PUTTING THE GOVERNMENT TO THE (HEIGHTENED, INTERMEDIATE, OR STRICT) SCRUTINY TEST: DISPARATE APPLICATION SHOWS NOT ALL RIGHTS AND POWERS ARE CREATED EQUAL

Jennifer L. Greenblatt

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I. INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt."[1] To that end, this article provides a comprehensive overview of one of the defining tools the Supreme Court utilizes to protect constitutional rights and constrain enumerated powers—heightened review.[2] There is no shortage of scholarship recommending what direction the Court should take in applying heightened review.[3] This article fills a necessary gap in the current field of constitutional law scholarship. In the midst of creative legal theories and impassioned pleas for departures from the legal status quo, this article provides what has thus far remained elusive: a comprehensive account of the controversial, interesting, confusing, and oftentimes frustrating doctrine of elevated judicial review.

The article begins with a history of the doctrines leading up to modern judicial scrutiny in Section II. Part A canvasses cases establishing the power of judicial review; Part B parleys the Court's first attempts at abstaining from questioning government powers

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[1] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[2] *See generally* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 2 (2005) ("The practice of judicial scrutiny of legislation and executive action challenged on constitutional or other legal grounds has long been understood to be a necessary corollary of the principle of judicial review.").

[3] *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1063 (1981).

especially reserved to nonjudicial departments; Part C examines the Court's rudimentary line-drawing techniques delineating legislative power to deal with conflicts between government powers and individual rights; Part D discusses the now defunct substantive due process right of liberty to contract and its impact on modern judicial review; Part E explains how the incorporation doctrine foreshadowed the Court's selection of triggers to heightened review; and Part F assesses *United States v. Carolene Products Co*.[4] footnote four's role in spawning a theoretical framework for heightened review jurisprudence.

Section III lays out the modern framework of scrutiny levels. Part A defines strict scrutiny and its associated means and ends test; Part B details intermediate scrutiny and its associated means and ends test; and Part C describes rational basis and its associated means and ends test.

Section IV clarifies the difference between definitional review and override review. Part A delineates definitional review as the interpretation technique of balancing competing interests to define the scope of constitutional provisions; Part B identifies override review as the superseding technique whereby different means and ends tests create levels of presumptive constitutionality triggered by the issue at stake.

Section V sets forth the research methodology used in the comprehensive study of heightened scrutiny applied by the Supreme Court. This Section describes the definition of a heightened scrutiny case, the search query used, the conventions for counting cases applying heightened scrutiny to multiple constitutional provisions within a single case, and research limitations.

Section VI reveals the results of the comprehensive study of judicial review. Part A considers all rights subject to heightened review. Part B details the one power subject to heightened review. Parts A and B are further subdivided, organizing all cases by the individual provisions of the Constitution treated in each. Listed in decreasing order of proportional representation among all heightened scrutiny cases, each constitutional provision that the Court has subjected to heightened review contains a brief overview of founding cases, the levels of scrutiny applied, the proportional representation of the provision in scrutiny jurisprudence, the kinds of government interests that have overridden competing constitutional claims, the contexts the

[4] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

cases arose in, and any related doctrines that might affect the importance of the right or power being open to heightened review (such as categorical exemptions from heightened scrutiny).

Section VII presents some concluding thoughts on the past, present, and future of judicial scrutiny. Goals for the use of the article's historical account of judicial scrutiny in fostering informed discussions about the sustainability of judicial scrutiny, as well as areas where heightened scrutiny might be expanded given the current protections of the doctrine are expounded.

II. THE PATH TO HEIGHTENED REVIEW

A. An Ambitious Beginning: Marbury v. Madison

The power of the Supreme Court to overturn governmental actions and laws as violating the United States Constitution may now seem inevitable.[5] The incontestability of the power of judicial review can be traced to a case asserting its existence in a political climate precluding refutation.[6] The 1803 Supreme Court case of *Marbury v. Madison* was never really about whether William Marbury would receive his commission to be justice of the peace, but whether the Supreme Court could claim a place for itself as a coequal branch of the newly formed government.[7] In a period of political flux, "Marbury wanted the Federalist-dominated Supreme Court to order the Jeffersonian Republican-controlled executive branch to deliver his commission" through a writ of mandamus.[8] Instead, through a strained reading of the Judiciary Act of 1789 and after making unnecessary legal conclusions, the Court ruled that the Act was unconstitutional insofar as it granted original jurisdiction contrary to Article III.[9]

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[5] *See, e.g.*, CHARLES L. BLACK, THE OLD AND NEW WAYS OF JUDICIAL REVIEW 9 (1957) ("Most impressive of all is the fact that judicial review, until quite recently, has almost never been opposed except by some of those who greatly disliked some current trend of decision, and has steadily received not only disinterested support but also a great deal of support against interest.").

[6] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803).

[7] *See* FRANK R. STRONG, JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER 20 (1997).

[8] KERMIT L. HALL, THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY 12 (1985).

[9] *See Marbury*, 5 U.S. (1 Cranch) at 180; *see also* WILFRED C. GILBERT, LIBRARY OF CONGRESS, PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES 1 (1936) (noting the case's departure from the natural decisionmaking order).

The genius of the Chief Justice's decision lies in its ultimate result rather than its flawed legal analysis: the Supreme Court assumed the power to exercise judicial review—to decide whether a law conflicted with the Constitution.[10] Judicial supremacy in constitutional interpretation rang clear: "It is emphatically the province and duty of the judicial department to say what the law is."[11] And what about President Thomas Jefferson, who was so opposed to the expansion of judicial power?[12] He had no recourse for Chief Justice Marshall's decision; Jefferson (or Congress for that matter) would not admonish the Court for finding it lacked jurisdictional power nor could he disobey the Court's ruling, denying the requested writ.[13]

B. Confining the Power of Judicial Review: The Departmental Discretion Principle

Judicial review was never seen as a blank check to exercise de facto judicial veto over laws deemed unwise, inefficient, or worse, ideologically inapposite to individual judge's views.[14] Rather, the Court's constitutional interpreter role was seen as unquestionably circumscribed by institutional capabilities.[15] Marshall qualified the Court's authority to pass on issues of law in *Marbury*, stating, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[16] Judicial review defined which acts were political, or left to the discretion of the executive or legislative branch, and which acts were judiciable, or reviewable by the Court.[17] A formalistic technique for

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[10] *Marbury*, 5 U.S. (1 Cranch) at 177-78.

[11] *Id.* at 177; *see also* Bryan Dearinger, Note, *The State of the Nation, Not the State of the Record: Finding Problems with Judicial "Review" of Eleventh Amendment Abrogation Legislation*, 53 DRAKE L. REV. 421, 422 (2005) ("Two centuries ago, for better or for worse, constitutional supremacy rested where Chief Justice John Marshall placed it.").

[12] *See* HALL, *supra* note 8, at 13.

[13] *See id.* ("President Thomas Jefferson complained that Marshall's opinion threatened to make the judiciary a despotic branch." (internal quotations omitted)); STRONG, *supra* note 7, at 20.

[14] *See* HALL, *supra* note 8, at 8 ("[James] Wilson thought the justices should—and most probably would—veto laws for reasons based on individual wisdom. His words fell on deaf ears.").

[15] *See id.* at 13 ("The chief justice accepted the inherent limitation placed on the scope of the judicial power by the department theory. . . .").

[16] *Marbury*, 5 U.S. (1 Cranch) at 170.

[17] White, *supra* note 2, at 15 (discussing the exercise of judicial review to determine whether a case raised judiciable questions).

avoiding politically laden issues was born.

Marshall further defined departmentalism in *McCulloch v. Maryland*, which, expounding an expansive view of the Necessary and Proper Clause, held that Congress has the power to incorporate banks.[18] Judicial review would be appropriate when Congress strayed from the proscriptions of the Constitution; however, a mantra signaled the limits of congressional power review: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[19] Barring illegitimate power usurpation or utilization, the Court was powerless to impede upon Congress' legislative discretion.[20]

C. Formalistic Boundary Tracing: Private Versus Affected with a Public Interest, Manufacturing Versus Commerce, and Indirect Versus Direct

Immunizing legislative or executive issues from judicial review became impossible as the Industrial Revolution distorted the scope of governmental power, eliciting pleas for judicial protection of exceedingly regulated private rights.[21] The watershed *Munn v. Illinois* case created a formalistic technique distinguishing valid police power regulations from invalid deprivation of due process rights by nominative means: businesses "affected with a public interest" were subject to unreviewable[22] public regulation, while entities implicating

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[18] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819).

[19] *Id.* at 421.

[20] *Id.* at 406; HALL, *supra* note 8, at 16 (describing *McCulloch* as standing for the proposition that "for judicial review to be legitimate, it had to be exercised within the proper sphere of judicial competence"). *See generally* White, *supra* note 2, at 16-35 (analyzing key departmental discretion cases). While beyond the scope of this article, the separation of powers doctrine has been weakened over time with the rise of the regulatory state. For an excellent discussion of the evolution and possible destruction of the separation of powers doctrine, see Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 696-701 (2006).

[21] *See* White, *supra* note 2, at 20. Indeed, from 1789 to 1936, only seventy-six cases deemed acts of Congress to be unconstitutional. GILBERT, *supra* note 9, at 95. In the first fifty years of this time span, only one case struck down a federal law on constitutional grounds. *Id.* at 95.

