured balancing methodology threatened to compromise the notion that fundamental rights truly occupied a preferred status at all. Situated between those two positions, the strict scrutiny formula—forbidding infringements of fundamental rights unless those infringements were necessary to promote a compelling governmental interest—bore the hallmarks of an inspired compromise,[145] and it was pushed most strongly by the Warren Court's great compromiser, Justice Brennan.[146] On the one hand, strict scrutiny avoided unworkably high-minded rigidity: When truly compelling interests were involved, the government could do what necessity dictated. What is more, in invalidating statutes pursuant to the strict scrutiny formula, the Court could appear accommodating by holding out the possibility that if the government's interest were truly urgent, the government could protect it by writing a more precisely tailored statute.[147] On the other hand, the compelling interest formula gave content to the notion that preferred rights were indeed preferred and that strict scrutiny was truly strict, at least for those Justices committed to robust judicial protection.[148] Since the strict scrutiny formula appeared to solve the standard of review problem in one context, it was natural for the Court to adapt it

145. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 804 (2006).

146. *See* POWE, *supra* note 139, at 303 (observing that "[w]hen the liberals came to dominate, Brennan's time arrived," and identifying "[s]trict scrutiny" and "compelling interests," inter alia, as "the vocabulary of unconstitutionality in Brennan's jurisprudence"); *id.* at 221, 371, 453–54 (discussing Brennan's application of the strict scrutiny formula in particular cases); Siegel, *supra* note 60 (manuscript at 33–40) (discussing Brennan's role in the development of the compelling state interest standard).

147. *See* POWE, *supra* note 139, at 117.

148. *Cf. id.* ("The technique of approving ends, but finding fault with the means, suited Brennan well, for it allowed everyone—save the absolutists—to take some consolation from the opinion, and in Brennan's hands this technique achieved his increasingly liberal and egalitarian objectives.").

for application to others—and to engage in further refinements of the test as it did so. Thus did strict scrutiny acquire its formulaic quality.

A similar but subtly different point about the attractiveness of the strict scrutiny formula to the Warren Court can be expressed by characterizing it as a "paradigm" in the Kuhnian sense: It reflected a set of assumptions that defined both a series of problems worth solving and a framework within which to seek answers.[149] Seen in this light, the strict scrutiny test invited the Court to think about whether particular claimed rights might deserve more than rational basis review, for it framed manageable issues regarding which infringements of those rights should nevertheless be permitted.

There can be little doubt that the ghost of *Lochner* overhung constitutional law during the period in which strict scrutiny developed. Against that background, the Warren Court's recurring juxtapositions of preferred or fundamental rights, frequently protected by strict judicial scrutiny, with ordinary liberties, protected only by rational basis review, appear to have embodied a self-conscious commitment to judicial self-discipline. Whereas *Lochner*-era jurisprudence knew no tiers of inquiry, and thus maps awkwardly onto either strict scrutiny or rational basis review, the Warren Court followed the path marked by the earliest preferred position decisions by assuming that the basic architecture of constitutional doctrine should be two-tiered, at least outside of those areas in which the Court was prepared to frame categorical prohibitions. One pillar of the doctrinal edifice—consisting of nonfundamental liberties protected only by a deferential form of rational basis review—was designed to eliminate what post–New Deal Justices predominantly viewed as the relatively untethered, case-by-case fairness review that marked the *Lochner* era[150] (even if the *Lochner*-era Justices would have rejected that characterization): In cases involving ordinary liberties, the Court should not repeat its past errors of judicial overreaching.

The other architectural pillar, consisting of preferred or fundamental rights protected by strict scrutiny or some comparably stringent test, also served disciplining functions. On the one hand, recognition of a category of highly preferred or fundamental rights promised to restrain the impulse to

149. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d. ed. 1970) (defining a paradigm as a scientific achievement that is both "sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity" and "sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve"); *see also id.* at 23–51 (discussing the role of paradigms in the development of scientific knowledge).

150. *See* David E. Bernstein, Lochner v. New York: *A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1473 (2005) (noting that, beginning in the 1960s, *Lochner* "became a leading case in the 'anti-canon,' the group of wrongly decided cases that help frame what the proper principles of constitutional interpretation should be").

balance away civil liberties, as some Justices believed had happened in the McCarthy era.[151] On the other hand, a design that afforded stringent protection to fundamental rights, and allowed the judiciary no easy escape from enforcing the rights that it so denominated, provided a discipline against elevating too many rights to the preferred category. The strictures against judicial overreaching that emerged in the wake of the *Lochner* period could thus retain vitality.[152]

In speaking of self-disciplining devices and their allure, I do not wish to state my claims too strongly. In particular, I do not mean to challenge the conclusion of Lucas Powe that none of the Warren Court Justices "seemed to care about theory" and that most were more concerned with results than with doctrine.[153] Self-discipline comes in degrees, and different Justices may have had more or less self-discipline in mind. In addition, it is in the nature of self-disciplining mechanisms that they can be applied consistently or inconsistently and that they can be strengthened or weakened through interpretation.

Two measures of the generic attractiveness of strict judicial scrutiny emerge from comparisons with the constitutional law of other nations. As one measure, the American narrowly-tailored-to-a-compelling-interest formula is similar to the approach that other nations have subsequently written explicitly into their constitutions to reconcile the protection of fundamental rights with the imperatives of public policy—affirming that a right occupies constitutional status but, at the same time, acknowledging that it permits exceptions to promote important public purposes. The Canadian Charter of Rights and Freedoms exemplifies this design when it states that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[154]

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151. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (stating that the framers "did all the 'balancing' that was to be done," with respect to the Bill of Rights); Hannah v. Larche, 363 U.S. 420, 494 (1960) (Douglas, J., dissenting) (remarking, in a voting rights case, that, as "important as these civil rights are, it will not do to sacrifice other civil rights in order to protect them").

152. *See* Jack M. Balkin, *"Wrong the Day It Was Decided": Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 686 (2005) ("The *Lochner* narrative that we have inherited from the New Deal projects on to the Supreme Court between 1897 to 1937 a series of undesirable traits—the very opposite of those characteristics that supporters of the New Deal settlement wanted to believe about themselves.").

153. POWE, *supra* note 139, at 303.

154. Canadian Charter of Rights and Freedoms, § 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). For a helpful treatment of this provision, see JANET L. HIEBERT, LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW (1996), especially chapter four. Other nations have taken similar approaches. For example, Israel's Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, provides that "[t]here shall be no violation of

Second, in its insistence that any infringement of fundamental rights must be necessary or narrowly tailored to compelling governmental interests, the strict scrutiny formula possesses important commonalities with (though possibly also some important differences from) the similarly generic "proportionality" tests applied in Germany,[155] Canada,[156] and Israel[157] and by the European Court of Justice.[158] Each of these proportionality tests encompasses three doctrinal subtests, all of which must be satisfied for legislation to survive judicial review.[159] The first asks whether a legislative measure restricting basic rights is rationally related to a desired end.[160] The second, called "the principle of necessity" in Germany[161] and "the least injurious means test" in Israel,[162] requires that the means, "even if rationally connected to the objective . . . should impair 'as little as possible' the right

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rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." *Id.* at art. 8. The South African constitution includes a general limitations clause, in section 36(1), which states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable" in light of both enumerated and unenumerated factors. S. AFR. CONST. 1996, § 36(1). In addition, specific provisions of the European Convention on Human Rights and the Basic Law of the Federal Republic of Germany contain clauses allowing for the restriction of particular rights provided that certain conditions are satisfied. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (involving private and family life); GRUNDGESETZ [GG] [Constitution] art. 11, § 2 (F.R.G.) (involving freedom of movement); *id.* at art. 9(2) (involving freedom of religion); *id.* at art. 10 (involving freedom of speech).

155. *See* EVELYN ELLIS, THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 58–60 (1999); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 23 (1996).

156. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 139.

157. *See* HCJ 2065/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807 para. 38, *available at* http://www.osa.ceu.hu/galeria/the_divide/cpt29files/israeli_high_court_ruling300604.doc (interpreting article 8 of Israel's Basic Law to reflect a principle of proportionality).

158. The principle of proportionality has long been treated as a general principle of European Community law. *See* EMILIOU, *supra* note 155, at 134–70.

159. The Canadians apply an additional subtest before they reach questions relating to proportionality; this subtest in some ways approximates the American demand for a compelling or substantial state interest: "[T]he objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom.'" *Oakes*, [1986] 1 S.C.R. at 138 (quoting R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 352).

160. In *Oakes*, the Canadian Supreme Court explained that the measures "must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective." *Id.* at 139.

161. EMILIOU, *supra* note 158, at 29–31.

162. *Beit Sourik*, HCJ 2065/04 para. 41 (internal quotation marks omitted).

or freedom in question."[163] The third, called the principle of "proportionality *stricto sensu*" in Germany[164] and the "proportionate means test" in Israel,[165] invites the court to balance societal interests against individual rights by asking whether an infringement of rights is proportionate to the desired objective.

I should emphasize, however, that although the strict scrutiny and proportionality tests both aspire to find a middle way between treating rights as absolutes and deferring routinely to legislative compromises of civil liberties, there may be important differences between them.[166] By inviting assessments of all-things-considered reasonableness, proportionality inquiries may tend to deprive rights of any "special force as trumps,"[167] whereas the American approach, on at least some interpretations, preserves a special, trumping aura for preferred rights.[168] The extent to which strict scrutiny is or should be more rigorous than a proportionality inquiry into whether the "costs . . . remain less than the benefits secured"[169] is among the questions that I pursue below.

One further feature of the strict scrutiny formula deserves mention. The Justices could, and did, agree that infringements on preferred rights could be upheld only if necessary to promote a compelling governmental interest without agreeing on a number of contentious issues, the full importance of which would become evident only when the formula had to be applied. The Justices who agreed to the strict scrutiny test could have different reasons for thinking it appropriate.[170] Perhaps more important, the Justices could, and did, fail to specify what its key terms meant. Among the issues on which the Justices did not reach agreement were these: First, and perhaps most

163. *Oakes*, [1986] 1 S.C.R. 103 at 139 (quoting *Big M Drug Mart*, 1 S.C.R. at 352). In Canada, the Court has taken a "flexible approach" to this second subtest, giving "greater judicial deference to legislative [judgment] in 'socio-economic' cases." Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions* 13 (Parliamentary Info. & Research Serv., Background Paper BP-402E, 2005); *see also* Timothy Macklem & John Terry, *Making the Justification Fit the Breach*, 11 SUP. CT. L. REV. 2D 575 (2000) (arguing in favor of a contextual, flexible application of the *Oakes* test).

164. EMILIOU, *supra* note 158, at 134; *see also id.* at 23, 134–70 (describing German jurisprudence).

165. *Beit Sourik*, HCJ 2065/04 para. 41 (internal quotation marks omitted).

166. For an overview and critique of types of proportionality analysis, including an exploration of its limited role in American constitutional jurisprudence, see Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004) (book review).

167. *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 171 (2004).

168. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977) (describing rights as "political trumps held by individuals").

169. Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 582 (2003).

170. *Cf.* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) (arguing that "[p]articipants in legal controversies try to produce incompletely theorized agreements on particular outcomes" rather than "agree[ing] on fundamental principle").

fundamental, what ultimate aims or purposes should guide determinations of whether the strict scrutiny test has been satisfied?[171] Is the test, in the end, just another balancing test—albeit with the scales a bit tilted at the outset to favor claims of constitutional right—or are subtler, less fully articulated considerations at stake? Second, and closely related, what content should the Court give to the crucial but vague concepts that the strict scrutiny formula either presupposes or employs, including preferred or fundamental rights, compelling governmental interests, and narrow tailoring? I return to these questions below.[172]

III. STRICT SCRUTINY'S LATER LIFE: A THUMBNAIL SKETCH

Issues involving the nature and attractions of the Supreme Court's strict scrutiny formula possess more than historical interest. Although the modern test emerged during the 1960s under the Warren Court, the narrowly-tailored-to-a-compelling-interest formula has continued unchanged, and its sweep has remained large—though not wholly undiminished—under the Burger, Rehnquist, and Roberts Courts.

