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Purpose Scrutiny in Constitutional Analysis

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Ashutosh Bhagwat

In its constitutional law jurisprudence over the past twenty-five years, the Supreme Court has generally declined to pass judgment on the legitimacy of legislative ends. Instead, the Court has focused on the rationality and fitness of the means legislatures have chosen to attain those ends. The Court's three-tiered approach to equal protection analysis, the outlines of which it has also adapted to free speech cases, exemplifies this eschewing of purpose inquiry. In the author's view, however, a number of recent cases in these two contexts and in other areas of constitutional law show an increased willingness by the Court to inquire into and pass upon legislative purposes. Because this new tendency has been haphazard and largely unannounced, the Court has not tied its review of purpose to any firm set of principles. In the absence of such principles, the author believes that the new trend presents counter-majoritarian dangers, in addition to being unpredictable. He therefore argues that the Court should explicitly lay out the classes of cases that will receive particular levels of purpose review, and tie that review to the text and history of the constitutional provisions at issue in each case. Finally, the author presents preliminary suggestions on how such a framework might work.

INTRODUCTION

Constitutional law is changing. Consider the following recent, and prominent, constitutional decisions by the Supreme Court and various Circuit Courts of Appeals:

> Under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court reviewed a Colorado constitutional amendment that prevented homosexuals from obtaining statutory protection from discrimination, or any other sort of specific, statutory protection. The Court applied its most lenient standard of review—the "rational basis" test. Nonetheless, it struck down the Colorado provision because it concluded that the only possible motivation for the provision was "animus" against a class of citizens, and that the provision therefore did not advance any legitimate government end.[1]

1. Romer v. Evans, 116 S. Ct. 1620 (1996).

Overruling at least one recent precedent, the Supreme Court ruled that all race-based governmental actions, including benign racial classifications adopted as part of an affirmative action program, are subject to "strict scrutiny," the most searching standard of review available under the Equal Protection Clause. The Court then remanded the case to the lower courts to determine if the program in question satisfied the requirements of strict scrutiny, which requires the courts to determine whether the government interests served by a classification are "compelling."[2]

Also under the Equal Protection Clause, the U.S. Court of Appeals for the Fifth Circuit struck down an admissions policy at the University of Texas Law School that gave preference to minority candidates for admission. The Fifth Circuit also applied strict scrutiny, as it claimed was required by precedent. It ruled, among other things, that promoting student diversity could never qualify as a "compelling" government interest. In so holding, the court declined to follow an earlier Supreme Court decision that seemed to permit universities to use race as a factor in graduate school admissions decisions.[3]

In a splintered decision, the Supreme Court held that a federal statute requiring cable television operators to set aside a certain number of channels to carry the signals of local television broadcasters without charge is a "content-neutral" law. As such, the Court subjected the statute only to "intermediate scrutiny" under the First Amendment's Free Speech Clause. One of Congress' clear purposes in adopting the statute was to foster diversity among sources of information. The majority and dissent disagreed most sharply over whether, because of this purpose, the statute should be considered "content-based" and therefore subject to strict scrutiny.[4]

Again under the Free Speech Clause, the Supreme Court struck down a Rhode Island law prohibiting off-premises advertising of liquor prices. A majority of the Court declined to apply the Court's well-established test for restrictions on "commercial speech," instead choosing to apply a stricter standard of review because the law entirely suppressed a category of truthful commercial speech. Along the way, the Court disavowed a precedent

2. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)).

3. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (declining to follow Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)). *But see* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (Posner, C.J.) (upholding a race-conscious hiring process for state prison guards).

4. Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).

that seemed to permit states to suppress the advertising of "vice" products in order to limit consumption.[5]

Against a First Amendment challenge, the U.S. Court of Appeals for the District of Columbia Circuit upheld a federal statute and regulations banning the broadcast of "indecent materials" between the hours of 6:00 a.m. and 10:00 p.m. Although it found that the provision was a content-based regulation, the D.C. Circuit held that it satisfied even "strict" scrutiny. The majority and dissent agreed that the government has a "compelling interest" in supporting parental supervision of children's exposure to indecent materials, but disagreed over whether the government has an independent interest in preventing minors' exposure to indecency regardless of their parents' wishes.[6]

Twenty-five years ago, Gerald Gunther urged the Supreme Court to adopt a newer equal protection analysis that would focus on the propriety and rationality of the means employed by legislatures to achieve their goals, rather than on the validity of legislative ends.[7] In the years that have followed, the Court has largely accepted that invitation, constructing a three-tiered doctrine of equal protection review that, at least in name, also guides the Court's constitutional analysis in many other doctrinal areas, notably including free speech cases. The cases described above, which apply different constitutional provisions and are drawn from different doctrinal contexts, reveal fissures in that approach.

It is the thesis of this Article that these and other recent cases are examples of a trend within the Court's jurisprudence toward an increased focus on the ends that the government seeks to advance with its actions, including an analysis of the true purposes underlying those actions—in the words of the current doctrine, an increased focus on "government interests." Such a trend would represent a substantial departure from previous practice, which concentrated mainly on scrutiny of government means, and on balancing the strength of government interests against individual rights.

If the shift toward purpose scrutiny is a real and significant trend, it will have important and controversial implications for constitutional theory and practice. Purpose scrutiny will call the constitutionality of many government actions into question, and will permit some actions

5. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) (calling into doubt Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986)).

6. Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996).

7. *See* 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, 20-22 (1972).

heretofore thought unconstitutional. In sum, it will substantially alter the contours of the Court's constitutional jurisprudence.

In addition to identifying and demonstrating the trend toward purpose scrutiny in recent decisions, this Article also contends that the Supreme Court's increased scrutiny of governmental purposes is a positive development that the Court should continue and expand. It is, however, equally imperative that the Court develop a coherent analytical framework so that it may apply purpose scrutiny in a principled manner. Without a principled and constitutionally-rooted framework, judicial second-guessing of the validity of the purposes pursued by the elected branches can lead to troubling results. Until now, the Court has failed to develop such a framework, the lack of which has brought its efforts at purpose scrutiny into question. One important contention of this Article is that purpose scrutiny, like all constitutional review, cannot retain its legitimacy and authority unless it is ultimately grounded in the Constitution. This Article proposes a purpose scrutiny framework that will provide the constitutional grounding that the Court's current means analysis lacks.

This Article attempts to identify principles that the Court may use to guide its purpose scrutiny in a manner consistent with its constitutional role. In doing so, it draws on recent Supreme Court cases and the developing academic commentary on governmental interests. Recent case law and commentary suggest three quite distinct ways in which the Court has employed—and should employ—purpose scrutiny in constitutional analysis. First, some governmental purposes, when they underlie actions burdening particular constitutional rights, are entirely illegitimate. Second, when core constitutional infringements are at issue, the universe of permissible governmental purposes is extremely limited, and its limits will be determined by the nature of the right allegedly burdened. Third, when neither illegitimate purposes nor core infringements are at issue, the Court has tended to, and most definitely should, defer substantially to the choices of democratically elected representatives, at least as to the importance and propriety of the purposes they have chosen to pursue. Finally, this Article compares the purpose scrutiny framework to the Court's existing three-tiered doctrine, suggesting ways in which the existing doctrine might be modified and extended to incorporate purpose scrutiny.

The discussion here is necessarily a preliminary one, indicating possible directions in which theory and analysis can move. Purpose scrutiny cannot provide a blueprint for all areas of constitutional law. Indeed, if one theme emerges from the following pages, it is that many of the Court's current doctrinal difficulties stem from the search for

grand constitutional approaches, which are then applied without modification to areas of law for which they were not designed.

I
THE COURT'S DEVELOPING JURISPRUDENCE

A. *Traditional Doctrine: Means Scrutiny Under the Three-Tiered Approach*

Over the past thirty years, the Supreme Court's constitutional jurisprudence where individual rights are concerned—with the exception of criminal procedure—has come to be dominated by a three-tiered system under which governmental action is categorized according to some predetermined criteria, and then subjected to an appropriate level of scrutiny. Actions that look particularly suspicious are subject to "strict scrutiny," those that are somewhat suspicious are subject to "intermediate scrutiny," and the most innocuous receive "rational basis" review.

1. Equal Protection Jurisprudence and the Origins of the Three-Tiered Approach

In the equal protection area, the Court decides which level of scrutiny to apply by examining the challenged law for "suspect" classifications or impingements of "fundamental rights." Goverument classifications that are suspect—such as those based on race, alienage, or national origin—or that are used to burden the exercise of certain fundamental rights—such as the right to speak, the right to vote, or the right to travel between states—are subject to strict scrntiny. Under strict scrutiny, the classification will survive only if it is *narrowly* tailored to advance a *compelling* government interest.[8]

Similarly, the Court applies intermediate scrutiny to those classifications it considers "semi-suspect"—such as those based on gender or illegitimacy. Such a classification will be upheld if it is *substantially* related to the achievement of an *important* government interest.[9] All other classifications, which are not based on suspect classes and do not burden fundamental rights, face only the lenient rational basis test, under which they must merely be *rationally* related to a *legitimate* government interest to survive.[10]

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8. *See, e.g., Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097, 2113 (1995); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

9. *See City of Cleburne*, 473 U.S. at 441; Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Mathews v. Lucas, 427 U.S. 495, 508 (1976); *cf.* United States v. Virginia (*VMI*), 116 S. Ct. 2264, 2275 (1996).

10. *See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996); *City of Cleburne*, 473 U.S. at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S.

Thus, the analysis formally requires three steps—categorization of the means, scrutiny of the strength of the chosen ends, and examination of the "fit" between the means and the ends. An objection might be raised here that the definitions of the three tiers of scrutiny appear to include standards for the examination of government purposes. After all, the very language of the strict scrutiny test does require that the class be narrowly tailored to advance a "compelling government interest." In fact, however, the categorization process has in most cases been outcome-determinative. Indeed, even scrutiny of the fit between means and ends has tended to be a mere formality, and ends scrutiny has been notably absent. The rational basis test is extremely permissive, and in the case of economic or social legislation has traditionally led to almost automatic approval. On the other hand, strict scrutiny has historically tended to be, in the oft-quoted words of Gerald Gunther, "'strict' in theory and fatal in fact."[11] The three-tiered approach tended to look only at the classifications used by the government, which are the means that the government had chosen to accomplish its purposes. It never got around to its promised analysis of the purposes themselves. Apart from the exceptional case,[12] placement into either the highest or lowest tier was decisive. Application of the middle tier, intermediate scrutiny, has led to slightly more uncertainty, but has increasingly led to invalidation in the equal protection context, absent unusual circumstances.[13]

2. *Tiers and Free Speech Jurisprudence*

Although the three-tiered approach is rooted in the Equal Protection Clause, it has spread to other areas of constitutional law. In recent years, the Court's First Amendment free speech jurisprudence, originally distinct from its equal protection jurisprudence, has entirely succumbed to the tiered-review model.[14] In the free speech area, a

166, 174-75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

11. Gunther, *supra* note 7, at 8. *But see Adarand Constructors,* 115 S. Ct. at 2117 (suggesting that certain race-based classifications might withstand strict scrutiny).

12. *See, e.g.,* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (striking down law placing special burdens on "hippies" under rational basis standard); Korematsu v. United States, 323 U.S. 214, 219 (1944) (approving forced relocation of Japanese Americans during World War II under an embryonic "strict scrutiny" standard).

13. *See, e.g., VMI,* 116 S. Ct. at 2287 (invalidating the male-only admissions policy at the Virginia Military Institute). *But see, e.g.,* Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (upholding the male-only registration provisions under the Military Selective Service Act).

14. For a description and criticism of the gradual—and apparently inadvertent—absorption of equal protection doctrine into free speeeh cases, see Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses,* 1994 SUP. CT. REV. 57, 116 (criticizing this development as misguided). I have elsewhere extensively discussed recent developments in First Amendment doctrine, and the following description draws on that analysis. *See*

regulation is subject to strict scrutiny if it is "content-based." Regulations that the Court deems "content-neutral," on the other hand, are subject to the *Ward/O'Brien* balancing test,[15] an intermediate form of scrutiny. The *Ward/O'Brien* approach is essentially an *ad hoc* balancing test.[16] It has evolved from a number of different strands in the Court's First Amendment jurisprudence—including, notably, its cases concerning regulation of the public forum, regulation of expressive conduct, and regulation of commercial speech—into a universal test for content-neutral regulations.[17] Finally, although the Court has not expressly so held, its cases suggest that minor and incidental burdens on speech imposed by laws not directed at speech as such are subject to minimal or no First Amendment scrutiny.[18] As with its equal protection cases, therefore, the Court's free speech analysis has become dominated by tiers, with at least the highest and lowest tiers being largely outcome-determinative.

3. *Tiers and Privacy Jurisprudence*

Tiered review has also been adopted in the area of the so-called "privacy" rights, meaning the unenumerated rights the Court has found in the Due Process Clause and the Ninth Amendment.[19] If a regulation impinges upon a fundamental right, it has been subjected to strict scrutiny, as defined in the equal protection context.[20] If no fundamental right is implicated, however, the law will be subjected only to rational basis review and generally upheld.[21] But the story is clearly more complex with regard to privacy rights than with equal protection and free speech doctrine. At least in the context of regulations limiting the constitutional right to an abortion, the above statement of the

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Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 158-76 (1995).

15. *See Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2458-59 (1994); *Simon & Schuster*, 502 U.S. at 112; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. O'Brien, 391 U.S. 367, 377 (1968); Bhagwat, *supra* note 14, at 166-67.

16. By "*ad hoc* balancing," I mean an approach that appears to decide cases based on the intuitive judgment of a majority of the Court about the relative strengths of the governmental and individual interests presented in the case. For a further discussion of balancing in current doctrine, see *infra* text accompanying notes 71-76.

17. *See* Bhagwat, *supra* note 14, at 167-69.

18. For an insightful discussion of this aspect of the Court's jurisprudence, see Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204-07 (1996) (discussing Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)).

19. These include the right to choose an abortion, the right to sexual privacy including the use of contraceptives, the right to marry, and rights associated with a parental relationship. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Zablocki v. Redhail, 434 U.S. 374 (1978); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

20. *See Zablocki*, 434 U.S. at 388; *Roe*, 410 U.S. at 155.

21. *See* Bowers v Hardwick, 478 U.S. 186 (1986).

Court's approach to privacy-rights cases may no longer be correct. In *Planned Parenthood v. Casey*, the Court adopted an "undue burden" standard, suggesting that regulations that impose an undue burden on the abortion right are *per se* unconstitutional—not merely subject to strict scrutiny—whereas other regulations are *per se* constitutional.[22]

Privacy doctrine thus also focuses on the means used by the government to accomplish its purpose. Once the means are categorized, however, the case is decided; no analysis of purpose is undertaken, nor indeed does the Court even bother with the fig leaf of determining whether the chosen means are a good "fit" for the asserted ends, as the equal protection and free speech cases purport to do. *Casey*'s bright-line *per se* standard may be explicable as an acknowledgment that, where pre-viability abortions are concerned, strict scrutiny is necessarily "fatal in fact" because the Court has already conducted the necessary inquiry and has decided that *no* possible government interest justifies such a regulation. If this view is correct, rational basis review should result in regulations being upheld, for similar reasons.[23] Thus, like equal protection and free speech, privacy analysis can also be seen as an example of outcome-determinative, means-based analysis because of its structure. Where it differs is that current privacy doctrine seems to have only two tiers, rather than the three provided in equal protection and free speech analysis. Privacy jurisprudence does not appear to have room for a middle tier of review under which rights and interests are balanced.[24] Even though the symmetry is not perfect, the enormous influeuce of the Court's tiered approach is evident in this area of individual rights jurisprudence as well.

B. Historical and Practical Limits of the Three-Tiered Approach

"Tiers" and "scrutiny" are thus the watchwords of current doctrine. This mode of review is not, however, inevitable, nor does the language of the three-tiered approach fully describe the cross-currents driving the Court's decisions. First, despite how firmly entrenched the approach has now become, the "tiers" of current doctrine are largely a product of the later Warren and Burger courts, although older cases do

22. *See Casey*, 505 U.S. at 874; *see also* Dorf, *supra* note 18, at 1220 n.198.

23. *See* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 878-81 (1994). As I will discuss later, this explanation of *Casey* leaves open a difficult question of how to deal with laws that are meant to burden the abortion right in impermissible ways, but impose a relatively minor burden. *See infra* Part III.C.

24. *See* Brownstein, *supra* note 23, at 926, 939. This distinction may be of less importance than meets the eye, however, because as Brownstein acknowledges, in close cases of somewhat burdensome abortion regulations, the Court appears to weigh government interests and the burden on individual rights in the course of making the undue burden determination. *See id.* at 891.

hint at the approach. The first use of the phrase "strict scrutiny" in an equal protection challenge to a race-based classification appears in the Japanese-American internment cases during World War II,[25] and the concepts underlying strict scrutiny can be traced back to the famous footnote 4 of the *Carolene Products* case.[26] The phrase "compelling government interest" seems to have made its first appearance in Justice Frankfurter's 1957 concurring opinion in *Sweezy v. New Hampshire*.[27] Despite these antecedents, however, tiered review did not become *the* equal protection methodology until the late 1960s and 1970s. Furthermore, as discussed above, the adoption of tiered review in the First Amendment area seems to have been almost inadvertent,[28] and the use of tiered scrutiny continues to be disputed, or applied inconsistently, in the privacy cases.

Moreover, the vagueness and undeveloped nature of tiered scrntiny is an even greater challenge to its authoritativeness than its relatively recent vintage. In this respect, Gerald Gunther's prescient insights of twenty-five years ago are extremely valuable. With the exception of a clearly problematic classification, such as one based on race, Gunther urged the Court to focus its equal protection scrutiny on the means chosen by the government to pursue its ends, rather than on the validity of the ends themselves.[29] The reason Gunther gave for his suggestion is especially telling, namely, "[t]he avoidance of ultimate value judgments about the legitimacy and importance of legislative purposes."[30]

In the years that followed, the Court seemed to listen. The hallmark of the Court's individual rights jurisprudence during the Burger Court and until quite recently has been a great reluctance to question the legitimacy of governmental purposes, even when the asserted government purpose seems quite clearly pretextual and the true purpose illegitimate.[31] And even when the government's purpose is known and not controverted, as in the typical case, the Court has strongly preferred to use means scrutiny to strike down (or uphold) the government action,

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25. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Of course, in these cases the Court, having identified the racism underlying the internment orders, then "inexplicably" upheld them. *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097, 2106 (1995).

26. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

27. 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring in the result); *see also* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 337 (Leonard W. Levy et al. eds., 1986) [hereinafter ENCYCLOPEDIA].

28. *See* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring).

29. *See* Gunther, *supra* note 7, at 20-24.

30. *Id.* at 21-22.

31. *See generally* Meese v. Keene, 481 U.S. 465 (1987); Wayte v. United States, 470 U.S. 598 (1985); Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

rather than seriously considering whether the asserted ends were "important" or "compelling."[32] Indeed, as numerous commentators have pointed out, the Court's analysis of "government interests," and in particular what constitutes a compelling or important interest, is almost entirely undeveloped.[33] These commentators have argued that the Court has never identified any guiding principles upon which it could base judgments about the validity of democratically-selected purposes—a point that a number of Justices have made as well.[34] This may be an overstatement—one might argue that within the vast number of means scrutiny cases the kernels of a coherent analysis of governmental purposes exist. One might even argue that in a substantial number of cases, means scrntiny has served the Court as a guise for assessing ends, and that this tendency has accelerated in recent years as part of the Court's generally increased concern with government purposes.[35] The recent predominance of means scrutiny, both in name and in fact, is nonetheless extraordinary, and seems most adequately explained by the at least implicit acceptance by the Supreme Court of Gunther's critique of judicial scrutiny of governmental purposes.

The predominance of means analysis in constitutional doctrine is troubling for both practical and theoretical reasons. As a practical matter, judicial reliance on means scrutiny is questionable because courts are not very good at this type of analysis. Legislatures, not courts, have

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32. *See* Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, LAW & CONTEMP. PROBS., Winter 1988, at 79, 89 n.55 (making this point about the Court's privacy cases). That the Court has strongly tended to prefer means scrutiny over ends scrutiny across doctrinal areas is a conclusion I have drawn from reviewing the Court's individual-rights jurisprudence over recent years. The conclusion is difficult to prove, but is I think relatively uncontroversial, and I am quite convinced it is correct.

33. *See* ENCYCLOPEDIA, *supra* note 27, at 337; T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 977 (1987); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 348-50 (1993); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932-37 (1988); Schneider, *supra* note 32, at 92-93; Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 983-85 (1994); David Charles Sobelsohn, Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 462, 479-80 (1977).

34. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring in the judgment); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 233-34 (1989) (Stevens, J., concurring) (quoting Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183-85 (1979) (Blackmun, J., concurring)); *see also* Stephen E. Gottlieb, *Introduction* to PUBLIC VALUES IN CONSTITUTIONAL LAW 2-4 (Stephen E. Gottlieb ed., 1993) [hereinafter PUBLIC VALUES].