[22] White, *supra* note 2, at 43 ("A regulation was either 'within' or 'without' the police power. If it were within the police power, it satisfied due process standards.").

only private interests had to remain unregulated.[23] "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[24]

The Court utilized its formalistic methods in delineating Congress' Interstate Commerce Clause power as well.[25] *Hammer v. Dagenhart* initialized the foray into restricting federal power by distinguishing between commerce, which was a legitimate end of federal legislation, and local manufacturing, which was not.[26] Congress transcended its authority by enacting a manufacturing law banning shipment of ordinary goods produced by child labor.[27] The direct versus indirect dichotomy premiered in *A.L.A. Schechter Poultry Corp. v. United States*, as hour and wage legislation applicable to slaughterhouses importing manufacturing inputs (live chickens) from out-of-state to sell finished products (slaughtered chickens) in-state was voided for "hav[ing] no direct relation to interstate commerce."[28] The line between these formal categories became increasingly strained as the Court's jurisprudential baggage belied claims that rational principles dictated case holdings.[29] Death by arbitrariness was just over the horizon.[30]

D. The Rise and Fall of Liberty of Contract: Reasonable Versus Unreasonable Exercises of Police Powers

Building on its experience micromanaging government regulatory powers, the Court began protecting economic rights from state regulation in so-called economic substantive due process cases.[31]

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[23] *See* Munn v. Illinois, 94 U.S. 113, 127, 130, 134 (1876).

[24] *Id.* at 134; *see also* Mugler v. Kansas, 123 U.S. 623, 665 (1887) (making a similar distinction between private behavior and behavior affected with the public interest in relation to individual behavior).

[25] *See generally* Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918).

[26] *Id.* at 272-73; *cf.* United States v. E.C. Knight Co., 156 U.S. 1, 42-43 (1895) (Harlan, J., dissenting) (distinguishing between the manufacture and movement of goods, although the case was decided on statutory, not constitutional grounds); HALL, *supra* note 8, at 30.

[27] *Hammer*, 247 U.S. at 276.

[28] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 520-21, 548 (1935).

[29] David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 647 (1994).

[30] *See id.* at 646-48 (providing a historical account of the fall of formalistic categories).

[31] *See* G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1514-16

Lochner v. New York was the beginning of the end as the liberty to contract, embodied in the Fourteenth Amendment Due Process Clause, trumped a state regulation setting maximum hours for bakers because redistributing benefits without enhancing public welfare was declared unreasonable.[32] The Court proclaimed it would determine in all cases implicating the liberty to contract whether "this [is] a fair, reasonable, and appropriate exercise of the police power of the state, or [whether] it [is] an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into [labor] contracts . . . ."[33]

Substantive due process provided the platform for vast expansions of judicial review as no fewer than 232 state laws were invalidated for violating the Due Process Clause between 1890 and 1937.[34] However, as the Great Depression set in, the Court's jurisprudence was seen as less mandated by doctrine, and more driven by ideology.[35] The collective irrationality of the doctrinal boundaries only heightened suspicions that the judiciary was inappropriately imposing its own views in essentially political matters.[36] Widespread public discontent with the Court's thwarting New Deal legislation culminated in an ultimatum—the Court could either abandon its restrictive rulings or face certain defeat in the form of Franklin Roosevelt's Court-packing plan.[37] Strategically choosing the former, *West Coast Hotel Co. v. Parrish* signaled the abandonment of judicial scrutiny of economic regulations on substantive due process grounds.[38] Not a single government regulation of economic rights post-1937 has

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(1993).

[32] Lochner v. New York, 198 U.S. 45, 53, 57, 64 (1905); HALL, *supra* note 8, at 27 (noting the reliance of the Justices on the reasonableness concept in substantive due process cases); White, *supra* note 2, at 58 (describing the anti-class principle behind much of the substantive due process cases of the *Lochner* era).

[33] *Lochner*, 198 U.S. at 56.

[34] HALL, *supra* note 8, at 27 (noting that substantive due process provided the grounds for invalidating over sixty percent of the state laws struck during this time period).

[35] *See* White, *supra* note 2, at 59.

[36] *See* HALL, *supra* note 8, at 29; White, *supra* note 2, at 59.

[37] *See* K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 406 (1997); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 953 (1987) (discussing Roosevelt's role in the rise of constitutional balancing as a replacement to the *Lochner* era's categorical reasoning).

[38] *See* HALL, *supra* note 8, at 29; David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 ENVTL. L. 603, 621 (2006) (confirming legislative line-drawing would generally pass muster under the due process and equal protection provisions, absent a suspect classification).

been similarly overturned.[39] It was only a matter of time before the formalistic techniques used to limit federal power met a similar demise.[40] *Wickard v. Filburn* put the nail in the powers boundary-drawing coffin as "[t]he direct-indirect effects test and the doctrine of dual federalism at last went the way of the liberty of contract dogma."[41]

E. Incorporating the Bill of Rights: Dividing Fundamental from Nonfundamental Rights

While boundary-tracing doctrines began to crumble, incorporation of the Bill of Rights against the states via the Fourteenth Amendment Due Process Clause was just beginning to ramp up.[42] However, with additional substantive due process protections becoming increasingly controversial and with ideological bias claims abound, Justice Benjamin Cardozo attempted to identify coherent criteria for determining which provisions of the Bill of Rights should be applied against the states.[43]

Enter *Palko v. Connecticut*.[44] While its holding did not endure (Fifth Amendment double jeopardy protections are not incorporated against the states),[45] its analytical technique lived on.[46] The Bill of Rights guarantees "implicit in the concept of ordered liberty" apply to the states through the Due Process Clause of the Fourteenth Amendment.[47] If abolishing the enumerated right would "violate a principle of justice so rooted in the traditions and conscience of our

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[39] Buchanan, *supra* note 31, at 1521; *see also* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 344 (1995) (commenting on the bias against scrutinizing economic legislation regardless of the constitutional provision evoked).

[40] *See* SANFORD BYRON GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST 68 (1980).

[41] *Id.*

[42] White, *supra* note 2, at 65-67.

[43] *Id.* at 67.

[44] *See* Palko v. Connecticut, 302 U.S. 319 (1937).

[45] Benton v. Maryland, 395 U.S. 784, 794 (1969) (overruled *Palko* and held that Fifth Amendment double jeopardy protections were incorporated against the states).

[46] *See Palko*, 302 at 328 (asking whether subjecting a defendant to double jeopardy "violate[s] those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" (internal quotation marks omitted)).

[47] *See id.* at 324-25 (confirming freedom of speech, freedom of the press, freedom of religion, the right to peaceable assembly, and the right of counsel for criminal defendants were all incorporated against the states).

people as to be ranked as fundamental," the Due Process Clause forbids it.[48] The question was thereafter asked in incorporation cases, foreshadowing the Court's later tracing of heightened scrutiny limits: is this a fundamental right?[49]

F. Setting the Stage: Carolene Products *Footnote Four*

Shut out of the property protection regime in 1937, *Carolene Products* reaffirmed that the Court was out of the economic substantive due process business.[50] Even if supporting evidence was lacking, "regulatory legislation affecting ordinary commercial transactions" would not be struck down unless "it is of such a character as to preclude the assumption that it rests upon some rational basis . . . ."[51] Ignoring the reality of the rent-seeking mission of the milk industry behind the law,[52] the Court upheld a legislative ban on filled milk because the Act *could* have been based on a rational basis—preventing shipment of a harmful, fraudulent product.[53]

Despite the amount of deference afforded to economic regulations, judicial review was not dead; help in the form of a footnote was on the way.[54] After declaring economic rights regulation review to be no review at all, the Court reserved a place for more searching judicial inquiry in the now famous footnote four of *Carolene Products*.[55] A more exacting degree of judicial scrutiny would be appropriate in claims involving specific Bill of Rights guarantees, political process access, and discriminatory treatment of certain minority groups.[56] The newly conceived two-tiered system of judicial

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[48] *Id.* at 325 (internal quotation marks omitted).

[49] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (establishing marriage as a fundamental right).

[50] *See* Pillai, *supra* note 37, at 405-06.

[51] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[52] *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 80 (2001); J.M. Balkin, *The Footnote*, 83 NW. U.L. REV. 275, 292 (1989) (characterizing the Filled Milk Act as a product of the dairy industry lobby).

[53] *See Carolene Prods.*, 304 U.S. at 149-50.

[54] *See id.* at 153, n.4.

[55] *See id.*

[56] *See id.*; GABIN, *supra* note 40, at 70-71 (portraying footnote four as providing the foundation for differential judicial protection in the realm of preferred constitutional rights); Buchanan, *supra* note 31, at 15 21-22 (crediting footnote four for the emergence of the Court's double standard approach to judicial review). *But see* Felix

review awaited its dramatic debut.

III. THE THREE LEVELS OF HEIGHTENED REVIEW: DEGREES OF PRESUMPTIVE CONSTITUTIONALITY

A. Strict Scrutiny: Narrow Tailoring to a Compelling Government Interest

Shortly after renouncing the delineation of legislative economic regulatory power, the Court began building an important, albeit in many instances more deferential, judicial review regime.[57] While several earlier cases arguably applied a version of strict scrutiny, the consensus is that the Court's modern version of the standard originated in 1944 in the World War II case of *Korematsu v. United States*.[58] *Korematsu* reviewed Executive Order 9066, which authorized the evacuation of all Japanese Americans from designated military areas.[59] Toyosaburo Korematsu, an American citizen of Japanese descent, was convicted of violating the Order by remaining in his home in a designated military zone.[60] The Court started by avowing "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[61] Suspicion did not equate to unconstitutionality, but laws targeting specific racial groups are subject "to the most rigid scrutiny."[62] Proving the trailblazing doctrine need not be commendably applied,[63] the Court upheld the evacuation order, accepting the

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Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 166 (2004) (arguing the importance of the *Carolene Products* footnote has been greatly overstated).

[57] *See* ROBERT J. HOPPERTON, STANDARDS OF JUDICIAL REVIEW IN THE SUPREME COURT LAND USE OPINIONS: A MONOGRAPH 9 n.10 (1998) (quoting WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 55 (1992)); SHAMAN, *supra* note 52, at 88.