Numerous factors have converged to produce this result. Among these is stare decisis: The Supreme Court does not lightly overrule its precedents.[173] Even apart from stare decisis, most of the considerations that recommended the strict scrutiny test to the Warren Court would have made it equally attractive to subsequent Courts. Throughout the history of the modern formula, the largest disputes have involved identification of the rights that trigger strict scrutiny and, to a lesser extent, the governmental interests that deserve to count as compelling. Where admittedly fundamental rights are infringed, Justices of otherwise varied ideological stripes have agreed that the compelling interest test reasonably accommodates competing concerns.

To say that the Burger, Rehnquist, and Roberts Courts have continued to apply the strict scrutiny test developed by the Warren Court is not to say

171. *See* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1676–80, 1683–86 (2005) (discussing, in the context of Equal Protection and Free Exercise Clause jurisprudence, functional characteristics of the Supreme Court's decision rules).

172. *See infra* Part IV (discussing the aims and purposes of the strict scrutiny test); *infra* Part V (discussing the concepts that strict scrutiny employs).

173. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (noting that a departure from precedent requires "some 'special justification'" (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996))); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 757 (1988) ("[P]recedent binds absent a showing of substantial countervailing considerations.").

that they have maintained all elements of the two-tiered jurisprudential regime (coupled with some categorical prohibitions) in which that formula once was located. Nor have they observed all of the disciplines that the two-tiered regime was once imagined to import. In some instances, Court majorities have unconvincingly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based.[174] In other instances, the Justices have unexplainedly declined to apply strict scrutiny in cases to which past decisions would have suggested that it ought to apply.[175] Inconsistencies of this kind obviously diminish the practical significance of the strict scrutiny formula, but they make no direct assault on the test's status in its central ranges of application.

Of larger significance, both practically and conceptually, is the Supreme Court's introduction of several varieties of intermediate scrutiny, differentiated both from rational basis review and from strict scrutiny. During the early 1970s, the Supreme Court divided over whether to apply strict scrutiny or rational basis review in challenges to gender-based classifications.[176] A 1976 decision in *Craig v. Boren*[177] split the difference by introducing a test under which gender-based discriminations will survive challenge only if "substantially related" to "important" governmental interests.[178] In *Craig*, Justice Rehnquist protested in his dissenting opinion that "we have had enough difficulty with the two standards of review which our cases have recognized . . . so as to counsel weightily against the insertion of still another 'standard' between those two."[179] Nonetheless, the innovation has apparently proved successful in the eyes of the Justices. The Court now applies intermediate scrutiny not only to statutes that discriminate on the basis of gender, but also to governmental discriminations against children born out of wedlock.[180] In the kind of doctrinal migration that characterized the

174. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 719–31 (2000) (upholding a ban on speech intended to protest, educate, or counsel as not content-based and, therefore, not subject to strict scrutiny).

175. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (noting that the plurality declined to adopt a standard of review for infringement of a right that the Court had previously characterized as fundamental).

176. *Compare* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (stating that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny" (footnotes omitted)), *with id.* at 691–92 (Powell, J., concurring) (arguing that classifications based upon gender should not be subjected to strict scrutiny).

177. 429 U.S. 190 (1976).

178. *Id.* at 197.

179. *Id.* at 220–21 (Rehnquist, J., dissenting).

180. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

development of strict scrutiny, the intermediate formula developed for equal protection challenges in *Craig* has also assumed a role under the First Amendment. In FCC *v. League of Women Voters*,[181] the Court invoked the *Craig* formula as applicable to at least some challenges to governmental regulations of broadcasts over the public airwaves.[182]

Comparable but differently formulated tests of midlevel stringency have developed to address other issues under the First Amendment, including those arising from the regulation of commercial speech and the zoning of businesses predominantly featuring "adult" speech. With respect to commercial speech, the central innovation came in 1976, when the Supreme Court held explicitly that commercial speech comes within the coverage of the First Amendment, but hinted that regulations of commercial speech would receive less than strict scrutiny.[183] Within a few years, the Court had evolved a four-part test, less stringent than strict scrutiny but more searching than rational basis review.[184] In 1976 (the same year as *Craig*), the Court also held that regulations imposing zoning restrictions on adult speech, rather than forbidding it entirely, will trigger a judicial inquiry intermediate between strict scrutiny and rational basis review.[185]

A form of intermediate scrutiny has also emerged in abortion cases. Whereas *Roe v. Wade*[186] held that infringements on the fundamental right to abortion could be upheld only if necessary to promote a compelling governmental interest,[187] *Planned Parenthood of Southeastern Pennsylvania v. Casey*[188] substituted a formula under which courts now assess whether abortion regulations place an "undue burden" on a woman's right to terminate an unwanted pregnancy.[189]

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181. 468 U.S. 364 (1984).

182. *See id.* at 402.

183. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("In concluding that commercial speech, like other varieties, is protected [by the First Amendment], we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.").

184. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) ("[1] For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.").

185. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 68–73 (1976) (plurality opinion); *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–48 (1986) (applying *Young*).

186. 410 U.S. 113 (1973).

187. *Id.* at 152–56.

188. 505 U.S. 833 (1992).

189. *Id.* at 874 (plurality opinion).

In election law cases, too, a distinct form of intermediate scrutiny has grown up. Under it, the Supreme Court has scrutinized not only regulations of contributions to political campaigns, but also some limitations on expenditures, to demand more than a rational basis but less than narrow tailoring to a compelling governmental interest.[190]

Although the introduction of intermediate scrutiny leaves strict scrutiny formally unaltered in the contexts in which it applies, intermediate scrutiny complicates the architectural structure of constitutional doctrine and, by doing so, diminishes the significance that strict scrutiny once held. At the time of strict scrutiny's emergence, its practical implications—and thus its pragmatic meaning—were substantially defined by contrast: Strict scrutiny was the alternative to rational basis review. If strict scrutiny or some similarly stringent formula did not apply, then rational basis review did, and challenges to governmental action would almost certainly fail.[191] The introduction of a third option demotes strict scrutiny to the status of one test among others, of varying degrees of stringency, and thus diminishes the necessary significance of a decision either to apply strict scrutiny or not to apply it.

Moreover, and perhaps more subtly, the introduction of an intermediate tier of scrutiny signals that the Supreme Court no longer feels the need for the degree of self-discipline that it once developed a mostly two-tiered doctrinal structure to provide. When the Court feels free to break the bonds of a two-tiered regime by developing intermediate scrutiny, it should probably come as no surprise that the Court sometimes fails to apply strict scrutiny to cases that it would appear to govern—a phenomenon I have noted already.[192]

190. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 207 (2003) (holding that even if the Bipartisan Campaign Reform Act of 2002 "inhibit[ed] some constitutionally protected corporate and union speech," the law could still be enforced "unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications'" (quoting Virginia v. Hicks, 539 U.S. 113, 120 (2003))); *see also* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 206 (1999) (Thomas, J., concurring) ("When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions.").

191. *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 90 (2001) (asserting that under the Warren Court, "[s]crutiny that was supposed to be strict in theory turned out to be fatal in practice, while scrutiny that was supposed to be minimal in theory turned out to be nonexistent in practice," with the result that "levels of scrutiny became the entire ball game, so to speak").

192. *See supra* notes 174–175 and accompanying text.

Nor should it come as a surprise that the Court occasionally imbues rational basis review with a bite that its protestations in other cases wholly disavow.[193]

Under these circumstances, some commentators depict the tiered regime of judicial review as decayed and crumbling.[194] Others see the creeping return of *Lochner*-like inquiries into the overall reasonableness of challenged legislation as gauged from a judicial vantage point.[195]

As I have noted in passing already, doctrinal tests can bind the Supreme Court only insofar as the Court is prepared to subject itself to self-discipline, and self-discipline is best measured as a matter of degree.[196] In claiming continuing significance for the strict scrutiny formula as administered by the Supreme Court, I would not know precisely how to calibrate the force that it exerts, though it would be my confident judgment that the effect is by no means negligible. To put the point slightly differently, one can be a bit of a realist, as I think one ought to be, while also taking doctrinal formulas such as the narrowly-tailored-to-a-compelling-interest test seriously, as I think that one who wants to understand Supreme Court decisionmaking ought to do.

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193. In cases decided over a number of years, but accelerating during the 1970s, the Court has made clear that rational basis view is not invariably "toothless," Mathews v. Lucas, 427 U.S. 495, 510 (1976), but permits more or less deferential application in different kinds of cases. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999) (identifying ten rational basis claims upheld by the Supreme Court); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 512–13 (2004) (noting that the Supreme Court has applied rational basis review to invalidate nearly a dozen classifications since 1973); Gunther, *supra* note 99, at 30–33 (describing cases in which the Court based a decision "centrally on interventionist use of equal protection without explicit invocation of strict scrutiny"). Over the past three decades, the Court has thus invoked a seemingly heightened form of rational basis review to invalidate statutes disadvantaging the mentally retarded, *see* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–50 (1985), and gays, *see* Romer v. Evans, 517 U.S. 620, 631–36 (1996), but without tying its hands in future cases by mandating the application of strict judicial scrutiny. In *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Kennedy's substantive due process opinion similarly invalidated a prohibition against sodomy without invoking strict judicial scrutiny. *Id.*

194. *See, e.g.*, SHAMAN, *supra* note 191, at 74 ("In the last five decades, the Supreme Court has engaged in a continuous reworking of the multi-tier system [of judicial scrutiny] . . . . Through this ongoing exercise, the system has become highly rarefied to the point where it threatens to collapse of its own complexity."); Goldberg, *supra* note 193, at 485 ("The long-standing stasis of the set of classifications deemed suspect or quasi-suspect initially suggests the need to reconsider the tiers. . . . While lack of expansion does not necessarily mean the screening system is flawed, it does suggest possible ossification of the governing framework that warrants careful examination."); White, *supra* note 22, at 3 ("Recently, several commentators suggested that the Court's established scrutiny levels typology . . . is on the verge of degeneration.").

195. *See* David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1128 (2001) (arguing that the Supreme Court's family privacy cases "signal that the polestar of the Court's emerging approach is 'reasonableness,' the very standard that the Court is supposed to have safely entombed along with *Lochner* itself").

196. *See* notes 151–153 and accompanying text.

In any event, in tracing continuities and discontinuities between early and later Supreme Courts in their administration of strict scrutiny, a point that I have made already deserves emphasis. From the very beginning, the decision to adopt the modern strict scrutiny test was incompletely theorized. The test's purposes have always invited varied interpretations. Its terms have always been vague. Or so I have said above. The challenge now is to demonstrate the validity of these claims—which should interest both realists and doctrinalists alike.

IV. THE NATURE AND THE PURPOSE OF THE STRICT SCRUTINY TEST

The bare words of the strict scrutiny test almost inevitably take their meaning from its aims and purposes. Yet the Supreme Court has been uncertain and ambivalent about the nature and purposes of strict judicial scrutiny. More precisely, the Court has sometimes adopted each of three interpretations, each of which produces a different inquiry. According to one interpretation, strict scrutiny embodies a nearly categorical prohibition against infringements of fundamental rights, regardless of the government's motivation, but subject to rare exceptions when the government can demonstrate that infringements are necessary to avoid highly serious, even catastrophic harms.[197] I shall refer to this interpretation as the "nearly categorical prohibition" version of the test. According to another interpretation, however, strict scrutiny is, in essence, a weighted balancing test, similar to European proportionality inquiries,[198] in which a court must ask whether a particular intrusion on protected liberties, which may be greater or lesser, can be justified in light of its benefits.[199] This "weighted balancing" version, as I shall call it, is a controversial interpretation because it narrows the gap between strict and intermediate scrutiny and, indeed, threatens to convert strict scrutiny to a reasonableness test. A test of this kind could raise alarms associated with *Lochner*, on the one hand, and with cases such as *Dennis v. United States*,[200] in which some Justices protested that the Court was balancing away First Amendment rights,[201] on the other. Nevertheless, Justices of pragmatic sensibility have frequently understood the test this way. So too has the Court as a whole, at least arguably, when it has advertised its wish to "dispel the notion that strict scrutiny is 'strict in theory, but

197. *See infra* Part IV.A.
198. *See supra* note 158.
199. *See infra* Part IV.B.
200. 341 U.S. 494 (1951).
201. *See id.* at 580 (Black, J., dissenting); *id.* at 584–86 (Douglas, J., dissenting).

fatal in fact.'"[202] Finally, according to a third interpretation, strict scrutiny is what I shall term an "illicit motive" test, aimed at "smoking out" forbidden governmental purposes.[203] In this view, strict scrutiny does not determine when the infringement of a right can be justified by competing governmental interests, as both the nearly categorical prohibition and weighted balancing versions of the test do. Instead, it defines constitutional rights as rights not to be harmed by governmental acts taken for forbidden purposes, such as promoting white privilege at the expense of racial minorities or suppressing speech based on disagreement with its message. On this interpretation, a finding of forbidden purposes requires immediate condemnation.

