LET THE END BE LEGITIMATE: QUESTIONING THE VALUE OF HEIGHTENED SCRUTINY'S COMPELLING- AND IMPORTANT-INTEREST INQUIRIES

INTRODUCTION: THE STATE-INTEREST INQUIRY

It is a fundamental principle of constitutional law that a state government's police power "is one of the least limitable of governmental powers."[1] Where no fundamental rights or protected social classes are implicated, the states may typically, within the constraints of the constitutional prohibition on arbitrary or discriminatory legislation, adopt any measure that is rationally related to a legitimate governmental interest.[2] And although the federal government acts within a more restricted ambit of lawful authority,[3] it too may as a baseline proposition take any action that is rationally related to a legitimate exercise of its constitutionally enumerated powers.[4] As Chief Justice Marshall once famously defined the scope of federal power, "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."[5]

At both the state and federal levels, then, any legitimate state interest can in most cases provide a constitutionally sufficient justification for state action. And up through the early twentieth century, even state action that encroached on constitutionally protected rights was lawful as long as it possessed a rational relationship to some legitimate end.[6] Even when the U.S. Supreme Court's recognition of a personal right to economic liberty under the Due Process Clause reached its apogee in 1905 with the Court's invalidation of a New York statute that limited bakers' working hours, for example, the Court did not impugn as insufficiently weighty the state's asserted interests in "safeguard[ing] the

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[1] Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946).

[2] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996); Nebbia v. New York, 291 U.S. 502, 537 (1934). Additional constraints, such as federal preemption of state law in certain fields, sometimes apply, *see, e.g.*, Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–54 (1982), but the actions of state governments generally enjoy a "strong presumption of validity," Heller v. Doe, 509 U.S. 312, 319 (1993).

[3] *See, e.g.*, NFIB v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

[4] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133–35 (2010); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects . . . .").

[5] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[6] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57 (1905) (requiring only that the challenged state action have a "direct relation, as a means to an end, and [that] the end itself . . . be appropriate and legitimate").

public health" and the health of the bakers;[7] rather, the ineffectual manner in which the statute served those interests[8] led the Court to suspect that the law was, "in reality, passed from other motives."[9] And those other motives — economic redistribution through the regulation of private contract — were simply not constitutionally legitimate under the Court's then-conception of economic liberty.[10]

But during the wax of the New Deal regulatory state, the wane of the Court's recognition of constitutional economic rights[11] ushered in an expanded range of constitutionally "legitimate" purposes.[12] A 1938 footnote in *United States v. Carolene Products Co.*[13] responded to this increased risk of potentially meddlesome state action by reserving the possibility that state action that impinges on select constitutional values may warrant "more exacting judicial scrutiny" than does state action otherwise.[14] Soon thereafter, perhaps wary of the totalitarian orthodoxies then riving Europe, the Court began to employ just such heightened scrutiny under the Free Speech Clause, declaring in 1943 that "freedoms of speech and of press . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the

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[7] *Id.* at 58.

[8] *See id.* at 61 (requiring "some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed").

[9] *Id.* at 64.

[10] *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) ("It is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes property from A. and gives it to B[.]" (italics omitted)); Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 LAW & HIST. REV. 275, 283 (2013) ("Property rights could be regulated solely for public uses and ends. Courts reviewed legislation to constrain government's reach, so that A's property rights were not abridged to advance B's private interests."). Pretext was not the only rationale for striking down state action that purported to serve legitimate ends; many early cases, for example, struck down measures that burdened rights to a greater degree than was necessary to serve the state's asserted ends. *See* David E. Bernstein, Essay, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 866–71 (2012). Critically, however, the early cases did not generally challenge the *importance* of the government's ends once those ends had been established as legitimate.

[11] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–94 (1937).

[12] *Compare* Adams v. Tanner, 244 U.S. 590, 592–94, 596–97 (1917) (reversing as unconstitutional an interpretation of a state statute that would have operated de facto to prohibit the business of employment agencies), *with* Ferguson v. Skrupa, 372 U.S. 726, 731–33 (1963) (upholding a state statute that prohibited the business of debt adjusting under most circumstances).

[13] 304 U.S. 144 (1938).

[14] *Id.* at 152 n.4; *see also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 923 (1988) (citing *Carolene Products* as the origin of heightened scrutiny). A discussion of which constitutional predicates trigger such scrutiny is outside this Note's scope, but for a thorough empirical exploration of the question, see generally Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 445–76 (2009).

State may lawfully protect."[15] This ideal crystallized into the First Amendment's demand, first articulated in a 1957 Justice Frankfurter concurrence, that state action requiring "a citizen to . . . forego even a part of so basic a liberty as his political autonomy" serve not simply a legitimate, but, still more, a *compelling* state interest.[16] A majority of the Court soon cemented this demand into free speech jurisprudence,[17] and the compelling-interest requirement eventually leaked into free exercise[18] and race-based equal protection[19] jurisprudence as well.

Over time, the application of heightened scrutiny has resolved into a familiar tripartite framework[20]: Most state action is subject to rational basis review and so need only be rationally related to a *legitimate* state interest.[21] On the other hand, state action touching select constitutional rights is subject to strict scrutiny and so must be narrowly tailored to serve a *compelling* state interest.[22] Finally, the Court applies an intermediate level of scrutiny — requiring that state action be "substantially related" to the achievement of an *important* state interest[23] — when assessing sex-based equal protection claims[24] and certain free speech claims.[25] But although the state-interest framework provides analytical scaffolding for a welter of constitutional doctrines, no watershed opinion has set out a clear method for determin-

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15 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

16 Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring in the result); *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 364 (2006) (identifying this concurrence as the origin of the "compelling state interest" formulation).

17 *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 529 (1958).

18 *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963). The Free Exercise Clause's compelling-interest test does not apply to "generally applicable, religion-neutral laws that have the *effect* of burdening a particular religious practice," Emp't Div. v. Smith, 494 U.S. 872, 886 n.3 (1990) (emphasis added), but only to those laws that *target* religious practice as such, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

19 *See* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

20 *See, e.g.*, Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 477 (1997).

21 *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 97 (1979).

22 *See, e.g.*, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665–66 (2015).

23 Craig v. Boren, 429 U.S. 190, 197 (1976). Cases employing intermediate scrutiny have variously characterized the requisite state interest as "substantial; subordinating; paramount; cogent; strong;" or, unhelpfully, "compelling." United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

24 *See, e.g.*, *Craig*, 429 U.S. at 197.