[58] 323 U.S. 214 (1944); *see, e.g.*, SHAMAN, *supra* note 52, at 88; *see* Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origin of Strict Scrutiny*, LAW & CONTEMP. PROBS., Spring 2005, at 30-32. *But see* White, *supra* note 2, at 73-76 (attributing establishment of strict scrutiny to the 1942 case of *Skinner v. Oklahoma*). The research methodology of this article categorizes *Skinner* as the first strict scrutiny case. *See infra* Part V (discussing the author's research methodology).

[59] *Korematsu*, 323 U.S. at 217.

[60] *Id.* at 215.

[61] *Id.* at 216.

[62] *Id.*

[63] *See id.* at 233 (Murphy, J., dissenting) (calling the exclusion order "the ugly abyss of racism"); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U.

government's unsubstantiated claim that the policy was "necessary to prevent espionage and sabotage in an area threatened by Japanese attack."[64]

Judicial scrutiny turned out not to repeat the result *Korematsu* might suggest. In future strict scrutiny cases, the Court actually required (although not always using the same language) that laws be narrowly tailored to serve "compelling governmental interests."[65] Strict scrutiny means the government is put to the test; the usual presumption of constitutionality is reversed and scrutinized laws need to fulfill both the necessity (ends) and fit (means) prongs of review to stand.[66]

B. Intermediate Scrutiny: Substantially Furthering an Important Government Interest

As the rigid two-tiered structure proved unworkable, the Court sought to alleviate the fissure between strict scrutiny on the one hand, and frankly, no scrutiny on the other. The inklings of an intermediate level of judicial review appeared in *United States v. O'Brien*, which reviewed a First Amendment protection claim involving burning a draft

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PA. J. CONST. L. 945, 949 (2004) [hereinafter *The New Formalism*] (describing *Korematsu* as "nearly universally discredited"); White, *supra* note 2, at 76. The racially targeted evacuation procedures were later found to be wholly unjustified. *See* SHAMAN, *supra* note 52, at 89. Congress later passed a law apologizing and admitting wrongdoing for the evacuation underlying *Korematsu*. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) ("[A] grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.").

[64] *Korematsu*, 323 U.S. at 217.

[65] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005); Gratz v. Bollinger, 539 U.S. 244, 270 (2003); *accord* Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002).

[66] *See* White, *supra* note 2, at 82-83 (construing strict scrutiny as a revocation of the ordinary presumption of legislation constitutionality); *see also* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (making the famous assertion that strict scrutiny "was strict in theory and fatal in fact," as opposed to rational basis review which was "minimal scrutiny in theory and virtually none in fact" (internal quotation marks omitted)); Edward V. Heck, *Constitutional Interpretation and a Court in Transition: Strict Scrutiny from* Shapiro v. Thompson *to* Dunn v. Blumstein*—and Beyond*, 3 U.S. A.F. ACAD. J. LEGAL STUD. 65, 65-68 (1992) (giving an account of the origins of strict scrutiny). *But cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 871 (2006) (concluding that "strict scrutiny is survivable in practice and not fatal in fact").

card.[67] The *O'Brien* Court ambitiously asserted: "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" only "if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[68] Puzzlingly, however, the Court found furthering military registration procedures justified punishing card burning despite the less-than-heightened importance of easing administrative burdens.[69] Like *Korematsu*, *O'Brien*'s greatest impact was in devising a jurisprudential framework.[70]

Explicitly outlining intermediate scrutiny in the context of Equal Protection, *Craig v. Boren* held: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[71] Although the burden of intermediate scrutiny is significantly less than that of strict scrutiny, the government must put forth an important interest (end) and show that the law at least bears a substantial relation to that interest (means).[72]

C. Rational Basis Review: A Rational Relationship to Any Legitimate Justification

Carolene Products illustrates the typical approach to post-New Deal rational basis review.[73] In *Carolene Products*, a heavy presumption of constitutionality weighed in favor of the Legislature.[74] Unless the challenging party can show that the legislature could not have had any conceivable rational basis for passing the law, the

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[67] 391 U.S. 367 (1968); *see* SHAMAN, *supra* note 52, at 93 (maintaining *United States v. O'Brien* was the flagship case for intermediate scrutiny).

[68] *O'Brien*, 391 U.S. at 376-77.

[69] *See id.* at 377-78; SHAMAN, *supra* note 52, at 94 (alleging the interest claimed should not have risen above a legitimate state interest and the law added little to the draft registration scheme).

[70] *See* SHAMAN, *supra* note 52, at 94-95.

[71] Craig v. Boren, 429 U.S. 190, 197 (1976).

[72] *See, e.g.*, FEC v. Beaumont, 539 U.S. 146, 161-62 (2003); City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 435-43 (2002); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 (1994); *see also The New Formalism*, *supra* note 63, at 950 (recounting the intermediate scrutiny test).

[73] *See generally* United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (using rational basis review to hold a statute was constitutional).

[74] *See id.* at 152.

Constitution is not offended.[75] Rational review is essentially no review at all.[76]

Rent-seeking lobbyists rejoice! In 1955, *Williamson v. Lee Optical of Oklahoma, Inc.* confirmed what every case since 1937 had suggested: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[77] Thus, it comes as no surprise that *Williamson* upheld a thoroughly rent-seeking statute barring opticians from filling eyeglass lenses "without a prescription from an ophthalmologist or optometrist, while exempting all sellers of ready-to-wear glasses from" the law.[78] If a member of the legislature could have dreamed of a reason to pass the law, even if every fact suggests otherwise, and even if the law is grossly under- or over- inclusive, the Court will not look further; traditional rational basis means the government prevails in all but the rarest of cases.[79]

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[75] *See id.*; SHAMAN, *supra* note 52, at 78 ("[A] statute will not be found unconstitutional as long as 'any state of facts reasonably may be conceived to justify it.'"); *The New Formalism*, *supra* note 63, at 951.

[76] *See* SHAMAN, *supra* note 52, at 79 (depicting minimal scrutiny as "no scrutiny whatsoever"); Gunther, *supra* note 66, at 19-20. A comprehensive study of all equal protection cases applying rational basis review from 1971 through 1996 revealed the government failed to meet its justification burden in only ten of the 110 cases. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 app. at 416 (1999).

[77] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

[78] SHAMAN, *supra* note 52, at 79. For further examples of nonsensical, arbitrary laws passing constitutional muster under rational basis scrutiny, see *id.* at 79-80.

[79] Gunther, *supra* note 66, at 46 (describing *Williamson v. Lee Optical* as accepting legislative silence as sufficient proof of a legitimate purpose and supplying its own conceivable rationale); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) ("If the standard is rationality, the government is supposed to win—and any lawyer who hires expert witnesses to dispute the empirical basis for legislation under this standard of review is wasting the client's money."); Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006) (depicting rational basis review as "the thumb on the scale in favor of governmental interests"). For an explanation for the lack of heightened scrutiny in economic rights cases post-*Lochner*, see generally Levy, *supra* note 39, at 360-68.

IV. DEFINING RIGHTS VERSUS DECIDING IF GOVERNMENTAL INTERESTS JUSTIFY OVERRIDING RIGHTS

In order to understand the mechanics of heightened judicial scrutiny, it is necessary to distinguish between two distinct judicial tasks that both utilize competing interest rhetoric: defining constitutional rights or powers on the one hand, and identifying when government interests may justify overriding constitutional rights or powers on the other. The Court repeatedly balances competing interests in defining which substantive rights or powers are constitutionally protected.[80] The Court also evaluates competing interests in deciding whether a given government interest can justify overriding a constitutionally protected right or power; the degree of scrutiny applied is shorthand for the level of presumptive validity a law enjoys. The two interest inquiry mechanisms have a relation to one another. In order to be subject to heightened review, a right or power must in fact be constitutionally protected while many rights and powers are substantively defined through a process of balancing government interests and claimed rights or powers. Although only heightened scrutiny—as distinguished from defining substantive constitutional protections—is the subject of this article, the difference between the two concepts is critical for delineating the scope of judicial scrutiny, and is therefore treated at length in Parts A and B.[81]

A. Definitional Review

Definitional review, for purposes of this article, refers to the Supreme Court's practice of balancing competing interests in *defining* the meaning and scope of constitutional provisions.[82] This method of definitional interests balancing exceeds the scope of this article, but illustrations of the method clarify how it differs from heightened review.[83]

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[80] *See, e.g.*, Washington v. Harper, 494 U.S. 210, 220 (1990).

[81] *See generally* Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 790-98 (2007) (investigating legislative override power and constitutional rights).

[82] *See id.* at 797-810 (distinguishing internal and external limits on constitutional rights).

[83] This article does not weigh in on what rights deserve constitutional protection, presuming (not uncontroversially) that the Supreme Court, as opposed to another government branch, should subject the government to heightened forms of scrutiny based on the infringed right. Rather, the goal of this article is to survey the current terrain of heightened review, lay out which rights *do* trigger a heightened form of scrutiny, and spark further discussion of whether the reasoning of previous cases suggests additional rights *should* trigger a heightened form of scrutiny.

Fourth Amendment jurisprudence is replete with examples of weighing government interests against claimed rights or powers to determine constitutional limits.[84] For example, when is a search unreasonable, and thus in violation of the Fourth Amendment?[85] In order to decide, the Court "balance[s] the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[86] For instance, a warrantless postarrest home search was reasonable when the officers' interest in thwarting possible attack by hiding suspects outweighed the corresponding intrusion on the suspect's privacy.[87] In determining the scope of the Fourth Amendment, the Court engages in balancing to decide:

> the definition of a search, the reasonableness of a search, the reasonableness of a seizure, the meaning of probable cause, the level of suspicion required to support stops and detentions, the scope of the exclusionary rule, the necessity of obtaining a warrant, and the legality of pretrial detention of juveniles.[88]

Similarly, the Court balances competing interests to define which categories of speech receive First Amendment protection. Is a class of speech such as obscenity or advertising constitutionally protected?[89] To decide, the Court balances the value of the speech in expressing ideas and promoting truth against societal interests in restraining the speech.[90] For instance, the First Amendment does not protect child pornography because the harm to children in making such materials "so overwhelmingly outweighs the expressive interests, if any, at stake . . . ."[91] Through categorical balancing of interests, the Court

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[84] *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 331 (1990) (balancing "the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests").