In view of the differences among these interpretations, it is little exaggeration to say that there are three strict scrutiny tests, not one, though all bear the same label. Not surprisingly, uncertainty and confusion have arisen about which version the Court will apply in cases in which differences among the tests would result in different outcomes. Indeed, the coexistence of three versions of strict scrutiny has not infrequently occasioned confusion among the Justices themselves.

A. Strict Scrutiny as a Nearly Categorical Prohibition

According to one account, the purpose of strict scrutiny is to protect rights that are so constitutionally preferred that they can be infringed, if at all, only to avert imminent catastrophic harms.[204] That some rights might merit this much protection is surely plausible. Among moral philosophers, it is widely believed that some rights have a moral or ontological status, rooted in respect for persons, that forbids their violation merely to promote overall utility or to achieve good consequences or avoid bad ones.[205] Nevertheless, prominent deontological philosophers acknowledge that even rights occupying the highest level of importance are not wholly absolute, but permit exceptions for cases of threatened catastrophe.[206]

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202. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)); *see also* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'").

203. *See infra* Part IV.C.

204. *See, e.g.*, *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521–22 (1989) (Scalia, J., concurring).

205. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30–33 (1974).

206. *See, e.g.*, CHARLES FRIED, RIGHT AND WRONG 9–13 (1978); Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34, 34; *see also* Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 346 (1989) ("The use of torture is so profound a violation of a human right that almost nothing can redeem it—almost, because one can not rule out a case in which the lives of many innocent persons will surely be saved by its use against a single person . . . .").

If it makes sense to think that moral rights may be less than absolute but nevertheless above being traded off for ordinary social advantage, the thought extends readily to constitutional law. Charles Black defended a view of this kind. Taking the right not to be tortured as an example, he argued that although "[t]he right not to be tortured cannot, literally, be an 'absolute' . . . the right not to be tortured is entirely unsuitable for 'balancing' against competing considerations of convenience, comfort, and safety, as we 'balance' . . . the ordinary affairs of life, with a view to setting the course of prudence."[207]

As suggested by Gerald Gunther's much-quoted remark that strict scrutiny is "'strict' in theory and fatal in fact,"[208] the Supreme Court has sometimes suggested that strict scrutiny will permit infringements of preferred rights only to avert rare, catastrophic harms. The Court has frequently described the freedom of speech in terms that make its claims sound almost categorically unyielding.[209] An especially striking example of this outlook comes from *American Booksellers Ass'n v. Hudnut*,[210] in which Judge Easterbrook, in a decision subsequently affirmed by the Supreme Court, assumed for the sake of argument that the "pornography" that a municipality sought to prohibit would "tend to perpetuate subordination" of women and "lead[ ] to affront and lower pay at work, insult and injury at home, [and] battery and rape on the streets."[211] Even on these premises, Easterbrook found the prohibition of pornography unconstitutional, for no governmental interest could be strong enough to justify a city in enforcing "an approved point of view."[212] Concurring in the judgment in *City of Richmond v. J.A. Croson Co.*,[213] Justice Scalia spoke in similar terms:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can

207. Charles L. Black, Jr., Mr. *Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S MAG., Feb. 1961, at 63, 67.

208. Gunther, *supra* note 99, at 8; *see also* Rubin, *supra* note 26, at 4 ("[M]ost have concluded that a judicial determination to apply 'strict scrutiny' is little more than a way to describe the conclusion that a particular governmental action is invalid.").

209. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000) (asserting that "[e]rror in marking [the] line" between protected and unprotected speech "exacts an extraordinary cost" because "[i]t is through speech that our convictions and beliefs are influenced, expressed, and tested").

210. 771 F.2d 323 (7th Cir. 1985).

211. *Id.* at 329.

212. *Id.* at 332.

213. 488 U.S. 469 (1989).

> justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind . . . ."[214]

So did Justice Thomas in *Grutter v. Bollinger*[215]: "[O]nly those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'"[216] satisfying strict scrutiny.

For better or worse, however, the Court has not consistently interpreted the strict scrutiny test as establishing that preferred rights must yield only to cataclysmic threats. As noted already,[217] the Court stated in *Adarand Constructors, Inc. v. Pena*[218] that it rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact,'"[219] and it followed up on that dictum when it upheld an affirmative action program in *Grutter*, based on a law school's compelling interest in educational diversity. Whatever else might be said about educational diversity, a reduction occurring through the abandonment of race-based preferences could hardly qualify as a calamity. Nor does *Grutter* stand alone. The Court did not demand proof of catastrophic harms in cases such as *Nixon v. Administrator of General Services*,[220] which deemed the government to have a compelling interest in recovering the presidential papers of Richard Nixon that were of general historical interest,[221] even though all previous presidents had been permitted to provide unilaterally for the disposition of their papers, or in *Storer v. Brown*,[222] which upheld a state statute that denied ballot access to independent candidates who had voted in party primaries or had been registered as a party member during the preceding year. In those cases, the Court reached its conclusions pursuant to something more like a weighted balancing test.[223]

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214. *Id.* at 521 (Scalia, J., concurring) (alteration in original) (citation omitted) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

215. 539 U.S. 306 (2003).

216. *Id.* at 353 (Thomas, J., concurring in part and dissenting in part); *see also id.* ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (describing the application of strict scrutiny as being necessary because "'[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting))).

217. *See supra* note 202 and accompanying text.

218. 515 U.S. 200 (1995).

219. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

220. 433 U.S. 425 (1977).

221. *See id.* at 467–68.

222. 415 U.S. 724 (1974).

223. *See generally* Winkler, *supra* note 145, at 813 (reporting that in roughly 30 percent of sampled cases in the federal courts, statutes survived strict scrutiny).

B. Strict Scrutiny as a Weighted Balancing Test

According to a second interpretation, strict scrutiny is indeed an all-things-considered balancing test,[224] distinguished from other balancing tests by its premise that the stakes on the rights side of the scale are unusually high and that the government's interests must therefore be weighty to overcome them. Justice Marshall argued repeatedly that strict scrutiny should be understood in these terms. According to him, the requirement that infringements on certain rights be justified by a "'[c]ompelling state interest' is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights."[225] Peter Rubin also appears to defend a balancing version of strict judicial scrutiny when he argues that the strictness of scrutiny in particular cases should be calibrated to the nature and severity of the harm that a challenged classification inflicts.[226]

The Supreme Court has often appeared to engage in a relatively ad hoc, weighted balancing of public and private interests in freedom of association cases in which it has strictly scrutinized governmental demands for information.[227] After crediting the government's purpose as permissible, the Court goes on in such cases to ask whether the government's interests are sufficiently weighty to justify the actual, sometimes disparate effects on different groups' associational interests, but it has done so without suggesting that such regulation could be justified only to avert a cataclysm.[228] Other examples of the deployment of strict scrutiny as little more than a balancing test come from cases under the Free Exercise Clause during the years

224. Justice Scalia refers to strict scrutiny as a "balancing test" in *Employment Division v. Smith*, 494 U.S. 872, 883 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000). *See also* Winkler, *supra* note 145, at 803 (referring to a "weighted balancing" version of strict scrutiny).

225. Richardson v. Ramirez, 418 U.S. 24, 78 (1974) (Marshall, J., dissenting); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (arguing that the Court's equal protection cases have "applied a spectrum of standards" and that "the degree of care with which the Court will scrutinize particular classifications [depends] . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn").

226. *See* Rubin, *supra* note 26, at 52 (rejecting a "rigid cookie-cutter" version of strict scrutiny).

227. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 92–98 (1982); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 467–68 (1977).

228. *See Nixon*, 433 U.S. at 467–68 (upholding a statute giving the government custody of former President Nixon's presidential records, without any showing of cataclysmic harm).

preceding *Employment Division v. Smith*[229] in which all substantial burdens on the exercise of religion triggered strict scrutiny.[230] Not without reason did Justice Scalia's majority opinion in *Smith*, in which the Court abandoned strict scrutiny in free exercise cases challenging facially neutral statutes, describe the test that the Court had previously employed as a "balancing test."[231]

Furthermore, it is at least arguable—as dissenting Justices have maintained vehemently—that Supreme Court majorities have effectively applied strict scrutiny as if it were a balancing test in a number of cases in which they have either found compelling governmental interests when no catastrophe impended or deemed statutes to meet the narrow tailoring requirement when the fit between legislative means and ends was actually loose. For example, in *Grutter*, Justice Thomas pointed out that the Court had implicitly held that a state university had a compelling interest not just in diversity, but in achieving diversity without significant diminution in the measurable academic strength of its student body,[232] even though neither a reduction in minority numbers nor a marginal fall-off in academic quality would seem genuinely catastrophic. In essence, he thought the Court was making calculations of mere social advantage when strict scrutiny should demand more.

In maintaining that strict scrutiny is sometimes applied as a balancing test, I do not mean to imply that it is always so applied or will bear no other interpretation. On the contrary, by juxtaposing the weighted balancing version of the test with the nearly categorical prohibition and illicit motive versions, I mean to suggest that a balancing interpretation is discordant with what the Court or its Justices have said and done in numerous cases. In addition, balancing applications frequently draw outraged protests from dissenting Justices who contend that the Court has betrayed the staunch commitment to preserve individual rights that the strict scrutiny

229. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

230. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257–60 (1982) (holding that members of the Old Order Amish could not refuse to pay Social Security taxes "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order"); Gillette v. United States, 401 U.S. 437, 454–60 (1971) (holding that the government's interest in manpower outweighed the petitioner's desire for religious exemption from Selective Service); *see also Smith*, 494 U.S. at 883–84 (collecting other cases).

231. *Smith*, 494 U.S. at 883.

232. *See* Grutter v. Bollinger, 539 U.S. 306, 357–61 (Thomas, J., dissenting).

test rightly embodies.[233] My limited claim is that the Court sometimes applies a version of strict scrutiny that is little more than a balancing test.

C. Strict Scrutiny as an Illicit Motive Test

According to another account, strict scrutiny is a test of illicit motives, appropriately applied to ensure that the government has not purposely targeted a protected group or burdened a preferred right.[234] When, for example, the government discriminates on the basis of race or bans speech of a particular kind, experience suggests that it may be animated by racial prejudice or hostility to certain messages. Against this background, one plausible purpose of strict judicial scrutiny is to invalidate legislation that reflects motivations such as these. Unless legislation that is framed in suspect terms is narrowly tailored to promote a compelling interest, the inference of unconstitutional motivation may be overwhelming[235]—or at least the risk of unconstitutional motivation may be deemed intolerably large. Because there will frequently be a question whether the proof of forbidden motivation is strong enough to control the outcome, a motive-based test can be applied more or less stringently. As the term strict scrutiny would imply, however, proponents of this interpretation have suggested that the test should be "so intent on catching pretextual legislation [that] it will strike down some laws that are in fact perfectly innocent."[236]

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233. *See, e.g.*, *id.* at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 387 (Kennedy, J., dissenting) (criticizing the majority for failing to apply strict scrutiny correctly); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 688 (1990) (Scalia, J., dissenting) (criticizing the majority for failing to apply the narrow tailoring aspect of strict scrutiny).

234. *See, e.g.*, Charles Fried, *Types*, 14 CONST. COMMENT. 55, 62–63 (1997); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428–29 (1997). Numerous commentators have explained the Supreme Court's application of strict scrutiny to race-based classifications on this ground. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145–48 (1980); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 111–13 (1976); Goldberg, *supra* note 193, at 491–92. For argument that First Amendment doctrine reflects a similar suspicion of the motivation underlying content-based regulations of speech, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996). *See also* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 96 (1997) (agreeing with Kagan that the best explanation for the application of strict scrutiny to statutes that discriminate on the basis of content is that "when the government regulates speech on the basis of content, there is reason to suspect that it has acted for the forbidden purpose of shielding citizens from ideas that the government finds objectionable").