25 *See, e.g.*, *O'Brien*, 391 U.S. at 376–77 (challenges to regulation of conduct with both speech and nonspeech elements); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984) (challenges to content-neutral restrictions on the time, place, and manner of public expression); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (challenges to regulation of commercial speech).

ing whether any given interest is compelling, important, or merely legitimate.[26]

This Note examines how the Court in practice undertakes this classification and suggests that the result in any given case bears little decisional weight; accordingly, it would behoove the Court to consider whether the gains of appearing to evaluate the relative importance of state interests outweigh the inquiry's potential costs. This Note proceeds in four Parts. Part I demonstrates how, under the Court's current approach to heightened scrutiny, the weight of the policy interests underlying any given state action will rarely if ever prove outcome-determinative in a suit challenging that action. Part II addresses the Court's race-based equal protection cases, which provide a seeming exception to the proposition laid out in Part I, and concludes that even in those cases the state-interest inquiry does not in the end carry much significance. In light of the state-interest inquiry's marginal decisional utility, Part III examines its possible costs. The Note concludes with the recommendation that the Court either give the state-interest requirement real weight — which would require the Court to develop a rigorous methodology for assessing the relative importance of asserted state interests — or else consider shedding the inquiry altogether.

I. THE STATE-INTEREST INQUIRY'S QUESTIONABLE UTILITY

The Court rarely deals in depth with the state-interest question. When applying heightened scrutiny, the Court often finds that the state has failed to adopt an appropriately tailored means of advancing its asserted interest and so has no need to decide whether that interest is compelling or important.[27] After examining those cases in which the Court *has* ruled on the state-interest question, this Part determines that such rulings bear little on the ultimate question of the challenged state action's constitutionality. Section I.A details the Court's expansive approach to defining compelling or important interests, such that

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[26] *Cf.* Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring) ("I have never been able fully to appreciate just what a 'compelling state interest' is."); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007) (observing the Court's "astonishingly casual approach to identifying compelling interests").

[27] In some such cases, the Court assumes that an interest is sufficiently consequential without firmly so holding. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (traffic safety and preserving a community's aesthetic appeal); Boos v. Barry, 485 U.S. 312, 324 (1988) (affording dignity to foreign officials); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987) ("encouraging fledgling publications"); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 19 (1986) (plurality opinion) ("fair and effective utility regulation"). In other such cases, the Court simply states the asserted interests without analyzing whether they are compelling or important, and without even assuming that they are. *See, e.g.*, Harris v. Quinn, 134 S. Ct. 2618, 2639–41 (2014); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997); Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990).

nearly any asserted interest can satisfy the requisite standard. Sections I.B and I.C examine those instances in which the Court *has* found an asserted state interest to be insufficient to justify rights-infringing measures. In some such cases, discussed in section I.B, the Court has found the asserted interest constitutionally *illegitimate*, rather than merely unimportant. In the remainder of such cases, discussed in section I.C, the Court has considered the interest only in narrow relation to the state's chosen means of advancing it — an inquiry that is already captured in heightened scrutiny's independent requirement that the state's means be appropriately tailored to serve its ends.

A. Upholding the Bulk of Asserted Interests

In most heightened-scrutiny cases, the Court easily blesses the state's asserted interest as satisfying the requisite standard. The Court is rarely explicit about the justification for its approval, typically treating the state interest's weight as purely axiomatic.[28] Many such cases rely on unelaborated social or moral value judgments. For example, the Court has treated as self-evident the state's compelling interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination,"[29] and has found it "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[30] Although the Court is typically content to employ an "intuitive . . . 'know it when I see it' approach" in such cases,[31] it has occasionally elaborated that a value might derive its "compelling" or "important" status from its coherence with longstanding traditions of common law[32] or with constitutional values.[33]

Elsewhere, the Court seems to rely on traditional notions about the proper functions and operation of the state to support its determination that an interest is compelling or important. For example, the Court has found that the interest in raising revenue "[o]f course . . . is critical to any government,"[34] and that "combating terrorism is an ur-

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[28] For an early compilation of such cases, see Gottlieb, *supra* note 14, at 932–37 & nn.82–87.

[29] R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

[30] New York v. Ferber, 458 U.S. 747, 756–57 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

[31] Gottlieb, *supra* note 14, at 937.

[32] *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (situating in tort law a compelling interest in "ensuring that victims of crime are compensated by those who harm them"); *id.* at 119 (finding that longstanding equity principles reflect an "undisputed compelling interest in ensuring that criminals do not profit from their crimes").

[33] *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

[34] Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983). Although treated as obvious, this throwaway observation jars with the Court's periodic *rejection* of fiscal conservation as a compelling interest in other contexts. *See* Aaron K. Block, Note, *When*

gent objective of the highest order."[35] Ensuring legitimacy is key: according to the Court, "no one denies" that a state's interest in inspiring public faith in its judiciary "is genuine and compelling,"[36] and the Court has noted the significance of "preventing *quid pro quo* corruption or its appearance" in the political process,[37] first labeling it "sufficiently important" to justify restrictions on campaign contributions[38] and later upgrading it without remark to "compelling."[39] Finally, democratic principles underlie many interests offhandedly described as compelling. For example, the Court has found that a state's interests in conducting reliable elections and in ensuring citizens' ability to vote freely "obviously are compelling ones."[40]

Although the Court has thus provided an array of foundations upon which to ground a conclusion that a given interest is compelling or important, these foundations do not provide much practical aid in sifting the compelling or important from the merely legitimate; after all, it is difficult to conceive of any legitimate state interest that, broadly defined, does not overlap with some common law or constitutional value or with some traditional state function. Indeed, the Court routinely upholds asserted interests without fanfare. As the D.C. Circuit has noted, "the pedestrian nature of those interests affirmed as substantial" in the commercial-speech context "calls into question whether *any* governmental interest — except those already found trivial by the Court — could fail to be substantial."[41] Under intermediate scrutiny, the Court has upheld a variety of interests virtually without comment, whether in the sex-based equal protection context[42] or in the free

Money Is Tight, Is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000, 14 TEX. J. C.L. & C.R. 237, 257–58 (2009).

35 Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

36 Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1667 (2015).

37 McCutcheon v. FEC, 134 S. Ct. 1434, 1445 (2014).

38 Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); *see also id.* at 26–29.

39 *See McCutcheon*, 134 S. Ct. at 1445 (citing FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)).

40 Burson v. Freeman, 504 U.S. 191, 199 (1992) (plurality opinion); *see also id.* at 198–99; Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 788–89 (1978) (describing similar electoral interests as being "of the highest importance," *id.* at 789); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

41 Kansas v. United States, 16 F.3d 436, 443 (D.C. Cir. 1994); *see also* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 318 n.128 (1998) ("Generally, the government has had an easy time demonstrating that laws serve important or substantial governmental interests.").

42 *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 64–65 (2001) (ensuring that a child and its biological parent "have some demonstrated opportunity," *id.* at 64, to develop "real everyday ties," *id.* at 65); Miller v. Albright, 523 U.S. 420, 438 (1998) (opinion of Stevens, J.) ("fostering ties between the foreign-born child" of an American citizen "and the United States"); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("raising and supporting armies"); Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (plurality opinion) ("the prevention of illegitimate pregnancy"); Craig v. Boren, 429 U.S.

speech context.[43] And even under strict scrutiny, the Court finds such arguably nonvital interests as "protecting the integrity of the Medal of Honor" to be compelling "beyond question."[44]

Certainly, few would quibble with the significance of the interests the Court has so elevated. However, the ease with which asserted state interests satisfy the compelling- and important-interest requirements suggests that those requirements play little practical role in distinguishing constitutional from unconstitutional state action. And indeed, as the next two sections explore, those interests that *are* rejected under heightened scrutiny appear to be rejected not because the Court deems them insufficiently consequential but because they fail to cut the constitutional mustard for independent reasons.