[85] *See* U.S. CONST. amend. IV (prohibiting "unreasonable searches and seizures").

[86] *Buie*, 494 U.S. at 331; *see also* Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 554-56 (1997).

[87] *Buie*, 494 U.S. at 334.

[88] Aleinikoff, *supra* note 37, at 965 (internal footnotes omitted).

[89] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[90] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-73 (1976) (commercial speech is protected); Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity is not protected); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words are not protected).

[91] New York v. Ferber, 458 U.S. 747, 763-64 (1982); *accord* Osborne v. Ohio, 495

found "speech that intentionally incites imminent illegal action, fighting words, threats, obscenity, and child pornography"[92] lacks constitutional protection (i.e., the speech could be banned entirely).[93]

B. Override Review

In contrast to definitional review, during override review the Court evaluates whether a given policy justifies restricting a constitutionally protected right or power, however that right or power is defined.[94] Override review is synonymous with applying a heightened

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U.S. 103, 108-11 (1990) (finding the private possession of child pornography, unlike the private possession of obscenity, may be punished). *But see* Ashcroft v. Free Speech Coal., 535 U.S. 234, 250-51, 256 (2002) (finding virtual child pornography—pornography that appears to be made with, but is not actually made with children—is protected speech).

[92] Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 851 (2005); *accord* Faigman, *supra* note 29, at 677-82. For a discussion about the pros and cons of employing categorical techniques to deny constitutional protection in contrast to weighing interests in a case-by-case analysis, see generally Sullivan, *supra* note 79.

[93] Just because the legislature may completely ban a class of speech does not mean it may selectively ban such speech based on the subject matter or viewpoint expressed therein. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) ("Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, . . . the ordinance is [nonetheless] facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 212-13 (2d ed. 2003) (discussing content-based restrictions of unprotected speech); EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS 337-40 (2001) (addressing content-based restrictions of unprotected speech).

[94] *See* Gardbaum, *supra* note 81, at 801-02 (relating judicial scrutiny as "stat[ing] the parameters of the government's *override* power" (emphasis added)); *see also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 917-18 (1988) (referring to heightened review as determining whether government interests *override* constitutional rights). For purposes of this article, it is presumed that the judiciary, as opposed to some other decision-making body, conducts override review. While this is the American practice, it is not the only way override review could take place, nor does this article normatively address whether override review powers should be vested in the courts. For a discussion of the different methods of implementing override review, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 708-09, 719-39 (2001) (discussing how the Commonwealth countries of Canada, New Zealand, and the United Kingdom refuse to grant the judiciary the ultimate responsibility for upholding constitutional supremacy); Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1230-33 (1990) (contrasting Canada's system of legislative

level of review to resolve a constitutional violation claim. Depending on the right or power at issue, the State faces a more or less burdensome means and ends test to justify the infringement.

Override review in the rational review realm asks whether there is a rational relationship between the law and a legitimate government interest; even if there is some basis for asserting the existence of a constitutional right, a valid government interest will justify restricting that right.[95] Rational review is essentially no review at all;[96] accordingly, the scope of this article only deals with judicial review that explicitly applies a more stringent standard. In the heightened scrutiny realm of override review, the government faces a more substantial burden to surviving a constitutional challenge. The Court scrutinizes the importance of the government interests promoted by the law as well as how closely the law tracks those interests to decide if interference with constitutionally secured rights or use of certain governmental powers is permissible.[97] The discussion that follows deals exclusively with heightened scrutiny in override review, taking definitional review in each case as a given. The question is not what rights and powers receive constitutional protection (definitional review), but rather, what rights and powers are subject to heightened scrutiny (override review)?[98]

V. RESEARCH METHODOLOGY

The study that follows surveyed every Supreme Court case explicitly applying a form of heightened scrutiny.[99] For purposes of the

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supremacy with the United States' system).

[95] *See supra* Part III.C (discussing rational basis review).

[96] *See* sources cited *supra* note 76.

[97] *See supra* Part III.A-B.

[98] The divergence between definitional balancing and override review is aptly displayed in *United States v. Robel*, which challenged the constitutionality of barring communist members from working in defense facilities. 389 U.S. 258, 260-61 (1967). Engaging in heightened review, the Court found the prohibition was not narrowly tailored to the state's interests in security and explicitly refused to balance competing First Amendment and governmental interests to find the complainant lacked constitutionally protected association rights. *Id.* at 261, 265-67, 268 n.20; *see also* Ball v. James, 451 U.S. 355, 371 (1981) (affirming there is a difference between defining constitutional rights—in that case the one-person, one-vote equal protection right—and deciding *when the right applies*—whether a policy violates the right under the applicable scrutiny test).

[99] Isolating the study to explicit application of heightened review (as opposed to trying to intuit what the Court is *really* doing) has several advantages, perhaps most

study: a case was classified as a *heightened scrutiny case* if it (a) claimed to apply any form of scrutiny greater than rational basis review *or* (b) used the means *and* ends framework of heightened scrutiny even if it did not explicitly declare which level of review applied.[100] To that end, if a case claimed to employ strict, intermediate, heightened, exacting, rigid, searching, or close judicial review, it was included. Similarly, if the case did not announce a standard of review, but required the government to show the law was narrowly or closely tailored, or had a substantial, significant, proportionate, or close relationship, to a compelling, important, significant, or substantial interest, it too was labeled a heightened scrutiny case.

To catalogue all heightened scrutiny cases, a LexisNexis search

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important of which is objectivity. By taking the Court at its word, the history is created by the Court, not the author. Furthermore, the Court likely reduces the protection of heightened review when it obscures what level of review it applies. The cases included in this study have the additional advantage, therefore, of being of greater precedential value since the lower courts, and not just the author of the Supreme Court opinion, know that heightened scrutiny was triggered. *See The New Formalism*, *supra* note 63, at 981 ("The lack of connection between the form of the scrutiny employed and its application invites speculation as to the underlying, unarticulated nature of the method of review that may be evolving behind the formal façade of tiered scrutiny."); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 802-03 (1987) (illustrating the dangers of sending ambiguous signals to the lower courts vis-à-vis muddling the levels of scrutiny through rational *plus* review).

[100] The Court's asserted level of scrutiny or application of the traditional heightened scrutiny framework was taken at face value; the author did not inquire whether the actual level of review was more or less burdensome than the explicit language demanded. Nor is it particularly critical for purposes of this article to determine whether the level of review, so long as it is explicitly more stringent than rational basis, is intermediate, strict, or somewhere in between. What specific level of scrutiny should apply, while interesting, is also largely beyond the scope of this article. For an argument that there are actually six levels of scrutiny, rather than the traditional model of three levels, see R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 app. at 258 (2002) (describing the "base plus six" model of levels of review of government action constitutionality). The research methodology of this article would include all but the rational review and heightened rational review standards in Kelso's model. *See id.* For an argument that the Court is moving away from a tiered scrutiny approach altogether, see Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 162, 165-82 (1984); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 480-508 (1997).

for key terms associated with heightened judicial review was performed yielding around 800 cases.[101] From there, the author read each case to determine whether the Court applied heightened scrutiny review, as defined above, in its majority or plurality opinion.[102] Ambiguous cases were resolved in favor of finding heightened scrutiny applied unless trigger words for rational basis were clearly used (such as requiring a reasonable relationship to a legitimate interest, or the equivalent). Only cases applying the two-prong ends and means test are included in this survey;[103] therefore, cases dealing with doctrines such as the dormant commerce clause, despite borrowing some language from heightened scrutiny review, are not included.[104] In total, 207 heightened scrutiny

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[101] The following LEXIS search of the U.S. Supreme Court Cases, Lawyers' Edition database was conducted: "(strict or intermediat! or heigh! or exact! or rigid or search! or close /2 scrut! or review or exam! or inquir! and sig! or subst! or import! or compel! /2 interest) or ("strict /2 scrut!" or "exact!/2 scrut!") or ("rigid /2 scrut!" or "heigh! /2 scrut!") or ("congruence /5 proportionality") or ("narrow! tailor!" or "substant! /2 relat!" or "closely tailor!" or "closely relat!") or (strict or intermediat! or heigh! or exact! or rigid or search! /2 scrut! or review or exam! or inquir! and sig! or subst! or import! or compel! /2 govern! or state /2 interest)" (last run February 28, 2008). *Cf.* Winkler, *supra* note 66, at 810 n.101 (giving the Westlaw query used to find strict scrutiny cases). In addition, when reading over the captured cases, if citations to prior cases suggested the Court applied heightened review, that case was also evaluated. The LEXIS "More Like This Headnote" feature for Headnotes dealing with heightened scrutiny was also used to locate additional heightened review cases the original search query may have missed.

[102] The search was not restricted to majority or plurality opinions, allowing a search of all cases mentioning the language of heightened scrutiny in any part of the case (including the dissent). Any case that applied heightened scrutiny is included even if the validity of the holding was later called into question, as the goal is to canvass every case subjected to heightened scrutiny, rather than to give the current state of the law.

[103] *See* discussion of the definition of a "heightened scrutiny case" *supra* pp. 121-22. The obvious and unavoidable skewing of this method is to exclude some early cases arguably employing heightened scrutiny review that arose before the modern identifying language of heightened review solidified. *See* Winkler, *supra* note 66, at 810-11 (discussing the unavoidable dilemma of coding earlier cases that may not use the modern scrutiny review rhetoric). There is no reason a priori to believe there was a marked difference in rights and powers challenged in these earlier periods, however, so the general trends described herein should be fairly representative.