235. *See* ELY, *supra* note 234, at 145–48.

236. Roosevelt, *supra* note 171, at 1684.

In the academic literature, the most famous defender of a motive-based interpretation of strict scrutiny remains John Ely, who thought that most of the doctrinal edifice of the Warren Court was designed to thwart forbidden legislative purposes of disadvantaging minorities[237] and clogging "the channels of political change."[238] The Warren Court—which developed strict scrutiny in the 1960s—did not defend strict scrutiny in these terms, but Ely thought the fit between his explanation and the Court's actions to be close. In numerous decisions in the 1950s and 1960s, the Court struggled to protect racial and other minorities not only from formally race-based discrimination, but also from applications of statutes targeted at the speech and association interests of groups such as the NAACP.[239] As applied to those cases, the narrowly-tailored-to-a-compelling-interest test and its doctrinal precursors may well have functioned to unmask forbidden motives.

Moreover, among the doctrinal precursors of the strict scrutiny test applied in fundamental rights cases are Dormant Commerce Clause cases, such as *Dean Milk Co. v. City of Madison*,[240] in which the Court pointed to the availability of more narrowly tailored alternatives as a ground for invalidating state regulatory legislation that was ostensibly intended to protect health or safety interests but adversely affected interstate commerce.[241] In the context of the Dormant Commerce Clause, if a state regulation has a discriminatory effect on interstate commerce, and a more narrowly tailored alternative exists, the most plausible explanation will typically be that the state legislated with the impermissible motivation of protecting in-state interests against out-of-state competition. The narrow tailoring requirement subsequently incorporated into strict scrutiny might similarly be thought to test the bona fides of legislative motivations in other doctrinal domains.

In recent years, the Supreme Court has sometimes asserted unequivocally that strict scrutiny aims to unmask forbidden motivations. It did so, for example, in *Johnson v. California*,[242] which involved the permissibility of a California policy of making initially race-based assignments of cellmates to prison inmates: "The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an

237. *See* ELY, *supra* note 234, at 135–79.

238. *See id.* at 105–34.

239. *See, e.g.*, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960).

240. 340 U.S. 349 (1951).

241. *See id.* at 354–56.

242. 543 U.S. 499 (2005).

invidious purpose."[243] The Court has proffered the same rationale in affirmative action cases, including *Grutter*, which upheld a state law school's race-conscious admissions program, and *City of Richmond v. J.A. Croson Co.*,[244] which invalidated affirmative action preferences for government contractors. The purpose of strict scrutiny, the Court said, was "to 'smoke out' illegitimate uses of race."[245] In formulating its inquiry in these terms, the Court acknowledged that the government can have compelling interests in achieving diversity in education[246] and in remedying specifically identified patterns of race discrimination.[247] The Court refused, however, to credit the government's avowed purposes at face value: "'Absent searching judicial inquiry into the justification for . . . race-based measures,' we have no way to determine what 'classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[248]

The Court has sometimes suggested, too, that motive-based concerns underlie its application of strict scrutiny in First Amendment cases. It did so, for example, in *R.A.V. v. City of St. Paul*,[249] which struck down a municipal ordinance that barred some fighting words, including those that insult on the basis of race, but not others. It was necessary to apply strict scrutiny, the Court said, to ensure that the government could not "regulate . . . based on hostility—or favoritism—towards the underlying message [that a speaker] expressed."[250]

Although it seems plain that the Supreme Court sometimes deploys strict scrutiny as a motive test, it also seems indisputable that the Court's inquiries do not always focus on governmental purposes.[251] The most decisive

243. *Id.* at 505.

244. 488 U.S. 469 (1989).

245. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (plurality opinion) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)); *see also* Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting) (asserting the need for "[c]lose review . . . 'to ferret out classifications in reality malign, but masquerading as benign'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting))).

246. *See Grutter*, 539 U.S. at 328.

247. *See Croson*, 488 U.S. at 509 ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.").

248. *Grutter*, 539 U.S. at 326 (quoting *Croson*, 488 U.S. at 493).

249. 505 U.S. 377 (1992).

250. *Id.* at 386; *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (asserting that the presumptive First Amendment bar against content discrimination reflects "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

251. For example, even sympathetic commentators maintained that during the years in which the Court subjected statutes that incidentally burdened the free exercise of religion to strict

proof comes from cases in which a forbidden governmental motive functions as the trigger for applying strict judicial scrutiny, not as the ultimate aim of judicial inquiry. For example, in cases involving the constitutionality of deliberately created majority-minority voting districts, the Court applies strict scrutiny only after finding that the legislature acted with a "predominant" purpose defined by race.[252] In this context, the Court thus holds out the prospect that narrow tailoring to a compelling governmental interest might redeem a statute the purposes of which would otherwise render it illegitimate.

The Court has adopted the same stance in post-*Employment Division v. Smith* Free Exercise Clause cases. In such cases, it has said, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[253] The Court has also said that facially neutral statutes or governmental actions that reflect racially discriminatory motivations might nonetheless be sustained against equal protection challenges if they could be shown necessary to promote compelling interests.[254]

Indeed, even in affirmative action cases, the Court has sometimes characterized strict scrutiny as serving not only to identify illicit motives, but also to determine whether an infringement of otherwise protected rights can be justified as necessary to avert a catastrophe or otherwise satisfies a balancing test. The Court's opinion in *Adarand Constructors, Inc. v. Pena* spoke in these terms:

> [W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. . . . The application of strict scrutiny . . . determines whether a compelling governmental interest *justifies* the infliction of that injury.[255]

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scrutiny, the Court most characteristically sought to balance competing governmental and individual interests, not merely to test the government's motives. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990).

252. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 958–59 (1996) (plurality opinion); *id.* at 993 (O'Connor, J., concurring) ("Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply."); Miller v. Johnson, 515 U.S. 900, 920 (1995).

253. Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 533 (1993).

254. *See* Shaw v. Reno, 509 U.S. 630, 643–44 (1993).

255. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229–30 (1995) (emphasis added); *see* Rubenfeld, *supra* note 234, at 438–39 (describing *Adarand* as having adopted a "cost-benefit" view of strict scrutiny that contrasted with the "smoking-out" interpretation reflected in *Croson*).

D. Varieties of Strict Scrutiny Tests and Surrounding Confusions

With three versions of strict scrutiny now having been distinguished, one might still wonder whether they fit together in a doctrinally ordered way. For example, do different versions apply within different doctrinal domains? Or do different versions of strict scrutiny operate as elements of a structured sequence in which courts first apply one test, then another? The answer to both questions is no. Instead, different Justices tend to vary the version of strict scrutiny to reflect their personal views concerning the nature and significance of the rights involved in particular cases.

1. Different Versions for Different Categories of Cases?

It is readily imaginable that the Supreme Court might apply different versions of strict scrutiny to different categories of cases.[256] For example, as noted above,[257] it is widely acknowledged that the version of strict scrutiny that the Court employed in Free Exercise Clause cases prior to *Employment Division v. Smith* was essentially a balancing test. Similarly, I believe courts most frequently apply what amounts to a balancing calculus in cases involving claimed rights not to disclose information pertinent to political or expressive association.[258]

If it could be shown that the Court applies a balancing version of strict scrutiny in these doctrinal areas, the thought occurs that perhaps the Court regularly employs other versions of strict scrutiny in other contexts. But the cases will not line up so neatly. The Court's affirmative action cases provide perhaps the clearest example of discordant statements within a single doctrinal area. Justice O'Connor wrote the lead opinions in a number of the Court's most important affirmative action cases to date. In doing so, she repeatedly avowed that the purpose of strict scrutiny was to unmask forbidden governmental motives.[259] Yet other aspects of her opinions belied her motive-based explanation. Especially in upholding an affirmative action program in *Grutter*, while insisting that race-based quotas not be used, the Court almost transparently engaged in a form of weighted interest balancing. Although it thought that quotas and other rigid racial preferences would

256. *Cf.* Winkler, *supra* note 145, at 815 (noting that "[s]trict scrutiny survival" varies from one constitutional doctrine to another).

257. *See supra* notes 230–231 and accompanying text.

258. *See supra* notes 227–228 and accompanying text.

259. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

do too much symbolic damage by explicitly marking the significance attached to race, the Court was prepared to accept a more discreetly designed program that achieved virtually the same racially defined effect.

As even a cursory examination of the affirmative action cases will reveal, however, not all of the Justices have applied the balancing version of strict scrutiny. Justices Scalia and Thomas have endorsed the form of strict scrutiny that would permit race-based classifications only to avert catastrophic harms.[260] With this division existing within the Court, it is perhaps not surprising that the Justices hostile to affirmative action, when afforded the opportunity to write majority opinions, frame their statements of strict scrutiny to reflect their more skeptical views. Chief Justice Rehnquist's opinion for the Court in *Gratz v. Bollinger*[261] thus emphasized that, in view of the "pernicious" character of race-based classifications, a court applying strict scrutiny must demand "the most exact connection" between any governmental use of race and a compelling governmental interest.[262]

Similar disparities appear in other doctrinal domains. In free speech cases, the Supreme Court most commonly applies a version of strict scrutiny that is "'strict' in theory and fatal in fact."[263] Yet there are exceptions. In *Burson v. Freeman*,[264] the Court found that a content-based prohibition against campaign speech within one hundred feet of a polling place survived strict scrutiny. In defending that conclusion, the plurality opinion demanded little evidence of intimidation or electoral fraud,[265] and it took a relaxed view of the government's burden in defending the precise bounds of the one-hundred-foot zone from which campaign activities were excluded.[266] The Court applied a similarly flaccid version of strict scrutiny in *Austin v. Michigan Chamber of Commerce*,[267] which found a compelling interest in avoiding "the corrosive and distorting effects" that would be occasioned by the expenditure of corporate wealth to influence the outcome of political campaigns.[268] Concurring in the same case, Justice Brennan actually found that the state's interest in protecting shareholders against

260. *See supra* notes 213–216 and accompanying text.
261. 539 U.S. 244 (2003).
262. *Id.* at 270 (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).
263. Gunther, *supra* note 99, at 8.
264. 504 U.S. 191 (1992).
265. *See id.* at 219 (Stevens, J., dissenting).
266. *See id.* at 209 (plurality opinion) (asserting that state regulations addressing voter intimidation should be upheld provided they are "'reasonable'" and do not "'*significantly impinge* on constitutionally protected rights'" (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986))).
267. 494 U.S. 652 (1990).
268. *See id.* at 659–60.

corporate waste—a run-of-the-mill economic regulatory interest—was sufficiently compelling to satisfy strict scrutiny.[269]

Against my suggestion that cases such as *Burson* and *Austin* ultimately provide no more protection to free speech interests than a weighted balancing test, the possibility might be raised that the Supreme Court opinions in those cases employed the version of strict scrutiny aimed at smoking out forbidden governmental motives and found no ground for concern. Clearly, however, a motive-based version of the strict scrutiny test can be more or less stringent, and the tests applied in *Burson* and *Austin* were no more exacting than weighted balancing tests, even if the identification of forbidden motives was their aim.[270]

Finally, because *Burson* and *Austin* both involved campaign speech, it might be suggested that when campaign speech is involved, the Supreme Court applies a less stringent version of strict scrutiny than in cases involving noncampaign speech. Even if this suggestion could be shown to be true as a matter of past practice, however, no majority opinion purports to have written this distinction into law, and it is not one that the dissenting Justices in either case would have endorsed.[271]

2. A Multipart Test?

Even if the different versions of strict scrutiny cannot easily be assigned to distinct doctrinal domains, it might be suggested that alternative versions of strict scrutiny fit together as components of a single multipart test, more than one element of which would need to be satisfied for a statute to pass constitutional muster. For example, to put the different versions in what would seem to me the most logical sequence, a court might first apply the

269. *Id.* at 675 (Brennan, J., concurring).

270. Indeed, dissenting opinions in both cases made plausible arguments that the challenged speech restrictions tended to disadvantage some candidates or political positions relative to others. *See Burson*, 504 U.S. at 224 (Stevens, J., dissenting) (arguing that the prohibition disproportionately disadvantaged candidates with "fewer resources" and "'grass-roots' candidates" who especially benefit from "last-minute campaigning near the polling place"); *Austin*, 494 U.S. at 692–93 (Scalia, J., dissenting) (suggesting that the real purpose of the challenged statute may have been to favor unincorporated unions over large employers, or to favor incumbent officeholders over challengers).