B. Interests that Fail Because They Are Illegitimate

Even under rational basis review, a prerequisite to state action is that the government's ends be legitimate.[45] Although the outer bounds of legitimacy are indeterminate,[46] it is clear at a minimum that the state may not legitimately take action in service of an end that flatly contravenes the Court's contemporary understanding of constitutional values.[47] Sometimes, then, the Court rejects asserted state interests under heightened scrutiny not because those interests are insufficiently

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190, 199–200 (1976) ("the protection of public health and safety"). The lower courts have generally followed suit, adopting the Court's all-embracing approach to "important" interests. *See* Ryan Lozar & Tahmineh Maloney, *Equal Protection*, 3 GEO. J. GENDER & L. 141, 154–55 & nn.81–86 (2002) (citing cases).

[43] *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 593–94 (2005) (enhancing political parties' "party-building efforts," *id.* at 594); City of Erie v. Pap's A.M., 529 U.S. 277, 296–98 (2000) (plurality opinion) ("combating the harmful secondary effects associated with nude dancing," *id.* at 296); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) ("protecting noncable households from loss of regular television broadcasting service" (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984))); Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) ("protecting . . . citizens from unwelcome noise" (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984))); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (managing crowd flow at state fairgrounds); Brown v. Glines, 444 U.S. 348, 354 (1980) (instilling respect for military duty); United States v. O'Brien, 391 U.S. 367, 377–78 (1968) (ensuring availability of certificates verifying selective service registration).

[44] United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012) (plurality opinion).

[45] *See, e.g.*, Katharine M. Rudish, Note, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1503–04 (2012); *supra* p. 1406.

[46] *See, e.g.*, Matthew J. Clark, Comment, *Rational Relationship to What? How* Lawrence v. Texas *Destroyed Our Understanding of What Constitutes a Legitimate State Interest*, 6 LIBERTY U. L. REV. 415, 437–38 (2012); Rudish, *supra* note 45, at 1511–21.

[47] *Cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); Loving v. Virginia, 388 U.S. 1, 11 (1967) (implicitly rejecting the maintenance of white supremacy as a legitimate governmental interest).

compelling or important, but rather because those interests are illegitimate in the first place and so could not animate state action under *any* standard of review.

Once upon a storied time, for example, the Court accepted an interest in stemming "the corrosive and distorting effects of immense aggregations of wealth" in the political arena as sufficiently compelling to justify limits on corporate campaign expenditures.[48] When the Court reversed course in *Citizens United v. FEC*,[49] it did so not on the basis that the interest's strength had been attenuated by intervening developments — but rather on the basis that the interest was "*unlawful*" under the First Amendment.[50] Similarly, in dismissing the state's interest in insulating shareholders from funding corporate speech they oppose — an interest once deemed "legitimate,"[51] perhaps even "weighty"[52] — *Citizens United* signaled that the potential for censorship inherent in such an interest left it constitutionally foreclosed altogether.[53] And in the sex-based equal protection context, the Court has rejected asserted state interests that overtly or covertly rely on assumptions about men's and women's purportedly distinct natural capacities and preferences[54] or fitness for particular social roles[55] — interests, in other words, that run directly counter to the Court's recognition that the Equal Protection Clause forbids state practices that curtail civil rights on the basis of broad stereotypes about gender roles.[56]

The race-based equal protection cases offer an additional context in which the Court has resolved heightened scrutiny's state-interest inquiry on the basis of the underlying illegitimacy of the state's asserted interest. Initially, race-based state action did not offend the Equal Protection Clause as such unless it withheld from members of one race

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48 Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990).

49 558 U.S. 310 (2010).

50 *Id.* at 356 (emphasis added); *see also, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825–26 (2011) (finding an interest in "leveling the playing field," *id.* at 2825, of campaign funding inconsistent with the First Amendment); Davis v. FEC, 554 U.S. 724, 741 (2008) (finding "no support for the proposition" that reducing the advantage of the wealthy in funding the campaigns of their preferred politicians was even a "*legitimate* government objective" (emphasis added)).

51 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 792 (1978); *see also id.* at 792–93.

52 *Id.* at 787.

53 *See Citizens United*, 558 U.S. at 361–62; *cf.* Cal. Democratic Party v. Jones, 530 U.S. 567, 582–84 (2000) (finding several interests "automatically out of the running," *id.* at 584, for contravening First Amendment values).

54 *See* United States v. Virginia, 518 U.S. 515, 540–46 (1996) (rejecting Virginia's asserted interest in maintaining a military-style pedagogy that allegedly "[could not] be made available, unmodified, to women," *id.* at 540).

55 *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982); *see also id.* at 725 ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.").

56 *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973) (plurality opinion).

a legal right held by members of other races.[57] But as the civil rights movement called into question the adequacy of a regime that promised formal racial equality while yet permitting racial division,[58] the Court toward the end of the 1960s began to foreground its World War II–era dictum that mere "*[d]istinctions* between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[59] Thus, alongside the Equal Protection Clause's original purpose of stemming racial *subordination*,[60] there now floats the idea that the clause operates to prevent state-sanctioned racial *differentiation* of any form.[61]

Against this backdrop, the Court has refused to recognize a compelling state interest in the broad remediation of the effects of past racial discrimination.[62] This refusal, however, is not grounded in the idea that such an interest is *unimportant*, but rather in the fear that it is "too amorphous," permitting "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future,"[63] and that so ensure race's continued relevance.[64] Accordingly, although the

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[57] *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 79 (1917) ("The Fourteenth Amendment and the[] statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."); Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) ("If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically."); Pace v. Alabama, 106 U.S. 583, 585 (1883) (finding no infirmity in an Alabama criminal statute that increased the sentence for fornication if committed by a biracial couple because the statute meted out identical punishment to white and black offenders).

[58] The Court's initial understanding that the Equal Protection Clause could be satisfied by purely facial equality under law had effectively ratified Jim Crow's "separate but equal" institutions, *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting), even though such institutions were not equal in practical operation, *see, e.g.*, Sweatt v. Painter, 339 U.S. 629, 632–33 (1950).

[59] Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (emphasis added), *quoted in part in* Loving v. Virginia, 388 U.S. 1, 11 (1967).

[60] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 306 (1880) (describing the Fourteenth Amendment as designed to "secur[e] to . . . a race that through many generations had been held in slavery[] all the civil rights that the superior race enjoy").