35. *See, e.g.*, Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711-15 (1994); Lawrence G. Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 TUL. L. REV. 928, 938 (1985); Schneider, *supra* note 32, at 92; *see also infra* text accompanying notes 73, 255 (considering possibility that some decisions denominated in terms of means scrutiny actually demonstrate a concern with the propriety of governmental purposes).

the best institutional ability to identify and assess the efficacy of means. When courts do second-guess legislative choices of this nature, they tend to be either proceeding *ad hoc* or disguising their true concerns.[36] As a theoretical matter, the almost exclusive judicial focus on means is troubling because it ignores the fact that the Constitution enacts substantive, and not merely procedural, limits on government action. The Constitution constrains not merely *how* the government acts, but also, and more siguificantly, *what* the government may seek to do.[37]

An important point to consider about the modern focus on means scrutiny, and the corresponding lack of scrutiny of government purposes, is that it was not always so. As many scholars have pointed out, prior to the emergence of the New Deal Court and the tradition of judicial deference to economic and social legislation, the Supreme Court and other courts routinely considered the validity of governmental purposes in assessing constitutionality. Indeed, the prevalent doctrinal analysis during the *Lochner*[38] era in the first part of this century required that a challenged law have a "reasonable relationship" to "some purpose within the competency of the state," with the latter requirement giving the standard some bite. Accordingly, the Court's analysis focused almost entirely on the validity of governmental purposes and was quite deferential regarding the legislative choice of means.[39] Thus, when the *Lochner* Court invalidated economic legislation, as it regularly did, it relied on its view of which governmental objectives were permissible. In particular, the Court held that the Due Process Clause of the Fourteenth Amendment prohibited governments from pursuing certain types of interventions in private markets, or other forms of economic paternalism.

Moreover, from the time of the Framers at least until the modern period, it was understood that federal statutes passed for pretextual purposes would *not* withstand scrutiny, even if the facial purpose was within Congress' allotted powers.[40] Courts did not defer to a given statement of purposes, and when they had identified the actual purposes of a given regulation, they then scrutinized those purposes against constitutional

36. *See infra* Part II.A.

37. *See generally* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

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

39. *See* Aleinikoff, *supra* note 33, at 951; David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 647-48 (1994); Gottlieb, *supra* note 33, at 975; Gunther, *supra* note 7, at 42-43; Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1042 (1978); Pildes, *supra* note 35, at 712-13; Schneider, *supra* note 32, at 82 n.11, 88 n.53.

40. *See* Dorf, *supra* note 18, at 1191-92; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 448 (1995).

limitations that they had defined.[41] Of course, the jurisprudence of the *Lochner* Court, most notably the Court's repeated invalidation of economic and social regulation on freedom-of-contract grounds, has been thoroughly disavowed, and is in almost complete disrepute.[42] In addition, and perhaps relatedly, the Supreme Court has long since gotten out of the business of striking down federal legislation because it believes that Congress' motives were not within its delegated authority, and that the invocation of its Article I power was pretextual.[43] These are generally, and quite properly, considered to be positive developments, because the *Lochner* Court undoubtedly had an unnecessarily narrow view of the permissible aims of government action. What is less self-evident, however, is the assumption that by rejecting the actual jurisprudence of the *Lochner* era, modern courts must also entirely turn away from some facets of the constitutional methodology of that era, including scrutiny of government purposes.[44] This is not to devalue the important lessons to be learned from the overreaching of the *Lochner* court—most notably including the dangers of unconstrained and unprincipled purpose scrutiny. But the lessons may not be quite as all-encompassing as the post-New Deal Court has assumed.

Before discussing the recent developments in purpose scrutiny that are the focus of this Article, one last point about the constitutional methodology of the modern Court should be considered—the omnipresent question of the role of "balancing." Since Alexander Aleinikoff's path-breaking 1987 article,[45] and perhaps even before,[46] scholars and judges have debated the role and legitimacy of

41. For a somewhat different view of the *Lochner* era and its relationship to modern constitutional law, see Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

42. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 873-75 (1987). *But see* RICHARD A. EPSTEIN, TAKINGS 277-82 (1985).

43. *See* South Dakota v. Dole, 483 U.S. 203 (1987); United States v. Darby, 312 U.S. 100 (1941); Champion v. Ames (*The Lottery Case*), 188 U.S. 321 (1903). *But see* United States v. Lopez, 115 S. Ct. 1624, 1631-33 (1995) (striking down legislation as beyond Congress' Article I power to regulate interstate commerce, and hinting that Congress' lack of commercial motivation was relevant to the Court's conclusion).

44. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 900 (1985) (O'Connor, J., dissenting) (accusing majority of "*Lochner*ism" in questioning legitimacy of government purpose of localism); *cf.* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996) (arguing for a revival of *Lochner* era methodology in Fourth Amendment jurisprudence). *See generally* Gottlieb, *supra* note 33, at 975-77 (nothing the mistake during *Lochner* era was in how Constitution was interpreted, not necessarily in methodology); Pildes, *supra* note 35, at 751 (discussing how rejection of *Lochner* era cases does not require rejection of its general judicial method).

45. *See* Aleinikoff, *supra* note 33.

46. *See* Henkin, *supra* note 39.

"balancing" in constitutional analysis.[47] How does judicial "balancing" of individual rights against governmental or public interests fit within the Court's current doctrinal framework? As described above, that framework does not appear to contemplate any balancing in most contexts.[48] It is, however, clear that the Court does engage in balancing, even in core individual rights cases; some results are explicable in no other way.[49]

The best explanation for what the Court is doing in these cases may lie in the metaphor of "weighted" balancing, or the "thumb on the scale." When the Court adopts a heightened standard of review, it essentially increases the weight it gives to the individual interest, and so requires a stronger governmental interest in order for the state to prevail. The amount of weight given to the individual right depends on the severity of the scrutiny.[50] However, this Article asserts that in certain—though not all—types of cases involving heightened scrutiny, the Court does not, and moreover should not, engage in balancing at all. Instead, it should utilize a stringent form of governmental purpose analysis.[51] In part, the Court's recent acceptance of balancing is the result of its failure to develop a coherent framework for analyzing government interests. Absent such an analysis, the Court must accept the strength and validity of most interests as proffered by the state. Such ready acceptance forces the Court into balancing if it is to vindicate individual rights. While sometimes unstated, balancing is clearly one aspect of the Court's current jurisprudence, and its use supports the notion that the Court is generally reluctant to engage in purpose scrutiny.

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47. *See, e.g.*, Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring); Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); Symposium, *When Is a Line as Long as a Rock is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS LJ. 707 (1994).

48. I refer here to the three-tiered jurisprudence that dominates the individual rights area. In other areas, such as the Fourth Amendment, the "negative Commerce Clause," and procedural Due Process, the Court has explicitly adopted multi-factored balancing tests, so no reconciliation is necessary. *See generally* Aleinikoff, *supra* note 33, at 963-70 (recounting the growth and spread of interest balancing in constitutional cases).

49. *See, e.g.*, Sable Communications, Inc. v. FCC, 492 U.S. 115, 130 (1989) (striking down total ban on indecent phone messages as not narrowly tailored, while implicitly conceding that other methods could not be *as* effective at advancing the compelling interest of protecting children); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding ban on sleeping in Lafayette Park, despite fact that ban prevented planned demonstration by homeless advocates across from White House); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding registration of only men for draft even though classification was arguably not necessary to advance government interest).

50. *See* Aleinikoff, *supra* note 33, at 984-85; Owen M. Fiss, *Silence on the Street Corner*, *in* PUBLIC VALUES, *supra* note 34, at 195, 199-204; *cf.* Sager, *supra* note 35, at 930-32 (suggesting that the tilted balancing metaphor is one understanding of the state-interest test, but is too narrow).

51. *See infra* Part II.B.2 (discussing "limited purposes" review as an alternative to traditional strict scrutiny).

C. Purpose Scrutiny: Recent Developments in Constitutional Law

Beginning in the early 1980s and accelerating in the past decade, a new methodology has emerged at the borders of the Court's doctrinal framework, and sometimes in apparent conflict with that framework. This new methodology manifests a renewed interest in the previously forbidden terrain of purpose scrutiny, including a new willingness to examine, and pass independent judgment on, the reasons why the state has chosen to burden individual rights. In other words, the Court is beginning to show a willingness, once again, to look at the *why* of state action, not just the *how*. Moreover, in the very recent past, the forces driving these decisions have begun to invade and undermine the Court's general three-tiered scheme. This Section will discuss evidence of the Court's new purpose scrutiny in the areas of equal protection and free speech in particular, and in other areas in general. The Section will conclude with an examination of recent academic commentary on the nature of government purposes, and how courts should analyze those purposes.

1. Purpose Scrutiny in Equal Protection Jurisprudence

The line of cases applying what has been called "rational basis with bite"[52] may provide the clearest example of the Court's renewed interest in government purposes. In these cases, all of which involved challenges to regulation under the Equal Protection Clause, the Court applied its lowest standard of scrutiny, the rational basis test, but nonetheless struck down the regulations because it perceived that the *actual* ends—as distinct from the *proffered* ends—motivating the legislation were illegitimate.[53] First, in a series of cases beginning in 1982, the Court has struck down state statutes that grant benefits based on distinctions between residents and non-residents, or among residents based on the duration of their residency in the state.[54] The Court began

52. *See* Gunther, *supra* note 7, at 21; Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 800-03 (1987).

53. Another factor that may explain the outcome of these cases is the strength of the individual right conferred by the Privileges and Immunities Clause of Article IV. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 73-81 (1982) (O'Connor, J., concurring in the judgment).

54. *See* Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618-23 (1985) (striking down New Mexico law limiting tax benefits to Vietnam veterans based on date of residency); Williams v. Vermont, 472 U.S. 14, 21-27 (1985) (striking down Vermont foreign tax credit exemption limited to those who were residents at time of payment); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882-83 (1985) (striking down Alabama tax on insurance premiums that taxed out-of-state insurers more heavily than in-state); *Zobel*, 457 U.S. at 63 (striking down Alaska law distributing oil revenues based on length of residency); *cf.* Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 909-12 (1986) (striking down under strict scrutiny New York law denying civil service preference points to out-of-state veterans, and finding certain governmental purposes impermissible, not merely not compelling); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261-70 (1974) (applying strict scrutiny and striking down law denying non-emergency medical care to indigents with less than one year of

analysis in these cases, naturally, by examining the means by which the regulations were put into place—the particular classifications chosen by the legislatures. It concluded that the classifications themselves did not implicate a suspect class, and did not necessarily burden the fundamental right to "travel" or "migrate interstate."[55] Despite the facial validity of the chosen means, the Court went on to examine the purposes underlying the legislation, concluding that the only conceivable purposes of the statutes—to "favor[] established residents over new residents,"[56] or to "reward citizens for past contributions"[57] to the State—were illegitimate. According to the Court, they were inconsistent with the structure and purposes of the federal system established by the Constitution.

The Court did not apply means scrutiny in these cases—there was little question that the chosen means directly advanced whatever ends the government was pursuing—and so the entire constitutional debate centered on the ends that the states could legitimately pursue. The Court's decisions in these cases can be contrasted with its opinion in *Nordlinger v. Hahn*,[58] where it upheld California's Proposition 13 against an equal protection challenge. Proposition 13 had established differing methods of property tax assessment for new and existing homeowners, which resulted in widely disparate tax burdens among homeowners. In particular, the initiative placed a disproportionate burden ou recent immigrants into California. Nevertheless, the Court upheld the initiative because its underlying purposes—to preserve and stabilize local neighborhoods and to protect the reliance interests of long-time homeowners, especially poor ones, against sudden rises in property taxes—were wholly legitimate and unrelated to any parochial concerns.[59] *Nordlinger* supports the view that the Court's earlier decisions striking down state benefits regulations were actually examples of purpose scrutiny, because the effects of Proposition 13 on new residents were at least as burdensome as those created by the regulations previously invalidated.

Second, in at least two modern decisions, and one earlier decision, the Court has struck down legislation that appeared to discriminate gratuitously against certain classes of citizens, even though it did not find

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residency; finding certain governmental interests impermissible); Shapiro v. Thompson, 394 U.S. 618, 631-34 (1969) (striking down one-year residency requirements to receive welfare; finding certain interests impermissible *before* selecting standard of review).

55. *See, e.g., Shapiro*, 394 U.S. at 634-37.

56. *Zobel*, 457 U.S. at 65 (quoting Vlandis v. Kline, 412 U.S. 441, 450 (1973)) (internal quotations omitted).

57. *Id.* at 63.

58. 505 U.S. 1 (1992).

59. *See id.* at 11-14.

that the legislative classifications were "suspect." Instead, in each of these cases the Court found that the purpose driving the challenged legislation was "a bare . . . desire to harm a politically unpopular group [that] cannot constitute a *legitimate* government interest" under the Equal Protection Clause."[60] These cases represent an even larger fissure within the Court's three-tiered system than the residency cases because they find a particular governmental purpose—"punitive discrimination"[61]—inherently impermissible under the Equal Protection Clause, even if no suspect classification is involved[62] and if no other constitutional provision is even arguably implicated.[63] And it is clear that these decisions turn on the government's illegitimate purposes, because the Court has often held that the mere disparate impact of a regulation on a vulnerable group is not enough to render the regulation unconstitutional.[64] The cases hold that the Equal Protection Clause does not simply constrain government from employing certain suspect classifications; it renders classifications adopted *because of* animus toward the affected class unconstitutional.[65]

While this "rational basis with bite" review presents the clearest example of the Court's newfound interest in purpose scrutiny, it is far from the only example. In recent years, the Court has scrutinized government purposes in other equal protection cases, and has even looked at purposes when it has employed higher levels of scrutiny. The most

60. Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotations omitted) (striking down law placing special burdens on homosexuals); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985) (striking down zoning ordinance restricting ability of mentally retarded to establish group homes); *Moreno*, 413 U.S. at 534 (striking down Food Stamp Act provision denying benefits to households containing "unrelated" people, on the grounds that motivation was animus); *cf.* Plyler v. Doe, 457 U.S. 202, 216-30 (1982) (striking down Texas law denying free public education to children who are not legal residents under an undefined form of heightened scrutiny seemingly based in part on a perception that the law was partly motivated by irrational animus).

61. *Plyler*, 457 U.S. at 240 (Powell, J., concurring) (asserting that the challenged law is unconstitutional because it embodies a form of "punitive discrimination").

62. *But cf. Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting) (suggesting that animus against gays and lesbians is not an illegitimate purpose because homosexuals are not a suspect class).

63. *But cf. Zobel v. Williams*, 457 U.S. 55, 73-81 (1982) (O'Connor, J., concurring in the judgment) (arguing that the Privileges and Immunities Clause of Article IV is the proper basis for the Court's residency decisions).

64. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (upholding imposition of fees for public school buses, despite impact on access of indigents to education, because neither suspect class nor fundamental right was burdened); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973); *see also* Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process.") (emphasis added).

65. One question this raises is, of course, precisely what function suspect and semi-suspect categories perform in the Court's jurisprudence. The answer seems to be that for historical reasons, these classifications are *so* thoroughly associated with improper motives that they are presumed to be unconstitutional, and will be permitted only in very special circumstances. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995); *see also infra* Part II.B.1.

notable examples of this trend are the Court's recent decisions on affirmative action. Beginning with its 1989 decision in *City of Richmond v. J.A. Croson Co.*,[66] and culminating with the recent decision in *Adarand Constructors, Inc. v. Pena*,[67] the Court has held that *all* governmental uses of race-based classifications are subject to the strict scrutiny test, even when the classifications are clearly designed to benefit minorities who have been subject to previous discrimination. But the story does not end there—one by-product of the affirmative action decisions is an active debate over which government purposes qualify as "compelling," and the beginnings of a jurisprudence that examines the justifications behind benign racial classifications.[68]

This purpose-oriented jurisprudence represents a substantial shift from the earlier cases dealing with race-based classifications that disadvantaged minorities. Since the discredited *Korematsu* decision, the Court has never found *any* state interest sufficiently compelling to justify a race-based classification that disadvantaged minorities, and further has strongly suggested that no such interest exists.[69] In the affirmative action context, however, it seems likely that *some* governmental purposes are "sufficiently compelling," although it is far from clear which purposes qualify. With no sound analytic framework in place to help them analyze and weigh government purposes, the Court has developed an *ad hoc* jurisprudence that seems to reflect more the proclivities and preferences of the decision maker than any constitutional principles.[70]

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66. 488 U.S. 469 (1989) (striking down city contracting program with 30% set-aside for minority-owned contractors).

67. 115 S. Ct. 2097 (1995) (requiring all racial classifications to be analyzed under strict scrutiny).

68. *See, e.g., Adarand Constructors*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting); Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting); Wittmer v. Peters, 87 F.3d 916, 919-20 (7th Cir. 1996); Hopwood v. Texas, 78 F.3d 932, 948-55 (5th Cir. 1996).

69. *See Adarand Constructors*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214 (1944)). For the textual origins of the term "strict scrutiny," and for an example of a punitive race-based classification that survived Supreme Court review, see Korematsu v. United States, 323 U.S. 214 (1944)

70. *See Adarand Constructors*, 115 S. Ct. at 2110 (reading precedent to suggest that racial classifications may be used to "eradicate the effects of private discrimination") (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491-92 (1989)); *id.* at 2118-19 (Scalia, J., concurring in part and concurring in the judgment) (asserting that *no* interest is sufficiently compelling to justify a racial classification); *id.* at 2127-28 (Stevens, J., dissenting) (arguing that diversity remains a government interest sufficient to support racial classifications); *Metro Broad.*, 497 U.S. at 612 (O'Connor, J., dissenting) (remedying past discrimination is *only* compelling interest to support racial classifications); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion) (concluding that providing minority role models for minority students is not a compelling interest); *id.* at 316-17 (Stevens, J., dissenting) (finding such an interest consistent with the Equal Protection Clause); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (holding that racial or ethnic diversity in an educational setting is a compelling interest); *Wittmer*, 87 F.3d at 919, 921 (finding compelling interest supporting racial preference given to black candidate for lieutenant position in "correctional boot camp," and rejecting as "unreasonable" view expressed in *Hopwood* and other

The Court's interest in purpose scrutiny in the affirmative action context is clear, and probably inevitable given the Court's reluctance either to embrace or to wholeheartedly condemn race-based remedies. Its halting jurisprudence in this area, however, demonstrates that the Court has yet to settle upon any clear methodology or defined principles to guide its efforts at purpose scrutiny.

2. Purpose Scrutiny in Free Speech Jurisprudence

The Court's recent free speech jurisprudence likewise contains an increased, though less explicit, attention to government purposes. This attention is especially apparent in the Court's "content" jurisprudence, where the Court's decision as to whether a given regulation is "content-based" or "content-neutral" determines which tier of scrutiny will apply. As I have noted elsewhere, there is an inconsistent but recurring tendency in the Court's content jurisprudence to define content-neutral laws as those "justified without reference to the content of the regulated speech"—in other words, the question of whether a law is content-neutral or not depends on the *purpose* of the challenged law.[71] On a related note, in the *Turner Broadcasting*[72] case described in the Introduction, the Court split sharply over whether a regulation whose purpose was to assure diversity among the viewpoints expressed in the media was content-based, and indeed over whether such a purpose was even permissible, again demonstrating the increased importance of governmental objectives in applying the Court's doctrine.[73] Other examples abound.[74] Together, these cases reveal an extraordinary doctrinal confusion over

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cases that remedying past discrimination is only compelling interest); *Hopwood*, 78 F.3d at 948, 951 (finding that *only* possible compelling interest is to remedy prior discrimination by the particular governmental body that has adopted the racial classification).

71. Bhagwat, *supra* note 14, at 161-62 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))) (internal quotations omitted); *see also* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994) ("We thus look to the government's purpose as the threshold consideration."); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986); American Library Ass'n v. Reno, 33 F.3d 78, 84-87 (D.C. Cir. 1994); Brownstein, *supra* note 23, at 922-23.

72. Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).

73. *Compare Turner Broadcasting*, 114 S. Ct. at 2470 (finding viewpoint diversity to be an important government interest) *with id.* at 2477 (O'Connor, J., dissenting) (concluding that any rule geared toward ensuring diversity must be content-based and therefore constitutionally suspect).

74. *See, e.g.*, Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc) (disagreements between the majority and the dissent over what purposes the government may pursue in regulating indecent speech), *cert. denied*, 116 S. Ct. 701 (1996). For other discussions of government purposes, see Burson v. Freeman, 504 U.S. 191 (1992) (considering the constitutionality of a statute forbidding political speech near a polling place in order to protect the voting process); United States v. Eichman, 496 U.S. 310 (1990) (discussing the constitutionality of criminalizing flag-burning for the purpose of preserving the flag as a symbol of nationhood); Texas v. Johnson, 491 U.S. 397 (1989) (same). Taken together, these cases reveal a renewed judicial interest in examining the governmental purposes underlying speech regulation. The sharp fissures that have developed within the Court on this issue underscore the significance of this effort.

the most basic questions underlying the Court's content jurisprudence, and suggest that at least part of that confusion is related to the Court's failure to develop an adequate framework to engage in purpose scrutiny.

Purpose analysis is also becoming more important in the area of commercial speech regulation. In a number of recent commercial speech cases—most notably, last Term's decision in *44 Liquormart*[75] discussed in the Introduction—the Court has suggested that creating or maintaining public ignorance, even in pursuit of otherwise legitimate ends, are inherently suspect, and perhaps automatically unconstitutional purposes, because such aims violate fundamental First Amendment principles.[76] In these cases, as in the equal protection context, the Court is moving away from the traditional three-tiered scrutiny, balancing tests, and deference to legislative objectives of the Burger Court, and toward a new form of purpose scrutiny.