[104] Adam Winkler, in his article *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, adopts a similar methodology in his study of strict scrutiny. Winkler, *supra* note 66, at 809-12. Winkler surveys all federal court opinions from 1990 through 2003 that apply strict scrutiny (whereas this article surveys strict *and* intermediate/admittedly heightened scrutiny across all Supreme Court cases), but notes that "[o]nly decisions that purported to apply the traditional compelling interest/narrowly tailored version of strict scrutiny were

cases were found and catalogued accordingly in the Appendix below.[105]

The constitutional right or power at issue was determined by reading each case to see if the Court explicitly applied heightened review to a particular provision—only provisions actually subjected to heightened scrutiny were counted.[106] In order to accurately reflect the distribution across rights and powers, every provision receiving heightened review analysis counted as a separate case even if it was contained in the same Supreme Court decision;[107] thus, several Supreme Court cases were counted more than once because they contained multiple provisions subject to a form of heightened review. While this search query would ideally capture all heightened scrutiny cases ever decided by the Supreme Court, the goal of this article is to provide a general overview of the heightened scrutiny landscape. Accordingly, should the search terms in conjunction with the additional search tools used overlook a few (arguably) heightened review cases, the substance of the article will not be greatly affected.

VI. NOT ALL RIGHTS AND POWERS ARE CREATED EQUAL: AN EMPIRICAL ANALYSIS OF EXPLICIT JUDICIAL SCRUTINY IN ACTION

While it comes as no surprise that only a limited subset of constitutional provisions are evaluated under the Court's heightened scrutiny rubric, the exact rights and powers, and the disproportionate application within these rights and powers, is perplexing to say the least. The literature is replete with criticisms and accounts of heightened scrutiny in individual realms of constitutional law. Absent, however, is a comprehensive account of what the scrutiny practice of the Court has been overtime.[108] Below is a comprehensive description,

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included." *Id.* at 810. He comes to the same conclusion that dormant commerce clause cases do not in fact apply heightened scrutiny. *Id.*

[105] A comprehensive list of all 207 of these cases is contained *infra* app., fig.5.

[106] For instance, if the First Amendment speech claim rendered the law unconstitutional so the equal protection claim was not decided, only the First Amendment speech provision would be registered as having received heightened review.

[107] For example, *Randall v. Sorrell* found campaign financing laws violated *both* freedom of speech *and* freedom of association under the First Amendment. 548 U.S. 230 (2006). Therefore, *Randall* was counted twice; once as a First Amendment freedom of speech case, and once as a First Amendment freedom of association case.

[108] The closest to a comprehensive account is likely constitutional law textbooks; however, these resources provide an overview, rather than a complete account of the doctrine. This article relies on first-hand research rather than a conglomeration of

broken down in proportion, of the rights and powers the Court has subjected to heightened scrutiny.[109] What may be most interesting is not which rights and powers *are* subject to explicit judicial scrutiny, but which ones *are not*, considering the ones that are.[110]

A. Rights Subject to Heightened Review

And so the journey begins. This Part provides a brief profile of every right subjected to heightened review including such information as the constitutional provision the right is derived from, the founding case, the number of times the right has been subject to heightened review, the proportion of total heightened scrutiny cases the right comprises, and some of the government interests that have been found to overcome the right. The rights are listed in descending order of their proportional representation among all heightened scrutiny cases.

1. First Amendment Freedom of Speech

In 1972, the Court first clearly applied strict scrutiny to a law interfering with the freedom of speech protected by the First Amendment in *Grayned v. City of Rockford*.[111] At issue was an antinoise ordinance prohibiting disruptive noises near schools while class was in session.[112] Interpreting the content-neutral law to ban only

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other scholarly articles and sources to provide a detailed picture of heightened scrutiny by the United States Supreme Court. For support for the decision to deal with heightened scrutiny historically, rather than normatively, see Brest, *supra* note 3, at 1063 & n.1 (finding normative constitutional law scholarship, defined as assessing "decisionmaking authority, competence, procedures, criteria, and results, in contrast to, say, historical or sociological" work "essentially incoherent and unresolvable").

[109] For a chart illustrating the proportional representation of each right and power, see *infra* app., fig.1.

[110] A theoretical explanation for the heightened review doctrinal scope is beyond the reach of this article. Given the varying rights and powers subject to some form of heightened review, it is unlikely that any theory of constitutional law can entirely account for what is and is not protected by the scrutiny technique, much less justify the disproportionate scrutinization among different rights and powers over the years.

[111] 408 U.S. 104, 116-17, 118-20 (1972). Many pre-1972 cases, while using some of the strict scrutiny language, did not actually apply the framework. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2444-47 (1996) (calling *Gitlow v. New York* and *Brandenburg v. Ohio* "pre-strict scrutiny free speech cases"). The first intermediate scrutiny case was *United States v. O'Brien*, described at length *supra* in Part III.B.

[112] *Grayned*, 408 U.S. at 107-08. The Court also evaluated an antipicketing ordinance, but under the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 107. Thus, *Grayned* was counted as two separate "heightened scrutiny cases." *See supra*

disruptive speech, the Court found it was "*narrowly tailored* to further [the city's] *compelling* interest in having an undisrupted school session conducive to the students' learning . . . ."[113]

Addressing a host of expressive contexts, free speech claims have been the darling of the Supreme Court's heightened review jurisprudence, comprising 35%[114] of all such cases (72 out of 207 cases).[115] Certain kinds of speech-affecting laws predominate: electoral process regulations cover 26%,[116] protest regulations cover 18%,[117] commercial speech regulations cover 15%,[118] and sexually explicit (but nonobscene)[119] matter regulations cover 19%,[120] leaving 23% for all other types of regulations.[121]

Both the kind of speech and the type of regulation determine what level of scrutiny ensues.[122] The kind of speech at issue is relevant: contribution limitations receive less protection[123] than expenditure limitations in campaign finance laws;[124] commercial speech receives

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Part V (discussing the author's method of categorizing cases).

[113] *Grayned*, 408 U.S. at 119 (emphasis added).

[114] All percentages are rounded to the nearest whole number unless otherwise noted.

[115] *See infra* app., fig.1.

[116] *See, e.g.*, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007); Randall v. Sorrell, 548 U.S. 230 (2006); McConnell v. FEC, 540 U.S. 93 (2003); Burson v. Freeman, 504 U.S. 191 (1992); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986); Buckley v. Valeo, 424 U.S. 1 (1976).

[117] *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); United States v. Eichman, 496 U.S. 310 (1990); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); *Grayned*, 408 U.S. 104 (1972).

[118] *See, e.g.*, cases cited *infra* note 130.

[119] *See supra* notes 91-93 and accompanying text.

[120] *See infra* app., fig.2; *see, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

[121] *See infra* app., fig.2.

[122] The following lists of scrutiny triggering speech and regulation types are nonexhaustive. For instance, sexually-explicit but not obscene speech may receive less protection. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986). Meanwhile laws creating a total medium ban may receive more protection. *See Schad*, 452 U.S. at 66.

[123] *Less protection* means a less difficult means and ends test for the government to overcome; intermediate scrutiny, therefore, provides less protection than strict scrutiny.

[124] *See* Randall v. Sorrell, 548 U.S. 230, 241-42 (2006); Buckley v. Valeo, 424 U.S. 1, 19-21 (1976).

less protection than noncommercial speech;[125] and expressive conduct receives less protection than pure speech.[126] The form of regulation is significant too: content-based laws receive greater scrutiny than content-neutral laws;[127] injunctions receive greater scrutiny than laws of general applicability;[128] and public forum restrictions receive greater scrutiny than nonpublic forum restrictions.[129] Perhaps because of the plethora of less-than-strict-scrutiny levels of review applied in the free speech arena, in 42% of all cases found, at least part of the law survived heightened review.[130]

2. First Amendment Freedom of Association

The implicit right of freedom of association was the earliest First Amendment right subjected to the scrutiny framework. In 1967, in the midst of a series of Communist era legislative challenges, the Court parted from its strategy of narrowly interpreting laws to address an

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[125] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980); *see* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553-54 (2001); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472 (1988).

[126] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66, 570-71 (1991); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293-94 (1984); United States v. O'Brien, 391 U.S. 367, 376 (1968).

[127] *Compare* Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002), *and* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), *with* Hill v. Colorado, 530 U.S. 703, 725-26 (2000), *and* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 217-18 (1997).

[128] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764-65 (1994) (stating that given the lack of electoral participation and the greater threat of discrimination and censorship, injunctions are held to a higher standard of scrutiny than generally applicable laws); *see also* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 374-85 (1997) (applying *Madsen* to an injunction affecting expressive activities).

[129] *Compare* United States v. Grace, 461 U.S. 171, 180 (1983) (finding sidewalks are traditional public forums so "the government's ability to permissibly restrict expressive conduct *is very limited*" (emphasis added)), *with* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48-49 (1983) (noting content-based distinctions which may be impermissible in traditional public forums may be permissible in nonpublic forums such as teachers' internal mailboxes).

[130] *See infra* app., fig.1. Some of the government interests found to override the freedom of speech claim include: preventing corruption or the appearance of corruption, reducing crime, protecting kids from using tobacco, avoiding potential trauma to patients associated with confrontational protests, promoting fair competition in the market for television programming, promoting the free flow of traffic on streets and sidewalks, protecting the right to vote, protecting societal order and morality, and limiting sound volume.

association infringement challenge head-on in *United States v. Robel*.[131] By overturning a ban on defense facility employment for certain Communist-action organization members, the Court refused to balance competing interests; instead, the Court required that the law be narrowly tailored to the interest promoted.[132] Since espionage and sabotage threats could be reduced by less association-intrusive means, the law could not stand.[133]

Though perhaps incorrectly thought of as subservient to freedom of speech claims (only ten of the twenty-three cases are freestanding—*i.e.*, unaccompanied by a freedom of speech claim), the First Amendment freedom of association has its own unique place in heightened review, making up 11% of cases.[134] Three general kinds of regulations have sparked scrutiny of associational rights claims: campaign finance limitations (eight cases),[135] nonfinance election regulations (eight cases),[136] and burdens placed on particular groups (seven cases).[137] Whether expenditures versus contributions are

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[131] 389 U.S. 258 (1967); *see* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 434-37 (1990) (canvassing First Amendment challenges to laws singling out Communist activities); Gerald Gunther, *Reflections on* Robel*: It's Not What the Court Did, but the Way that It Did It*, 20 STAN. L. REV. 1140, 1140-42 (1968) (examining the constitutional challenge avoidance strategy which *Robel* departed from).