271. *See Burson*, 504 U.S. at 217 (Stevens, J., dissenting) (stating that the speech prohibited by the challenged statute was "classic political expression" and that the state therefore had to show that the statute "[was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end" (internal quotation marks omitted) (quoting *id.* at 198 (plurality opinion))); *Austin*, 494 U.S. at 687–88 (Scalia, J., dissenting) ("'Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest.'" (quoting *id.* at 666 (majority opinion))).

version of strict scrutiny designed to ascertain whether a statute serves a permissible legislative purpose. If not, the statute would be invalid. If so, the court would apply a further strict scrutiny test to determine whether the statute was otherwise sufficiently justified, either because it was necessary to avert a catastrophe or because compelling governmental interests dominated a balancing test.

Although this suggestion would seem plausible as applied to some areas, it cannot explain all the data. As I have pointed out already, in some doctrinal realms the Supreme Court actually applies strict scrutiny only after a suspect motive has been established. In cases challenging the creation of majority-minority voting districts under the Equal Protection Clause, the Court employs strict judicial scrutiny only if it first ascertains that the legislature's predominant purpose in drawing district lines reflected race-based concerns.[272] It follows a similar approach in post-*Smith* Free Exercise Clause cases, in which statutes first determined to be motivated by religious hostility are thereafter subjected to a strict judicial scrutiny.[273] In these contexts, the Court does not treat a permissible governmental motive and an overriding state purpose as each being necessary for constitutional validity under an integrated, multipart strict scrutiny test. Instead, it contemplates that satisfaction of the strict scrutiny formula could *excuse* governmental action that would otherwise be invalid because impermissibly motivated.

3. Justice-by-Justice Variation?

The most promising hypothesis to explain variations in the application of strict scrutiny, as I have suggested already and shall attempt further to support below, is that individual judges and Justices shift from one version to another depending on the substantive right at issue.[274] In other words, different Justices apply different versions of strict scrutiny to different rights.

V. THE ELEMENTS OF STRICT SCRUTINY

However the purposes of strict scrutiny are characterized, there are three crucial steps in applying the formula: (1) identifying the preferred or fundamental rights the infringement of which triggers strict scrutiny;

272. *See supra* note 252 and accompanying text.

273. *See supra* note 253 and accompanying text.

274. *Cf.* Winkler, *supra* note 145, at 815 (noting that the survival rate for statutes subjected to strict scrutiny "is correlated with doctrine," but that "significant variation is limited to religious liberty decisions").

(2) determining which governmental interests count as compelling; and (3) giving content to the requirement of narrow tailoring. Perhaps unsurprisingly in light of the unsettled purposes of strict scrutiny, the natures of these inquiries are less well understood and less clearly defined than one might otherwise have expected.

A. Identifying the Rights That Trigger Strict Scrutiny

At the outset, courts need to identify the rights that trigger strict judicial scrutiny. Disputes about which rights are protected by strict scrutiny have sometimes attained notorious status. For example, the Supreme Court Justices have recurrently debated whether there is a fundamental abortion right[275] and, more generally, whether fundamental rights under the Due Process Clause must be narrowly defined and firmly rooted in tradition.[276] But disputes about whether rights count as fundamental are not limited to the due process arena.

In all cases, not just those under the Due Process Clause, the conceptual logic of strict scrutiny requires a distinction between what I call "triggering rights" and "ultimate rights."[277] A triggering right is a right the infringement

275. *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (concluding that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy"), *and* Roe v. Wade, 410 U.S. 113, 153 (1973) (stating that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"), *with Casey*, 505 U.S. at 952–53 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that "the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a 'fundamental right'"), *and Roe*, 410 U.S. at 172–77 (Rehnquist, J., dissenting) (disputing the conclusion that a due process right protects a woman's decision whether to terminate her pregnancy).

276. *Compare* Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997) (holding that to be protected under the Due Process Clause, rights must be narrowly defined and deeply rooted in the nation's history and traditions), *and* Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (plurality opinion) (arguing that rights must be both "fundamental" and "traditionally protected by our society" to be protected under the Due Process Clause), *with Glucksberg*, 521 U.S. at 752 (Souter, J., concurring) (arguing that the Court can strike down "arbitrary impositions" or "purposeless restraints" under the Due Process Clause), *and Michael H.*, 491 U.S. at 139–40 (Brennan, J., dissenting) (arguing that rights need not have been traditionally recognized to be protected under the Due Process Clause).

277. There is an important sense in which the modern strict scrutiny formula often manages to avoid judgments of ultimacy in one sense of the word: When the Court says that a particular infringement of a particular triggering right is impermissible because the government has not shown it to be necessary to promote a compelling interest, it frequently leaves open the possibility that a similar infringement might be permissible under a more narrowly drawn statute or upon a record that better established the infringement's necessity. *See, e.g.*, Randall v. Sorrell, 126 S. Ct. 2479 (2006) (plurality opinion) (striking down a Vermont campaign finance law because it was not sufficiently narrowly drawn or supported by sufficient evidence); City of

of which occasions strict scrutiny (or another relatively stringent test such as the "actual malice" test of *New York Times Co. v. Sullivan*[278]). By contrast, an ultimate right is a right that emerges from, or survives the application of, strict scrutiny (or some other applicable constitutional test). First Amendment doctrine illustrates the ubiquity of the need for courts to identify triggering rights. Although some content-based regulations of speech survive strict scrutiny,[279] not all regulations of speech even provoke an exacting judicial inquiry. The Supreme Court has ruled that obscenity, fighting words, and child pornography lie outside the Free Speech Clause;[280] speech that is used to make threats, solicit bribes, or engage in price-fixing subsists even further beyond the pale.[281] It is not always obvious, however, where the coverage of the First Amendment—the domain in which stringent safeguards apply—begins and ends.[282] For example, the Court has divided sharply over whether flag burning is the kind of speech that the First Amendment protects at all.[283] Similar debates have raged about whether

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Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion) (striking down an affirmative action program because it was not sufficiently narrowly tailored or supported by sufficient evidence). By an ultimate right, I thus mean only a right that has been or would be upheld on the facts of a particular case, not necessarily a right to be free from any possible infringement under any possible circumstances. As I noted above, *see supra* p. 30, strict scrutiny emerged as an alternative to absolutism as a strategy for implementing constitutional rights.

278. 376 U.S. 254 (1964); *see supra* notes 140–143 and accompanying text.

279. *See, e.g., Burson*, 504 U.S. 191 (upholding a prohibition on campaigning within one hundred feet of a polling place).

280. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography); Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (fighting words). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–85 (1992) (remarking that "these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content . . . [but] that they are [not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content" (emphasis omitted)).

281. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268–71 (1981); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770–71 (2004) [hereinafter Schauer, *Boundaries*].

282. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 3–7 (1989) (describing communicative acts that are not clearly "speech" and claiming that "[h]ow these acts should be treated [under the First Amendment] is of considerable practical significance, and . . . their character [is] often . . . misunderstood"); Schauer, *Boundaries*, *supra* note 281, at 1769 (distinguishing between the "coverage" of the First Amendment, defining the boundaries within which First Amendment doctrines apply at all, and the ultimate protection afforded by the First Amendment).

283. *Compare* United States v. Eichman, 496 U.S. 310, 315 (1990) (holding that flag burning is a form of expression that enjoys the "full protection of the First Amendment"), *and* Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (holding that the defendant's burning of the flag "implicate[d] the First Amendment"), *with Johnson*, 491 U.S. at 430–32 (Rehnquist, C.J., dissenting) (arguing that flag burning, like fighting words, is not protected by the First Amendment).

campaign donations and expenditures should count as speech protected by the First Amendment.[284] In my terminology, triggering rights need to be identified under the First Amendment as much as under the Due Process Clause.

Questions about which rights trigger strict scrutiny have also arisen under the Equal Protection Clause. In perhaps the most conspicuous example, courts and commentators have struggled to determine which classifications are sufficiently "suspect" to be permissible only if necessary to protect compelling governmental interests. Decisions not to apply strict scrutiny to classifications based on gender,[285] mental retardation,[286] illegitimacy,[287] and poverty[288] have all provoked controversy—as has the conclusion that race-based affirmative action should be reviewed under the same test as more traditional, transparently invidious race discrimination.[289]

Other well-known disputes about the definition of triggering rights have occurred in cases in which the central question was whether a constitutional provision conferred a (triggering) right to be free from certain defined effects or, by contrast, only a right to be free from being deliberately targeted for regulation. The Supreme Court's decision in *Employment Division v. Smith*[290] illustrates the distinction. Prior to *Smith*, the Court

284. *Compare* McConnell v. FEC, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part, and dissenting in part) (characterizing political contributions and expenditures as lying at "the heart" of the First Amendment), *with* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1008 (1976) (asserting that the excessive use of money in the political process, like draft-card burning, is "a vice Congress ha[s] authority to control").

285. Although a plurality opinion would have subjected gender-based discriminations to strict scrutiny in *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), there was no majority for that position, and the Court adopted a form of intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

286. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–47 (1985) (rejecting arguments for strict scrutiny).

287. *See* Mathews v. Lucas, 427 U.S. 495, 504 (1976) (rejecting the application of strict scrutiny to "legislation treating legitimate and illegitimate offspring differently").

288. *See* Maher v. Roe, 432 U.S. 464, 471 (1977) (asserting that the Court had "never held that financial need alone identifies a suspect class").

289. *Compare* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (plurality opinion) (determining that affirmative action preferences should be subject to strict scrutiny), *and* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) (applying strict scrutiny and stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color"), *with Croson*, 488 U.S. at 535 (Marshall, J., dissenting) (rejecting the strict scrutiny test), *and Bakke*, 438 U.S. at 356–63 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (arguing that race-based affirmative action should trigger only intermediate scrutiny).

290. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

had held that "substantial burdens" on the free exercise of religion would trigger strict scrutiny.[291] In *Smith*, the Court reversed course and held that in free exercise cases, strict scrutiny generally applies only to laws that deliberately target religiously motivated conduct, not to all laws that have the effect of burdening religion.[292]

Smith fits a pattern of decisions by the Burger and Rehnquist Courts. Whereas the Warren Court had suggested that strict scrutiny would be triggered by statutes that made it difficult to exercise preferred constitutional rights,[293] the Burger and Rehnquist Courts held quite consistently that the only statutes that require strict scrutiny are those that single out certain groups or preferred rights.[294] Or, to put the point another way, incidental burdens imposed by statutes that do not single out preferred liberties or intentionally disadvantage suspect classes do not provoke the narrowly-tailored-to-a-compelling-interest test.[295] Under the Equal Protection Clause, the crucial decision came in *Washington v. Davis*,[296] which involved a District of Columbia requirement that candidates to be police officers achieve a minimum score on a written test. The test had the effect of disproportionately excluding African Americans from employment: Blacks failed the test at four times the rate of whites.[297] But disproportionate effects,

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291. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–42 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972); Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).

292. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (explaining that after *Smith*, strict scrutiny generally only applies to laws that burden free exercise if those laws are not neutral or generally applicable).

293. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (applying strict scrutiny to the District of Columbia's one-year residency requirement for welfare recipients because it infringed on the fundamental right to travel); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (applying strict scrutiny to a poll tax because it infringed on the fundamental right to vote); *Sherbert*, 374 U.S. at 403–07 (applying strict scrutiny to a denial of unemployment benefits because it infringed on the fundamental right to free exercise of religion).

294. *See, e.g.*, *Smith*, 494 U.S. 872; Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986) (stating that heightened scrutiny under the First Amendment only applies to restrictions on expressive conduct "where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity").

295. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1199–1232 (1996) (describing recent free exercise, free speech, and unenumerated rights cases in this way); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (arguing that burdens on religion should be highly scrutinized not because religion is extraordinarily important, but rather because religious practices are distinctly vulnerable to discrimination and singling out).

296. 426 U.S. 229 (1976).