3. *Purpose Scrutiny in Other Areas*

A focus on government purposes can be found in other areas of individual-rights jurisprudence as well, although it is less prominent. For example, after the recent *Casey* decision, there is some indication that purpose scrutiny will play an increased role in the Court's abortion jurisprudence and its application of the "undue burden" standard

75. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

76. Of particular interest in this regard is Justice Thomas' concurring opinion in *44 Liquormart*, which argues that an asserted governmental interest in maintaining consumer ignorance is *per se* illegitimate. *See id.* at 1515-17 & n.2 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas traces this principle to a long line of commercial speech cases, beginning with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 767-70 (1976), the Court's first modern commercial speech case. *See 44 Liquormart*, 116 S. Ct. at 1516-17 & n.2. It should be noted that the illegitimate purpose identified by the Court in these commercial speech cases—producing ignorance to manipulate consumer choice—can be recharacterized as a form of means analysis, ignorance being an improper means to the legitimate end of discouraging vice. What this points out is that means and purposes can blur, depending on the level of generality with which purposes are defined. This in turn suggests that in the Court's means scrutiny cases one can find the kernels of an ends analysis, if one describes governmental purposes in appropriately narrow terms. I am grateful to Michael Dorf for this insight.

articulated in *Casey*.[77] Furthermore, there is evidence of purpose scrutiny in the free exercise of religion context as well.[78]

As the strict and intermediate scrutiny decisions discussed above suggest, the Court has increasingly focused on government purposes instead of merely examining legislative means in heightened-scrutiny cases as well as in rational basis decisions. Although the Court may apply purpose scrutiny in both situations, the nature and focus of the Court's inquiry in heightened-scrutiny cases differs from that accorded under rational basis.[79]

4. Recent Academic Commentary on Purpose Analysis

The recent increased interest in purpose scrutiny has not been limited to the judiciary—the past few years have also seen increasing, though still somewhat embryonic, academic commentary on the nature of government interests and how courts should analyze those interests. The pioneer in this area is Stephen Gottlieb, who in the last decade has argued tirelessly for greater academic attention to the role of government interests in the Court's constitutional jurisprudence.[80] Other than a single student note,[81] Gottlieb's 1988 article appears to have been the first substantial examination of the theory underlying governmental interests, and he has played an important role in stimulating more recent work in the area. Gottlieb's basic position—that valid governmental interests, like individual constitutional rights, must be rooted in the constitutional text—is certainly debatable,[82] but it has provided a starting point for further discussion. Alexander Aleinikoff's important 1987 piece on constitutional balancing also touches on the topic of governmental purposes, although that is not the focus of the article.[83]

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77. *See* Brownstein, *supra* note 23, at 939-42 (reading *Casey* as suggesting that laws with the impermissible purpose of seeking to hinder exercise of the abortion right are *per se* unconstitutional); Dorf, *supra* note 18, at 1233-35 (stating that while *Casey*'s language suggests that a law passed with the purpose of slightly burdening the abortion right would be constitutional, that cannot be what the Court actually meant); *cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down statute prohibiting distribution of contraception to unmarried persons under rational-basis review, but engaging in searching scrutiny of actual legislative motives); Gunther, *supra* note 7, at 34-36 (suggesting that the only explanation for the analysis in *Eisenstadt* was "a value-laden appraisal of the legitimacy of ends"); Schneider, *supra* note 32, at 92 (arguing that *Eisenstadt* improperly defined and evaluated the state interests at issue).

78. *See* Dorf, *supra* note 18, at 1240 (discussing Employment Division v. Smith, 494 U.S. 872 (1990)).

79. How the ends scrutiny should and does differ in different arenas is discussed *infra* Part II.B.

80. *See, e.g.*, Gottlieb, *supra* note 34; Gottlieb, *supra* note 33; Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825 (1994).

81. *See* Sobelsohn, *supra* note 33.

82. *See* Erwin Chemerinsky, *Constitutional Scholarship in the 1990s*, 45 HASTINGS L.J. 1105, 1114-16 (1994) (reviewing PUBLIC VALUES, *supra* note 34).

83. *See* Aleinikoff, *supra* note 33, at 947, 977 & n.214, 986.

In the past few years, however, an important literature on government purposes and constitutional law has emerged. The Albany Law Review held a symposium on the subject, which eventually turned into an entire book edited by Stephen Gottlieb.[84] Another symposium, which focused largely on the topic, was organized by the Hastings Law Journal.[85] Most of the recent literature has focused on the validity of particular governmental interests within specific areas of constitutional law.[86] But there are exceptions, including Richard Pildes' work arguing for a renewed focus on "excluded reasons" as a basis for constitutional adjudication,[87] and Richard Fallon's examination of the relationship between individual rights and governmental powers.[88] Across the spectrum, however, one central theme emerges from the literature: there is a need for a principled theory of permissible and compelling governmental purposes, and the Supreme Court has failed to articulate such a theory. The commentators also strongly suggest that the Court's recent purpose analysis, without a unifying theory, has tended to be completely *ad hoc*, and driven largely by political or social predilections.[89] Despite these concerns, none of the commentators has articulated a more general approach to the questions of when and under what standards the Court should employ purpose scrutiny, or of how the nature of purpose scrutiny might vary across different areas of substantive constitutional law. The remainder of this Article begins to sketch the outlines of such a theory.

II
PURPOSE SCRUTINY: THEORY AND PRACTICE

This Part addresses the two obvious and difficult questions about the workability of purpose scrutiny within our constitutional system. First, can the Supreme Court develop a principled and effective purpose

84. *See* Gottlieb, *supra* note 34, at 2-3 (acknowledgements); *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535-761 (1992).

85. *See* Symposium, *supra* note 47.

86. Of particular note in this regard is Carl Schneider's work on government interests in the privacy area. *See, e.g.*, Carl E. Schneider, *State-Interest Analysis and the Channeling Function in Privacy Law*, *in* PUBLIC VALUES, *supra* note 34, at 97, 99-109; Schneider, *supra* note 32, at 92-93; *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443-505 (1996) (discussing role of government purposes in free speech doctrine); Margaret Jane Radin, *Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory*, *in* PUBLIC VALUES, *supra* note 34, at 69, 79-83 (discussing the evaluation of government interests in takings jurisprudence); Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, *in* PUBLIC VALUES, *supra* note 34, at 137, 139 (addressing the role of government interests in criminal procedure jurisprudence).

87. *See* Pildes, *supra* note 35.

88. *See* Fallon, *supra* note 33.

89. *See, e.g.*, Robert F. Nagel, *"Unfocused" Governmental Interests*, *in* PUBLIC VALUES, *supra* note 34, at 45, 58-59; Schneider, *supra* note 32, at 97-99.

scrutiny that is grounded in the Constitution? Second and relatedly, is purpose scrutiny consistent with the role of an unelected judiciary in our constitutional system?[90] For purpose scrutiny to be meaningful, it will have to be rigorous and consistently applied, but a rigorous purpose scrutiny could easily slip into *Lochner*-esque overreaching. Nevertheless, I believe that a properly and adequately constrained purpose scrutiny is conceivable. Furthermore, if properly limited, purpose scrutiny is a perfectly legitimate function for the judiciary. Finally, purpose scrutiny has substantial potential to both cement doctrinal coherence and further constitutional principles. The Supreme Court should therefore expand its recent focus on governmental purposes, adjusting its doctrine to provide for a more meaningful scrutiny of governmental objectives.

To be legitimate, purpose scrutiny must be principled and textually based. First, a court engaging in purpose scrutiny should identify certain governmental purposes that are inherently illegitimate when advanced to justify burdens on particular individual rights. Second, it should identify which purposes may be properly advanced to justify actions that appear to directly infringe core constitutional rights. Third, when neither an illegitimate purpose nor a core constitutional violation appears to be present, the court should recognize the need for judicial deference to democratically selected objectives.

As this proposed framework suggests, purpose scrutiny is not designed to give the judiciary a blank check to review all governmental purposes based on a particular judge's notions of rationality or legitimacy; when a court lacks a specific, constitutional basis for employing purpose scrutiny, the court should refrain. In addition, it remains a threshold requirement for judicial scrutiny that a *right* be infringed in a constitutionally meaningful sense by the challenged government action,[91] although an examination of how rights are defined and infringed is well beyond the scope of this paper.[92] Even with these practical limitations, however, systematic judicial scrutiny of governmental purposes

90. Of course, some state judiciaries are elected. But given the dominance of the federal courts, and the Supreme Court in particular, in formulating constitutional law, the assumption that most important constitutional law is made by democratically unaccountable judges seems reasonable.

91. My position on this point appears to separate me from Alan Brownstein and Richard Pildes. *See* Brownstein, *supra* note 23, at 939-42; Pildes, *supra* note 35, at 726-27. It should also be noted that barriers to judicial review might arise quite independently from substantive doctrine, for example from standing principles. However, I am concerned in this Article primarily with governmental actions that infringe rights and harm individuals, *not* with actions that, while arguably violating constitutional principles, do not cause direct injury to individuals—such as for example, certain Establishment Clause violations, or violations of the separation of powers.

92. In this regard, Michael Dorf's recent work is extremely insightful, and I will be relying upon it to a substantial extent. *See* Dorf, *supra* note 18, at 1175.

would have substantial consequences for constitutional law theory and practice.

A. Problems of Competence and Legitimacy

It is an axiom of modern constitutional scholarship that, when reviewing the actions of the democratically selected branches, the courts are better suited to evaluation of the *means* by which governments accomplish their purposes than the *ends* they choose to pursue. Gerald Gunther articulated this position twenty-five years ago,[93] and other scholars have made similar arguments.[94] Indeed, this impulse appears to underlie much of the modern criticism of judicial "balancing."[95] The reasoning underlying this conclusion is quite simple, and is tied to Alexander Bickel's concept of the "counter-majoritarian difficulty."[96] Simply put, the idea is that in a democracy, the choice of what ends government should pursue, and the evaluation of the importance of those ends, should be exercised by elected representatives.

Once this principle is accepted, the conclusion that courts have neither the ability nor the right to second-guess legislatures (or elected executive-branch officials) as to governmental objectives follows naturally. As noted earlier, the Supreme Court's three-tiered approach, which in practice focuses principally on government means, seems to accept this logic.[97] The Court has also seemed to accept Gunther's related argument that when courts engage in means scrutiny, they deal with empirical and evidentiary issues well within their traditional sphere of competence.[98] In contrast, when courts engage in purpose scrutiny, they are not on such comfortable footing.[99] Any defense of a reinvigorated purpose scrutiny must therefore respond to the argument that courts lack both the legitimacy and the competence to engage in scrutiny of legislative ends.

To begin with, the argument that courts lack the *competence*, as opposed to the *legitimacy*, to engage in purpose scrutiny is highly suspect. One important assumption underlying the means-oriented position is that courts are somehow better at assessing the wisdom of the

93. *See* Gunther, *supra* note 7, at 20-24.

94. *See, e.g.*, Fallon, *supra* note 33, at 387-88; Sager, *supra* note 35, at 931-32; Schneider, *supra* note 32, at 117; Sobelsohn, *supra* note 35 at 494; *cf.* Gottlieb, *supra* note 33, at 966-69.

95. *See* Aleinikoff, *supra* note 33, at 986; Henkin, *supra* note 39, at 1048.

96. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (coining term "counter-majoritarian difficulty"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-9 (1980); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1525-28 (1992).

97. *See supra* text accompanying notes 7-13.

98. *See* Gunther, *supra* note 7, at 20-22.

99. *See id.* at 24, 43.

means chosen by a legislature than at assessing the ends. Another is that means scrutiny is more "neutral" and less affected by value judgments than purpose scrutiny. But commentators, including Gunther himself, have noted that "tailoring" analysis, the Court's general label for means scrutiny, is notoriously manipulable. In fact, the Court has manipulated means scrutiny with some frequency as a way of making implicit judgments about legislative ends.[100] Moreover, this is hardly surprising; the kinds of factual and predictive judgments required for a meaningful and non-arbitrary means scrutiny are extremely complex, and far better suited to a legislative setting than a judicial one. For example, when a legislature chooses among different means to achieve a given end, decisions must be made about the relative effectiveness and cost of each option, and what other benefits and detriments, both political and practical, might be associated with each option. Indeed, to evaluate accurately the wisdom of a particular choice of means, one would need to know a great deal about the range of alternative means that were available at the time the legislation at issue was enacted, including the expected effectiveness and costs of each of those options. These kinds of choices, while perhaps resting at least partly on facts that are in some sense "empirical," also require pervasive and fundamental value judgments, which it is hardly clear that judges are competent to make. Even the "empirical" issues underlying a choice of means are not necessarily the kinds of facts courts are very good at "finding." Courts are notoriously bad at evaluating legislative and constitutional facts,[101] and full knowledge regarding legislative options is in any event extremely unlikely to be available in litigation. For these reasons, Gunther's hope of a neutral and effective means scrutiny would be hard to fulfill.

In contrast to the difficulty of locating and evaluating empirical evidence about means, information about legislative ends and purposes is often far more accessible. After all, it is not particularly difficult to make reasonable judgments about the motivations behind legislation in most cases. Statutory text and structure, legislative history, and an examination of political context provide strong and generally adequate tools with which to make these determinations. In fact, as Richard Pildes points out, evaluating legislative purposes may be what courts are *best*

100. *See* Schneider, *supra* note 32, at 89-92 (cataloging problems with Court's means analysis); *see also* Gunther, *supra* note 7, at 33-36 (pointing out that Court's rigorous means analysis in both *Reed v. Reed*, 404 U.S. 71 (1971), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), seemed to mask some underlying hostility to the challenged legislation in each case).

101. For a general discussion of the Supreme Court's (mis)handling of empirical issues in constitutional adjudication, see David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991).

suited to do, given their typical training and expertise.[102] Naturally, this discussion raises the broader question of whether legislative purpose is ever definable in a meaningful sense, since the hidden motivations of legislators are rarely known, and because attributing one defined "intent" to a multi-member body is necessarily a fictitious enterprise. Although the resolution of this important question is beyond the scope of this Article, I am inclined to agree that while of course legislative purpose is to some degree a fictional concept, the process of attributing purposes to the actions of lawmaking bodies is implicit in the legal method. In other words, the legal community has agreed upon a series of conventions and techniques through which we construct a narrative account of "legislative intent" or purpose, and though naturally there are close cases, the process produces a reasonably consistent account in most cases.[103] Also, the fact that the actual legislative purpose in any given case may be a matter of dispute does not strike me as a particularly powerful objection to purpose scrutiny; it is true that purpose scrutiny will continue to require the exercise of judicial judgment, but that is what judging is all about. Only the most ardent supporter of "neutral principles" would believe that the need to make some difficult judgments in close cases constitutes a significant objection to a theory of constitutional adjudication.

This of course leaves the problem of legitimacy—even if courts *can* define and evaluate legislative purposes, *should* they? Here, many of the objections to judicial purpose scrutiny are well-founded. It is quite true that assessing the strength of government interests and then choosing which interests to pursue is a quintessentially legislative task. *Ad hoc* reweighing of such legislative judgments by the judiciary is highly problematic. But this is precisely the kind of analysis that the upper tiers of the current three-tiered system appear to contemplate, through the language of "compelling" and "important" government interests. In practice, of course, courts have been understandably reticent about exercising their claimed authority in this regard,[104] and have focused primarily on the means by which government action is

102. *See* Pildes, *supra* note 35, at 729 n.45 (citing Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1872 (1987)).

103. For an excellent exposition of this position, see Radin, *supra* note 86, at 79-83; *see also* Pildes, *supra* note 35, at 729 n.45; Sheppard, *supra* note 33, 984-85 & nn.50-51. *See generally* RONALD DWORKIN, LAW'S EMPIRE 49-53, 313-17 (1986). For a somewhat different, but related approach to motive analysis that emphasizes somewhat the difficulty of identifying legislative motives, see Kagan, *supra* note 86, at 439-41. Finally, for a more sanguine view of the Court's ability to identify invidious purposes, see JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 52-53 (1995).

104. *See supra* text accompanying notes 8-13.

accomplished. Nevertheless, even the possibility of such review may undermine democratic principles.

Moreover, even beyond the basic legitimacy issue, there are enormous practical difficulties with *plenary* judicial reweighing of government interests, because the possible universe of governmental purposes is essentially infinite. It is therefore difficult to imagine any consistent "theory of the state" that could be used to explain, and evaluate, every single one of these purposes.[105] The basically unlimited scope of valid government purposes flows naturally from the broad modern understanding of the "police powers" of the states,[106] the extraordinarily broad range of federal government powers after the New Deal,[107] and the absence of limits on which objectives Congress may pursue through the use of those powers.[108] The critical consequence of the broad scope of government power is that when the judiciary seeks to reevaluate a chosen legislative purpose, it has no basis upon which to conduct such an evaluation other than the political instincts of the deciding judge—and that, of course, is anathema to democratic theory.[109] The problem of how to construct a legitimating theory of purpose scrutiny is therefore a real and serious one.

To a substantial extent, this argument parallels the traditional, Bickelian argument against assertive judicial review because of the counter-majoritarian difficulty,[110] an argument with which, at the broadest level, I agree. Ultimately, judicial review must be somewhat constrained if it is not to undermine democracy, and *ad hoc* and plenary judicial second-guessing of legislative policy judgments is entirely un-

105. *See* Aleinikoff, *supra* note 33, at 947, 977; David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 757-58 (1994); Fallon, *supra* note 33, at 348-51; Sheppard, *supra* note 33, at 983-84; Stith, *supra* note 86, at 141-143.

106. *See* Fallon, *supra* note 33, at 350-51. For a history of the state police power, challenging the view that the "modern" police power represents an expansion of state authority, see William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994).

107. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (upholding Congress' power to regulate home-grown wheat); United States v. Darby, 312 U.S. 100, 115 (1941) (upholding Congress' authority to regulate wages and hours of workers producing goods shipped in interstate commerce); *see also* Dorf, *supra* note 18, at 1192-94. *But see* United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (striking down federal legislation banning possession of a handgun in a school zone as beyond Congress' Article I power).

108. *See* Sonth Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (upholding federal regulation of the legal drinking age pursuant to spending power); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding federal regulation of racial discrimination under commerce power); Champion v. Ames (*The Lottery Case*), 188 U.S. 321, 363-64 (1903) (upholding federal regulation of lottery tickets under commerce power).

109. One consequence of accepting a generally unlimited scope of permissible governmental objectives is that, unlike Stephen Gottlieb and Kate Stith, I do *not* believe that governmental interests in constitutional adjudication can, or must, be derived exclusively from the Constitution. *But see* Gottlieb, *supra* note 33, at 937; Stith, *supra* note 86, at 143-45. Rather, the source of these interests is in most instances the will of the majority. *See* Chemerinsky, *supra* note 82, at 1114-16.

110. *See* BICKEL, *supra note* 96, at 16.

acceptable. But these largely uncontroversial principles need not doom all judicial review, or even all judicial review of legislative purposes. More importantly, they need not even limit purpose scrutiny to the few areas—such as anti-discrimination or voting rights law—where the need for representation reinforcement renders the general assumption of deference to democratic institutions less compelling.[111] Such a narrow approach would severely weaken the protections granted by the Bill of Rights and the Civil War Amendments. Moreover, it is not necessary to retain judicial legitimacy. Instead, what Bickelian principles *do* require is that any searching, judicial review of legislative purposes must be meaningfully constrained by and grounded in the Constitution itself—the one source of authority that properly trumps the decisions of democratically elected bodies.[112] This point is not controversial, but it has important implications for the construction of a coherent framework for purpose scrutiny. This Article now turns to that practical question.

B. Purpose Scrutiny in Practice: A Proposed Framework

As the previous discussion demonstrates, purpose scrutiny has been an increasingly common element of the Court's constitutional jurisprudence, especially over the past decade. Even as it employs purpose scrutiny, however, the Court has never offered any systematic explanation of the principles that guide its assessment of "government interests." These facts suggest that although a theory of purpose scrutiny needs to be constructed, it need not and should not be constructed in a vacuum. Instead, the theory should explain the Court's existing case law, at least to some degree, and construct a harmonizing framework to guide future analysis.

Construction should begin, then, with an examination of patterns in the Court's current doctrine and jurisprudence, and some patterns do emerge. Most importantly, the cases suggest that the Court has been engaging in three quite distinct forms of purpose scrutiny, depending on the type of case. Of course, without a coherent underlying theory the Court has not always been clear about which type of purpose scrutiny it is pursuing in each instance. First, the Court has held that some government purposes are simply not legitimate. This type of analysis has long been implicit in the Court's doctrine, because its rational basis test requires that a government action be "rationally related" to a

111. *See* ELY, *supra* note 96, at 86-88 (describing the need for "representation reinforcing"); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

112. This contention, of course, essentially tracks the argument made by Alexander Hamilton in his defense of judicial review. *See* THE FEDERALIST No. 78 (Alexander Hamilton). It also faces the same objections. The task of the remainder of this Article is to (hopefully) address some of those objections. For a discussion, in the First Amendment context, of why government motive might matter independent of the effects of a challenged regulation, see Kagan, *supra* note 86, at 511.