[132] *Robel*, 389 U.S. at 268 n.20.

[133] *Id.* at 265-68.

[134] *See infra* app., fig.1.

[135] *See* Randall v. Sorrell, 548 U.S. 230, 236-37 (2006); FEC v. Beaumont, 539 U.S. 146, 149 (2003); McConnell v. FEC, 540 U.S. 93, 114 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 437-38 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 381-82 (2000); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 608-09 (1996); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 291-92 (1981); Buckley v. Valeo, 424 U.S. 1, 6-7 (1976); *infra* app., fig.3.

[136] *See infra* app., fig.3. *See generally* Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002); Cal. Democratic Party v. Jones, 530 U.S. 567, 569-70 (2000); Norman v. Reed, 502 U.S. 279, 282 (1992); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 216-17 (1989); Munro v. Socialist Workers Party, 479 U.S. 189, 190-91 (1986); Tashjian v. Republican Party of Conn., 479 U.S. 208, 210-11 (1986); Anderson v. Celebrezze, 460 U.S. 780, 782 (1983); Kusper v. Pontikes, 414 U.S. 51, 52-53 (1973).

[137] *See infra* app., fig.3. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640, 643-44 (2000); Rutan v. Republican Party of Ill., 497 U.S. 62, 64-65 (1990); Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984); Widmar v. Vincent, 454 U.S. 263, 264-65 (1981); *In re* Primus, 436 U.S. 412, 414 (1978); Elrod v. Burns, 427 U.S. 347, 349 (1976); United States v. Robel, 389 U.S. 258, 259-60 (1967).

limited,[138] the degree of interference with the electoral process,[139] and the significance of the burden placed on association[140] determine the scrutiny level utilized. Faring slightly better than its freedom of speech counterpart, freedom of association claims were overridden by government interests in 26% of all cases.[141]

3. Fifth and Fourteenth Amendment Equal Protection: Race-Based Classifications

The race-based classification component of equal protection jurisprudence came in like a lamb and out like a lion. While *Korematsu* is infamous for unquestioningly accepting a race-based evacuation program,[142] later cases proved that strict scrutiny in the race-based classification realm is almost insurmountable.[143] Of the twenty-one cases applying heightened scrutiny to race-based distinctions, only five upheld the law, and of those, only *Korematsu* clearly imposed a burden on a minority racial group.[144]

Race-based classification challenges under the Equal Protection

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[138] *See supra* notes 123-24 and accompanying text.

[139] *Compare Jones*, 530 U.S. at 575-76 (applying strict scrutiny), *with Munro*, 479 U.S. at 198-99 (applying a looser standard than *Jones*).

[140] *See Dale*, 530 U.S. at 647-48 (holding a law requiring unwanted members to be included in an association imposes a severe burden on associational freedoms and is subject to strict scrutiny review); *Roberts*, 468 U.S. at 623.

[141] *See infra* app., fig.1. Some of the government interests found to override the freedom of association claim include: deterring corruption and its appearance, simplifying the general election ballot, and eradicating gender-based discrimination.

[142] *See supra* notes 58-64 and accompanying text.

[143] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007) (rejecting a school assignment plan that relied on racial classifications); Gratz v. Bollinger, 539 U.S. 244, 251, 270 (2003) (finding an automatic point system for minority college applicants unconstitutional); Shaw v. Hunt, 517 U.S. 899, 902 (1996) (deeming a racially gerrymandering districting scheme unconstitutional). For purposes of this article, race and nationality are treated as one category.

[144] With the sole exception of *Korematsu*, all other unsuccessful race-based classification challenges involved affirmative action programs seeking to benefit minority racial groups. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (law school affirmative action program); United States v. Paradise, 480 U.S. 149, 153, 185-86 (1987) (state trooper promotion affirmative action program); *see also* Shaakirrah R. Sanders, *Twenty-Five Years of a Divided Court and Nation: "Conflicting" Views of Affirmative Action and Reverse Discrimination*, 26 U. ARK. LITTLE ROCK L. REV. 61, 66-67, 73-74, 79, 102-04 (2003) (discussing the four cases supporting affirmative action).

Clause (or its Due Process counterpart for federal legislation)[145] comprise 10% of all heightened scrutiny cases.[146] The use of race-based distinctions automatically triggers strict scrutiny irrespective of the racial group burdened or benefitted, the effect of the law, or the kind of government authority involved.[147] Cases can be divided into three contexts: 45% involve affirmative action in the allocation of government benefits, 35% involve restrictions of civil liberties or civil rights, and 20% involve racial gerrymandering in electoral districting.[148] The only government interests that have overridden the racial equality guarantee are: promoting classroom diversity,[149] encouraging broadcast diversity,[150] ensuring minority business access to public contracting opportunities,[151] and (although later questioned) preventing an enemy invasion.[152]

4. Fifth and Fourteenth Amendment Equal Protection: Gender-Based Classifications

Demands for gender neutrality scrutiny were already in the works[153] when the Court first announced gender classifications trigger

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[145] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995) ("[T]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." (emphasis omitted) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (internal quotation marks omitted)).

[146] *See infra* app., figs.1 & 5.

[147] *Metro Broad., Inc. v. FCC* was the only case to apply less than strict scrutiny to a race based classification. 497 U.S. 547, 564-65 (1990) (deciding "[b]enign race-conscious measures mandated by Congress" are reviewable under intermediate scrutiny). The Court quickly reversed the decision in *Adarand,* deciding once and for all that race-based classifications receive strict scrutiny review. 515 U.S. at 222, 227; *see also Gratz*, 539 U.S. at 270.

[148] *See infra* app., fig.4. For examples of the first context, see cases cited *supra* note 144; for an example of the second context, see *Loving*, 388 U.S. at 2; and for an example of the third context, see *Shaw*, 517 U.S. at 901-02.

[149] *See Grutter*, 539 U.S. at 325.

[150] *See Metro Broad., Inc.*, 497 U.S. at 552-53.

[151] *See Adarand Constructors, Inc.*, 515 U.S. at 237-38 (1995).

[152] *See* Korematsu v. United States, 323 U.S. 214, 223-24 (1944).

[153] *See* Reed v. Reed, 404 U.S. 71, 75 (1971) (stating differential treatment by sex warrants scrutiny); *Developments in the Law—Equal Protection: The Concept of Equality: The View from a Wider Perspective*, 82 HARV. L. REV. 1065, 1174 n.61 (1969) (foreseeing future changes in suspect classes by suggesting if the belief that biological sex-based differences predict performance becomes controversial, gender classifications will receive heightened review); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499,

heightened review in *Frontiero v. Richardson*.[154] *Frontiero* involved a congressional law allowing servicemen to automatically claim their wives as dependents to qualify for health benefits while servicewomen had to *prove* their husbands were actually dependent.[155] Administrative convenience could not support placing burdens on a historically disadvantaged gender; paternalistic notions of gender roles could no longer justify unequal treatment among the sexes.[156]

Gender-based classifications comprise 8% of all heightened scrutiny cases.[157] With all but one case applying a form of intermediate scrutiny,[158] the government has proportionally fared better in defending gender-based distinctions than race-based classifications. By focusing on undisputed physical differences between men and women, six out of seventeen cases sustained differential gender treatment.[159] The list of overriding government interests—assuring valid parental relations, developing a pool of combat troops, reducing the economic disparity between men and women caused by historical discrimination against women, and preventing illegitimate teenage pregnancies—has largely

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1500-01 (1971) (arguing many believe sex-based legislation is illegitimate).

[154] 411 U.S. 677, 688 (1973). *But see* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312-13 (1976) (concluding that age-based restrictions do not receive heightened review); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (deciding wealth is not a suspect class, therefore, rational review applies).

[155] *Frontiero*, 411 U.S. at 678.

[156] *See id.* at 684-91.

[157] *See infra* app., figs.1 & 5.

[158] *See Frontiero*, 411 U.S. at 688 ("[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to *strict* judicial scrutiny." (emphasis added)). However, later cases uniformly applied the rhetoric of an intermediate form of scrutiny. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 60 (2001) (stating all gender-based classifications must serve "*important* governmental objectives" and be "*substantially* related to the achievement of those objectives" (emphasis added and internal quotation marks omitted)); Califano v. Webster, 430 U.S. 313, 316-17 (1979) ("[C]lassifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives." (emphasis added and internal quotation marks omitted)).

[159] *See Nguyen*, 533 U.S. at 72 (imposing a greater burden to prove citizenship for claims based on paternal versus maternal ties); Miller v. Albright, 523 U.S. 420, 440, 445 (1998); Heckler v. Mathews, 465 U.S. 728, 730-31, 736, 750-51 (1984) (providing a five-year extension of the invalid gender-based classification of *Califano v. Goldfarb* in calculating Social Security spousal benefits); Rostker v. Goldberg, 453 U.S. 57, 76-79 (1981) (requiring men but not women to register for the draft); Michael M. v. Superior Court, 450 U.S. 464, 472-73 (1981) (making men but not women criminally liable under the statutory rape law); *Webster*, 430 U.S. at 317-18 (allowing women to exclude more low-earning years than men in computing old age benefits).

tracked biological differences and remedies for prior discrimination.[160] The issues were as follows: six cases involved distributing government employment or welfare benefits,[161] three cases with allocating child custody or property when relationships dissolve,[162] two cases with defining the scope of penal laws,[163] two cases with creating single-sex universities,[164] two cases with establishing citizenship,[165] and two cases with selecting individuals for civil service.[166]

5. First Amendment Free Exercise of Religion

In 1963, the Court began its precarious history of applying heightened scrutiny to laws imposing burdens on the free exercise of religion in *Sherbert v. Verner*.[167] When a Seventh-Day Adventist Church member who refused to work on her Sabbath day was fired, the state found her termination to be "without good cause," disqualifying her from unemployment benefits.[168] Finding the suspension of benefits to be a burden on free exercise of religion and unsubstantiated fears of fraud insufficiently compelling, the law could not persist and a new realm of heightened review was born.[169]

Embodying 4% of all cases,[170] if heightened scrutiny is triggered the test is stringent, as all religion-burdening laws that are not neutral and of general applicability must be narrowly tailored to a compelling

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[160] *See* cases cited *supra* note 159. The one outlier is *Heckler*, which found an overriding interest in "protecting individuals who planned their retirements in reasonable reliance on [a later invalidated] law." 465 U.S. at 751.