297. *Id.* at 236–37.

the Court held, were not enough to occasion strict scrutiny. A facially nondiscriminatory statute will trigger strict scrutiny, the Court ruled, only if it can be shown to have been adopted for a racially discriminatory purpose.[298]

Nevertheless, the pattern of the Burger and Rehnquist Courts included notable anomalies. In cases involving freedom of association and freedom not to be compelled to associate with speech, the Court continued to hold that substantial burdens triggered strict scrutiny, even when the burdens resulted from general prohibitions against discrimination on the basis of race, gender, or sexual orientation that were not narrowly aimed at expressive organizations or deliberately crafted to alter their speech.[299] The most important point, however, is a conceptual one: The problem of identifying rights that trigger strict judicial scrutiny is pervasive, not limited to due process cases.[300] Moreover, although the strict scrutiny formula presupposes

298. *Id.* at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."). A partly parallel approach prevails under a decision tracing to the Warren Court, *United States v. O'Brien*, 391 U.S. 367 (1968). As interpreted by subsequent decisions, *O'Brien* established that statutes that restrict expressive activities will not be subject to strict judicial scrutiny if they do not aim at the suppression of ideas. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) ("If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech." (citing Texas v. Johnson, 491 U.S. 397, 403 (1989))); Texas v. Johnson, 491 U.S. 397, 403 (1989) ("If the State's regulation is not related to expression, then the less stringent standard . . . for regulations of noncommunicative conduct controls." (citing *O'Brien*, 391 U.S. at 377)).

299. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000) (holding that a general antidiscrimination law violated the right to freedom of expressive association); Roberts v. U.S. Jaycees, 468 U.S. 609, 617–20 (1984) (subjecting a general antidiscrimination law that impinged on freedom of association to heightened scrutiny).

300. Cases in which the Supreme Court has employed strict scrutiny to protect freedom of association should suffice to debunk the recurrent claim that strict scrutiny is appropriate to protect enumerated rights but not unenumerated rights. This formulation is more misleading than illuminating, *see* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 76–81 (1996), as is suggested by the fact that skeptics of unenumerated rights under the Due Process and Equal Protection Clauses are often among the foremost champions of freedom of association, even though the U.S. Constitution nowhere expressly refers to such a right. For example, Justices Scalia and Thomas joined the majority in *Dale*. 530 U.S. at 642. Similarly, in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), Justice Scalia delivered the majority opinion in which the Court held that so-called "blanket" primary elections violated political parties' freedom of association. *Id.* at 586. In addition, almost no one disputes that the Constitution creates a right to travel, even though it would be odd to characterize this as an enumerated right.

As these examples suggest, rights can be implicit as well as explicit in the Constitution, and infringements of both types of rights can appropriately trigger strict judicial scrutiny. Moreover, as much with explicit as with implicit rights, courts must move beyond general language to identify the triggering rights that receive strict scrutiny in some doctrinal contexts. For example, courts must determine which conduct is sufficiently "expressive" to come within the First Amendment freedom of speech. *See O'Brien*, 391 U.S. at 376 (noting that the Court will not treat an unlimited range of conduct as expressive).

that triggering rights can be identified, it gives no guidance concerning how the identification should occur.

B. Compelling Interests

Application of strict scrutiny obviously requires the identification of compelling governmental interests. Equally plainly, what will count as a compelling interest depends on the version of the test that a court applies. An interest that suffices as compelling under the balancing version would not necessarily pass muster under the test that permits infringements of protected rights only to avert catastrophes. Regardless of the version of strict scrutiny, however, the Supreme Court has frequently adopted an astonishingly casual approach to identifying compelling interests.[301]

Courts and commentators have sometimes suggested that compelling interests can be derived from the Constitution itself.[302] They have argued, for example, that values underlying the Equal Protection Clause give the states a compelling interest in eradicating private discrimination on the basis of race and gender.[303] Courts and commentators have also suggested that the Constitution presupposes fairly conducted elections and thus generates compelling interests in limiting speech and association rights to the extent necessary to preserve electoral fairness.[304]

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301. *See* Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 367 (2002); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988). For a variety of analyses of and perspectives on the idea of compelling governmental interests, see *Conference on Compelling Governmental Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535 (1992).

302. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (asserting that a public university has a compelling interest in being able to select a diverse student body that arises from its First Amendment right to academic freedom); David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 755–64 (1994) (describing an approach for interest balancing that "fully incorporates the foundational premises of the Constitution and offers precise guidelines to judges who must maneuver through the rocky shoals of constitutional adjudication").

303. *See Roberts*, 468 U.S. at 625 (gender).

304. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (noting that the Constitution grants states "broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives'" and that this power "is matched by state control over the election process for state offices" (quoting U.S. CONST. art. 1, § 4, cl. 1)); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 43–50 (2005); *see also* Burson v. Freeman, 504 U.S. 191, 198–99 (1992) (plurality opinion) (upholding a restriction on otherwise protected campaign speech within one hundred feet of a polling place as justified by the "obviously" compelling governmental interests of protecting citizens' right to vote free from intimidation and "to vote in an election conducted with integrity and reliability").

Sometimes, however, the Supreme Court labels interests as compelling on the basis of little or no textual inquiry. Examples include cases in which the Court has found a compelling interest in protecting children from one or another purported injury[305] and in preserving the lives of viable fetuses and the health of pregnant women.[306] Controversy seldom erupts when a consensus exists about the supervening importance of a governmental interest. Sometimes, however, there can be as much discord about the importance of a state interest as about whether a triggering right exists. To take just two prominent examples, dissenting Justices have argued vehemently that there is no compelling interest in diversity in public education[307] or in avoiding the influence of corporate expenditures in political campaigns.[308]

In a provocative article, Bruce Ackerman has argued that judicial conservatives are more willing to find compelling interests implicit in the Constitution than to conclude that the Constitution implicitly creates or recognizes fundamental rights.[309] There are undoubtedly examples that would fit his thesis.[310] In other contexts, however, liberals too have proved quick to find compelling governmental interests. To repeat examples I just gave above, liberal Justices have held—over conservative dissents—that states have a compelling interest in maintaining diverse student bodies in public universities[311] and in avoiding corporate influences on electoral politics.[312] What is really going on, one suspects, is that liberals do not truly

305. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996) (plurality opinion) ("We agree with the Government that protection of children is a 'compelling interest.'").

306. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162–63 (1973).

307. *See* Grutter v. Bollinger, 539 U.S. 306, 356–61 (2003) (Thomas, J., concurring in part and dissenting in part).

308. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 692–95 (1990) (Scalia, J., dissenting); *id.* at 701–04 (Kennedy, J., dissenting).

309. *See* Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 317–18 (1992) (arguing that "the new Republicanism" has "glorif[ied] the powers of the state and diminish[ed] the constitutional protection of individual rights").

310. Abortion rights and the right to die arguably fit within this paradigm. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justice Scalia found that the Constitution recognized a compelling interest in preserving fetal life, *see id.* at 982 (Scalia, J., concurring in part and dissenting in part) (citing Roe v. Wade, 410 U.S. 113, 162 (1973)), even as he denied that women had a fundamental right to abortion, *see id.* at 980. Similarly, in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), Justice Scalia found that states have a compelling interest in preventing suicide, even as he denied that people have a fundamental right to choose when to end their lives. *See id.* at 298–300 (Scalia, J., concurring).

311. *See Grutter*, 539 U.S. at 328.

312. *See Austin*, 494 U.S. at 666.

believe that the rights at stake in these cases merit any stringent version of strict scrutiny, if indeed they ought to trigger strict scrutiny at all.[313] In other words, a disagreement about the preferred character of the right spills into the debate about whether a governmental interest is compelling. Conservatives, too, seem more likely to find compelling interests when they take a skeptical view of the underlying right. For example, in cases involving regulation of sexually explicit cable television programming, Justice Scalia has affirmed that the government has a compelling interest in protecting children from exposure to sexually explicit broadcasts,[314] but he has also doubted that the cases involve any free speech right that properly calls for elevated scrutiny.[315]

Sympathies involving underlying rights aside, perhaps the most important point about compelling governmental interests within the strict scrutiny formula is that it will frequently be crucial how the government's interest is defined.[316] In other words, there will often be an important level-of-generality question involving purportedly compelling governmental interests.

To see the importance of the level-of-generality issue, it will help to consider the controversial question whether the government has a compelling interest in diversity that would justify affirmative action programs for public

313. Judicial liberals have sometimes argued explicitly that strict judicial scrutiny should not apply in cases presenting challenges to race-based affirmative action programs. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 535 (1989) (Marshall, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 356–63 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part). In fact, four of the five justices in the *Grutter* majority—Stevens, Souter, Ginsburg, and Breyer—likely would have held that race-based affirmative action should be reviewed pursuant to a less exacting standard than that applied to other forms of race-based decisionmaking. *See* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986) (Stevens, J., dissenting) ("There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.").

314. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 842–43 (2000) (Breyer, J., dissenting). Justice Scalia joined Justice Breyer's dissent. *Id.* at 835.

315. *See* Ashcroft v. ACLU, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting) ("[C]ommercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." (alterations in original) (quoting *Playboy*, 529 U.S. at 831 (Scalia, J., dissenting))).

316. *See* Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 757–59 (1963) (demonstrating the diversity of ways in which competing interests can be formulated and noting the implications of this choice for the judicial role).

institutions of higher education.[317] Obvious on the surface is a question concerning how the government's interest should be described: Is it an interest in racial diversity or, instead, an interest in diversity of perspectives for which racial background may function as evidence, but evidence of only limited weight? A further complication arises if it would be possible for a university to achieve diversity without affirmative action if, for example, it reduced its reliance on grades and test scores as admissions criteria. Is the government's compelling interest one that embraces both retaining high academic distinction and achieving diversity?[318] Finally, because diversity is inherently a matter of degree, the question emerges whether the government's interest should be defined as one in achieving diversity per se, or whether, instead, it should be regarded as one in attaining particular levels or increments of diversity?[319] In other words, is there a compelling interest in moving from one level of diversity (that is more than zero) to another, higher level?

The importance of level-of-generality questions is by no means peculiar to affirmative action cases. Consider once again a case in which the government attempts to regulate the transmission of sexually explicit television programming—whether over the public airwaves or via cable—and claims a compelling interest in protecting children.[320] Surely there is a compelling interest in protecting children, at least from serious harm, if the interest is stated wholly abstractly, but this much generality may not be helpful for anyone who takes the compelling interest question seriously.[321]

317. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

318. *Compare id.* at 339 (asserting that a university need not "choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups"), *with id.* at 357 (Thomas, J., concurring in part and dissenting in part) ("[T]here is no pressing public necessity in maintaining . . . an elite law school.").

319. In *Grutter*, the university argued, and the Court appeared to accept, that the compelling interest was in achieving a critical mass of students from particular disadvantaged groups. *See id.* at 333 (majority opinion). As Chief Justice Rehnquist argued in dissent, however, this argument seemed to be belied by the university's practice of setting the necessary threshold for a critical mass much lower for some groups, such as Native Americans, than for others, most notably blacks. *See id.* at 380–86 (Rehnquist, C.J., dissenting).

320. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. at 689 (Breyer, J., dissenting) (finding that protecting children from commercial pornography is a compelling governmental interest); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996) (plurality opinion) ("We agree with the Government that protection of children is a 'compelling interest.'"); Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.").

321. For example, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), Justice Kennedy's majority opinion expressed some doubt about whether the government had a compelling interest of its own in shielding children from sexually explicit material or only a compelling interest in aiding the efforts of those parents who

Perhaps it would be better to ask what exactly the harm is that sexually explicit programming causes and whether there is a compelling interest in prohibiting that particular harm—perhaps a specified psychological dislocation, whether short-term or long-term. But even this formulation might seem too simple. If sexually explicit programming causes harm, it seems likely that it will damage some children but not others, for certainly some children who have been exposed to such programming show no ill effects. Is it better, then, to inquire whether the government has a compelling interest in achieving a specific quantum of reduction in the risk or incidence of harm?

To put the question this way might seem to collapse the narrow tailoring prong of strict scrutiny into the compelling interest element of the test. As reformulated, the question essentially becomes whether there is a compelling governmental interest in achieving as much reduction in the risk or incidence of harm as a challenged regulation is likely to achieve. But the corresponding problem on the other side is that the narrow tailoring inquiry will be left untethered if there is too little attention to exactly what the government's purportedly compelling interest is. Imagine that psychologists could establish conclusively that prolonged exposure to sexually explicit programming would cause severe psychological damage to one child in every one hundred thousand, and that a prohibition against the transmission of such programming during the hours between 6 a.m. and 10 p.m. would reduce by exactly half the likelihood that the vulnerable children would sustain the harm that otherwise would befall them. Should a court proceed on the flat assumption that the government (always) has a compelling interest in protecting children from serious harm, or possibly in protecting children from the particular kind of psychological harm in issue, or should it ask instead whether there is a compelling governmental interest in achieving the limited quantum of reduction in harm (or risk thereof) that the government could reasonably hope to achieve? Perhaps remarkably, Supreme Court cases yield no clear answer to this question. I offer further reflections on this issue below.