"legitimate" government purpose. In practice, however, this principle has not been limited to cases employing the rational basis test, and has found serious expression only recently. Second, and primarily in cases where a party alleges a direct burden on a core constitutional right, the Court has been willing to accept only particular, specified governmental purposes as adequate to justify government action. This tendency has been made explicit in certain equal protection cases, but it lurks elsewhere as well. Finally, in the remainder of cases, where the government's purposes are not improper, and the Court has no basis to limit the universe of permitted public purposes, the Court has struggled. It has not yet identified the difficult qnestions that arise in this context, much less formulated an approach. It is in these cases that the problem of legitimacy—the counter-majoritarian difficulty—is at its height, and therefore that the need for judicial deference to legislative or executive judgments regarding the importance of governmental purposes is at its greatest. The Court has occasionally hinted at an explicitly deferential approach to purpose scrutiny—indeed, that has been the Court's tendency throughout the post-New Deal period[113]—but it has failed to identify when deference is appropriate and when it is not.

There is an obvious symmetry between the three types of purpose scrutiny that I have identified and the three tiers of the Court's current doctrine.[114] There are, however, important differences between the current tiers and the above-described framework for purpose scrutiny. Notably, the categories of cases are *not* identical, meaning that the basis upon which the Court currently categorizes cases is not identical to the analytic framework necessary for systematic purpose scrutiny. Even more fundamentally, the current doctrine simply does not explain *how* legislative ends are to be evaluated, beyond describing the requirements that they be "legitimate," "important," or "compelling." These differences exist because the current doctrine and tiers were not really designed with scrutiny of governmental purposes in mind, operating instead primarily as vehicles for the evaluation of means.[115] For the same reason, on the rare occasions when the Court does scrutinize purposes, it tends to do so on an essentially *ad hoc* basis. An evolution of the current doctrinal tiers into the categories I describe here would alleviate that problem, and bring order to the case law. I should reiterate, however, that no analysis, including the framework I propose, can provide precise answers to all difficult questions. Indeed, the search for a

113. *See* cases cited *supra* note 34.

114. Indeed, one might expect that if the Court's formal doctrine begins to take explicit account of purpose scrutiny and the framework I set forth above, it would be through the evolution of its existing "tiers."

115. *See supra* text accompanying notes 8-13.

universal "test" is partly responsible for the current doctrine's disarray. What I present here is a broad and hopefully useful framework, but actual analysis must proceed right-by-right and case-by-case.

1. Illegitimate-Purpose Analysis

a. Examples from Recent Jurisprudence

The Supreme Court's three-tiered system has long suggested that *all* government action must at least be rationally related to a legitimate government interest, even if the action is not subject to any heightened scrntiny.[116] In practice, however, that requirement has largely been ignored in the post-New Deal era. The latter half of that formulation has been particularly toothless, imposing no meaningful constraint on governmental purposes.[117] Recently, however, the Court's constitutional jurisprudence—especially in the areas of equal protection and free speech—has revealed a renewed attention to the legitimacy of governmental purposes, including some consideration of *how* legitimacy is to be determined by the judiciary. In the equal protection context, starting with the 1973 *Moreno*[118] decision, and continuing with *Cleburne*[119] in 1985 and *Romer v. Evans*[120] this past Term, the Court has struck down non-suspect legislative classifications on the grounds that the legislative purpose of "harm[ing] a politically unpopular group" is incompatible with the Equal Protection Clause.[121] Similarly, in a series of cases involving interstate migration and residency requirements, the Court has found that state legislation favoring residents or long-time residents of that state is generally motivated by either of two purposes—favoring established residents over new residents, or rewarding residents for past contributions to the state—both of which are wholly improper.[122] These cases, which have been categorized as applying "rational basis review with a bite," are difficult to explain as anything but cases examining the legitimacy of government purposes.

Although it is not as explicitly stated, the same trend can be seen in other doctrinal areas, notably the Court's free speech jurisprudence. In a series of commercial speech cases culminating in last Term's

116. *See supra* Part I.A.1; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1439-43 (2d ed. 1988).

117. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (per curiam); Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955); TRIBE, *supra* note 116, § 16-2, at 1440-41; Fallon, *supra* note 33, at 348-51.

118. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

119. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47 (1985).

120. 116 S. Ct. 1620, 1628-29 (1996).

121. *See supra* Part I.C.1.

122. *See supra* text accompanying notes 52-57.

44 Liquormart[123] decision, the Court seems to have adopted a general principle that a speech regulation passed with the purpose of keeping consumers ignorant is *per se* invalid, because it lacks a legitimate purpose, even if the government's ultimate objective is to discourage or control activity that it concededly has the power to regulate.[124] In addition, and more significantly, the Court has identified a principle that speech regulations passed for the purpose of suppressing the speaker's message are inherently invalid.[125] In several cases, including the flag-burning cases and the *Simon & Schuster*[126] case, the Court has struck down a regulation with minimal analysis because it believed the regulation was motivated by hostility to the regulated speech.[127] This same principle may also explain the Court's long-standing "hostile audience" decisions, which severely limit the ability of the State to restrict speech because of the potentially violent reaction of listeners—the connection being that such laws, either facially or as applied, are often motivated by hostility to the message of the speaker.[128]

It is important to note that although many of the above cases were analyzed under "strict scrutiny" because the challenged legislation was found to be "content-based," this categorization appears to have added little or nothing to the analysis—except in the thoroughly circular sense that "content-based" regulation is sometimes *defined* as regulation premised on hostility to a message. Once the Court found the legislation to be improperly motivated by ideological hostility to the speaker's message, the possibility that it would be upheld was essentially nil. The

123. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508-09 (1996).

124. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 643-46 (1985); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983); Linmark Associates. v. Willingboro Township, 431 U.S. 85, 96-97 (1977).

125. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2351 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

126. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991).

127. *See Simon & Schuster*, 502 U.S. at 121-23; *Eichman*, 496 U.S. at 317-19; *Johnson*, 491 U.S. at 414-20.

128. For an excellent discussion of the hostile audience cases, and the motive analysis underlying them, see Kagan, *supra* note 86, at 461-64. The *R.A.V.* decision, striking down a municipal hate-crime ordinance that targeted "fighting words," is probably best explained by the hostile audience principle. Justice Scalia's majority opinion seems entirely premised on the proposition that the ordinance was motivated by hostility to bigoted speech, and that such hostility is improper. *See R.A.V.*, 505 U.S. at 386, 389-90, 396. The cursory means analysis of the majority opinion, which is thoroughly discredited by the concurring Justices, effectively highlights the crucial role of purpose analysis in the decision. *Compare id.* at 395-96 (majority opinion) *with id.* at 403-05 (White, J., concurring in the judgment). Of course, the Court's basic conclusion, that the ordinance was motivated by hostility to the message, as opposed to a desire to alleviate the special harms caused by hate speech, is open to question. *See id.* at 432-34 (Stevens, J., concurring in the judgment). *R.A.V.* presents one of those "hard cases" where, even under purpose scrutiny, determining the true, predominant purpose behind the ordinance is a difficult and controversial task.

sole purpose of the "content" analysis in these cases appears to have been to identify the nature of the legislative purpose.[129] Indeed, as discussed above, there has been a tendency in the Court's cases, albeit a hesitant one, to convert the "content" analysis of its First Amendment doctrine into a search for improper purposes.[130] Of course, if used in that manner, content analysis is no longer a mere means of categorization, a threshold that must be met for strict scrutiny to be applied. Instead, it is a search for illegitimate purposes, leading to automatic invalidation. Furthermore, content analysis is a roundabout and fairly ineffective way to smoke out improper purposes, and its use in this manner has led to substantial confusion in the Court's analysis.[131]

The search for improper purposes in the Court's jurisprudence extends beyond equal protection and free speech, to other constitutional rights as well. In the abortion context, for example, it seems widely accepted that under the Court's *Casey* decision, legislation passed solely for the purpose of burdening a woman's abortion right is unconstitutional.[132] Similarly, it seems clear that, in the free exercise of religion area, despite the language of strict scrutiny, legislation passed for the purpose of hindering religious exercise is flatly unconstitutional, because it has no legitimate purpose, much less the "compelling" one strict scrutiny requires.[133] This understanding of the Court's free exercise jurisprudence as driven in part by a search for illegitimate purposes is consistent with, and indeed supported by, the Court's decision in *Employment Division v. Smith.*[134] In *Smith*, the Court held that laws that are neutral and of general applicability do not implicate the free exercise clause because a law of general application is presumably *not* improperly motivated, even if it does have the effect of burdening religious exercise.[135] Finally, the search for illegitimate governmental

129. A particularly good example of such an analysis is *Eichman*, 496 U.S. at 315-19, in which the Court analyzed the *purposes* of the federal flag-burning statute as tied to hostility to the message conveyed, and then struck down the law with *no* further analysis.

130. *See supra* Part I.C.2.

131. For example, in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2458-64 (1994), and in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986), the Court declined to categorize as "content-based" legislation that appeared to be so, because of the apparent lack of an improper purpose, and in *Burson v. Freeman*, 504 U.S. 191, 211 (1992), the Court upheld legislation it did classify as content-based, again because the governmental purpose was quite clearly not illegitimate; *see also id.* at 211-14 (Kennedy, J., concurring) (finding that strict scrutiny in this case serves the function of ensuring that no improper purpose exists). *See* discussion *infra* Part III.B.

132. *See* Brownstein, *supra* note 23, at 939-42; Dorf, *supra* note 18, at 1233-35.

133. *See* Church of Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542-48 (1993) (finding asserted government interests inadequate *because* the legislation is targeted only at religion, and therefore does not advance those interests neutrally).

134. 494 U.S. 872, 878-79 (1990).

135. *See id.* at 878-79. Of course, this need not lead to the conclusion that such a law creates *no* free exercise issues, as the Court held in *Smith*; rather it could just as easily suggest, and in my view does suggest, the need for balancing. Restoring a balancing test is presumably the purpose of the

purposes is, and has been for a long time, a central part of the Court's establishment clause jurisprudence, which requires that a law have a secular purpose if it is to be found constitutional.[136]

b. Methodological Lessons: Measuring Legitimacy Against Particular Constitutional Rights

Several important lessons can be drawn from the Court's recent jurisprudence. First and foremost, when the case requires it to do so the Court is willing and able to identify the true purpose behind challenged legislation,[137] and to determine the legitimacy of that purpose. Also, to avoid the counter-majoritarian difficulty, the Court will look to constitutional principles in determining legitimacy. The Court has therefore turned to constitutional interpretation to identify the core principles underlying relevant individual-rights provisions. These principles, in turn, suggest that certain types of government actions cannot be taken for certain purposes. For example, classifications among citizens cannot be adopted because of animus toward a particular unpopular group—evidence of an anti-caste principle the Court has found in the Equal Protection Clause.[138] Also, classifications among state residents cannot be adopted for the purpose of favoring long-time residents or local business at the expense of the national economy—evidence of an anti-parochialism principle that the Court has also found (though with less obvious historical and textual support) in the Equal Protection Clause.[139] Speech, even of the commercial variety, cannot be regulated for the purpose of keeping citizens ignorant—evidence of an anti-ignorance principle the Court has found in the First Amendment's Free Speech Clause.[140] Nor may the government regulate private speech because of its hostility to the message communicated—evidence of an anti-

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congressional legislation reversing the result in *Smith*. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb).

136. *See* Edwards v. Aguillard, 482 U.S. 578, 586-91 (1987); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968).

137. *See* United States v. Virginia (*VMI*), 116 S. Ct. 2264, 2277 (1996) (Court will inquire into "actual state purposes" in assessing constitutionality of gender classifications); *Edwards*, 482 U.S. at 586-87 (Court will look beneath stated secular purpose to ensure no religious motivation). *But see VMI*, 116 S. Ct. at 2289 n.*** (Rehnquist, C.J., concurring in judgment) (refusing to conclude that the state's exclusion of women from the Virginia Military Institute was improperly motivated, despite finding that the proffered reason, diversity in education, was not the real reason for the action).

138. *Cf.* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

139. It is beyond the scope of this Article to consider whether the anti-parochialism principle relied upon by the Court in these cases, which appears to be more rooted in principles of federalism and national unity than equal protection, is properly found in the Fourteenth Amendment, though I admit to serious doubts on the subject. The point, for my purposes, is that the Court has indeed found and applied such a principle in equal protection cases.

140. *See* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.05, at 2-32 to -37 (1984).

orthodoxy principle the Court has also found in the First Amendment.[141] More generally, the government may not act for the purpose of preventing or hindering the exercise of a constitutional right[142]—a principle that seems uncontroversial, and that the Court has located separately in the substantive provisions of the Bill of Rights. Each of these *constitutional* principles has been understood to make illegitimate a class of government purposes.

A second and related key lesson in the Court's recent case law is that the legitimacy of governmental purposes varies with the right at issue—meaning that a particular government purpose might be entirely legitimate when one right is being burdened, and yet illegitimate in another context. This conclusion would seem to follow logically from the fact that purpose scrutiny requires constitutional interpretation; when the Free Speech Clause is being interpreted, one would naturally expect different constitutional principles to emerge than from the Equal Protection or Due Process Clauses.[143] In practice, however, this point has been more controversial, and it has important implications for constitutional analysis, because it dictates whether the Court's analysis of government interests can be imported across doctrinal areas. The disagreement between the majority and dissenting opinions in *Metropolitan Life Insurance Co. v. Ward*[144] illustrates this point well. In *Metropolitan Life*, the Court was faced with an equal protection challenge to an Alabama law that taxed out-of-state insurers at a higher rate than domestic insurers. The majority struck down the statute, finding that the state's asserted interest in promoting local industry was illegitimate under the Equal Protection Clause and its anti-parochialism principle. The Court reached this conclusion even though it had previously found the *same* purpose to be legitimate when resolving a dormant Commerce Clause issue, because the Equal Protection Clause and the Commerce Clause serve different purposes.[145] Justice O'Connor's

141. For a detailed discussion of the anti-orthodoxy principle and its role in the Court's First Amendment jurisprudence, see Kagan, *supra* note 86, at 428-37. Kagan argues that most, if not all, of the Court's First Amendment jurisprudence can be explained as being grounded in a concern about impermissible motives. Clearly, I do not agree with all of her conclusions. Much of her description of the role of motive analysis in the Court's doctrine, however, is compelling.

142. *See* Sheppard, *supra* note 33, at 989; *cf.* Brownstein, *supra* note 23, at 936.

143. My argument here is similar, but not identical, to Richard Pildes' position that constitutional analysis often turns on the discovery of "excluded reasons," within particular "spheres of activity," and that constitutional rights are the tool by which we define those "spheres." *See* Pildes, *supra* note 35, at 720-25. Where I differ from Pildes most sharply is that in my view the critical factor that triggers, and defines the contours of, purpose scrutiny is government action burdening a constitutional right. Pildes, on the other hand, appears to take the position that individual harm is largely irrelevant to the structural constitutional analysis described above. *See id.* at 726-27.

144. 470 U.S. 869 (1985).

145. *See id.* at 876 n.6 ("The Equal Protection Clause, in contrast [to the Commerce Clause], is concerned with whether a state purpose is impermissibly discriminatory."); *id.* at 881 ("The two

dissenting opinion sharply disagreed with this analysis, arguing as follows:

> [T]he majority suggests that a state purpose might be legitimate for purposes of the Commerce Clause but somehow illegitimate for purposes of the Equal Protection Clause. No basis is advanced for this theory because no basis exists. The test of a legitimate state purpose must be whether it addresses valid state concerns. To suggest that the purpose's legitimacy, chameleon-like, changes according to the constitutional clause cited in the complaint is merely another pretext to escape the clear message of this Court's precedents.[146]

This argument is facially appealing, and Justice O'Connor fairly accuses the majority of not explaining its reasoning terribly well. Nonetheless, on this point (though perhaps not in its ultimate conclusion) the majority is clearly correct, both in theory and on the basis of the Court's precedents. The dissent's claim that the "test of legitimacy" is whether the statute "addresses valid state concerns" cannot be correct—this would have reviewing courts deciding what state concerns are "valid" as an abstract matter, without reference to constitutional provisions. It would encourage judges to make ungrounded value judgments without reference to the constitutional text, and thus would raise the counter-majoritarian difficulty in its strongest form. Legitimacy therefore *must* be a function of constitutional analysis, in that a purpose can be found illegitimate, at least as a matter of judicial decision, only if it runs afoul of a specific constitutional provision. If that is the case, different constitutional provisions will invalidate different governmental purposes.

The dependence of purpose scrutiny on the constitutional provision at issue is well illustrated by the Court's decisions in its recent flag-burning cases, *Texas v. Johnson*[147] and *United States v. Eichman*.[148] Although the Court used the language of strict scrutiny, these cases are clearly about illegitimate purposes. In these cases, the government's asserted interest was preserving the flag as a symbol of national unity. The Court found this purpose to be illegitimate because it was inextricably tied to hostility to the message conveyed by flag desecration, and therefore contravened the anti-orthodoxy principle of the Free Speech

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constitutional provisions perform different functions . . . —one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.") (footnote omitted).

146. *Id.* at 895 (O'Connor, J., dissenting). Justice O'Connor goes on to accuse the majority of *Lochner*ism, presumably because of its willingness to second-guess the judgment of the legislature. *See id.* at 900.

147. 491 U.S. 397 (1989).

148. 496 U.S. 310 (1990).

Clause.[149] Indeed, when the Court struck the laws down, it did not concern itself in any serious way with "compelling interests" or "narrow tailoring." Once the Court found that the basic purpose behind the legislation violated First Amendment principles, its analysis was essentially concluded—there was no need for "balancing" or other types of scrutiny.[150] A critical point to note, however, is that there is obviously nothing inherently illegitimate about fostering the symbolic significance of the American flag—as the Court acknowledges.[151] Congress did not violate the Constitution by designating June 14 as Flag Day. When the Court found such a purpose illegitimate, therefore, it must have found the purpose illegitimate *only within the First Amendment context.* In other words, the purpose was illegitimate only when advanced as a justification to regulate or forbid speech, because such regulation sought to create an "orthodoxy" through coercion of speech.

The Court's recent "cross-burning" decision, *R.A.V. v. City of St. Paul*,[152] illustrates the same point. There, the majority struck down a municipal hate-speech ordinance because it was improperly motivated by hostility to the message conveyed by hate speech. However, there is surely nothing improper about governmental hostility to bigotry—indeed, the Equal Protection Clause would appear to *require* such hostility. It is only in the context of regulating *speech* that such hostility becomes improper. I should note again[153] that it is far from clear that the *R.A.V.* ordinance *was* motivated by such hostility, but once the majority concluded that it was, invalidation followed naturally.

Another, more recent example of purpose scrutiny tied to a specific constitutional provision is *Romer v. Evans*,[154] the recent decision striking down a Colorado constitutional amendment that stripped gays and lesbians of legal protections, on the grounds that the provision was motivated solely by animus and therefore lacked any legitimate purpose.[155] Justice Scalia's dissenting opinion echoed Justice O'Connor's dissent in the *Metropolitan Life* case. He argued that because the Court's earlier decision in *Bowers v. Hardwick*[156] had upheld a Georgia anti-sodomy law against a substantive due process/right to privacy attack, hostility to homosexuality and homosexuals could never be an illegitimate purpose.[157] Although the majority did not respond directly to this point, its

149. *See Eichman*, 496 U.S. at 315-19; *Johnson*, 491 U.S. at 410-19.

150. *See Eichman*, 496 U.S. at 315-18; *Johnson*, 491 U.S. at 410-20.

151. *See Eichman*, 496 U.S. at 318; *Johnson*, 491 U.S. at 418 (citing Spence v. Washington, 418 U.S. 405, 412 (1974)).

152. 505 U.S. 377 (1992).

153. *See supra* note 128.

154. 116 S. Ct. 1620 (1996).

155. *See id.* at 1628-29.

156. 478 U.S. 186 (1986).

157. *See Romer*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting).

implicit response is clear: although animus may not violate privacy principles when it is the basis for regulation of conduct, the same animus does violate equal protection principles when it is the motivation behind legislation creating "'classes among citizens.'"[158] These and other decisions illustrate a crucial point: the legitimacy or illegitimacy of a governmental purpose is not an absolute quantity. Instead, it varies depending on the constitutional right that the challenged governmental action is alleged to violate. Legitimacy must be assessed based on principles that underlie that right, which can only be derived by interpreting the relevant constitutional provisions.[159]

There will, of course, be hard cases, where the relevant government purposes and constitutional principles will be difficult to discern, and therefore the legitimacy of the government's interest will be unclear. One example of such a hard case is *Barnes v. Glen Theatre, Inc.*,[160] in which the Court was faced with a First Amendment challenge to an Indiana public indecency statute, as applied to nude dancing within a private club. The plurality conceded that nude dancing was "expressive conduct" within the perimeter of First Amendment protection, but nevertheless found the purpose behind the statute—protecting societal order and morality—to be legitimate, and therefore rejected the constitutional challenge under minimal scrutiny.[161] In dissent, Justice White argued that the state's purpose was illegitimate, at least as applied in the particular case, because it was rooted in hostility to the message conveyed by nude dancing, and therefore concluded that the statute, as applied to private nude dancing, was unconstitutional.[162] In this exchange, both the plurality and the dissent appeared to agree that the purpose behind the challenged action was critical to the constitutional

158. *Id.* at 1623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion)); *cf.* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (arguing that because of the different history and purposes of the Due Process and Equal Protection Clauses, the *Bowers* decision need not foreclose the possibility that sexual orientation is a suspect classification for equal protection purposes).