[61] *See* Sonu Bedi, *Collapsing Suspect* Class *with Suspect* Classification*: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 310–14 (2013) (distinguishing between a view of the clause that requires governmental indifference as between racial groups and a view of the clause that permits the state to take account of group-based power imbalances); *see also, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (describing the "frustrating duality of the Equal Protection Clause").

[62] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (declining "[t]o accept [the] claim that past societal discrimination alone can serve as the basis for rigid racial preferences"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion).

[63] *Wygant*, 476 U.S. at 276 (plurality opinion).

[64] *See, e.g.*, *Croson*, 488 U.S. at 505–06 (expressing concern that remedial action would cause "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement [to] be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs"). Curtailing the temporal scope of race-based remedial action has been a hobbyhorse of the Court since soon after the Fourteenth Amendment's enactment. *See*

Court has held that broadly remedial ends are not *compelling*, the Court seems to view such ends as altogether constitutionally *illegitimate*.[65] In contrast, the Court has recognized a compelling interest where a state actor employs race-based measures to correct *its own* past unlawful discrimination.[66] Unlike remedial action predicated on one's membership in a given racial group, remedial action yoked to a personal rights violation — the law's very wheelhouse[67] — classifies people not by race, but rather by legal injury.[68] Ultimately, the Court's distinction between general and specific remediation has little to do with these interests' respective importance, and everything to do with their respective legitimacy under the Court's view of the Fourteenth Amendment.

C. Interests that Fail Because They Are Defined Narrowly in Terms of the State's Chosen Means of Furthering Them

As observed in section I.A, the Court upholds nearly any legitimate interest that is defined broadly in terms of its animating values. Sometimes, however, the Court rejects a state interest after defining that interest narrowly; rather than considering the state's overarching policy objective, the Court in these cases, whether sua sponte or based on the state's own characterization, considers the state's interest in pursuing that objective *through the specific means at issue*. For example, in invalidating a law that deprived criminal offenders of profits earned through depictions of their crimes, the Court wrote that "the State has a compelling interest in compensating victims . . . but little if any interest in limiting such compensation to the proceeds of the wrongdoer's

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The Civil Rights Cases, 109 U.S. 3, 25 (1883) ("[T]here must be some stage in the progress of [a formerly enslaved person's] elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ."). In the twenty-first century, the Court remains antsy. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary . . . .").

[65] *See, e.g.*, *Croson*, 488 U.S. at 506 (describing judicial determinations of relative racial disadvantage under the Equal Protection Clause as "contrary to both the letter and spirit of a constitutional provision whose central command is equality").

[66] *See, e.g.*, *Parents Involved*, 551 U.S. at 720–21; *cf.* Fullilove v. Klutznick, 448 U.S. 448, 497–98 (1980) (Powell, J., concurring) ("[T]he distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation . . . ." *Id.* at 498.).

[67] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

[68] *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 746–47 (1974) (describing court orders for formerly segregated school districts to undertake integrative measures as "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct").

speech about the crime."[69] Under this method of analysis, the Court has advanced two unremarkable propositions that are already covered by heightened scrutiny's independent requirement that the state's means be appropriately tailored to serve the state's desired end.

First, the Court has established that the state has no compelling interest in pursuing its substantive aims through action that only marginally advances those aims relative to the burden such action imposes on individual rights.[70] For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[71] the Court considered whether a city ordinance forbidding ritual animal sacrifice violated the Free Exercise Clause.[72] Although the Court described the state's asserted interests in "protecting the public health and preventing cruelty to animals" as merely "legitimate,"[73] little hinged on the description: the Court held not that such interests are *never* compelling, but rather that they were not compelling "*in the context* of the[] ordinances" at issue.[74] At bottom, the city's "fail[ure] to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort" meant that the sacrifice ban simply did not make a sufficient contribution toward the state's end to justify its incursions on religious liberty.[75]

But although such cases are framed in terms of the state's interest in pursuing a given measure, they are better understood as cases in which the state *has* articulated a broad objective that the Court would typically recognize as compelling, but in which the state has simply failed to further its objective through appropriately tailored means.[76] In *Lukumi*

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[69] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 120–21 (1991); *see also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (observing that the state's interest in raising revenue through a sales tax "does not explain selective imposition of the sales tax on some magazines and not others, based solely on their content").

[70] As an a fortiori matter, the Court will necessarily reject an asserted state interest if it is incapable of ever being meaningfully advanced. *See* Republican Party of Minn. v. White, 536 U.S. 765, 777–78 (2002); *cf.* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 543 (1980) (finding no compelling interest in combating entirely speculative harms).

[71] 508 U.S. 520 (1993).

[72] *See id.* at 527–28. Ritual sacrifices are a form of devotion in the Santeria faith. *See id.* at 524–25.

[73] *Id.* at 538.

[74] *Id.* at 546 (emphasis added).

[75] *See id.* at 546–47. The fact that the ordinances at issue inadequately furthered the asserted state interests also led the Court to suspect that those interests were manufactured justifications for what was in reality the city's illegitimate effort to burden an unpopular religion. *See id.* at 533–40; Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1314–15 (2003).

[76] Admittedly, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court intimated that the state's broad interest in "minimizing the visual clutter associated with signs" may not be compelling, *id.* at 54. Nonetheless, in striking down a municipal ordinance forbidding homeowners from displaying signs on their property, the Court ultimately made clear that its beef was with the ordinance's inadequate tailoring. *See id.* at 58–59 ("[M]ore temperate measures could in large part satisfy [the municipality's] stated regulatory needs without harm to . . . First Amendment rights.").

Babalu, the Court's rationale for holding that the ordinances at issue served no compelling interest was virtually identical to the Court's rationale for finding that, "even [had] the governmental interests [been] compelling, the ordinances [had not been] drawn in narrow terms to accomplish those interests."[77] Similarly, in *Brown v. Entertainment Merchants Ass'n*,[78] the Court found that California's ban on the sale or rental of certain violent video games to minors was not "justified by that high degree of necessity [the Court] ha[s] described as a compelling state interest."[79] But the Court's reasoning on this point rested largely on California's inability to "show a direct causal link between violent video games and harm to minors."[80] The constitutional infirmity in *Brown*, then, appeared to lie not in an insufficiently important objective but rather in the inefficacy of the state's chosen means.[81]

Second, the Court has established that the state has no compelling interest in pursuing its underlying goals through overbroad measures in order to capture administrability gains.[82] This proposition is most clearly illustrated in the early free exercise cases that reversed adverse unemployment benefits decisions. For example, in *Frazee v. Illinois Department of Employment Security*,[83] the Court found that Illinois had shown no interest "sufficiently compelling" to justify denying unemployment benefits to a plaintiff who was unwilling to work on Sundays — *not* because the Court maligned Illinois's interest in having workers available to facilitate "America's weekend way of life," but rather because the Court was "unpersuaded . . . that there [would] be a mass movement away from Sunday employ" were the plaintiff granted benefits.[84] Here, too, the Court's pronouncement on the state-interest

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[77] *Lukumi Babalu*, 508 U.S. at 546; *see also id.* (faulting the ordinances for not pursuing "[t]he proffered objectives . . . with respect to analogous nonreligious conduct"); *cf., e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 863–64 (2015) (acknowledging the Arkansas Department of Correction's "compelling interest in staunching the flow of contraband," *id.* at 863, but indicating that a prisoner's ability to grow long hair on his head raised doubt under a federal religious liberty statute *both* as to whether the Department had a compelling interest in forbidding a prisoner from growing a religiously motivated half-inch beard *and* as to whether such a refusal was the least restrictive means of limiting prisoners' access to contraband).