[161] *Heckler*, 465 U.S. at 730-31; Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 143 (1980); *Webster*, 430 U.S. at 314; Califano v. Westcott, 443 U.S. 76, 78 (1979); Califano v. Goldfarb, 430 U.S. 199, 200-01 (1976); *Frontiero*, 411 U.S. 677, 678-79 (1973).

[162] Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981); Caban v. Mohammed, 441 U.S. 380, 382 (1979); Orr v. Orr, 440 U.S. 268, 270 (1979).

[163] *Michael M.*, 450 U.S. at 469; Craig v. Boren, 429 U.S. 190, 191-92 (1976).

[164] United States v. Virginia, 518 U.S. 515, 519 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 719 (1982).

[165] Nguyen v. INS, 533 U.S. 53, 56-57 (2001); Miller v. Albright, 523 U.S. 420, 423-24 (1998).

[166] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994); Rostker v. Goldberg, 453 U.S. 57, 59 (1981).

[167] 374 U.S. 398 (1963).

[168] *Id.* at 399-401.

[169] *See id.* at 403-04, 406-07; Comment, *Legislative Free Exercise and Conflict Between the Clauses*, 61 NW. U. L. REV. 816, 824 (1967) (discussing *Sherbert*); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 354-55 (1980) (discussing *Sherbert*).

[170] *See infra* app., fig.1.

state interest.[171] However, several categorical bans complicate the doctrine: the government may not penalize or reward someone on the sole basis of their religion,[172] nor may the government impinge on someone's "freedom to believe . . . ."[173] Perhaps more consequently, heightened scrutiny is not triggered absent a constitutionally significant infringement on religious beliefs; in certain contexts such as the military and prisons, the heightened scrutiny doctrine is inapplicable as well.[174]

Cases encompassing scrutiny-triggering burdens on religion appeared in the following contexts: denying state welfare or tax benefits (four cases),[175] forcing participation in an objected-to activity (three cases),[176] prohibiting religious leaders from participating in a

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[171] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) ("*Sherbert* and *Thomas* held . . . infringements [on the free exercise of religion] must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest.").

[172] McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs . . . .").

[173] *See id.* at 627 n.7 (internal quotation marks omitted) (describing the inalienable prohibition of *Torcaso v. Watkins*, 367 U.S. 488 (1961)); *see also* Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such." (emphasis added)).

[174] *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks *whether* government has placed a *substantial* burden on the observation of a central religious belief or practice *and, if so*, whether a compelling governmental interest justifies the burden." (emphasis added)); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related* to *legitimate* penological interests." (emphasis added and internal quotation marks omitted)); Goldman v. Weinberger, 475 U.S. 503, 507-10 (1986) (upholding an Air Force regulation preventing a Jewish man from wearing religious garments during his military service under rational basis review).

[175] *See Hobbie*, 480 U.S. 136, 146 (1987) (holding refusal to award unemployment compensation benefits violated free exercise clause of First Amendment); Bob Jones Univ. v. United States, 461 U.S. 574, 601-03 (1983) (holding nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt); United States v. Lee, 455 U.S. 252, 261 (1982) (finding employers of those whose religious beliefs conflict with the payment of taxes have no basis for withholding the social security tax imposed on the employer); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 709 (1981) (reversing denial of unemployment compensation benefits).

[176] *See* Wisconsin v. Yoder, 406 U.S. 205, 207, 215 (1972) (forcing Amish parents to send their children to public school beyond the eighth grade is unconstitutional); Gillette v. United States, 401 U.S. 437, 462 (1971) (holding individuals who oppose only a particular war, and not war in general for religious beliefs, are not exempt);

certain public office (one case),[177] and criminalizing ritual practices (one case).[178] "[E]radicating racial discrimination in education,"[179] "assuring mandatory and continuous . . . contribution to the social security system,"[180] and obtaining involuntary military service survived strict scrutiny to override free exercise claims,[181] while six of the nine cases struck down the law at issue.[182]

6. Fourteenth Amendment Due Process: Fundamental Rights

Making up 4% of all heightened review jurisprudence,[183] fundamental rights review under the Fourteenth Amendment Due Process Clause has been immensely controversial. For the first time since the discredited *Lochner* case, heightened scrutiny of a substantive due process claim surfaced in *Roe v. Wade*.[184] Deeming abortion decisions a fundamental right by analogy to prior privacy cases, the Court held regulations restricting the decision to terminate a pregnancy must be narrowly drawn to "a compelling state interest."[185] Both the *Roe* decision and its resilience to challenge surprised many commentators.[186]

Sherbert, 374 U.S. at 399-402 (holding unconstitutional a statute which required accepting work on Saturday to qualify for unemployment benefits when refused because of religious belief).

[177] *See McDaniel*, 435 U.S. at 620 (forbidding religious leaders from serving as delegates in constitutional convention is unconstitutional).

[178] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523-25 (1993) (banning specific animal sacrifices targeted at the Santeria religion is unconstitutional).

[179] *Bob Jones Univ.*, 461 U.S. at 603-04.

[180] *Lee*, 455 U.S. at 258-59.

[181] *Gillette*, 401 U.S. at 455, 461-62.

[182] The Court upheld the law at issue in these three cases: *Bob Jones Univ.*, 461 U.S. 574; *Lee*, 455 U.S. 252; and *Gillette*, 401 U.S. 437. See also *infra* app., fig.5 for a complete list of cases.

[183] *See infra* app., fig.1.

[184] *See* CURRIE, *supra* note 1311, at 466 (describing *Roe* as the first case since *Lochner* to base its decision firmly on substantive due process).

[185] Roe v. Wade, 410 U.S. 113, 155 (1973) (internal quotation marks omitted). The Court found a Texas law "restricting legal abortions to those 'procured or attempted by medical advice for the purpose of saving the life of the mother,'" was unconstitutional. *Id.* at 164. For one of the most famous criticisms of the *Roe v. Wade* decision, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[186] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 868-69 (1992) (affirming "*Roe*'s essential holding" but noting it decided "[an] already-divisive issue of governmental power to limit personal choice to undergo abortion"); CURRIE, *supra*

The Court (perhaps due to the backlash of *Roe*) has confined its substantive due process analysis to just two fundamental rights: pregnancy decisions (eight cases)[187] and family living arrangement decisions (one case).[188] Limitations on abortion, restriction of contraceptive information, and restraints on family dwelling arrangements are the only circumstances that triggered such review.[189] While cases from *Roe* onward appeared to apply strict scrutiny,[190] *Casey* and its progeny applied the arguably less stringent undue burden standard.[191] The government successfully upheld portions of laws affecting abortion decisions (however not familial arrangements), but only those aimed at preserving the health of the pregnant woman or protecting potential human life.[192]

7. Fifth and Fourteenth Amendment Equal Protection: Alienage-Based Classifications

In 1971, *Graham v. Richardson* made alienage the second (race

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note 1311, at 467-70 (discussing the lack of political unanimity on the validity of abortion bans); *see also* Linda J. Wharton et. al., *Preserving the Core of* Roe: *Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 319 (2006).

[187] *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa.*, 505 U.S. 833; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[188] *See generally* Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

[189] *See, e.g.*, *Carhart*, 530 U.S. at 920-21 (dealing with a statute criminalizing partial birth abortions); *Population Servs. Int'l*, 431 U.S. at 700 (1977) (dealing with a statute placing limitations on the distribution and advertisement of contraceptives); *Moore*, 431 U.S. at 503; *cf.* Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 197 (1989) (holding there is no Due Process right to have the State provide protection against violence by private actors); Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding there is no due process right to state-funded abortion or other medical services); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding there is no due process right to adequate housing). See *infra* app., fig.5 for a complete list of cases.

[190] *See, e.g.*, *Population Servs. Int'l*, 431 U.S. at 686 ("[R]egulations imposing a burden on [constitutionally protected choices] may be justified only by *compelling* state interests, and must be *narrowly drawn* to express only those interests." (emphasis added)); *Roe*, 410 U.S. at 155 (announcing the strict scrutiny framework applied); *see also Planned Parenthood of Se. Pa.*, 505 U.S. at 871 (describing cases following *Roe* as demanding the law "survive strict scrutiny" (internal quotation marks omitted)).

[191] *See Planned Parenthood of Se. Pa.*, 505 U.S. at 876 (adopting an "undue burden standard"); Wharton et al., *supra* note 186, at 319.