159. It may be that there are certain purposes that are always illegitimate, regardless of the particular constitutional challenge. This does not seem to be an important possibility, however, because in general, the illegitimacy of such a purpose is likely to derive from a particular provision—for example, legislation motivated by hostility to African Americans is always illegitimate under equal protection principles, and, in practice, a challenge to such legislation will almost certainly be premised on the Equal Protection Clause. Describing this principle as "universal" in some sense does not seem to advance the analysis much.

160. 501 U.S. 560 (1991).

161. *See id.* at 567-72. Chief Justice Rehnquist, writing for the *Barnes* majority, notes that "public indecency statutes were designed to protect morals and public order.... This interest is unrelated to the suppression of free expression." *Id.* at 569-70.

162. *See id.* at 590-94 (White, J., dissenting). Justice White's response to the majority notes that "[t]he purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates." *Id.* at 591.

analysis, and also appeared to agree that the purpose should be tested against principles of free expression, which forbid regulation of speech because of hostility to the speaker's message—i.e., for the purpose of fostering an "orthodoxy." Where they disagreed was in the identification of the purpose behind the regulation. Chief Justice Rehnquist, who authored the plurality opinion, saw the issue as "morality." Justice White saw it as hostility to the speaker's message.

Regardless of who was correct, the *Barnes* opinions illustrate that even when the Court is asking the right questions, it may still be difficult to reliably locate the actual purpose behind a given government action. The *R.A.V.* decision, discussed above, illustrates the same point. And the potential difficulties do not end there. Even when a government purpose has been identified, and the Court's purpose scrutiny is properly tied to a constitutional provision, interpretation can be a difficult and ambiguous process. In *Romer v. Evans*, the majority and dissent essentially agreed that the legislation at issue was motivated by animus toward gays and lesbians, and yet sharply disagreed over whether the Equal Protection Clause forbade such animus.[163] Obviously, this issue can be resolved only by determining what judicially enforceable principles the Equal Protection Clause enacts. The dissent's view appears to be that the clause prohibits only animus against protected classes, while the majority takes the position that the clause imposes a broader prohibition against creating "classes among citizens." The correct position is not immediately clear from the text or history of the Fourteenth Amendment; a difficult process of interpretation is inevitable.[164]

Another illustration of the close relationship between the definition of a right and the legitimacy of government purposes can be found in the Court's abortion jurisprudence, including the majority opinion in *Roe v. Wade*.[165] In *Roe*, the Court first found that women possess a constitutional privacy right to choose an abortion.[166] Then, with essentially no analysis, the Court identified two "compelling" state interests—protecting the health of the mother *after the first trimester*, and protecting the "potential life" of the fetus *after the point of viability*.[167] What

163. *Compare Romer*, 116 S. Ct. at 1627-29 (finding animus toward homosexuals to be an illegitimate motivation for legislation) *with id.* at 1629-37 (Scalia, J., dissenting) (arguing that hostility toward homosexuals is not an improper legislative motivation because the state may forbid homosexual conduct).

164. As is probably evident, I am quite convinced that the majority's view is the better one, both because the broad language of the Fourteenth Amendment appears to me to adopt a much broader principle than the narrow protections envisioned by the dissent, and because a broader anti-caste principle seems more consistent with democratic norms. The issue is, however, obviously beyond the scope of this Article.

165. 410 U.S. 113 (1973).

166. *See id.* at 154.

167. *See id.* at 162-63; *see also* Schneider, *supra* note 32, at 93-94.

is thoroughly unclear from the opinion, however, is why the interest in potential life is not "compelling" prior to viability, or, for that matter, why the interest in maternal health springs into being only after one trimester. Similarly, in its most recent abortion decision, *Planned Parenthood v. Casey*,[168] the Court appeared to hold that even though the state has a legitimate interest in potential life throughout pregnancy, the state may not seek to hinder the exercise of the abortion right prior to viability, although it may seek to ensure that the decision is an "informed" one.

These seemingly conflicting statements can be harmonized if one recognizes that the strength and legitimacy of a purported state interest in fetal life *must* be determined in light of the same constitutional principles that nnderlie and define the scope of the abortion right itself.[169] In other words, the same interpretive process[170] must guide both analyses. If we assume that the Court is correct that the Constitution creates a right to choose a pre-viability abortion, then *a fortiori* the purpose of hindering women from making such a choice is illegitimate. This illegitimacy is tied to the right itself. There is nothing *inherently* illegitimate in a state seeking to protect fetal life—through feticide statutes, for example—but when the state attempts to protect fetal life by preventing a woman from choosing a pre-viability abortion, the purpose becomes illegitimate. Without this understanding, *Roe* and *Casey* are difficult to make sense of, because as Alexander Aleinikoff has pointed out, the result in *Roe* does not seem explicable as a product of "*ad hoc* balancing" or other unstructured comparison of competing interests.[171] The problem is that the strength of the competing interests here, a woman's right to privacy and the government's interest in fetal life, are unknowable in any abstract sense. Therefore, in deciding how to reconcile these interests, the Court *must* turn to constitutional principles, to determine at what point during a pregnancy the existence of fetal life constrains a woman's liberty right to control her own body. In other words, the abortion right, like all other constitutional rights, is a limited one, and the "viability" standard is best understood as defining the contours of

168. 505 U.S. 833, 877 (1992).

169. *See generally* Brownstein, *supra* note 23, at 883-85 & n.52. Brownstein makes the further point that after *Casey*, the Court apparently will permit abortion regulation designed to "inform" a woman's choice, so long as it does not hinder the choice, because of the way the Court has defined the abortion right itself. *Id.* This is quite consistent with my argument that the same constitutional principles control the definition of rights and the legitimacy of governmental purposes.

170. Given the non-textual nature of the privacy rights recognized by the Court, calling this process "interpretive" might seem a stretch, but the point is that the analysis through which the Court found and defined the underlying constitutional right must also control its analysis of governmental purposes.

171. *See* Aleinikoff, *supra* note 33, at 976.

that right, just as the line between "speech" and "conduct" defines the contours of the speech right.[172]

There is a broader point here as well. The Court's apparent recognition of a more general right to sexual privacy in *Roe*, *Casey*, and *Griswold v. Connecticut*,[173] raised profound questions, which the Court has until now dncked,[174] about the constitutional legitimacy of a state interest in coercing sexual orthodoxy. Of course, the scope of this privacy "right" remains quite unclear, and therefore so do the limitations on legitimate state interests in sexual morality. However, the view could be taken that the Constitution, through the Ninth Amendment and the common-law decision making apparently authorized by that provision,[175] creates a consistent and coherent right to privacy and autonomy in the personal sphere. If this view is the correct one, then grave questions are raised about the correctness of decisions like *Bowers v. Hardwick*, which seem to presume the legitimacy of the state's asserted interest in regulating consensual sexual conduct for reasons of "morality."[176]

In conclusion, what is noteworthy about the Court's recent cases is that the Court has demonstrated both a willingness and an ability to identify and assess the legitimacy of the purposes underlying a variety of governmental actions. The Court has also begun to settle upon an interpretive methodology for engaging in such analysis. There is, however, an element of incoherence in the Court's opinions, because of the Court's failure to state clearly the principles driving its search for improper purposes. The Court's constitutional jurisprudence would be much improved if it would settle on a logical framework—one that acknowledged that the scope of government purposes is limited in each case by the principles underlying the specific constitntional right at issue.

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172. Having analyzed the abortion cases in this way, I must concede that the distinction I draw between interpretation and balancing may have few practical implications, since in fact the Court appears to have defined the abortion right as narrowly as it has because of concerns for fetal life. Abortion is unusual in the realm of rights analysis because very rarely do two competing interests conflict so directly as here—which perhaps explains why the abortion issue creates so many difficulties, both legal and social. Moreover, the nontextual nature of the privacy right of course makes it difficult to claim that the Constitution has prejudged the relative importance of the interests at issue, which intensifies the tendency for balancing to creep into definitional analysis.

173. 381 U.S. 479 (1965).

174. *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986) (deciding that not all private sexual conduct is constitutionally protected from state proscription).

175. *See generally* CALVIN R. MASSEY, SILENT RIGHTS 21-94 (1995) (examining the history of Ninth Amendment jurisprudence).

176. *Cf.* Schneider, *supra* note 32, at 112 (generally defending state interest in legislating morality, but noting that the state interest in *Bowers* was "particularly problematic").

2. *Limited-Purpose Analysis for Direct Burdens on Core Constitutional Rights*

Evaluating the legitimacy of government purposes is probably the most perceptible element of the Court's purpose scrutiny, but it is not the only way in which the Court has recently expressed a renewed interest in government purposes. In another class of cases, the Court seems to take an even more stringent approach to governmental purposes. The Court has held that in certain circumstances, government action will be permitted *only* if prompted by particular, specified purposes, with all other purposes being presumptively invalid. In other words, in these cases the Court is not merely labeling certain, specified purposes as out of bounds; it is limiting the universe of acceptable purposes to a specified few.

Often, the Court has presented this analysis under the label of "strict scrutiny," notably in the Court's recent affirmative action jurisprudence.[177] But it is not strict scrutiny in the traditional sense, because strict scrutiny seems to presume a potentially unlimited number of "compelling government interests" that could justify infringement of constitutional rights.[178] The sharpest contrast between traditional strict scrutiny and the new "limited-purposes" analysis is that traditional strict scrutiny provided no principles to guide the Court in evaluating the "compellingness" of a particular government interest. The test therefore raised serious counter-majoritarian difficulties. In contrast, the Court's new and developing approach, when honestly conducted, looks to constitutional principles in defining a class of allowable government purposes. Moreover, this type of purpose analysis does seem to represent the direction in which strict scrutiny is evolving—and more to the point, in my view, it is the direction in which it *should* evolve. If limited-purpose analysis is to take the place of strict scrutiny, however, the constitutional principles guiding the Court in its analysis will have to be better explicated, and adjustments will have to be made to the categories of cases in which strict scrutiny is today invoked if the analysis is to be workable and retain legitimacy.

To begin with, it must be noted that when the Court limits—and limits sharply, as the above analysis envisions—the scope of permissible

177. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); *see also* Hopwood v. Texas, 78 F.3d 932, 944-49 (5th Cir. 1996).

178. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (protection of electoral process sufficiently compelling to permit limited, but content-based prohibition on political speech); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (preventing discrimination against women is a sufficiently compelling interest to justify infringing associational rights of private all-male organization); Korematsu v. United States, 323 U.S. 214 (1944) (national security concerns sufficient to justify internment of Japanese-Americans during World War II).

government interests, it engages in a highly intrusive form of judicial review—far more intrusive, for example, than simply finding a few specified interests to be out of bounds. Some special justification is therefore needed for such constraints to be imposed on democratic decision making. Moreover, it seems apparent that the justification for such intense purpose scrutiny can only be found in the Constitution, and in particular in a special concern that the challenged governmental action presents core, and not merely peripheral, constitutional concerns.

Under the current three-tiered system, such "special concerns" are associated with the categories that trigger strict scrntiny—suspect (and perhaps semi-suspect) classes for equal protection, content-based regulation for free speech, and undue burdens for abortion rights. The current categories provide reasonably satisfactory starting points in developing guidelines for a searching purpose scrutiny, but they will need some adjustment (especially in the free speech area) in light of the differences between traditional strict scrutiny and the limited-purpose analysis that seems to be taking its place.[179] In Part III, I will suggest some beginnings toward reforming the current doctrinal categories. The central concern of this Article, however, is not the categories that determine what is needed to trigger this limited-purpose analysis, but rather the nature of the scrutiny itself.

I will therefore begin by assuming that some special constitutional concern is present, and that the need for heightened scrutiny is acknowledged. Perhaps the government has chosen to use a "suspect" classification such as race, or has engaged in intrusive regulation of private speech.[180] Under these circumstances, the state's action is *presumptively* unconstitutional (though rebuttably so), because the action appears to directly contravene the Constitution.[181] There is therefore good reason for the judiciary to place sharp limits on the purposes that will be allowed to justify such actions. In other words, in these situations the Constitution itself should be understood to prejudge the relative strengths of individual rights against most general governmental purposes, and in favor of the individual litigant. Therefore, the government should not be able to directly burden core constitutional rights for any

179. In this respect, Michael Dorf's recent article on incidental burdens might provide a useful starting point in establishing new categories. Dorf distinguishes between direct and incidental regulation of constitutional rights, and then further distinguishes between substantial and minor incidental burdens on rights. Searching scrutiny seems clearly appropriate when a direct burden exists, and as Dorf suggests, at least some level of heightened scrutiny seems necessary with regard to substantial incidental burdens. *See* Dorf, *supra* note 18, at 1176-78, 1243-46 (discussing the difficulties of determining when an incidental burden is substantial).

180. *See* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2328 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("Curbs on protected speech . . . must be strictly scrutinized.") (citations omitted).

181. *See* Faigman, *supra* note 39, at 665-66.

old reason, even a reason that is described by the state as "compelling." Instead, it must advance specific, constitutionally approved reasons that the judiciary, as a matter of constitutional interpretation, finds to be consistent with the underlying purposes of the violated provision.[182] This is the core of the argument for intrusive purpose scrutiny, which explicitly limits allowable government purposes. It is also an argument that certain members of the Court appear to have accepted, at least in certain contexts.[183]

The next question that emerges is how the judiciary should define what purposes are allowable. Although the case law here is a good deal less clear, I think a pattern does begin to emerge. The cases are far from consistent, but it would appear that the Court tends to find allowable—or, in the jargon of the three-tiered system, "compelling"—government interests only when the asserted interest is found to advance the principles and policies underlying the *particular constitutional provision* and right at issue. Having said this, I must acknowledge that there are clearly contrary cases, in which the Court has found a compelling interest quite unrelated to the underlying constitutional provision.[184] I would, however, argue that the Court *should* impose this limitation on allowable purposes, and that it should only permit highly suspect regulation when on balance the regulation advances the specific constitutional policies that the regulation appears to threaten. I argue for this sharp limitation on state authority not because other purposes are not "compelling" as an abstract matter, but because only such a rigorous

182. My description of direct, highly suspect regulations as "violating" the Constitution is perhaps controversial, but I think defensible—such regulations presumptively *do* violate the Constitution, even if the Court later finds the regulations to be justifiable. *See* Sager, *supra* note 35, at 933 (state interest test serves two functions: to define the limits of what the Constitution prohibits, *and* sometimes to permit action even though it violates a constitutional right). Justice Holmes appears to have held this view of the "police power" as *justifying* constitutional violations. *See* Oliver Wendell Holmes, *Cooley's Treatise on Constitutional Limitations, in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES 268, 269 (Sheldon M. Novick ed., 1995); *see also* Joseph F. DiMento, *Mining the Archives of* Pennsylvania Coal: *Heaps of Constitutional Mischief,* 11 J. LEGAL HIST. 396, 406 (1990); Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 623 nn.40-41 (1996).

183. *See, e.g.,* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995); Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516, 2544 (1994) (Scalia, J., concurring in part and dissenting in part); Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-48 (1993).

184. *See, e.g.,* Roberts v. United States Jaycees, 468 U.S. 609, 622-29 (1984) (compelling interest in preventing discrimination against women justifies infringing on associational rights of private all-male organization); Buckley v. Valeo, 424 U.S. 1, 25-29 (1976) (per curiam) (compelling interest in limiting corruption and appearance of corruption justifies limits on campaign contributions); Korematsu v. United States, 323 U.S. 214, 223-24 (1944) (compelling interest in protecting national security justifies racially discriminatory policy of exclusion from certain areas).

approach gives adequate protection to constitutional rights.[185] Any broader view of allowable purposes inevitably degenerates into *ad hoc* balancing, with its lack of predictability and systematic bias in favor of current governmental needs as opposed to abstract constitutional principles.[186]

Such a rule will impose substantial limitations on democratic legislatures. But they are not as severe as one would imagine, because the types of government actions subject to these sharp restrictions will be very few—fewer indeed than the number of current cases subject to "strict scrutiny." And, on the positive side, such a rule properly reflects the primacy of constitutional values within our system of government. Most importantly, only such a categorical rule can ensure that decisions such as *Korematsu*, which is the logical outgrowth of ungrounded interest-balancing even in the face of core constitutional violations, do not recur.[187]

a. Limited-Purpose Analysis in Equal Protection Jurisprudence

Perhaps the clearest example of a "limited purposes" approach in the Court's jurisprudence can be found in its equal protection decisions regarding race, most notably in its recent affirmative action cases. Because these cases involve challenges to racial classifications, they all invoke heightened, and even "strict," scrutiny.[188] In practice, however, the crucial issues in these cases seem to relate to allowable goverument purposes. In a series of decisions through the 1980s and 1990s reviewing affirmative action programs, the Court has substantially

185. Of course, even if the Court concludes that an allowable purpose exists, this does not end the constitutional analysis. The Court must still make an independent judgment whether *on net* the challenged action advances the policies underlying the constitutional provision at issue. This analysis would not be *ad hoc* balancing; rather it would be an interpretational process combined with some empirical assessment of the effectiveness of the challenged policies. On the empirical issues, however, substantial deference to legislative judgments seems inevitable.

186. A principled approach to defining allowable purposes also rebuts Judge Posner's argument in the *Wittmer* case that any effort to circumscribe the universe of "compelling" interests is dicta, and unreasonable dicta at that. *See supra* note 70. Such statements are dicta *only* if compelling interests are identified on an ad hoc basis; otherwise, they are descriptions of the reasoning necessary to reach the Court's final conclusion, and therefore part of the "holding" of the Court. *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

187. *See* Aleinikoff, *supra* note 33, at 986-87 (discussing and citing further commentary on the tendency of balancing to undermine constitutional rights). By criticizing *Korematsu* as the product of interest balancing, I do not mean to suggest that balancing will always weaken individual protections—indeed, as David Faigman has pointed out, sometimes precisely the opposite will be true. *See* Faigman, *supra* note 39, at 684-86. I do wish to suggest, however, that when interest balancing is applied to claims of violation of core constitutional rights, as in the *Korematsu* internment policy decsion, evisceration of rights is a likely result. The Court is likely to invoke such balancing only when it wishes to permit a blatantly unconstitutional action.

188. *See Adarand Constructors*, 115 S. Ct. at 2117; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion).

narrowed the class of government interests which can be advanced to justify benign racial classifications, but has simultaneously recognized that *some* allowable purposes do exist.[189] In contrast, the Court has strongly suggested that *no* government purpose will be allowed to justify racial classifications that disfavor minorities.[190] This distinction between benign and malignant racial classifications seems to be inconsistent with the Court's current formulation of the "strict scrutiny" test.[191] It makes perfect sense, however, if viewed through the lens of allowable-purposes analysis. Given the history and policies underlying the Equal Protection Clause, which clearly are centrally aimed at protecting minorities against majoritarian discrimination, there is basically *no* government action disfavoring minorities that can be said to advance equal protection principles. When a classification redresses discrimination against minorities, however, it is easy to see why, on balance, it might advance equal protection principles, even though some members of the majority will suffer an injury as a consequence. Thus it seems clear that unlike truly discriminatory racial classifications, benign racial classifications are not *per se* unconstitutional—and the Court has so acknowledged.[192]

A great deal of ambiguity remains, however, in the Court's affirmative action jurisprudence, which is well illustrated by two recent appellate decisions. In the first of those decisions, *Hopwood v. Texas*,[193] the Fifth Circuit Court of Appeals struck down racial preferences in a public law school's admissions process. The Fifth Circuit concluded that "the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."[194] On the other hand, in an even more recent decision authored by Chief Judge Posner, the Seventh Circuit rejected this narrow

189. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) (suggesting that remedying past discrimination would be an allowable purpose); *Croson*, 488 U.S. at 493 (plurality opinion) (same); *see also Adarand Constructors*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting) (arguing that diversity should remain a permissible reason to adopt benign racial classifications). *But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (plurality opinion) (rejecting creation of "role models" as a compelling interest).

190. *See Adarand Constructors*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting). An interesting illustration of this principle is Palmore v. Sidoti, 466 U.S. 429 (1984), in which the Court reversed a state judicial decision that had denied a mixed-race couple custody of a child by the mother's previous marriage on the theory that the child would suffer harm by being exposed to societal prejudice. In *Palmore*, the purported state interest, the best interests of the child, was certainly a compelling one. Indeed, the Court accepted the important nature of the interest, but reversed anyway. 466 U.S. at 433-34. The best explanation seems to be that the state interest, while certainly "compelling" in the abstract, was not equality-enhancing.

191. *See infra* Part III.A.

192. *See Adarand Constructors*, 115 S. Ct. at 2117 (strict scrutiny is not "fatal in fact"); Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996) (same).

193. 78 F.3d 932 (5th Cir. 1996).

194. *Id.* at 944 (citing *Croson*, 488 U.S. at 493 (plurality opinion)).

position as "dicta," and indeed as "unreasonable" dicta.[195] Instead, it held that the range of allowable compelling interests is much broader, and includes appropriate penological interests, so long as the interests asserted are specific and substantiated.