[78] 131 S. Ct. 2729 (2011).

[79] *Id.* at 2741.

[80] *Id.* at 2738.

[81] *See, e.g.*, *id.* at 2742 ("As a *means* of protecting children from portrayals of violence, the legislation is seriously underinclusive." (emphasis added)); *id.* at 2741–42 (noting that California's ends "are legitimate, but when they affect First Amendment rights they must be pursued by *means* that are neither seriously underinclusive nor seriously overinclusive" (emphasis added)).

[82] *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986). Insofar as there is a distinction, such an interest does not even meet intermediate scrutiny's "important interest" requirement. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152 (1980) (discussing cases).

[83] 489 U.S. 829 (1989).

[84] *Id.* at 835; *see also* Thomas v. Review Bd., 450 U.S. 707, 719 (1981) (rejecting Indiana's denial of unemployment benefits to a Jehovah's Witness who declined on religious grounds to work

question is ultimately a judgment on the fit between means and ends: a measure that sweeps more broadly than necessary in the name of convenience is simply inadequately tailored to its underlying goal.[85]

The upshot of the foregoing analysis is that, standing alone, the inadequacy of the substantive policy aim underlying a rights-infringing measure seems to be an inadequate basis for a finding of unconstitutionality. Rather, even when the Court rejects a legitimate interest as insufficiently compelling, it is in fact the lack of fit between ends and means that drives the Court's analysis. Given that the tailoring inquiry already asks whether the state can better fulfill its substantive goals through less burdensome means,[86] then, the state-interest inquiry turns out to be largely redundant.

II. AN OUTLIER? RACE AND THE STATE-INTEREST INQUIRY

As Part I has explained, the Court virtually never invalidates state action on the sole ground that it serves an insufficiently consequential end. When it appears to do so, its holding typically rests on a conclusion that the state's asserted interest is per se illegitimate or on a find-

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in a factory that manufactured war materiel, as Indiana had not shown that allowing religious exemptions would compromise its "by no means unimportant" interests in limiting unemployment and in "avoid[ing] a detailed probing by employers into job applicants' religious beliefs").

[85] *Cf., e.g.*, Lindsey Sacher, Comment, *From Stereotypes to Solid Ground: Reframing the Equal Protection Intermediate Scrutiny Standard and Its Application to Gender-Based College Admissions Policies*, 61 CASE W. RES. L. REV. 1411, 1418 (2011) ("[T]he tailoring prong of intermediate scrutiny turns on the concept of stereotype just as much as the substantial-interest prong."). Of course, the Court has permitted the state to employ broadly sweeping measures under the Free Exercise Clause when the state's interest in uniform application of the law is inextricably entwined with its ability to effectuate its overall policy aims. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 698–700 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (finding that tax benefits for private religious schools engaging in racial discrimination would undermine the government's "fundamental, overriding interest in *eradicating* racial discrimination in education" (emphasis added)); United States v. Lee, 455 U.S. 252, 259–60 (1982) ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."). Following *Employment Division v. Smith*, 494 U.S. 872 (1990), the state can now assert an interest in the uniform application of virtually all neutral laws of general applicability, *see id.* at 886 n.3, 888–89.

[86] This inquiry resembles the practice of constitutional balancing, by which the Court, without recourse to the formally tiered levels of scrutiny, performs a freestanding comparison between the extent to which a state action infringes a private constitutional interest and the extent to which that action serves an interest of public importance. *See generally* Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978). The Court has perhaps most notoriously employed such balancing in interpreting the Fourth Amendment's requirement that searches and seizures not be "unreasonable." U.S. CONST. amend. IV; *see, e.g.*, Maryland v. King, 133 S. Ct. 1958, 1977 (2013) ("By comparison to [the] substantial government interest [in identifying detainees] and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one."); New Jersey v. T.L.O., 469 U.S. 325, 337–43 (1985) ("The determination of the standard of reasonableness . . . requires 'balancing the need to search against the invasion which the search entails.'" *Id.* at 337 (quoting Camara v. Mun. Court, 387 U.S. 523, 537 (1967)).); Terry v. Ohio, 392 U.S. 1, 27–30 (1968).

ing that the state's chosen means are inadequately tailored to the state's policy ends. In one area of law, however, the Court *does* at first glance appear to distinguish between the relative weight of legislative aims: race-based equal protection. Only two primary state interests — national security[87] and the educational benefits flowing from classroom diversity in higher education[88] — have been established as compelling interests that can justify the state's use of racial categories.[89] Given the ease with which the Court typically finds compelling interests, the dearth of such interests in the race-based equal protection context is notable. Justice Thomas, for one, has expressed incredulity that classroom diversity should represent a compelling interest in light of the fact that "the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination."[90] Perhaps the Court's miserly approach to ratifying state interests in this line of cases reflects an effort to develop a compelling-interest standard that has greater bite.

But upon further examination, it becomes clear that dispute over the validity of state-sanctioned racial classification per se,[91] and not judgments about the relative weight of the state's asserted justificatory interests, has been driving the Court's race-based equal protection jurisprudence. For example, in *Palmore v. Sidoti*,[92] the case in which the Court supposedly rejected promotion of a child's best interests as a compelling state interest, the Court reversed a Florida court's summary affirmance of a trial court's decision to grant custody of a young girl to the girl's white father over the girl's white mother, who was cohabiting with a black man.[93] While finding neither parent to be un-

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[87] *See* Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[88] *See id.* at 343 (majority opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (opinion of Powell, J.). While maintaining that a school's interest in "assur[ing] within its student body some *specified percentage* of a particular group," *Grutter*, 539 U.S. at 329 (emphasis added) (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)), constitutes "patently unconstitutional" "racial balancing," *id.* at 330, the Court has permitted schools to seek out a certain diversity sweet spot, gamely described as a "critical mass" of minority students sufficient to generate the "educational benefits that diversity is designed to produce," *id.*

[89] *See, e.g.*, John Bennett, *The Diversity Ruse: How* Grutter *Upheld Affirmative Action by Failing to Apply Strict Scrutiny*, 45 CUMB. L. REV. 225, 227 (2015). Remediation of specific past rights violations is frequently cited as another such interest. *See id.*; *see also Grutter*, 539 U.S. at 351–52 (Thomas, J., concurring in part and dissenting in part). As discussed at p. 1415, *supra*, however, the state in such cases technically categorizes individuals based not on their race but on their legal injury.