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wanted their children to be shielded. *See id.* at 825. Writing in dissent, Justice Breyer maintained that the government's interest was compelling regardless of the parents' views. *See id.* at 842 (Breyer, J., dissenting); *see also* Reno v. ACLU, 521 U.S. 844, 864–65 (1997) (distinguishing between independent state interests in children's well-being and in aiding parents in shielding children from potentially harmful speech).

C. Narrow Tailoring

As so far as I am aware, the necessity or narrow tailoring prong of the strict scrutiny test has sparked little systematic investigation.[322] A careful parsing of the cases reveals that this requirement encompasses at least three elements and may sometimes include a fourth. When the elements of the Supreme Court's narrow tailoring inquiries are teased apart, it becomes clear that the test contains significant, unresolved ambiguities of which the Court appears startlingly unaware.

1. Elements of Narrow Tailoring

The Supreme Court's narrow tailoring inquiries include multiple components that merit separate analysis.

a. Proof of Necessity of Infringement on a Triggering Right

The first element of the narrow tailoring requirement insists that infringements of protected rights must be necessary in order to be justified.[323] The Supreme Court sometimes expresses essentially the same demand when it says that the government's chosen means must be "the least restrictive alternative" that would achieve its goals.[324] A law would not be necessary to achieve its ends if the government could accomplish the same result while inflicting lesser burdens on protected rights.[325]

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322. The most thorough treatments of which I am aware are Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996), and Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

323. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) ("[T]o show that the [statute] is narrowly tailored, [the government] must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.'" (fourth alteration in original) (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982))); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969) ("[T]he classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal.").

324. *Ashcroft v. ACLU*, 542 U.S. at 666; *Playboy*, 529 U.S. at 815; *Sable Commc'ns*, 492 U.S. at 126; *see* Fla. Star v. B.J.F., 491 U.S. 524, 538 (1989) (striking down a governmental action in part because less speech-restrictive alternatives were available); Volokh, *supra* note 322, at 2422.

325. The necessity or narrow tailoring requirement may explain why the Supreme Court has demanded that a government body explore race-neutral alternatives before implementing an affirmative action plan. At least one prominent commentator has expressed puzzlement about this requirement: "The Court's preference for 'race-neutral means to increase minority participation' is inconsistent with narrow tailoring" because "[e]xtending affirmative action subsidies to non-victim whites produces less-tailored, over-inclusive programs." Ayres, *supra* note 322, at 1784. If this criticism fails, it must be because the Court believes that a race-neutral program would not infringe any triggering right at all and, accordingly, that infringement is not necessary for the government to accomplish its compelling goal. This is of course a

b. Underinclusiveness Inquiry

In identifying the requirements of narrow tailoring, the Supreme Court often says that governmental infringements on fundamental rights must not be underinclusive[326]: A statute will not survive strict scrutiny if it fails to regulate activities that pose substantially the same threats to the government's purportedly compelling interest as the conduct that the government prohibits. Underinclusive regulations "diminish the credibility of the government's rationale"[327] for infringing on constitutional rights and generate suspicion that the selective targeting betrays an impermissible motive. Even absent concern about governmental motives, the demand that restrictions on constitutional rights not be underinclusive reflects an insistence that the government not infringe on rights when doing so will predictably fail to achieve purportedly justifying goals.

It is far from clear, however, that every underinclusive statute is therefore necessarily unconstitutional. Under *Roe v. Wade*,[328] regulations of abortion designed to protect the health of pregnant women were never deemed invalid just because the states that enacted such statutes did not attempt to avert other threats to maternal health such as those posed by smoking or drinking or riding on motorcycles. Nor has the Court suggested that a state cannot forbid parents to withhold medical care from their children,[329] thereby trenching on parents' constitutional rights to control their children's upbringing,[330] unless it also regulates all other conduct that threatens children's health.[331]

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controversial conclusion in view of the Court's suggestion in *Washington v. Davis*, 426 U.S. 229 (1976), that a facially neutral statute adopted for racially discriminatory reasons would trigger strict judicial scrutiny. *See id.* at 241–42. So far, however, the Court has never held or had occasion to hold that a facially race-neutral affirmative action plan would trigger the same strict judicial scrutiny as a facially race-based affirmative action plan.

326. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (quoting *Fla. Star*, 491 U.S. at 541–42 (Scalia, J., concurring in part))).

327. City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994); *see White*, 536 U.S. at 780.

328. 410 U.S. 113 (1973).

329. *See* Parham v. J.R., 442 U.S. 584, 630–31 (1979) (Brennan, J., concurring in part and dissenting in part) (stating that parental rights are limited in our society, as reflected by statutes and court decisions "that, *inter alia*, curtail parental authority . . . to withhold necessary medical treatment" from their children).

330. *See* Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972) (recognizing parents' rights to control their children's upbringing).

331. *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1381–82 (1994).

c. Overinclusiveness Inquiry

Just as the Supreme Court says that the narrow tailoring requirement forbids or at least strongly disfavors underinclusive statutes, it insists symmetrically that "overinclusive" statutes also fail strict judicial scrutiny.[332] As most often applied, the prohibition against overinclusiveness probably only repeats the demand that any permissible regulation of protected rights must be necessary or the least restrictive alternative. There is a potentially important difference, however. Whereas the least restrictive alternative formulation invites the conclusion that a regulation that is necessary to promote a compelling governmental interest will therefore satisfy strict scrutiny as long as no narrower regulation would suffice, the prohibition against overinclusiveness suggests that a statute might be condemned for lack of narrow tailoring even if no less restrictive alternative existed.[333]

To see the importance of this distinction, it will help to consider a hypothetical variation on the facts of *Korematsu v. United States*,[334] which upheld the World War II exclusion of all persons of Japanese ancestry from the West Coast of the United States. The military order involved in *Korematsu* applied to roughly 112,000 people;[335] military officials defended it as necessary to prevent sabotage.[336] If we suppose, quite possibly counterfactually, that at least one act of sabotage would have occurred if the military had not enforced the exclusion, and that no other practicable steps would have proved equally effective, then the exclusion order would pass muster as necessary to achieve its ends. On the same supposition, however, the order would have imposed constitutionally suspect, race-based disabilities on many thousands of blameless people and thus might have been deemed overinclusive. Would the statute have passed the modern strict scrutiny test?

Supreme Court decisions give no clear answer. The Court has sometimes invalidated statutes that it deemed overinclusive without pausing to assess whether less restrictive alternatives existed that would have effectively

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332. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121–23 (1991); First Nat'l Bank v. Bellotti, 435 U.S. 765, 792–95 (1978); *see also* Volokh, *supra* note 322, at 2422.

333. *Cf.* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1136 (2005) (observing that Supreme Court explications of the narrow tailoring formula leave open whether a least restrictive means will satisfy the requirement even if it is substantially overinclusive).

334. 323 U.S. 214 (1944).

335. *See id.* at 241–42 (Murphy, J., dissenting).

336. *See id.* at 218–19 (majority opinion).

protected the government's asserted interests.[337] In addition, the Court stated in dictum in *Johnson v. California*[338] (quoting *Grutter v. Bollinger*) that "'[w]hen race-based action [subject to strict scrutiny] is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is *also* satisfied.'"[339] Some indicators point the other way, however. The Court said in dictum in *Sable Communications v. FCC*[340] that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[341] And under even the most stringent interpretation of strict scrutiny, regulation would seemingly need to be allowed to avert true catastrophes, notwithstanding possible overinclusiveness in the reach of a challenged statutory regulation.

Perhaps the most that can be said with confidence is that the Supreme Court has sent ambiguous signals about how the "least restrictive alternative" and "no overinclusiveness" elements of the narrow tailoring test relate to one another.

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337. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 359–60 (1972) (invalidating a state durational residency requirement as insufficiently tailored to the state's interest in having an informed electorate without considering whether other mechanisms were available to ensure an informed electorate).

338. 543 U.S. 499 (2005).

339. *Id.* at 514 (emphasis added) (quoting *Grutter*, 539 U.S. at 327). Also pertinent may be *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), in which the Court said that in the First Amendment context, "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* at 255. In doing so, it made no mention of a possible exception for cases in which a sweeping prohibition was nonetheless the least restrictive alternative that would be effective in achieving its end.

Ashcroft v. Free Speech Coalition invalidated a provision of the Child Pornography Prevention Act that barred the dissemination of virtual child pornography. Against arguments that it was impossible even for experts to distinguish real from virtual child pornography, and that the government must therefore be able to bar the latter in order to address the harms occasioned by the production of the former, the Court replied that an analysis under which "protected speech may be banned as a means to ban unprotected speech. . . . turns the First Amendment upside down." *Id.* at 254–55.

Justice Thomas has said explicitly that the fact that alternative measures "are not completely effective . . . is no justification for the conclusion that prophylactic controls . . . are narrowly tailored." Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 643–44 (1996) (Thomas, J., concurring in part and dissenting in part).

340. 492 U.S. 115 (1989).

341. *Id.* at 126.

d. Proportionality

It is imaginable, if only barely, that even the smallest element of underinclusiveness or overinclusiveness could condemn a statute subject to strict scrutiny. But if any underinclusiveness, and perhaps especially any overinclusiveness, is permissible, the question inevitably arises: How much under- or overinclusiveness is tolerable, and how much is too much?

Although the Supreme Court has seldom if ever said so expressly, the need to answer this question would appear to require an inquiry analogous to those that other countries' courts conduct in assessing "proportionality"[342]—a term that I invoke here to emphasize similarity, not to claim identity. In determining whether a particular degree of statutory under- or overinclusiveness is tolerable, a court must judge whether the damage or wrong attending an infringement on protected rights is constitutionally acceptable in light of the government's compelling aims, the probability that the challenged policy will achieve them, and available alternative means of pursuing the same goals.[343]

The necessity for courts to conduct inquiries of this kind can be brought out by reflection on many of the actual and hypothetical cases that I have discussed in this Part, including those involving the use of admittedly overinclusive race-based regulations to address the (greater or lesser) risk of genuine catastrophe[344] and the overinclusive regulation of sexually explicit television programming that would likely harm only some children.[345] For purposes of illustration, consider a situation in which the government claims it must infringe rights to freedom from discrimination on the basis of race or religion—for example, by subjecting certain classes of people to special scrutiny before they can ride on airplanes or work in high-risk facilities—to avert a calamitous terrorist strike. If the question is whether there is a compelling interest in avoiding a catastrophic terrorist attack, the answer is obviously yes. The problem, of course, involves the difficulty of knowing in advance whether particular restrictions on protected rights would be either necessary or sufficient to forestall the threat. Instead, one must deal in probabilities by attempting to assess how great a risk currently exists and how much reduction in that risk particular proposed

342. *See supra* notes 156–166 and accompanying text.

343. For a partly parallel argument that the application of strict scrutiny in affirmative action cases should focus on marginal costs and benefits, see Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517 (2007).

344. *See* Korematsu v. United States, 323 U.S. 214 (1944).

345. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

measures would likely achieve. One could frame the question as whether there is a compelling interest in achieving a projected quantum of risk reduction. But even if it would be theoretically possible to answer that question as if it stood in isolation, it is hard to imagine actual human beings doing so—and it is far from obvious why they ought to—without taking simultaneous account of the seriousness and scope of the deprivations of protected rights that particular risk-reducing measures would entail. However one might gauge the constitutional costs of allowing race to help trigger heightened airport screening procedures, those costs are surely less than those that would attend prolonged race-based detention.