The conflict between the Fifth and Seventh Circuits reveals the incoherence of the Supreme Court's current "compelling interests" analysis. In particular, it points to a crucial ambiguity in that analysis. If the Supreme Court really believes that benign racial classifications should be subject to the strictest form of scrutiny, then Judge Posner's position—that any type of government interest can justify such a classification so long as it is "truly powerful and worthy"[196]—seems incorrect. Such a standard does not resemble the approach the Court currently takes to other "strict scrutiny" cases. Instead, it resembles more closely the approach taken in "intermediate scrutiny" cases—and the Court rejected the application of intermediate scrutiny for benign racial classifications in *Adarand* and *Croson*.[197]

On the other hand, Judge Posner makes a strong case against the Fifth Circuit's position by pointing out that there is nothing obviously distinctive about the goal of remedying past discrimination in contrast to other "legitimate" goals.[198] What is missing from either of these opinions, however—and understandably so, since it is also missing from the Supreme Court precedents that they apply—is any explanation of how courts are to decide which interests will suffice, other than by reliance on judicial instinct as to what goals are "powerful and worthy." The interesting question, therefore, and one that I will address in greater detail later in this Article,[199] is precisely which government purposes are consistent with the policies underlying the Equal Protection Clause. In particular, I will examine whether the Fifth Circuit in *Hopwood* was correct to conclude that the *only* sufficiently compelling purpose for benign racial classifications is remedying prior discrimination by the acting government body.

Movement in the direction of a limited-purposes approach is further demonstrated by the Court's equal protection jurisprudence with regard to gender-based classifications, although the case law is far less consistent in this area. The gender decisions are an interesting case

195. *Wittmer*, 87 F.3d at 919-21. For my response to this objection, see *supra* note 186.

196. *Id.* at 918.

197. *See Adarand Constructors*, 115 S. Ct. at 2117; *Croson*, 488 U.S. at 493-94. It is possible, of course, that the scrutiny accorded to benign racial classifications will devolve into something resembling intermediate scrutiny, despite the Court's current language, so that allowable government purposes will *not* be strictly limited. For the purposes of this Article, however, I am inclined to take the Court at its word regarding the level of scrutiny it is employing, as I think that is the more faithful reading and more likely result of the Court's decisions in this area.

198. *See Wittmer*, 87 F.3d at 919.

199. *See infra*.Part III.

study, because even though the Court theoretically applies only intermediate scrutiny to gender classifications, the Court has almost always struck down such classifications and has created "a strong presumption that gender classifications are invalid."[200] In practice, then, the level of scrutiny applied to gender classifications appears more akin to the scrutiny given to benign racial classifications, rather than to other types of intermediate scrutiny.[201] The gender case law also evidences a strong concern with governmental motives—in particular, a concern that gender classifications are based on stereotypes about the abilities and proper roles of women and men.[202]

One prominent example of the role of purpose scrutiny in decisions considering gender-based policies is the recent *VMI* decision, in which the Court's reasoning was distinctly focused on the asserted governmental purpose. There, the Court found that the reasons provided by Virginia for maintaining the Virginia Military Institute as a male-only institution were pretextual, and in any event inadequate.[203] Because *VMI* involved a classification that hindered women, it was an easy case; indeed, the result in the case might also be explicable as a finding of a wholly illegitimate purpose on the part of Virginia—to deny women certain educational opportunities because of a stereotypical view of the appropriate social role of women.[204]

But even when a classification appears to benefit women, the Court has tended to view it with suspicion and has often invalidated such classifications. The Court seems to fear that such "gilded cage" measures ultimately will not advance the principle of equality.[205] It has therefore generally upheld only those gender classifications that were adopted to

200. United States v. Virginia (*VMI*), 116 S. Ct. 2264, 2275 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1433 (1994) (Kennedy, J., concurring in the judgment)).

201. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1425-26 (1994) (stringently reviewing goverment purposes advanced in defense of gender-based peremptory challenges). Examples of deferential intermediate scrutiny include the scrutiny accorded under the First Amendment to time, place, or manner regulations of speech in a public forum, or regulations of expressive conduct, which are notoriously lenient. *See* Bhagwat, *supra* note 14, at 170 & n.134.

202. *See VMI*, 116 S. Ct. at 2275 ("[The State's justification] must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.") (citations omitted); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

203. *See VMI*, 116 S. Ct. at 2276-79 & n.8.

204. *See id.* at 2276 (gender "classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women") (citations omitted); *cf. id.* at 2289 n.*** (Rehnquist, C.J., concurring in judgment) (denying that a finding of pretextual state reason necessarily implies an illegitimate one).

205. *See, e.g., Mississippi Univ. for Women*, 458 U.S. at 729-30 (permitting men to compete with women for admission to a previously all-female university); Caban v. Mohammed, 441 U.S. 380, 389 (1979) (allowing men to prevent adoption of their children); Orr v. Orr, 440 U.S. 268, 279-83 (1979) (requiring women to pay alimony); Craig v. Boren, 429 U.S. 190, 204 (1976) (striking down law that set a higher minimum drinking age for men than women); *see also* Sager, *supra* note 35, at 952 & n.36.

"compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people."[206] In other words, these cases suggest that gender-based classifications will only be upheld when the purpose of the classification is the promotion of long-term equality between men and women.

There are, however, significant exceptions to this trend. In *Rostker v. Goldberg*,[207] the Court sustained the policy requiring only males to register for the draft, apparently out of deference to Congress' judgment on the role of women in the armed forces. In *Michael M. v. Superior Court*,[208] the Court sustained a statutory rape law prohibiting only sex with underage females. *Rostker* might be understood as a special case, where normal, heightened scrutiny was not imposed because of separation-of-powers concerns in the military context;[209] or it might simply be wrongly decided. *Michael M.*, however, is difficult to reconcile with these principles at all. The Court has thus not yet answered the difficult question of whether gender classifications are truly subject to limited-purpose analysis—which would mean that only equality-enhancing purposes are proper—or whether a broader range of purposes, including ones that do not advance equality, can justify such classifications. The trend of recent years seems to be toward the more stringent position, but the jury is still out.

b. Limited-Purpose Analysis in Free Speech Jurisprudence

Outside of the equal protection context, the Court's use of purpose scrutiny is more haphazard. Although purpose scrutiny is present in the decisions on a general level, clear analytical patterns do not easily emerge. When core constitutional rights are involved, for example, the Court tends to scrutinize proffered government purposes very carefully, and will only accept those purposes that accord with the principles underlying the substantive constitutional provision. This is especially true in its free speech cases.

Although the Court's free speech doctrine is confused, many decisions seem to hold that only limited, speech-promoting purposes can justify certain types of speech regulation. But even though

206. *VMI*, 116 S. Ct. at 2276 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987)) (alterations in original); *see also* Kahn v. Shevin, 416 U.S. 351, 353-55 & n.8 (1974); Sager, *supra* note 35, at 951-52. *But see* Heckler v. Mathews, 465 U.S. 728, 750-51 (1984) (upholding temporary gender-based classification in social security benefits to protect male retirees who relied on an invalidated statute).

207. 453 U.S. 57 (1981).

208. 450 U.S. 464 (1981).

209. *See, e.g.*, Able v. United States, 88 F.3d 1280, 1296 (2d Cir. 1996) ("In the military context . . . free speech rights are substantially diminished and the courts' deference to the views of Congress and the military . . . is high.").

attention to purpose seems to underlie much of its free speech jurisprudence, the Court is not consistent in describing its analysis in the terminology of purpose scrutiny. To make matters worse, the current doctrinal categories of free speech jurisprudence—most notably the distinction between "content-based" and "content-neutral" regulations—are not particularly stable or well-suited to purpose analysis.[210] Because of the awkward fit between the Court's current doctrine and the principles of purpose scrutiny, the Court's actual analytical methodology is often obscured.[211] Even so, some patterns do emerge from the case law.

As a normative matter, principled purpose scrutiny seems to be a clear improvement over the content analysis and three-tiered review of current doctrine. And various cases indicate that purpose scrutiny already has a strong influence in free speech jurisprudence. First, much of free speech doctrine purportedly turns on whether a challenged regulation is "content-based" or "content-neutral." But an examination of case law reveals that whether a regulation is content-based actually seems to have little impact on whether that regulation will be strictly scrutinized. This pattern emerges in both Supreme Court and federal appellate decisions.

Thus, in several cases, what were in truth content-based regulations have been sustained because the reviewing courts concluded that they were not enacted for illegitimate, speech-impairing purposes, and did not burden core free speech rights.[212] When no obvious illegitimate motive is present, the Court asks whether the government is seeking to directly regulate truly private, "high-value" speech. If the answer is yes, then the Court seems to apply limited-purpose analysis—very few purposes will suffice to justify regulation. If, however, the answer is no—if the burden on speech is merely incidental, if the regulation primarily limits conduct, if the restriction is limited to speech on government property, or if the speech itself is of questionable value (such as commercial and perhaps indecent speech)—then the government is given a much freer hand in selecting purposes. And in such cases, once the purposes have been selected, the Court tends to be

210. This is because, as discussed *supra* Part I.C.2, the Court often uses its content analysis as a means to flush out improper purposes. It does not, however, do so consistently, leading to confusion. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994) ("[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.") (quoting Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 117 (1991) (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983))) (internal quotations omitted) (emphasis in original).

211. *See* Bhagwat, *supra* note 14, at 162-63.

212. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992); Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996). *Cf.* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994); *Turner Broadcasting*, 114 S. Ct. at 2445.

quite deferential to the government's judgments about their relative importance. A particularly strong example is *Burson v. Freeman*,[213] in which the Court upheld a statute prohibiting voter solicitation and the distribution of campaigu literature within 100 feet of a polling place—even though it found the statute to be content-based, and therefore applied strict scrutiny. The result is inexplicable except in terms of purpose analysis. In *Burson*, the content-based nature of the regulation clearly did not hide an improper motive. Nor was this a direct regulation of private speech, since the regulation applied only to government property, and in particular, to property temporarily dedicated to a particular purpose. Therefore, heightened purpose scrutiny was not required, and the Court could uphold the regulation under the deferential balancing approach discussed in the next Section.[214] Similarly, in *Madsen v. Women's Health Center, Inc.*,[215] the Court upheld an injunction against protesters at an abortion clinic because it found the central purpose of the injunction to be content-neutral and reasonable. The finding of content-neutrality, however, is quite unconvincing unless understood as a finding about purpose—which is in fact how the Court defends it.[216] In addition, the *Madsen* Court also seemed to give courts much more discretion to restrict speech on public property than on private property. Such a result cannot be explained by content jurisprndence, which purportedly condemns *all* content-based regulations, without drawing distinctions based on the location of the speech (so long as the government property is a public forum); but it is entirely consistent with the notion that heightened purpose scrutiny is tied to a distinction between regulations of fully private speech and speech on public property.[217]

The Court's free-speech jurisprndence also includes a number of examples of what appears to be limited-purpose analysis. Again, application of such analysis appears to have no apparent relationship to content analysis.[218] In each of these cases, the Court stringently reviewed

213. 504 U.S. 191, 197-98, 211 (1992).

214. *See infra.* Part II.B.3.

215. 114 S. Ct. 2516, 2524-28 (1994).

216. *Compare id.* at 2523-24 (majority opinion), *with id.* at 2538 (Scalia, J., dissenting) (explaining why injunction was content-based under any natural understanding).

217. *See, e.g., id.* at 2528 (striking down injunction as applied to private areas).

218. *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (striking down a law prohibiting anonymous campaign literature); Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (remanding for apparently stringent review a federal law requiring cable television operators to dedicate a large percentage of their channel capacity to local broadcasters); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991) (invalidating law that escrows income from books describing crimes); Florida Star v. B.J.F., 491 U.S. 524 (1989) (reversing a jury award against a newspaper for publishing a rape victim's name that the paper had obtained legally); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (holding unconstitutional federal regulations governing corporate electoral expenditures as applied to

the asserted government interests, giving essentially no deference to legislative judgments. Yet in only two of the cases—*McIntyre* and *Simon & Schuster*—did the Court even find that the laws were content-based, and in *McIntyre* it was far from clear that the finding was necessary for the rigorous scrutiny.[219] It is true that in most of these decisions, the Court's scrutiny does not explicitly discuss the advancement of First Amendment policies, but especially in the political speech cases, such as *McIntyre* and *Massachusetts Citizens for Life*, the idea seems to be very much present. Moreover, the *Turner Broadcasting* decision, perhaps the most confusing of the group, seems explicable in no other way. In *Turner*, after concluding that the challenged "must-carry" rules for cable operators were content-neutral,[220] the Supreme Court remanded to the lower court for a determination of whether the law actually advanced the government's stated objectives of preserving free television and increasing diversity among publicly-accessible speech. The Court apparently envisioned a rigorous lower court review.[221] Though seemingly incoherent under current doctrine, *Turner* is a nice illustration of purpose scrutiny. The Court was faced with a law that directly regulated private speech, and was thus presumptively unconstitutional. However, the key purpose motivating the legislation—increasing diversity among speakers—is one that both the Court and numerous commentators have recognized as advancing the purposes of the First Amendment.[222] A remand was therefore necessary to determine whether the regulation *actually* advanced First Amendment policies.[223]

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a non-profit corporation); *see also* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (upholding restrictions on election spending by corporations).

219. *See McIntyre*, 115 S. Ct. at 1519 ("When a law burdens core political speech, we apply 'exacting scrutiny.'"); *see also* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2319-21 (1996) (striking down limitations on campaign spending by political party); *id.* at 2328 (Thomas, J., concurring in the judgment and dissenting in part) ("Curbs on protected speech . . . must be strictly scrutinized.").

220. *See Turner Broadcasting*, 114 S. Ct. at 2470-72.

221. *See id.*

222. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981); FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 800 & n.18 (1978); United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 48-51 (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986). *See generally* Bhagwat, *supra* note 14, at 178-79.

223. I should note that even if diversity-enhancement is seen as a purpose consistent with First Amendment policies, and therefore an allowable reason to regulate private speech, that does not mean that *any* method of advancing diversity will necessarily survive scrutiny. In a case involving such a method, the Court must still determine whether, as a matter of substantive First Amendment analysis, there are any restrictions on how the government may pursue these goals. *Compare* Bhagwat, *supra* note 14, at 193-208, *with* Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 145-60 (1994).

c. *Limited-Purpose Analysis in Other Areas of Constitutional Jurisprudence*

Scrutiny of governmental purposes, and limitations on allowable purposes, can be found in other areas of constitutional analysis as well, although such trends are often not explicitly acknowledged. In the context of free exercise of religion, the Court seems unlikely to find *any* government purpose sufficient to uphold regulation intended to burden religious practices, presumably because it is difficult to imagine such a purpose that is consistent with principles of religious liberty.[224] On the other hand, it seems willing to uphold regulation that only incidentally burdens religious exercise under its very deferential balancing test.[225] Similarly, in its voting rights cases, the Court has tended to uphold restrictions if and only if the purpose behind the restrictions is to protect, organize, and advance the electoral process—in other words, if the government purpose is consistent with the policies underlying the right to vote.[226]

The most interesting illustration of this tendency—accepting limitations on rights only if the purpose behind the limitation is consistent with the underlying constitutional policies—can be found in the abortion-rights context. There, the Court permits regulation designed to protect women's health and to "inform" women of the consequences of abortion—i.e., attempts to convince her not to choose abortion at all. The Court will not, however, permit regulations designed to hinder the choice itself.[227] The explanation for this distinction appears to lie in the Court's definition of the scope of the abortion right. The Court appears to understand the abortion right as protecting a woman's right to make an informed choice and to secure a reasonably safe abortion, rather than as a more unlimited right to personal autonomy. Under this definition, regulations of the medical aspects of abortion—mandating information disclosure, or perhaps even waiting periods—might be considered not

224. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993); Brownstein, *supra* note 23, at 934-35.

225. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); United States v. Lee, 455 U.S. 252 (1982).

226. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 439-41 (1992) (upholding prohibition on write-in voting in part based on a state's interest in preventing "party raiding" and thus strengthening the electoral process overall); Storer v. Brown, 415 U.S. 724, 736-37 (1974) (upholding ban on independent candidates who were recently members of political parties); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973) (upholding "delayed enrollment" for primary elections). *But see* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989); Tashjian v. Republican Party, 479 U.S. 208 (1986); Williams v. Rhodes, 393 U.S. 23 (1968); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (all striking down election regulations that did not advance the electoral process).

227. *See* Planned Parenthood v. Casey, 505 U.S. 833, 877-78 (1992).

only legitimate, but totally consistent with the policies underlying the abortion right.[228] In conclusion, although the Court has been far from consistent, there is a clear tendency across doctrinal areas to permit direct burdens on core constitutional rights if and only if the ultimate purpose of the burden is to advance the principles underlying that right.

d. Limited-Purpose Analysis in Extreme Cases

One somewhat intractable issue that remains with regard to purpose scrutiny is what to do in the so-called "hard cases." Even the most vocal critics of constitutional balancing agree that in certain, extreme situations, the Court must sometimes permit action that clearly seems to violate the Constitution.[229] The classic example is the one presented in *Near v. Minnesota ex rel. Olson*,[230] of a newspaper that plans to publish the departure times of troop ships in time of war. Another example might be the need to segregate prisoners temporarily by race in the face of potential rioting.[231] The limited-purpose framework does not appear to leave any room for such a safety valve. One answer to this objection might be to stress the rarity of such occurrences—the government rarely has an extreme need to violate constitutional rights directly because the vast majority of emergency cases require merely incidental or marginal burdens on rights. And in such cases, balancing is already, and should continue to be, the preferred mode of analysis.[232] Another more potent answer to the objection is that the Court has defined the scope of "core" constitutional rights with just such extreme situations in mind.[233] Moreover, case law suggests that in such cases valid, countervailing government interests will often be rooted in the very constitutional provision being infringed—in other words, the government may be infringing the rights of some citizens in order to safeguard the rights of the majority. Thus, true dilemmas are likely to be rare under a limited-purposes approach.

Admittedly, the above responses do not resolve the troop-ship or prison-riot problems. Although the subject is beyond the scope of this

228. *See* Brownstein, *supra* note 23, at 885 & n.58; Dorf, *supra* note 18, at 1224-26. Another explanation for the expansion of permitted government interests in the abortion context might be that the *Casey* Court demoted the abortion right to non-fundamental status. If so, the Court has consigned abortion rights to mere balancing scrutiny, with deference given to the government's assessment of its interests. I do not, however, think that this is the best reading of *Casey*.

229. *See* Aleinikoff, *supra* note 33, at 999-1000; Pildes, *supra* note 35, at 714.

230. 283 U.S. 697, 716 (1931).

231. *Cf.* Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam) (explaining that prison officials have a right in certain circumstances to take racial tensions into account to maintain order); Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (assuming that separation of races in prison during a race riot is not unconstitutional).

232. *See infra* Part II.B.3.

233. *Compare* Dorf, *supra* note 18, at 1227-28, *with* Faigman, *supra* note 105, at 756-57.

Article, I would like to reiterate Alexander Aleinikoff's suggestion that courts should not allow the need for exceptions in extreme cases, or the ability to think up outlandish hypotheticals, to guide their analysis in typical cases.[234] Moreover, because Supreme Court justices are only human beings living in a social context, there is a grave danger in recognizing broad constitutional exceptions for special circumstances. In a time of passion, a politicized Supreme Court may pick up on such exceptions as a reason to uphold blatantly unconstitutional actions. This is what happened in *Korematsu v. United States*,[235] and the same thing could easily have happened in a different context in *New York Times Co. v. United States*, the Pentagon Papers case.[236] There may be enough room in equitable standards governing the granting of injunctive relief to permit necessary safety valves. In any event, however, there seems to be no pressing need to distort mainstream constitutional doctrine because of the potential for such emergencies.

3. *Balancing Analysis for Incidental or Unintended Burdens*

Many constitutional disputes do not fall into either of the above two categories. In many cases where a constitutional violation is alleged, the government is acting for an entirely legitimate purpose. Moreover, often in these cases the government has not directly invaded core constitutional rights, so as to trigger limited-purpose analysis. Instead, it is acting in an area of peripheral constitutional concern, or has imposed a merely incidental burden on a constitutional right. However, the effect of the law is to place some substantial burden on the exercise of a recognized constitutional right, and therefore to raise serious constitutional concerns. In these situations, there is a real clash between constitutional values and legitimate governmental purposes, and the Constitution has not itself prejudged the relative weight of those values. Because of this uncertainty, *ad hoc* balancing has been the rule. Even where the Court's doctrine does not speak in the language of balancing, the results in these cases appear to reflect a case-by-case comparison of the strength of the individual and government interests involved.[237]

In some areas, such as First Amendment free speech and free exercise litigation, most cases fall into this third category. These include, as

234. *See* Aleinikoff, *supra* note 33, at 1000; *cf.* Dennis v. United States, 341 U.S. 494, 528 (1951) (Frankfurter, J., concurring in the judgment) (reciting danger of establishing doctrine based on facts of "great" or "hard" cases).

235. 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II). *But see id.* at 245-46 (Jackson, J., dissenting) (explaining particular harm caused by a judicial opinion sustaining an unconstitutional action).

236. 403 U.S. 713 (1971) (denying injunction against publication of classified government documents regarding prosecution of Vietnam War).