[90] *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

[91] *See supra* p. 1414.

[92] 466 U.S. 429 (1984).

[93] *See id.* at 430–31. The opinion never states the child's race, but it leaves the reader to infer that she is white. *See id.* at 430 (describing the child's natural mother and presumptively natural father as "both Caucasians").

fit,[94] the trial court feared the child would face stigma were she to remain in a mixed-race household.[95] In reversing the Florida appeals court's affirmance of the trial court's judgment, the Supreme Court acknowledged Florida's "duty *of the highest order*" to protect its minors, but held nevertheless that "the reality of private biases and the possible injury they might inflict" are not "*permissible* considerations for removal of an infant child from the custody of its natural mother."[96] In other words, the Court did not find Florida's asserted interest in any way wanting; rather, despite Florida's legitimate, even compelling,[97] interest, "[t]he effects of racial prejudice, *however real*," simply could not form part of the Florida trial court's calculus.[98]

Further, even though military necessity is commonly cited as a state interest sufficient to justify racial categorization, this conventional wisdom rests upon shaky ground. The proposition that national security is uniquely compelling in this context derives from the World War II–era case *Korematsu v. United States*,[99] in which the Court affirmed the conviction of a Japanese American man under an exclusion order that barred persons of Japanese ancestry from being present in a designated military area.[100] But *Korematsu*, although understood to be a progenitor of strict scrutiny,[101] preceded a decade of far greater judicial deference to race-based state action than would be accepted today.[102] Moreover, *Korematsu* did not squarely hold that the racial distinction at issue was appropriate *only* because of military necessity;[103] rather, it pointed to military exigency as evidence that the racial distinction at issue was not driven by animus.[104] Given that animus is no longer necessary to make out an equal protection violation,[105]

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[94] *See id.* at 432.

[95] *See id.* at 431.

[96] *Id.* at 433 (emphases added).

[97] *See id.* at 432–33.

[98] *Id.* at 434 (emphasis added). Notably, the Court so held without performing any analysis of whether Florida's race-consciousness was narrowly tailored to advance its interests.

[99] 323 U.S. 214 (1944).

[100] *See id.* at 215–16, 219; Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part).

[101] *See* Siegel, *supra* note 16, at 380.

[102] *See id.* at 383–84.

[103] Much of the Court's emphasis on military necessity went toward justifying the exclusion order as a restriction on civil liberties per se, and not toward justifying the order's racially disparate nature. *See Korematsu*, 323 U.S. at 218 (finding that "exclusion from the area in which one's home is located" is impermissible except under "apprehension . . . of the gravest imminent danger to the public safety").

[104] *See id.* at 223 ("Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire . . . .").

[105] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

Korematsu's continuing vitality is unclear.[106] Certainly, the opinion has been roundly criticized, including by the Court itself.[107]

Against this backdrop of skepticism as to any state-sanctioned racial categorization, *Grutter v. Bollinger*,[108] the 2003 decision that established classroom diversity as a compelling interest sufficient to justify racial distinctions in university admissions,[109] appears to be an outlier. Commentators have recognized that the tacit dispute in the educational diversity cases appears to be over the validity of the state's interest in "aid[ing] persons perceived as members of relatively victimized groups"[110] — an interest that precedent forbids the state from pursuing directly, at least in the context of race[111] — and not over how or whether the racial composition of a classroom actually affects learning outcomes.[112] Indeed, for at least some of the Justices who support the constitutionality of affirmative action measures, assuaging intractable racial injustices is the chief purpose of such measures.[113] And on the other hand, those who reject the constitutionality of such measures seem to suggest that state-sanctioned racial categorization, for *any* reason, is flatly unconstitutional.[114]

The Court has been reluctant to extend *Grutter* into new areas[115] and indeed has signaled its discomfort with the opinion itself.[116] Ac-

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106 *See* Jonathan R. DeFosse, Note, *Asian Americans, Racial Profiling, and National Security*, 70 GEO. WASH. L. REV. 181, 208 (2002) (noting that "[a]lthough *Korematsu* has never been explicitly overruled by the Court," its "legal basis . . . is suspect").

107 *See, e.g.*, *Adarand*, 515 U.S. at 236; Craig Green, *Ending the* Korematsu *Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 985 & nn.6–7 (2011) (citing sources); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 392 (2011) (reporting that *Korematsu* has been "repudiated in open testimony by . . . at least four nominees" to the Supreme Court).

108 539 U.S. 306 (2003).

109 *See id.* at 343.

110 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

111 *See supra* pp. 1414–15.

112 *See, e.g.*, Gail Heriot, *Thoughts on* Grutter v. Bollinger *and* Gratz v. Bollinger *as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 157 (2004) ("While [*Grutter*] purports to find the educational benefits of diversity a compelling purpose, . . . what actually impresses [the Court] is the argument for representation, without regard to whether the presence of minority preference beneficiaries on campus enhances the educational experience . . . .").

113 *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) ("The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital." (citation omitted)).

114 *See Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race . . . 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.").

115 The Court has declined to take even the minimal step of extending *Grutter*'s compelling interest in educational diversity from the university setting into elementary or secondary schools. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 724–25 (2007).

116 *See* Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661, 668–73 (2014) (describing the Court's steady narrowing of the educational diversity interest over the last decade); Gail Heriot, Fisher v. University of Texas*:*

cordingly, the elevation of educational diversity as a compelling interest is best understood as a sui generis toehold in the constitutional edifice, at risk of crumbling away under pressure.[117] But whether because they believe that the Court should recognize additional interests that could support affirmative action measures[118] or because they believe that *Grutter* was wrongly decided,[119] commentators seem dissatisfied with a regime in which educational diversity stands above almost all others as a compelling state interest. Thus, although the race-based equal protection cases cast little light on the Court's approach to the state-interest inquiry more generally, they inadvertently illuminate something else: the doctrinal quicksand in which the Court would mire itself if it *were* to develop a compelling- or important-interest jurisprudence that required it to pick and choose which state interests to elevate. Taking up this point, the next Part examines the Court's current dilemma — on the one hand, applying true discernment when evaluating state interests' weight would leave the Court in an awkwardly legislative role, but on the other hand, the current practice of ratifying virtually any broadly termed state interest raises its own potential problems.

III. THE POSSIBLE COSTS OF THE STATE-INTEREST INQUIRY

As Parts I and II have explained, despite the Court's language of legitimate, important, and compelling interests, such classifications bear little decisional weight. Indeed, apart from administrative convenience — which, as discussed in section I.C, is better understood as a question of tailoring — it is difficult to find any interest that the Court has described as legitimate but not compelling. Insofar as distinctions exist among the various levels of scrutiny, they appear to lie not in the requisite weight of the state's interest, but rather in the requisite fit between that interest and the state's chosen means of advancing it.[120]

The Court (Belatedly) Attempts to Invoke Reason and Principle, 2013–2014 CATO SUP. CT. REV. 63, 63–64 (finding signals in recent precedent that *Grutter* "may be on its way" to the "judicial attic," *id.* at 64).