Coming at the same question of constitutional permissibility from the narrow tailoring side, a judge could ask whether there is a less restrictive alternative that would equally advance the government's interest in reducing the risk of terrorism. Typically if not invariably, however, any alternative that is less restrictive in theory is also likely to be less effective in fact. In assessing whether this consideration should be controlling, it may therefore be important to take note of whether a less restrictive alternative exists that would achieve almost as much risk reduction while infringing less on protected rights. Once again, it thus seems impossible to think sensibly about compelling governmental interests and the narrow tailoring requirement as if they were sequentially isolated components of a bifurcated two-step inquiry—or as if every compelling interest were equally compelling or every infringement of a triggering right equally disturbing. In a practical sense, the dispositive, proportionality-like question becomes whether a particular, incremental reduction in risk justifies a particular infringement of protected rights in light of other reasonably available, more or less costly and more or less effective, alternatives.[346]

A similar inquiry will frequently be called for when a governmental regulation aims to lower the incidence of a harm without extirpating it completely. An illustration comes from *Ashcroft v. ACLU*,[347] involving the constitutionality of the Child Online Protection Act (COPA),[348] which sought to protect minors from exposure to sexually explicit material on the Internet by requiring those posting such material for commercial purposes to take costly steps to deny access to minors.[349] Writing for the

346. *Cf.* Rubin, *supra* note 26, at 14 (asserting that one aspect of the narrow tailoring inquiry involves "comparing the marginal benefits and costs of the use of a particular classification with those of some alternative if there is one").

347. 542 U.S. 656 (2004).

348. 47 U.S.C. § 231.

349. 542 U.S. at 661–63.

Court, Justice Kennedy invalidated the COPA on the ground that it was not "the least restrictive means" of protecting children[350]: Filtering software, which would restrict harms to children without infringing adults' rights, might be even more effective if it were put more broadly into place.[351] As Justice Breyer pointed out in dissent, however, filtering technology was already a part of the status quo: It was available, but parents and others with child supervision responsibilities failed, for whatever reason, to employ it on a broad scale.[352] Under these circumstances, the COPA would have had some effect in diminishing the incidence of children's exposure to sexually explicit material, even though it would not have reduced the level to zero. Postulating ex ante that the government either has or does not have a compelling interest in protecting children from exposure to sexually explicit speech, and then inquiring whether a restriction is narrowly tailored to that end (which could never be achieved completely), makes the issue excessively abstract. As a practical matter, the constitutional question required marginal analysis: Were the COPA's incremental benefits in protecting children constitutionally justified in light of its infringement of protected freedoms? Once again, the ultimate question for decision seems inescapably to be one of proportionality.[353]

D. Narrow Tailoring to Compelling Governmental Interests: A Restatement

It may be useful for me to pull together some of the threads of the foregoing analysis. The Supreme Court, I have suggested, frequently presents the strict scrutiny inquiry as if it possessed two discrete parts. First, has the government defended a challenged regulation by referring to the need to protect a genuinely compelling interest? Second, if so, is the

350. *See id.* at 666–67.

351. *See id.* at 667–69.

352. *See id.* at 684–85 (Breyer, J., dissenting).

353. A similar issue divided the Court in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), which involved the constitutionality of a governmental regulation designed to ensure that cable television signals for sexually explicit channels would not "bleed" into the homes of nonsubscribers to those channels. The majority held that the regulation was not narrowly tailored because a less restrictive alternative was available: advising cable subscribers of their rights to contact their cable company and request that specific channels be blocked. *See id.* at 816. As Justice Breyer argued in dissent, however, it will almost always be possible to imagine a restriction on speech that is narrower than any particular restriction that the government might impose, *id.* at 841 (Breyer, J., dissenting), and the real question is thus whether the governmentally imposed restriction, "viewed in light of the proposed alternative, is proportionate to [the] need," *id.* at 846 (Breyer, J., dissenting).

challenged regulation narrowly tailored to that interest in the sense of being neither under- nor overinclusive?

In contrast with this bifurcated sequence, I have suggested that the effort to identify compelling interests and to determine the adequacy of regulatory tailoring is likely to involve fluid, two-way traffic in which assessments of ends and means occur simultaneously—at least in cases in which challenged governmental regulations, viewed realistically, will at best merely reduce risks or incidences of harm more or less effectively than would other regulations. For example, although the Supreme Court could ask whether a particular challenged regulation is necessary to promote the compelling governmental interest in avoiding a calamitous terrorist strike, what is really involved is risk reduction, rather than sure prevention. The Court must determine whether infringements of constitutional rights, which can be more or less grievous, can be justified in view of the benefits likely to be achieved, the scope of infringement of protected freedoms, and the available alternatives.

Although I have emphasized the similarity of this type of inquiry to the proportionality inquiries carried out in other countries, I repeat that I do not mean to claim an identity. As is suggested by the version of strict scrutiny that would allow infringements on fundamental rights only to avert calamities, the burden of justification for the infringement of rights can be set very, as opposed to just moderately, high. To put the point more concretely, there may be a real difference between stringent American applications of strict scrutiny and the proportionality tests commonly applied abroad.[354] It is noteworthy that the Constitutional Court of South Africa, in explicating its version of a proportionality test, has expressly rejected the American strict scrutiny formula as too "rigid."[355] Similarly, there can be a real difference between an interpretation of strict scrutiny as a modestly weighted balancing test and a version that would refer to catastrophes to exemplify what needs to be at stake for infringements on fundamental rights to be acceptable. This was Charles Black's point when he said that although the right not to be tortured was not absolute, it was "entirely unsuitable for 'balancing'" in the way that we would trade off one good for another in "the ordinary affairs of life."[356] A nearly categorical prohibition version of strict scrutiny may share almost as much common ground with absolutism as with some versions of weighted balancing.

354. *See supra* notes 166–168 and accompanying text.
355. *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) at 777.
356. Black, *supra* note 207, at 67.

At the end of the day, however, it will seldom be the case that a catastrophe will either certainly happen or certainly not happen depending on whether a uniquely necessary and sufficient infringement of constitutional rights is permitted. The thought experiment of the known ticking bomb that could be stopped from going off if, but only if, the police were permitted to torture a terrorist bears little similarity to most actual moral and constitutional problems. Much more frequently, the immediate stakes will involve marginal changes in the risks or incidences of harms—including the risks of genuine catastrophes, such as terrorists' acquisition and use of weapons of mass destruction. In addition, the means that the government has chosen to combat risks of harm will require assessment in light of alternative regulatory strategies that are likely to be only marginally less efficacious or more costly than those that the government has chosen to employ, but in contexts in which to characterize differences as marginal is not to trivialize them. Whether a threatened catastrophe materializes or is avoided may depend on such differences. Also at stake, however, may be the vibrancy of our culture of constitutional freedoms.[357]

CONCLUSION

The history of strict judicial scrutiny is a case study in judicial efforts to implement the Constitution through doctrinal tests that at best approximate, without perfectly expressing, the historical or semantic meaning of

357. As the foregoing discussion of the need for proportionality inquiries even under a catastrophe version of strict scrutiny may have suggested, the distinguishable elements of the narrow tailoring inquiry do not correlate as neatly as one might imagine with the three versions of strict scrutiny identified above. Although the elements would play different roles in the alternative versions of strict scrutiny, each of the elements could potentially function in every version of the test. For example, if an infringement on a fundamental right is defended as necessary to promote a compelling governmental interest, but in fact is underinclusive, overinclusive, or not the least restrictive alternative, then there is reason to suspect that the government's actual motivation differs from its post hoc representations. Inquiries into the fit between statutory ends and means thus accord well with the aims of the smoking out version of strict scrutiny. Yet the same inquiries can also help to gauge whether the precise infringement that the government has inflicted on a protected right is truly necessary to avert an avoidable catastrophe, or whether, all things considered, it is worth the cost within a weighted balancing calculus.

Conversely, although the proportionality inquiry most closely reflects the concerns of the weighted balancing version of strict scrutiny, a lack of proportionality between ends and means would also raise doubts about whether the government's articulated purpose was its actual one. Perhaps more surprisingly, even a stringent version of strict scrutiny that views the avoidance of catastrophes as alone justifying the infringement of fundamental rights might sometimes rely on proportionality inquiries to determine whether governmental regulations should be upheld in light of the degree of risk of calamity that would otherwise exist.

constitutional language.[358] In the 1960s, the Warren Court was eager first to establish and then to consolidate a doctrinal structure sharply differentiating preferred from ordinary constitutional rights. With rational basis review established as the norm in run-of-the-mill cases, this strategy required the development of an implementing test or tests to protect preferred rights. Strict judicial scrutiny—as formalized in a test inquiring whether infringements of preferred rights were necessary to promote compelling governmental interests—furnished an attractive model, capable of application across a range of doctrinal contexts. To use a term perhaps more current when the strict scrutiny formula was proliferating than it is today, the strict scrutiny framework functioned as a paradigm. It permitted the Warren Court to solve the problem of precisely how to give heightened protection to preferred rights without making them impractically absolute.

Developed in the haunted aftermath of the *Lochner* era, but also in light of anxieties that the Court had too readily balanced away speech rights during the 1950s, strict scrutiny had the initial allure of a device of judicial self-discipline. On the one hand, precisely because strict scrutiny was intended to be strict, it promised to check impulses to elevate too many rights to the preferred or fundamental category. On the other hand, it appeared to guarantee strong protection for rights in the favored class. It seems clear, however, that the strict scrutiny formula never played its imagined self-disciplining role perfectly, even from the beginning. Ironically or otherwise, precisely because the strict scrutiny formula that emerged during the 1960s furnished a workable standard for the implementation of preferred rights, it may have made it seem practically feasible for the Warren Court to elevate more rights to the preferred or fundamental category than it otherwise might have. It seems to be no coincidence that the modern strict scrutiny test evolved during the same decade in which the Warren Court's expansion of constitutional rights reached high tide.

As a case study in the implementation of the Constitution through judicially developed doctrine, the history of strict scrutiny epitomizes the capacity of judicial formulas to acquire an aura of legal or constitutional necessity. But if the words of the strict scrutiny formula remain the same, they have lost part of their pragmatic significance as the Court has developed other alternatives to rational basis review, including formal

358. *See generally* FALLON, *supra* note 2, at 76–101 (discussing doctrinal tests as devices for constitutional implementation).

intermediate scrutiny, through which it can give meaningful protection to constitutional rights. With the ghost of *Lochner* no longer quite so frightening, the Court now eschews the relatively rigid discipline of a two-tiered scheme of strict scrutiny and minimal rational basis review that it once found attractive.

Again, however, the discipline that the strict scrutiny formula could impose was always limited—and this, too, is an important lesson that this case study in constitutional implementation teaches. Agreement on the strict scrutiny formula was "incompletely theorized."[359] From the beginning, there were at least three possible interpretations of the test among which the Justices never formally and decisively chose. On one interpretation, strict scrutiny was intended to be fatal in fact in nearly all cases: It guaranteed protection of preferred rights except in cases of impending catastrophe. On another interpretation, however, the heightened scrutiny formula was little more than a weighted balancing test. On yet a third, its purpose was to expose forbidden legislative motivations. Some Justices may have held one interpretation, some another. Probably more likely is that few, if any, of the Justices ever carefully thought the matter through.

The incomplete theorization of the decision to adopt the strict scrutiny formula as the baseline test for protecting fundamental rights lives on in the test's operative terms: They remain crucially vague and thus capable of varying applications from one Justice and one case to another. The Supreme Court has never squarely confronted, much less solved, the conundrum of the level of generality at which to specify compelling governmental interests. Neither has the Court noted the ambiguities built into the narrow tailoring requirement. As I have tried to show, the catastrophe-avoidance and weighted balancing versions of the test frequently require a seldom acknowledged proportionality-like judgment of whether marginal increments in the avoidance of risks or marginal reductions in the incidence of harms sufficiently justify infringements of fundamental rights in light of available, but typically less efficacious, alternatives. No wonder that applications of the test often seem conclusory, as if the stated terms of inquiry had little influence on the ultimate outcome.

To say all this is not to say that the strict scrutiny formula has no significance in structuring analysis and determining results. Surely it does.

359. On incompletely theorized agreements, see generally CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 4–5, 35–61 (1996).

Especially at the Supreme Court level, however, doctrinal formulas that are established as tools of judicial self-discipline share the characteristic limitations of self-disciplining formulas in other facets of life. They permit not only varied interpretations, but also selectively stringent or flaccid enforcement from case to case—which, once again, is not to say that they have no effect at all. Such, I would suggest, is the way of constitutional implementation through doctrinal tests.

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