237. Moreover, in some instances involving minor, incidental burdens on rights, no scrutiny at all might be required. *See* Dorf, *supra* note 18, at 1243-46.

discussed above, cases involving speech on government property (*Burson v. Freeman* and *Madsen v. Women's Health Center*), and a number of cases involving so called "low-value" speech. For example, in *City of Renton v. Playtime Theatres, Inc.*,[238] the Court upheld a zoning statute restricting the location of theaters that exhibited "adult" films. It found that the statute was not content-based because it was justified without reference to the content of speech—i.e., because the purpose behind the statute was less related to content than to the secondary effects of that content on the community.[239] But this narrow understanding of what is "content-based" is somewhat awkward and, more importantly, does not comport with other cases finding content regulation regardless of purpose.[240] The best explanation for the *City of Renton* decision appears to lie in the fact that although the zoning ordinance was a direct regulation of private speech, and indeed was also "content-based" regulation by any reasonable understanding, it concerned the regulation of "indecent" speech, which arguably receives a lower level of constitutional protection.[241] *City of Renton*, and many of the Court's other cases involving sexually explicit speech, can be understood as an example of a more general aspect of the Court's free

238. 475 U.S. 41 (1986).

239. *See id.* at 47-48; *accord* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of reguated speech.'") (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis in original). Of course, the *City of Renton* Court simultaneously, and somewhat inexplicably, disclaimed any reliance on legislative motive in its analysis. It drew a sharp distinction between legislative motive—why the legislature enacted a law—and legislative intent—how the legislature formally justified its law. The Court noted that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *City of Renton*, 475 U.S. at 48 (quoting United States v. O'Brien, 391 U.S. 367, 383-84 (1968)). The Court's disavowal of a motive inquiry in *City of Renton*—and in *O'Brien*, the seminal case on which the Court relies—seems to have been driven by a reluctance to strike down legislation which under the Court's precedents was quite clearly improperly motivated—in *City of Renton*, because of hostility to an "adult" theater, and in *O'Brien*, because of hostility to the anti-Vietnam War message conveyed by draft card burning. It should be noted, though, that the flat constitutional principle stated in *City of Renton* and *O'Brien* has not been followed historically. *See* Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating 1901 state constitutional provision because it was motivated in part by racism, even though the same provision, if adopted with neutral motives, might be upheld).

240. *See* Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428-30 (1993).

241. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (partially upholding regulation of indecent cable speech); *cf. id.* at 2391 ("Nor need we here determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue.") (citing FCC v. Pacifica Found., 438 U.S. 726, 745-48, 761-62 (1978)); Osborne v. Ohio, 495 U.S. 103 (1990) (upholding ban on private possession of child pornography); New York v. Ferber, 458 U.S. 747 (1982) (upholding prohibition on distribution of child pornography); Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc) (upholding ban on daytime broadcast of indecent materials), *cert. denied*, 116 S. Ct. 701 (1996).

speech jurisprudence—the classification of entire categories of speech as "low-valued." Under this jurisprudential scheme, disfavored speech becomes subject to direct government regulation without stringent purpose scrutiny because regulation of such speech does not raise core constitutional concerns. Instead, "low-valued" speech cases are generally resolved through balancing, which normally involves strong deference to governmental purposes. In some instances, such speech is given no constitutional protection at all.[242] Commercial speech, "fighting words," and libelous speech appear to constitute other categories of such "low-valued" speech.[243]

More generally, balancing is required whenever a generally acceptable statute is applied to a protected activity, thereby creating an incidental (and presumably unintended) burden. Broad regulations of

242. The prime examples of speech entirely denied constitutional protection are child pornography and obscenity. For example, in the *Osborne* and *Ferber* decisions, the Court employed "definitional" rather than *ad hoc* balancing to entirely deny First Amendment protection to a category of speech—child pornography. *See Osborne*, 495 U.S. at 108-11; *Ferber*, 458 U.S. at 757-64. Obscene speech has been treated similarly. *See* Miller v. California, 413 U.S. 15, 23-24 (1973). Definitional balancing requires the Court to balance free speech interests against the strength of governmental objectives with regard to an entire *category* of speech, rather than with regard to specific burdens on speech, as is the case with *ad hoc* balancing. David Faigman has criticized this type of analysis, claiming that it improperly relies on the strength of government interests in defining the scope of the speech right itself. *See* Faigman, *supra* note 96, at 1557-62. While the Court's decisions in this area, which purport to define obscenity (for example) as "not-speech," justify Faigman's critique, I am not convinced that these cases in fact rely on such reasoning. It seems to me that the child pornography decisions and the obscenity decisions, like other cases involving indecent speech, necessarily reflect a *prior* judgment by the Court that the speech at issue, because of its sexual content, is of lower constitutional value and therefore not within the full ambit of the First Amendment. One cannot, for example, imagine the Court upholding a ban on *political* speech based on reasoning parallel to that of *Ferber*. Therefore, the cases are best understood to involve merely a broad, categorical application of the general balancing approach that dominates the Court's middle tier of scrutiny. Of course, none of this is to say that the Court's categorical approach to these types of speech, which entirely denies constitutional protection rather than engaging in case-by-case balancing, is necessarily proper or wise. It should be noted, moreover, that even seemingly "unprotected" speech, such as obscenity or child pornography, is generally accorded *some* constitutional protection by defining the unprotected categories of speech extremely narrowly, in the course of "definitional" balancing. *See, e.g., Miller*, 413 U.S. at 24.

243. For a general discussion of the Court's categorical approach to "low-valued" speech, see Kagan, *supra* note 86, at 472-83. Kagan seeks to explain the creation of these categories as a product of motive analysis, suggesting that the Court's greater tolerance for regulation of such speech reflects a perception that the regulation is rarely improperly motivated. I find that explanation unconvincing, however, because at least some less-protected speech, such as indecent speech, is clearly the target of greater regulation because of ideological hostility on the part of the government. The better explanation for these categories is that the Court classifies such speech as unrelated, or only tangentially related, to the purposes of the First Amendment. Of course, if the Court changes its mind about the place of allegedly "low-valued" speech in the First Amendment hierarchy, its approach to regulation of such speech might change. There are hints in recent cases that such a change might be occuring with respect to regulations of commercial speech.

conduct, as applied to expressive activity, raise this concern, as do general statutes that have the effect of burdening religious exercise.[244]

The questions of how *ad hoc* balancing should be applied, and whether it is even possible to engage in balancing in a coherent manner, are beyond the scope of this Article. It seems evident to me that *some* form of judicial balancing is inevitable if rights are not to be radically underprotected. After all, it is quite impossible, if government is to function at all, for the judiciary to review stringently every government action that incidentally burdens individual rights.[245] Indeed, this reality appears to have driven the Court's recent jurisprudence, especially its middle tier of scrutiny, towards a balancing methodology. Although balancing inevitably increases the role of subjective judgment in constitutional decision making, such subjectivity is an unavoidable component of a legal system that is forced to make extremely delicate accommodations of competing social and individual interests.[246]

Even if the need for balancing is conceded, however, the question remains as to how government interests should be evaluated, and what kind of balancing the courts should apply in the purpose scrutiny context. The discussion here can be very brief, because the conclusion is simple. In the context of *ad hoc* balancing, the number of legitimate governmental purposes is essentially unlimited—indeed, it is the unlimited scope of permissible governmental purposes that necessitates balancing in the first place.[247] With respect to purpose scrutiny, the counter-majoritarian difficulty is at a height here. As a result, in the context of *ad hoc* balancing courts must defer to legislative and executive judgments regarding the need for, and importance of, a particular action; any other approach would constitute untethered, and unjustifiable, judicial second-guessing of democratic judgments. Thus in the context of true balancing, the Court should not, and generally does

244. *Compare* Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (ruling that such incidental burdens receive *no* constitutional scrutiny) *with* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb) (apparently restoring a balancing test in such cases).

245. *See* Bhagwat, *supra* note 14, at 169-70 (explaining why balancing cannot be avoided with regard to regulation of speech on government property and regulation of conduct that incidentally burdens speech); *see also* Dorf, *supra* note 18, at 1251; Faigman, *supra* note 39; Fiss, *supra* note 50. It is important to note, though, that just because balancing is required does not mean the results cannot be constrained somewhat, and the scales tilted, through the application of subsidiary principles. *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693-703 (1992) (Kennedy, J., concurring in the judgment) (discussing the use of weighted balancing to resolve public forum disputes).

246. *See generally* Chemerinsky, *supra* note 82, at 1117-18.

247. *See* Fallon, *supra* note 33, at 348-51 (describing the proliferation of permissible government purposes); Sheppard, *supra* note 33, at 984-85; *see also* Aleinikoff, *supra* note 33, at 977 ("[B]alancing takes an expansive view of what should count as a constitutional interest."); Faigman, *supra* note 105, at 757-64.

not,[248] engage in any purpose scrutiny. Instead, it limits its analysis to defining individual rights, and weighing them against governmental purposes whose strength is derived from the fact and nature of legislative action.

Under this purpose scrutiny framework, courts will—and should—defer to the wishes of the elected branches as to the importance of their chosen objectives. This deference should not, however, extend to the elected branches' measure of the strength of the individual right or the *result* of the balancing process. The courts possess a unique institutional ability and obligation to protect individual rights against majoritarian intrusion.[249] In these cases, therefore, courts should independently compare the significance of the burden on the individual right against the importance of the governmental purpose to determine if the government action should be permitted.[250]

The difficult question that remains is whether the courts should *always* accept the government's assertion regarding the importance of its purposes. One approach, generally followed by the moderu Court in its rational basis review but not in higher tiers, would be to accept any statement of a governmental purpose, including an *ex post* creation of counsel.[251] In balancing cases, where there is a substantial, albeit unintended or incidental, burden on a constitutional right, this seems too deferential an approach. Instead, for courts to defer to a democratic judgment in this area there should be some indication that such a judgment has *actually* been made. Sanford Levinson makes the point that when a facially neutral law is applied in a manner that burdens constitutional rights, the enacting legislature has frequently made *no* judgment about the relative importance of the government interest in that particular application of the law.[252] He therefore suggests process-oriented limitations on deference to government statements of compelling interests.[253]

One cannot go too far in this regard, of course, because decisions regarding specific applications of general laws are typically made by prosecutors, or other executive branch officials, not legislatures. It would be utterly unreasonable to expect *ex ante* legislative consideration

248. *See supra* Part I.B.

249. *See* Faigman, *supra* note 96, at 1525-29.

250. *See* Aleinikoff, *supra* note 33, at 984-86; Faigman, *supra* note 39, at 655.

251. *See* Faigman, *supra* note 39, at 681 (even if no government purpose is apparent, the Court will uphold the legislation if it can devise a justification under current doctrine).

252. To demonstrate this point, Levinson uses the example, from the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), of the application of drug laws to the use of peyote in Native American spiritual ceremonies. *See* Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1036-46 (1994).

253. *See id.*

of every possible application of a law. However, it does seem reasonable as a prerequisite for deference to require that an elected official, or an appointee of such an official, has made a reasoned and consistent judgment regarding the strength of the government's purposes underlying both the general legislation, and the particular application being challenged.[254]

Finally, I should note that in defending and advocating a reinvigorated purpose scrutiny, I do not mean to suggest that courts should cease their scrutiny of government means. In fact, at least some degree of means scrutiny will always remain essential, if for no other reason than to smoke out pretextual ends, the function that means scrutiny arguably performs today.[255] I do believe, however, that if purpose scrutiny is revived, means scrutiny will and should become more deferential, reflecting greater legislative competence in this area.

FIGURE 1

FRAMEWORK FOR JUDICIAL SCRUTINY OF GOVERNMENT PURPOSES

	Direct Burden on Core Constitutional Right	*Incidental Burden or Marginal Right*	*Minor, Incidental Burden*
Illegitimate Purpose	*Illegitimate purpose analysis*: law is invalidated	*Illegitimate purpose analysis*: law is invalidated	*Illegitimate purpose analysis*: law is invalidated
Legitimate Purpose	*Limited-purpose analysis*: law is valid only if purpose is consistent with principles underlying substantive constitutional right	*Balancing test*: Court's assessment of the burden on rights should be measured against government's assessment of the importance of the governmental purpose	*No Scrutiny*

III

DOCTRINAL IMPLICATIONS: SOME PRELIMINARY THOUGHTS

Without attempting to rewrite all of constitutional doctrine, this Part undertakes a preliminary discussion of how purpose scrutiny points to the need for further changes in the Court's current doctrinal frame-

254. If only an executive officer's judgment is at issue, then it would appear proper to permit the judgment to be first articulated and explained during litigation, unlike a legislative judgment. In addition, if only a facial challenge has been brought, then deference will be necessary to the legislative judgment alone.

255. *See, e.g.*, Romer v. Evans, 116 S. Ct. 1620, 1627-28 (1996); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 449-50 (1985); Shapiro v. Thompson, 394 U.S. 618, 629-38 (1969); Gunther, *supra* note 7, at 45-46; Sager, *supra* note 35, at 937-38; Sheppard, *supra* note 33, at 991-93.

work. As a preliminary matter, it should be noted that the Court often employs purpose-oriented analysis similar to the type recommended by this Article, although it does not always couch its reasoning in those terms. The question addressed here is how the language of the Court's opinions would change if it were to make explicit what it now tends to do implicitly—in other words, how the written doctrine would and should change if purpose scrutiny were explicitly adopted as a form of constitutional analysis. Given the substantial continuity between the proposals set out in this Article and the Court's current practice, it should come as no surprise that the suggested changes are incremental, rather than revolutionary.

A. Equal Protection Doctrine

If the Court were to adopt purpose scrutiny explicitly, its equal protection doctrine would require less adjustment than many other areas. Equal protection is already the most purpose-conscious area of the Court's jurisprudence. For example, the Court has already recognized explicitly that the Equal Protection Clause creates certain principles—the strong anti-caste principle recognized in *Moreno*, *Cleburne*, and *Romer*, and the anti-parochialism principle recognized in *Shapiro v. Thompson* and its progeny—that render certain government purposes entirely illegitimate when they underlie classifications drawn among citizens.[256] It has also recognized the crucial role played by governmental purpose in its "strict scrutiny" race cases.[257]

Regarding illegitimate purpose analysis, only two adjustments to the Court's equal protection doctrine seem advisable. First, the Court should make it clear precisely how it has derived the relevant principles from the Fourteenth Amendment. Second, it should set the limits of those principles.[258] In addition, a more explicit focus on forbidden purposes might reveal other governmental purposes, beyond animus-driven class discrimination and parochialism,[259] that are forbidden by the Equal Protection Clause. Such an explication might raise some difficult substantive questions,[260] but it would contribute substantially to the clarity of the Court's doctrine.

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256. *See supra* text accompanying notes 52-57.

257. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985); Washington v. Davis, 426 U.S. 229 (1976); *cf.* Palmer v. Thompson, 403 U.S. 217 (1971).

258. Such an explication might lead the Court to reconsider its conclusions that certain principles, including perhaps the anti-parochialism principle, can properly be found in the Fourteenth Amendment.

259. *See supra* Part I.C.1.

260. One example of such a difficult question might be the one that seems to have divided the majority and dissent in *Romer v. Evans*, 116 S. Ct. 1620 (1996), which is whether the anti-caste principle can be extended to classifications such as homosexuality, which is defined *primarily* based on conduct that is not constitutionally protected (or at least not while *Bowers v. Hardwick* remains

In other areas of its equal protection doctrine, there is more room for doctrinal clarification. With regard to gender classifications, the Court's jurisprudence is simply confused; some cases suggest that gender classifications are highly suspect, and may be adopted only for limited, equality-enhancing purposes, but others seem to adopt a more *ad hoc* balancing approach.[261] To create a coherent analysis, the Court must first determine why it considers gender to be a classification worthy of special scrutiny (a point that might seem obvious, but apparently is not so to some members of the Court). That is to say, what principles underlie the constitutional right to be free of discrimination based on one's gender? Based on the conclusions reached by that exercise, the Court must determine what kinds of government motives will justify a gender classification. In particular, the strong trend of the cases, and the better position, seems to be to treat gender discrimination as raising core equal protection concerns, which would then subject gender classifications to limited-purpose analysis.[262]

This analysis does not imply that gender classifications must be treated the same as racial classifications.[263] For example, some gender classifications that seemingly favor women are treated with a great deal of suspicion—in some instances with greater suspicion than benign racial classifications. Under the equality principle, a gender classification that does not help to make up for discrimination against women[264] may be viewed as a "gilded cage," trapping women in outmoded gender roles.[265] More fundamentally, there appear to be more reasons for the government to treat men and women differently, consistent with the equality principle, than with regard to race—an obvious example being that "separate but equal" educational facilities do not seem to be *per se* unconstitutional for the sexes,[266] but are obviously so in the context of race.[267] Broadly speaking, the concept of "equality" has a slightly different meaning when applied to gender as opposed to race. In the context of race, the objective of equal protection policy seems to be that

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good law). I have already explained, *supra* Part II.C.1, why I think the anti-caste principle is properly so extended.

261. *See supra* text accompanying notes 200-209.

262. *See* United States v. Virginia (*VMI*), 116 S. Ct. 2264, 2274-76 (1996); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1433-34 (1994) (Kennedy, J., concurring in the judgment).

263. *But see VMI*, 116 S. Ct. at 2295-96 (Scalia, J, dissenting) (implying that the Court has begun to apply the same scrutiny to gender classifications as to racial classifications).

264. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam) (upholding regulation giving women greater Social Security benefits than men because it helped reduce economic disparity between genders); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (upholding differing property tax treatment for widows and widowers for the same reason).

265. *See J.E.B.*, 114 S. Ct. at 1423.

266. *See VMI*, 116 S. Ct. at 2276-77 nn. 7-8.

267. *See* United States v. Fordice, 505 U.S. 717 (1992); Brown v. Board of Educ., 347 U.S. 483 (1954).

people will have the same opportunities, and be treated in the same way, regardless of skin color—until, ultimately, race will simply not matter in civil society. With gender, however, that is not necessarily so; biological differences between the sexes will remain in existence, and therefore true "equality" might well require differing treatment. This is not to say that gender discrimination is less significant, or a less important concern of equal protection policy, than race discrimination—but it is *different*.[268] The Court should confront this fact. By discussing how and why equal protection doctrine differs between the gender and racial contexts, the Court could clarify its doctrine immeasurably.

A shift toward a purpose-oriented framework would lead to particularly interesting doctrinal implications in the area of racial classifications. Traditionally, the Court has applied strict scrutiny to racial classifications disfavoring minority groups, and at least since World War II, it has allowed no government purpose to justify such a classification.[269] The Court should make this explicit, and end the farce of "strict scrutiny" review, if for no other reason than the danger of another *Korematsu* in a time of social stress. The more difficult issue has to do with benign racial classifications—those designed to favor previously discriminated against minorities.[270] Here, despite the langnage of strict scrutiny, the Court has emphasized that scrutiny is not "fatal in fact."[271] Although the Court has already moved towards a limited-purposes analysis, it has not yet decided what governmental purposes are permitted in this context. Nor has it grounded its analysis in the principles underlying the Equal Protection Clause.[272] The Court has recognized

268. This point is closely related to David Faigman's insightful critique of equal protection tiers of scrutiny. Faigman argues that the Court appears to lower the level of scrutiny in certain cases when it perceives that a particular government interest is a valid one. *See* Faigman, *supra* note 96, at 1563-65. Whether it is engaging in "balancing" as Faigman believes, or in "purpose scrutiny" as I believe, the Court's critical error lies in assuming that the choice of a "tier of scrutiny" or "level of review" also dictates a conclusion as to the strength and permissibility of government interests.

269. In the years following *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II), the Court has consistently prohibited all such racial classifications. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down statute prohibiting miscegenation); *Brown*, 347 U.S. at 483 (prohibiting racial segregation in public schools). Even before *Brown*, the Court sometimes struck down an obviously invidious racial classification. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

270. Of course, the difference between benign and invidious discriminatory classifications is not always clear—although Justice Stevens has argued that the difference is often an obvious and well-understood one, and is not difficult to apply in most cases. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2121-22 (1995) (Stevens, J., dissenting).

271. *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)) (internal quotations omitted); *see also* Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996). This statement of course represents yet another move away from Gerald Gunther's pathbreaking article regarding equal protection. *See* Gunther *supra* note 7.

272. To be precise, the Court as a whole has not stated a clear position on this point. Individual members have done so, however, essentially suggesting that *no* purpose will suffice to justify any racial classification, because the primary principle underlying the Equal Protection Clause is one of

one acceptable purpose for such classifications—remedying past discrimination—which seems obviously consistent with the purposes of the Fourteenth Amendment. But the Court's recognition of this, and thus far no other, allowable purpose seems to be the product of *ad hoc* balancing, of judicial distaste for racial classifications, rather than of reasoned, interpretive analysis. For example, little else can explain the distinction drawn by some courts permitting racial classifications designed to remedy public discrimination, but not private or societal discrimination. After all, combating *all* of these forms of discrimination seems to advance the principles behind the Equal Protection Clause.[273]

The *ad hoc* nature of the current doctrine is particularly evident in the Seventh Circuit's recent decision in *Wittmer v. Peters*. In that case, Judge Posner concluded that benign racial classifications—"reverse discrimination," in the language of the court—could survive strict scrutiny if motivated by *any* "truly powerful and worthy concern," presumably as evaluated by the reviewing court.[274] The state's expressed purpose in *Wittmer* was the desire to hire *some* black supervisors for a "correctional boot camp" for adult offenders, where the majority of the boot camp's population was African American. The court accepted the state's empirical argument that the "adversarial" model of such institutions simply could not work "with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots."[275] It therefore found that the state had advanced a sufficiently compelling purpose.