117 *See* Reply Brief of Petitioner on Petition for a Writ of Certiorari at 8, Fisher v. Univ. of Tex. at Austin, No. 14-981 (U.S. May 4, 2015) (alluding to the "constitutional battle over the validity of a racial diversity interest" that "may someday be fought"), *cert. granted*, 135 S. Ct. 2888 (2015).

118 *See* Deo, *supra* note 116, at 690–99.

119 *See generally* Bennett, *supra* note 89.

120 For example, under intermediate scrutiny, the state might enjoy leeway to further its aims through means more overinclusive than strict scrutiny would permit. *Compare, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 633–34 (1995) (upholding under intermediate scrutiny a rule prohibiting lawyers from mailing targeted solicitations to accident victims and their relatives soon after the accident in light of alternative available modes of communication), *with, e.g.*, Cohen v. California, 403 U.S. 15, 16–17, 25–26 (1971) (finding under strict scrutiny that a young man who had worn a jacket reading "Fuck the Draft" inside a state courthouse was constitutionally entitled to choose the specific language through which he hoped to convey his distaste for U.S. military

It should not, however, be surprising that the gradations between legitimate, important, and compelling interests are essentially rhetorical. Because setting national policy priorities is a quintessential duty of the political branches, the Court would be ill situated to develop a rigorous judicial mechanism for assessing the relative *importance*, rather than *legitimacy*, of a state's objectives.[121] Making such policy-based judgment calls would threaten to insert the Court in debates that the Constitution demands be left to a popular "free trade in ideas"[122] and feed the common suspicion that the Court rules based on its policy preferences and not on neutral principles of law[123] — a suspicion not infrequently voiced by the Court's own members.[124] Accordingly, the Court has prudently avoided wrangling with legislative priorities and has instead freely imparted its stamp of approval upon legitimate legislative ends.

But despite the minimal *decisional* weight of the Court's frequent endorsements of broadly stated governmental interests, commentators nonetheless view such endorsements as consequential.[125] Accordingly,

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policy). Similarly, intermediate scrutiny, unlike strict scrutiny, does not typically require that the state's choice of means materially advance its substantive aims. *Compare, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50–52 (1986) (holding that a city need not "conduct new studies," *id.* at 51, or produce independent evidence of a speech-restrictive measure's efficacy under intermediate scrutiny, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *id.* at 51–52), *with, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–39 (2011) (pointing to the lack of evidence under strict scrutiny that a video game regulation would have its intended effect and distinguishing cases that used intermediate scrutiny). Under rational basis review, the state has still greater latitude to legislate incrementally. *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

[121] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("How is this Court to divine what objectives are important? . . . I would have thought that if this Court were to leave anything to decision by the popularly elected branches . . . it would be the decision as to what governmental objectives to be achieved by law are 'important,' and which are not."); Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting) ("It is not easy to . . . disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy.").

[122] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *cf.* Dennis v. United States, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring in the judgment) ("The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; . . . judges . . . unconsciously are too apt to be moved by the deep undercurrents of public feeling.").

[123] *See, e.g.*, Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 210 (2015) (describing "the Roberts Court conservative bloc's corporate and partisan agenda").

[124] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . .").

[125] *See, e.g.*, Deo, *supra* note 116, at 690–99 (arguing that the Court should recognize a compelling interest in avoiding racial isolation in educational institutions); Elizabeth L. Kinsella, Note, *A Crushing Blow:* United States v. Stevens *and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 378–81 (2009) (arguing that the Court should recognize a compelling interest

one potential risk of the largely extraneous state-interest inquiry is the unexpected power of the Court's *failure* to provide explicit ratification of any given state interest. A pair of First Amendment freedom-of-association cases provides illustration. In *Roberts v. United States Jaycees*,[126] the Court found that "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests" sufficient to justify Minnesota's decision to require a private organization to admit women under a state antidiscrimination law.[127] In coming to this conclusion, the Court in typical fashion relied on broadly stated values for the notion that discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."[128]

But in the post-*Jaycees* case *Boy Scouts of America v. Dale*,[129] the Court held that New Jersey could not require under its public accommodations statute that the Boy Scouts reinstate a former assistant scoutmaster who had been terminated for being "an avowed homosexual and gay rights activist."[130] Absent from *Dale*'s majority opinion was any mention of New Jersey's interest in combating antigay discrimination.[131] Although *Dale* seemingly would have arrived at the same outcome even had the Court explicitly recognized the worth of New Jersey's aims,[132] the disparity between *Jaycees*'s recognition of the importance of sex-based antidiscrimination laws and *Dale*'s total silence on the importance of sexual orientation–based antidiscrimination laws seemed to invite readers to see meaning in the difference.[133]

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in preventing animal cruelty); *cf.* Rob Natelson, *Contraceptive Coverage: A "Compelling Government Interest"?*, AM. THINKER (July 14, 2014), http://www.americanthinker.com/articles/2014/07/contraceptive_coverage_a_compelling_government_interest.html [http://perma.cc/M27M-W9YU] (arguing in the context of a federal religious liberty statute that the Court should not recognize a compelling interest in ensuring access to free contraceptives).

126 468 U.S. 609 (1984).

127 *Id.* at 626.

128 *Id.* at 625; *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (reaffirming the state's compelling interest in ensuring that women enjoy equal access "to the acquisition of leadership skills and business contacts").

129 530 U.S. 640 (2000).

130 *Id.* at 644.

131 *Compare id.* at 660 ("[I]t appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views." (citation omitted)), *with id.* at 664 (Stevens, J., dissenting) (arguing that the majority failed to accord New Jersey "the respect that is its due" for pioneering gay rights legislation).

132 The *Dale* Court distinguished *Jaycees* not on any distinction between the state interests at play in the two cases, but rather on the grounds that in *Dale*, but not in *Jaycees*, enforcement of the law at issue would have "significantly affect[ed]" the message of the "expressive association" that was forced to take on new members. *Id.* at 656 (majority opinion); *see also id.* at 657–58.

133 *See* Sara A. Gelsinger, Comment, *Right to Exclude or Forced to Include? Creating a Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 PENN ST. L. REV. 1155, 1169–70 (2012).

Instructive, too, is the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*[134] In *Hobby Lobby*, the Court assessed a provision of the Patient Protection and Affordable Care Act of 2010[135] (ACA) under the Religious Freedom Restoration Act of 1993[136] (RFRA), a federal religious liberty statute that contains a compelling-interest standard analogous to the constitutional standard.[137] The ACA provision at issue required certain employers to provide their employees with "minimum essential [health insurance] coverage"[138] — later interpreted to include certain contraceptives.[139] The Court found that the ACA's contraceptive mandate violated the RFRA as applied to closely held corporations religiously opposed to covered contraceptives,[140] on the grounds that the mandate was not the least restrictive means of fulfilling the state's interest in "ensur[ing] that women employees receive, at no cost to them, the preventive care needed."[141] But in so holding, the majority opinion conspicuously declined to weigh in on whether such an interest is compelling[142] — an omission that drew fire both from a dissenting Justice Ginsburg[143] and from commentators.[144]

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134 134 S. Ct. 2751 (2014).