The *Wittmer* analysis seems peculiar and incomplete, however—surely the state could not have provided a preference for a white applicant over a black one because of the racism of the institution's white inmates.[276] I do not mean to suggest that the court's conclusion was incorrect, but it cannot be that the challenged racial preference was constitutional merely because the underlying motivation was "worthy" in some abstract sense. Under a purpose scrutiny framework, Illinois's use of a racial preference would be allowable only if its purpose—presumably to recognize and compensate for the lingering effects of

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color-blindness and formal equality. *See Adarand Constructors*, 115 S. Ct. at 2118-19 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment). This view, of course, is one possible understanding of the purposes of the Fourteenth Amendment, although it seems to me an implausible one, for reasons both historical and practical. *See* Baker, *supra* note 14, at 124-125 n.225 (arguing that the state can use a racial classification to achieve the "unobjectionable" purpose of promoting an egalatarian society).

273. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-99 (1989); Hopwood v. Texas, 78 F.3d 932, 948-55 (5th Cir. 1996).

274. *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996).

275. *Id.* at 920.

276. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that an individual should not be denied a right simply because recognition of that right might be met with societal prejudice).

historical and societal discrimination on the attitudes of minority inmates—is consistent with and advances equal protection policies. It is my view that the remedial purposes of the Equal Protection Clause are probably broad enough to encompass such a state policy, but that is a question of substantive interpretation that the courts have only implicitly addressed.

The question of whether the enhancement of diversity is an allowable government purpose is particularly difficult. In *Hopwood v. Texas*, the Fifth Circuit concluded—or more accurately, held that the Supreme Court had concluded—that fostering racial diversity in educational or employment settings is not a compelling government purpose, presumably because it is inconsistent with equal protection principles.[277] It left the reason why essentially unexplained.[278] One interpretation of the Equal Protection Clause holds that the clause requires absolute color-blindness on the part of the government,[279] which would prohibit *any* race-based classifications. The contrary view, based on the perceived value of pluralism, finds a diversity-enhancing purpose entirely consistent with the principles underlying the clause.[280] If the Court has chosen between these views, it must explain where in the text, history, or purposes of the Fourteenth Amendment it has found the basis for doing so.

B. Free Speech Doctrine

As I have already discussed, the Supreme Court's free speech doctrine is in disarray.[281] Although a more explicit purpose scrutiny may point the way for a more coherent reformulation of the doctrine, it cannot provide a complete answer, or a substitute for a thorough rethinking. Nevertheless, the lens of purpose analysis does generate some

277. *See Hopwood v. Texas*, 78 F.3d 932, 944-48 (5th Cir. 1996); *see generally* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357 (1996).

278. There is some suggestion in the Fifth Circuit's opinion that the problem with the diversity rationale is that it encourages "racial stereotypes." *Hopwood*, 78 F.3d at 945. What is not clear, however, is why the court considers, as it apparently does, an interest in racial pluralism to be inherently contrary to equal protection principles.

279. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118-19 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment).

280. *See id.* at 2127 (Stevens, J., dissenting); Metro Broad., Inc. v. FCC, 497 U.S. 547, 566-68 (1990), *overruled by Adarand Instructors*, 115 S. Ct. at 2097; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314-15 (1986) (Stevens, J., dissenting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978).

281. *See supra* text accompanying notes 116-122, 210-223; *see also* Bhagwat, *supra* note 14, at 158-72. For a criticism of the current free speech doctrine that is distinct from, but overlaps somewhat with the analysis in this Article, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

insights into the Court's current categories and how its analysis is leading it astray.

First and foremost, the Court should abandon its current distinction between content-based and content-neutral regulations. The Court appears to employ this analysis mainly to identify improperly motivated regulations,[282] but "content" is a poorly-suited tool for such a task. To be sure, content-based regulations are often motivated by hostility to targeted speech, which is certainly an impermissible purpose. Equally clearly, however, that is not always the case. In turn, this suggests that the relationship between content and purpose could be captured more accurately by a rebuttable presumption than by the current inflexible, categorical analysis. Rather than using content as a proxy for bad motive, the Court would be better served simply to conduct a direct inquiry into purpose, guided by whatever presumptions it cares to establish.

Such a doctrinal adjustment would also permit the Court to identify more explicitly the category of government actions that it believes pose a fundamental threat to First Amendment values, and which therefore should be subject to limited-purpose analysis. Content analysis has failed to perform this task, in part because it serves two unrelated purposes in the Court's jurisprudence: to smoke out illicit legislative motives,[283] and to identify the speech regulations that raise the most serious concerns.[284] But the Court has not clearly distinguished these functions, and does not in individual cases consistently state or determine which function its content analysis is performing. Therefore, it is often less than clear what the consequence of a content classification should be.

Not only does it have trouble identifying illegitimate purposes, but the content classification does not serve the heightened scrutiny function particularly well, either.[285] I have argued in this Article that the ap-

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282. *See supra* text accompanying notes 116-122; *see also* Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458-59 (1994); R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992); Texas v. Johnson, 491 U.S. 397, 414-17 (1989); Brownstein, *supra* note 23, at 922-23.

283. *See* Kagan, *supra* note 86, at 451; *see also supra* text accompanying notes 117-128.

284. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428-31 (1993) (striking down a local ordinance prohibiting the distribution of "commercial handbills" on public property); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 115-18 (1991) (holding that a statute that imposes a financial burden on speakers because of the content of their speech is presumptively unconstitutional); *see also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a statute requiring newspapers to print replies of political candidates to criticism).

285. The *Discovery Network* decision is a particularly good example of the failure of content analysis to identify actions of particular concern. The case involved an ordinance that distinguished between commercial and noncommercial newspapers in regulating the placement of news racks on public property. The ultimate government purpose—the prevention of clutter on sidewalks—was obviously legitimate, and the distinction it had drawn, based as it was on the Court's own case law placing a lower value on commercial speech in the First Amendment hierarchy, also seems unproblematic. *See Discovery Network*, 507 U.S. at 435-36 (Blackmun, J., concurring). Yet based on a formalistic content analysis, the Court concluded that strict scrutiny should apply, and struck

propriate category for heightened purpose scrutiny—limited-purpose analysis—is direct regulation of private, fully-protected speech.[286] That, however, is only a preliminary suggestion, and cannot take the place of the more sustained judicial analysis of which the common-law methodology is capable. In any event, doctrinal progress cannot occur until the Court focuses on this question without being distracted by the false promise of content analysis.

In addition, within this highly scrutinized category of cases, the Court must articulate, in more specific terms, which policies and approaches toward speech the First Amendment supports and which it forbids. The Court has shown itself to be sharply divided even on the permissibility of a government purpose in enhancing diversity among speakers, which appears to be the only free speech-enhancing interest that the Court has recognized in its cases.[287] The Court should establish more completely why such a purpose might or might not enhance free speech policies. Perhaps a more nuanced analysis is needed, identifying what kinds of diversity enhancement might and might not be constitutionally acceptable. For example, can the state suppress or diminish the speech of some in order to prevent others from being drowned out, thereby increasing the diversity of viewpoints heard?[288] Relatedly, can it place burdens on the editorial discretion of publishers in order to promote diversity and the speech of those who might not otherwise be heard? Moreover, does the nature of the media being regulated influence this analysis, and if so, why?[289]

The Court must also determine what, if any, other governmental motives for regulating private speech are consistent with, and advance, free speech goals. Is a policy of imposing special taxes on the media consistent with First Amendment principles? Obviously not in the ab-

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down the ordinance. *See generally* William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1640-43 (1996) (raising questions about *Discovery Network*'s distinction between commercial and noncommercial speech); *cf.* Kagan, *supra* note 86, at 482-83 (defending the *Discovery Network* decision as a proper application of motive analysis).

286. *See supra* text accompanying notes 210-217.

287. *See* Bhagwat, *supra* note 14, at 158-62 (discussing majority and dissenting opinions in *Turner Broadcasting*).

288. *Cf.* Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976) (per curiam) (suggesting that such a purpose is not consistent with the First Amendment); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2349-50 (1995). Elena Kagan argues that *Buckley*'s hostility to diversity-enhancement might be explained by a perception on the part of the Court that such laws often mask hostility to the speech being suppressed or reduced. *See* Kagan, *supra* note 86, at 468-69.

289. *Compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding such a policy unconstitutional with respect to the print media), *with* Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (suggesting that such a policy might withstand scrutiny with respect to cable television operators).

stract[290]—but what if the tax were designed to raise funding to support marginalized speech? May the state require that political campaigns allocate a certain percentage of their commercial time to a "serious discussion" of the issues, thereby encouraging deliberative and robust political debate?[291] Once the Court begins to consider explicitly what kinds of speech regnlation might actually advance First Amendment principles, the list of interesting questions is long and potentially endless. But these issues must be addressed if the Court's free speech jurisprudence is ever to become coherent.

Finally, as long as the government purpose is not illegitimate, balancing remains inevitable in a very large and important set of free speech cases involving incidental or ancillary burdens on speech.[292] In addition, it seems likely that regulations of certain types of speech, including "indecent" speech[293] and "commercial" speech,[294] would be

290. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that an Arkansas tax on general interest magazines is unconstitutional); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (invalidating a Minnesota tax on paper and ink products used by newspaper).

291. Given the current, strongly *laissez-faire* bias of the Court's free speech case law, the present Court would almost certainly answer "no." That should not, of course, end the debate about the proper interpretation of the First Amendment. On this topic, see generally Sunstein, *supra* note 223.

292. Several categories of common First Amendment cases may fall into this category. First, regulations of speech on government property may be a candidate for balancing analysis. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Burson v. Freeman, 504 U.S. 191 (1992); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (also involving regulation of expressive conduct). Though not usually described in those terms, this category of cases might also encompass the Court's jurisprudence according lower constitutional protection to television (and radio) broadcasters, if one considers broadcasters' use of the airwaves to be use of "public property." *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); *cf. Turner Broadcasting*, 114 S. Ct. at 2456-58 (rejecting lower level of scrutiny for regulation of cable television).

Second, regulation of expressive conduct, including the regulation of the conduct components of otherwise protected speech, such as volume regulations or restrictions on aggressive panhandling, might be so analyzed. *See Krishna Consciousness*, 505 U.S. at 704-08 (Kennedy, J., concurring in the judgment) (solicitation of money); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (volume at a rock concert); United States v. O'Brien, 391 U.S. 367 (1968) (burning a draft card); Kovacs v. Cooper, 336 U.S. 77 (1949) (sound truck on public streets). Both the *Ward* and *Krishna Consciousness* cases involved regulation of speech on government property, but their principles would probably extend to fully private speech as well. An interesting issue that arises here is whether political contributions or expenditures, of money qualify as fully protected "core" speech, or as conduct intertwined with speech, which is subject to some regulation for non-speech reasons, such as to limit corruption. *See generally* Colorado Republican Fed. Campaigu Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996) (presenting various views on this issue without any majority opinion).

293. *See* Denver Area Educ. Telecommunications Consortium v. FCC, 116 S. Ct. 2374 (1996); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); FCC v. Pacifica Found., 438 U.S. 726, (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996); *cf.* Sable Comm., Inc. v. FCC, 492 U.S. 115 (1989) (striking down a ban on indecent telephone messages).

subject to balancing because they are considered to be "low-valued" under the First Amendment, which means that the Court recognizes a much greater range of allowable purposes for regulating such speech than with respect to "core" speech.[295] These general categories, however, are neither clearly defined nor well established, leaving a great deal of ambiguity regarding precisely what type of scrutiny the Court will employ in individual cases.

Under purpose scrutiny, therefore, it is critical that the Court clearly identify which kinds of free speech cases are subject to *ad hoc* balancing review. It must then explicitly defer to the judgments of elected officials regarding the existence and strength of the government interests. The reason for deference is clear: these cases, where a multitude of legitimate government objectives can be implicated, raise the countermajoritarian difficulty in the strongest possible way. The need for clarity exists because the Court's current doctrinal confusion might lead to too much, or too little, deference to legislative judgments in individual cases, thereby either sacrificing constitutional rights or impinging improperly on democratic prerogatives. For example, should courts defer to legislative judgments regarding the harm caused to children by indecent speech? Should the Court defer to legislative judgments regarding the need to regulate particular forms of advertising to prevent subtle forms of deception, especially of minors? These questions cannot be answered without a clear statement from the Court regarding the degree of protection accorded to indecent and commercial speech.[296] If such speech is properly subject to relatively intrusive regulation, then the Court should defer. If it is fully protected private speech, however, then presumably First Amendment principles would shift the balance in favor of speech. There is much doctrinal repair work to be done in the free speech area, and the bulk of that work consists of clarifying the doctrinal lines that separate cases into the various categories of review.

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294. *See* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995); United States v. Edge Broad. Co., 509 U.S. 418 (1993); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). It should be noted that commercial speech is a very narrow category, referring only to speech designed to accomplish no more than proposing a commercial transaction. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421 (1993); *cf.* Gentile v. State Bar, 501 U.S. 1030, 1051-54 (1991) (arguing that speech by an attorney regarding pending cases is *not* commercial speech subject to greater regulation).

295. For example, the Court permits regulation of indecent speech for the amorphous purpose of "protect[ing] children," *Denver Area,* 116 S. Ct. at 2386, and permits regulation of commercial speech to prevent deception or fraud, *see* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507 (1996), neither of which would be permissible reasons to regulate fully protected speech, such as political speech.

296. *Cf. Denver Area,* 116 S. Ct. at 2391; *44 Liquormart,* 116 S. Ct. at 1507 ("Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review.") (emphasis in original).

C. Other Doctrinal Areas

In other areas of constitutional jurisprudence, I can give only some preliminary thoughts about areas where a move toward purpose scrutiny would lead to greater doctrinal clarity. With abortion rights, the Court's leading decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* present together a classic example of the way in which the definition of a constitutional right is inextricably tied to the identification of permissible and impermissible governmental purposes.[297] Some ambiguity does exist, however, in the Court's most recent statements in this area regarding precisely what type of scrutiny courts should apply to abortion regulations. In particular, the question exists as to whether the abortion right remains "fundamental," or has been demoted to mere "liberty interest" status.[298] Under the purpose scrutiny framework, the question is whether the Court will subject abortion regulations to limited-purpose analysis, or whether it will merely engage in balancing, combined with prohibitions on certain impermissible purposes such as the direct hindering of a woman's ability to choose an abortion. To give the lower courts real guidance on how to review legislation limiting abortion rights, the Court must clear up this ambiguity, and state candidly where the abortion right falls within the Court's doctrinal framework. In some peripheral areas of its abortion case law the Court has already done so. For example, in its cases reviewing parental consent requirements for abortions by minors, the Court has quite clearly adopted a balancing approach, presumably because of the lesser degree of protection generally accorded by the Constitution to minors.[299] On the critical question of abortion rights for adults, however, ambiguity persists.[300]

In addition to its abortion-rights jurisprudence, the Court's privacy doctrine would be benefited substantially by a clearer exposition of the status, and contours, of the other purportedly "fundamental" privacy rights the Court has recognized, including the right to marriage and the right to parental relationships.[301] Presently, the Court's jurisprudence makes clear that some regulation of these rights is permitted, but leaves to speculation precisely what regulations will pass scrutiny. Moreover,

297. *See supra* text accompanying notes 162-172, 230-231.

298. *See* Faigman, *supra* note 96, at 1566-71.

299. *See* Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990); H.L. v. Matheson, 450 U.S. 398 (1981); *cf.* New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches of minors on school property entitled to greater deference because of the special safety needs involved).

300. *See* Brownstein, *supra* note 23, at 885-92 (discussing difficulty in reconciling the *Casey* Court's decision striking down spousal notification provision of abortion law but upholding 24-hour waiting period).

301. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Stanley v. Illinois, 405 U.S. 645 (1972) (right to parental relationship).

much of the confusion is rooted in the Court's failure to define precisely the scope of the rights that it has recognized—a failure that is magnified by the non-textual nature of these rights.[302] Because the definition of rights and the evaluation of legitimate governmental purposes are necessarily tied together, the Court's silence has stunted its ability to produce a clear jurisprudence regarding governmental purposes in the privacy area.

Finally, as with its free speech doctrine, the Court's jurisprudence with respect to the religion clauses of the First Amendment is in disarray. A reinvigorated focus on governmental purposes can only help to clarify thought. For example, in the free exercise context, the Court had long purported to apply "strict scrutiny" to all burdens on religious exercise, direct or incidental. In reality, it had done so haphazardly.[303] Finally, in the *Employment Division v. Smith*[304] decision, the Court put an end to all constitutional scrutiny of incidental burdens, limiting its scrutiny to direct, and therefore presumptively improperly motivated, regulations of religious exercise. Congress promptly responded by restoring the "old" strict scrutiny standard for all substantial burdens on religion, direct or otherwise.[305] But this cannot be correct; direct and incidental burdens on religious exercise *must* be evaluated differently, just as they are in the free speech context, because they place quite different burdens on constitutional interests and raise quite different concerns about the propriety of government action. Incidental burdens must be subject to a balancing test—though perhaps a weighted one—while direct regulations are properly subject to searching purpose scrutiny.

The Court's establishment clause jurisprudence suffers from even more thorough confusion. The *Lemon v. Kurtzman*[306] "test," the mainstay of the Court's doctrine in this area, makes purpose inquiry an explicit part of its analysis.[307] But *Lemon* has been followed only inconsistently in recent years, while the "coercion" test favored by some Justices of the Court seems to exclude any examination of governmental purposes.[308] Because the Establishment Clause is more of a "structural" than a rights-oriented limitation on governmental power, it is not entirely clear whether purpose should play the same role in this

302. *See generally* Schneider, *supra* note 32, at 86-89.

303. *See* Dorf, *supra* note 18, at 1210-19 (discussing free exercise cases).

304. 494 U.S. 872, 877-78 (1990).

305. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb).

306. 403 U.S. 602 (1971).

307. *See id.* at 612-13.

308. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

area as in the other areas discussed above. At a minimum, however, it seems clear that governmental actions motivated by certain purposes—such as an explicit desire to favor one religion over others—constitute an establishment of religion and are unconstitutional. In any event, the Court should clarify precisely the role of purpose scrutiny in this area and how the inquiry should be structured.

CONCLUSION

Despite the broad range of this Article, its ultimate conclusion is relatively simple. In recent years the Supreme Court has shown an increased interest in the purposes behind government action. This movement is to be applauded. The relative expertise and constitutional role of the Court makes it better suited to purpose scrutiny than the means scrutiny that has dominated constitutional analysis since the New Deal. The Court's movement toward what is in my view a superior mode of analysis is far from complete, however. The Court badly needs to develop a framework for purpose scrutiny to replace the essentially *ad hoc* approach that it now employs. Moreover, to satisfy the requirements of judicial legitimacy in a democratic state, such an approach must be rooted in the constitutional text and its underlying principles, rather than in untethered judgments about the strengths and weaknesses of particular policies. The jurisprudence must also be flexible, recognizing that different constitutional provisions are based on different principles and therefore impose distinct limitations on government action. Although these important details still need to be worked out, the new jurisprudence of governmental interests and purposes offers promise for increasing the coherence of constitutional decision making and doctrine.

On a more specific level, I have suggested that if the Court adopts constitutionally-rooted purpose scrutiny, it will properly invalidate improperly-motivated legislation or regulation even when the legislation falls outside the "heightened scrutiny" tiers of the Court's current doctrine. Such decisions are not judicial usurpations of the authority of the elected branches. Rather, they are legitimate exercises of constitutional authority. To be sure, this authority must be exercised with care and restraint—this is the enduring lesson of the *Lochner* era—but restraint need not lead to abdication of judicial responsibility, as the modern Court has tended to believe.

At the other end of the scrutiny spectrum, I have argued that the Court needs to develop a doctrinal framework to explain what it labels, but are not, "compelling government interests." In particular, the Court should declare what its cases imply: when a fundamental constitutional right is at stake, it will not simply accept any proffered govern-

mental purpose to justify infringement of that right—even if the relevant governing body considers it to be "compelling." Indeed, the Court should recognize that some infringements cannot be justified by *any* governmental purpose. More broadly, the Court must develop a methodology through which it can specify which government purposes can be advanced to justify actions that raise special constitutional concerns. I have suggested that the Court can find the beginnings of such a methodology in the idea that when a constitutional right is directly threatened, only governmental purposes that advance the principles underlying that right can justify the action.

Finally and most importantly, this Article calls for deference in the vast number of cases where neither of the two analyses set forth above are applicable. In such situations, the courts must explicitly recognize that elected officials, not courts, are best suited to define and assess the importance of public purposes. Basic principles of democratic legitimacy prohibit courts from second-guessing such democratic judgments on an *ad hoc* basis, without grounding in the Constitution. Courts cannot shirk their ultimate duty to safeguard constitutional rights from majoritarian intrusion, but neither should they forget the source of their authority and responsibility to do so.