135 Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of the U.S. Code).

136 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

137 *See id.* §§ 2000bb(b)(1), 2000bb-1(b).

138 26 U.S.C. § 4980H(a)(1) (2012).

139 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

140 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

141 *Id.* at 2801–02 (Ginsburg, J., dissenting).

142 *See id.* at 2779–80 (majority opinion). Justice Kennedy, going beyond the majority opinion that he joined in full, seemed to accept in his separate concurrence that the Department of Health and Human Services had "ma[de] the case that the [contraceptive] mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees." *Id.* at 2785–86 (Kennedy, J., concurring); *see also id.* at 2800 n.23 (Ginsburg, J., dissenting).

143 *See id.* at 2800 n.23 (Ginsburg, J., dissenting); *see also id.* at 2805. In contrast to the majority opinion, Justice Ginsburg's dissent pointedly foregrounded the gravity of the economic and public health issues that the mandate sought to address. *See id.* at 2799–801.

144 *See, e.g.*, Neil S. Siegel & Reva B. Siegel, Essay, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, 1031 (2015) (arguing that the *Hobby Lobby* briefing, as well as the opinion itself, failed adequately to develop the interests served by the contraceptive mandate); Pema Levy, *Democrats Ready to Pounce on Supreme Court Contraception Decision*, NEWSWEEK (June 30, 2014, 3:27 PM), http://www.newsweek.com/democrats-ready-pounce-supreme-court-contraception-decision-256799 [http://perma.cc/UY6B-QFQX] ("If the Supreme Court will not protect women's access to health care, then Democrats will." (quoting then–Senate Majority Leader Harry Reid)); Ruth Marcus, *Judging from Experience*, WASH. POST (July 1, 2014), https://www.washingtonpost.com/opinions/ruth-marcus-judging-from-experience/2014/07/01/78c51c30-0148-11e4-b8ff-89afd3fad6bd_story.html [http://perma.cc/GCA7-XXM8] ("[T]he interests of the contraceptive users are almost entirely absent from the majority opinion in *Burwell v. Hobby Lobby*.").

If the Court's pronouncements on the weight of the state interest at issue are unnecessary as a doctrinal matter and can perhaps on occasion compromise the Court's appearance of neutrality, there would seem to be little loss in dispensing with the value-laden "compelling" and "important" labels and instead moving directly to the question of whether a challenged state action is appropriately tailored to serve a legitimate interest.[145] Of course, such a doctrinal shift would not wholly obviate the concerns associated with "overconfident judicial assessments of how important or unimportant some government interests, conceived of in any of several ways, 'really' are."[146] The tailoring inquiry itself invites value judgments, both in terms of how broadly or narrowly the Court defines the state's legitimate interest,[147] and in terms of what tradeoffs the Court will permit between marginal burdens on personal rights and marginal advancement of the interest at issue.[148]

However, the lone fact that the risk of actual or perceived value judgments will remain even if the Court dispenses with the "compelling" and "important" labels is not a justification for retaining those labels if they serve little utility and merely provide yet another locus for public skepticism. The level-of-generality problem associated with defining the state interest in question, after all, is no less troubling under the current doctrine than it would be under a regime that simply labels the state's asserted interest either "legitimate" or "illegitimate."[149] And if the Court is to employ policy-based judgment calls, it

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[145] Moreover, there is no reason that the Court could not in addition — as it has already done with illegitimate *ends*, *see supra* section I.B — begin to identify illegitimate *means* that per se contravene the relevant constitutional values. Certainly, the Court has readily done so in other doctrinal contexts, even in the face of countervailing state interests. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2495 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple — get a warrant."); District of Columbia v. Heller, 554 U.S. 570, 636 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."); Roper v. Simmons, 543 U.S. 551, 573–74 (2005) ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life . . . .").

[146] R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 200 (2014).

[147] *Cf. generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (describing a similar problem inherent in the Court's approach to identifying fundamental rights).

[148] Constitutional balancing in other contexts has long been open to the charge that its indeterminacy invites the Court to rule based on its own value judgments. *See, e.g.*, *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 258–59 (2014); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402 (1974) (describing the Court's weighting of interests under the Fourth Amendment's balancing jurisprudence as "rest[ing] upon value judgments which are exquisitely difficult for the committee of the Supreme Court to make").

[149] Indeed, the Justices do not always agree on how to define the state's interest in any given case. *Compare, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring in

seems better equipped to do so when undertaking an analysis of how well the state has tailored its means to its legitimate ends — in which context the Court's analysis focuses on the effects of the specific state action at issue and not on the abstract prioritization of nebulously defined values.[150] At any rate, the status quo calls for *both* such sets of seeming judgment calls, rather than simply the former.

CONCLUSION

The formidable compelling- and important-interest requirements, as it turns out, are more bark than bite. The requirement that any state action that threatens to encroach upon personal rights be justified by a weighty state interest looms large in constitutional rhetoric. But in practice, the Court, perhaps reluctant to usurp the legislature's role in pronouncing on the relative importance of public policy aims, tends to green-light almost any broadly asserted interest without much fanfare. If the "compelling" and "important" labels provide nothing more than rhetorical gilding for legitimate interests, however, the Court should question whether its practice of parting freely with such currency in some cases and withholding it in others transmits tacit normative signals that sit ill with the Court's institutional role.

Given that the distinction between legitimate, important, and compelling interests is virtually never of consequence, the Court could simplify its constitutional doctrine by requiring merely that state action be appropriately tailored to serve a legitimate end. Alternatively, the Court could begin to inject more rigor into the analysis, placing greater demands on the interests it upholds as compelling and thereby providing litigants with clear criteria for arguing an interest's weight. As it stands, the compelling and important state-interest requirements remain an awkward, under-the-radar component of constitutional law — generally inconsequential but occasionally underfoot.

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the judgment) ("Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them."), *with id.* at 909–10 (Blackmun, J., dissenting) ("It is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."); *cf. supra* note 85.

150 Of course, there is dispute over the extent to which the Court acts within its institutional authority when it attempts to assay the real-world effects of a challenged state action. *See, e.g.*, William K. Ford, *The Law and Science of Video Game Violence: What Was Lost in Translation?*, 31 CARDOZO ARTS & ENT. L.J. 297, 299–309 (2013) (discussing manifold problems with courts' reliance on empirical studies). But even if tailoring itself remains an unrefined process, it has at least been employed more systematically than has been the state-interest inquiry. For a helpful analysis of how the Court applies its narrow-tailoring analysis, see Fallon, *supra* note 26, at 1326–32.