[192] *See Planned Parenthood of Se. Pa.*, 505 U.S. at 900.

being the first) inherently suspect classification subject to strict scrutiny under the Equal Protection Clause.[193] Striking one state's statute reserving welfare benefits for citizens and another state's statute conditioning welfare benefits on aliens meeting a residency requirement, the Court found fiscal savings is not a compelling rationale for making distinctions based on citizenship status.[194]

The alienage anticlassification principle is unique in that it only uniformly applies to the *states*; the Court *does not* apply strict scrutiny to classifications made by the *federal* government in the exercise of its *power over immigration*.[195] Moreover, there is a special carve out from heightened review for alienage-based qualifications attached to jobs sufficiently "bound up with the operation of the State as a governmental entity . . . ."[196]

Graham would not be the last time the Court scrutinized alienage classifications (although most cases have required less than

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[193] *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)); *see also* Raymond M. Kwasnick, Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155, 157 (1973) (discussing the categories triggering strict scrutiny at the time); *cf.* Martinez v. Bynum, 461 U.S. 321, 328-29, n.7 (1983) (finding bona fide residence requirements are not subject to strict scrutiny).

[194] *Richardson*, 403 U.S. at 375-76 (determining the constitutionality of both statutes).

[195] *See* Mathews v. Diaz, 426 U.S. 67, 69, 83 (1976) (upholding Congress' requirement that *aliens* be admitted for permanent residence who have lived in the United States for five years because it was not wholly irrational); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[I]n the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" (quoting *Diaz*, 426 U.S. at 80)). The detailed nuances of the federal power to discriminate based on citizenship is beyond the scope of this article. For an in-depth account of the Court's hands-off approach to the federal government's alienage discrimination in immigration law, see Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1056, 1059-65, 1087-90 (1994); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864-65 (1989) ("[S]eeing the immigration power as an aspect of international relations suggested a very limited—or nonexistent—role for the courts.").

[196] Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (applying rational basis review to a citizenship requirement for parole officers); *accord* Ambach v. Norwick, 441 U.S. 68, 74 (1979) (applying rational basis review to a citizenship requirement for public school teachers). Categorization of government policy imbued jobs served to provide a safe harbor for government use of otherwise highly suspect classifications; this practice resembles many of the techniques employed in *definitional review*. *See supra* Part IV.A.

strict scrutiny),[197] however, with seven cases, alienage-based classifications encompass 3% of all heightened scrutiny cases.[198] The alienage-distinctions laws reviewed have either dealt with the distribution of state welfare and education benefits (three cases)[199] or occupational qualifications (four cases).[200] No alien-based distinction survived heightened review, but the two large safe harbors from judicial scrutiny substantially lessen the presumption against constitutionality.[201]

8. Article IV Section 2 Privileges and Immunities Clause

Constituting one of the few categories prone to heightened review not included in the Bill of Rights, Article IV Section 2 Privileges and Immunities Clause scrutiny entered the scene in 1978 in *Hicklin v. Orbeck*.[202] At issue was an Alaska law providing residents with preferential hiring treatment for certain public works projects.[203] Seriously questioning the causal relationship between nonresident influx and resident joblessness, the Court found even assuming *arguendo* alleviating unemployment vis-à-vis resident preferences is a substantial interest, the law lacked the requisite substantial relationship: educated, employed Alaskan residents were provided the same benefit as uneducated, habitually unemployed residents.[204]

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[197] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (requiring a denial of free education to undocumented children "must be justified by a showing that it furthers some *substantial* state interest" (emphasis added)).

[198] *See infra* app., figs.1 & 5.

[199] *See Plyler*, 457 U.S. 202 (striking down a statute denying education to children residing in the country illegally); Nyquist v. Mauclet, 432 U.S. 1, 2-3 (1977) (barring certain aliens from state-provided financial aid for higher education); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding a state welfare provision which conditions benefits on citizenship and imposes a durational residency requirement violative of equal protection).

[200] *See* Bernal v. Fainter, 467 U.S. 216 (1984) (holding a wholesale ban on resident aliens becoming a notary public unconstitutional); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores De Otero, 426 U.S. 572, 573-74 (1976) (finding Puerto Rico's prohibition on aliens engaging in the private practice of engineering unconstitutional); *In re* Griffiths, 413 U.S. 717, 718-19 (1973) (holding unconstitutional a law excluding aliens from the practice of law); Sugarman v. Dougall, 413 U.S. 634 (1973) (striking down a provision that only citizens may hold permanent positions in the competitive class of the state civil service).

[201] *See supra* notes 195-96 and accompanying text.

[202] 437 U.S. 518 (1978).

[203] *Id.* at 520, 525-26.

[204] *Id.* at 527.

Not all discrimination against nonresidents or noncitizens of a state[205] beckons constitutional scrutiny, however, "[i]t is discrimination against out-of-state residents *on matters of fundamental concern* which triggers the Clause . . . ."[206] For instance, while conditioning employment on state residency is scrutinized under the Article IV Section 2 Privileges and Immunities Clause,[207] imposing higher licensing fees on nonresidents for hunting is not.[208] Furthermore, state-residency status discrimination for the sake of discrimination is a per se illegitimate state interest.[209]

With all seven cases applying intermediate-like scrutiny, 3% of heightened review cases involve the Article IV Section 2 Privileges and Immunities Clause.[210] The nature of the challenged laws falls into three categories: imposing residency requirements for admission to the bar (four cases),[211] preferential treatment of state residents in employment

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[205] For purposes of Article IV Section 2 analysis, discrimination based on state citizenship or residency is treated the same. *See* United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor of Camden, 465 U.S. 208, 216 (1984); *Hicklin*, 437 U.S. at 524 n.8. For ease of reference, and to avoid confusion with the equal protection anti-alienage classification principle, *see supra* notes 193-96, the term *nonresident* is used as shorthand for discrimination against nonresidents *and* noncitizens of a state.

[206] *United Bldg. & Constr. Trades Council*, 465 U.S. at 218, 220 (emphasis added). *See generally* Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws Under the Privileges and Immunity Clause*, 22 SW. U. L. REV. 1, 14-15 (1992) (discussing *Camden*).

[207] *See, e.g.*, Frazier v. Heebe, 482 U.S. 641, 642-43 (1987) (dealing with local rules limiting bar admission to lawyers either residing or maintaining an office in that state); Supreme Court v. Piper, 470 U.S. 274, 275 (1985) (dealing with a state statute limiting bar admission to state residents).

[208] Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 373-74, 383, 390 (1978) (charging nonresidents seven and a half times as much as residents for elk hunting licenses did not violate the Privileges and Immunities Clause because hunting is not one of "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity," thus, discrimination by residency or citizenship is not subject to heightened review).

[209] *Hicklin*, 437 U.S. at 525-26 (prohibiting discrimination solely because someone is a citizen of another state unless the state has a substantial interest in that discrimination). *But see* Martinez v. Bynum, 461 U.S. 321, 328-30, 333 (1983) (finding bona fide residence requirements for tuition-free education is related to the State's substantial interest in limiting educational benefits to bona fide residents).

[210] *See infra* app., figs.1 & 5.

[211] *See infra* app., fig.5 (including Barnard v. Thorstenn, 489 U.S. 546, 549 (1989); Supreme Court v. Friedman, 487 U.S. 59, 61 (1988); *Frazier*, 482 U.S. at 642-43; and *Piper*, 470 U.S. at 275).

(two cases),[212] and denying nonresidents alimony deductions from state income tax (one case).[213] The following purposes have all fallen short of justifying state residency-based distinctions: reducing unemployment, ensuring lawyers are familiar with local law, guaranteeing lawyers behave ethically, making sure lawyers complete mandatory pro bono and other state requirements for practicing law, ensuring lawyers are available for proceedings, reducing judicial caseloads, and excluding deductions of personal expenses entirely linked to out-of-state activities.[214] Not a single discriminatory law survived heightened review.[215]

9. Fourteenth Amendment Equal Protection: First Amendment Speech-Based Classifications

In 1972, scrutiny for differential treatment because of speech was announced in *Police Department of Chicago v. Mosley*, which dealt with a city ordinance banning picketing near schools, but selectively exempting *labor* picketing from the prohibition.[216] The *Mosley* Court decried the ordinance and held that "discriminations among pickets must be tailored to serve a substantial governmental interest."[217] Although preventing school disruption and violence might be substantial interests, nonlabor pickets were not shown to be more disruptive or innately prone to violence than labor pickets so the law could not stand.[218]

Speech-infringing distinctions comprise 3% of all heightened scrutiny analyses.[219] The *Mosley* scenario of content-based differentiation constitutes the majority of laws reviewed (four cases),[220]

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[212] *See infra* app., fig.5 (including United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor of Camden, 465 U.S. 208, 210 (1984); and *Hicklin*, 437 U.S. at 520).

[213] *See infra* app., fig.5 (including Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 290-91 (1998)).

[214] *See* cases cited *supra* notes 199-200, 207.

[215] *See* cases cited *supra* notes 199-200, 207.

[216] 408 U.S. 92, 92-93 (1972). Although *Mosley* and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), were decided on the same day, the latter explicitly relies on the former. See *Grayned*, 408 U.S. at 107 (judging the ordinance unconstitutional "[f]or the reasons given in *Mosley*").

[217] *Mosley*, 408 U.S. at 99.

[218] *See id.* at 100-01.

[219] *See infra* app., figs.1 & 5.

[220] *See infra* app., fig.5 (including Carey v. Brown, 447 U.S. 455, 457, 461-62 (1980) (prohibiting residential picketing but exempting on the basis of content peaceful labor

but the Court also scrutinized content-neutral distinctions that differentially burden expression (two cases).[221] The kinds of speech implicated were picketing (three cases),[222] political expression (two cases),[223] and nudity (one case).[224] Context drives the level of scrutiny in the First Amendment classification jurisprudence: distinction-based burdens on political campaign expression received strict scrutiny, while the remainder of cases applied a less stringent test.[225] One-third of the cases found the distinction withstood the scrutiny threshold.[226]

10. Fourteenth Amendment Equal Protection: Franchise-Burdening Classifications

Deriving the need for heightened scrutiny from the democratic ideals of representative government, *Kramer v. Union Free School*

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picketing of places of employment); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976); *Mosley*, 408 U.S. at 92-93; and *Grayned*, 408 U.S. at 107).

[221] *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655-57 (1990) (restricting on a content-neutral basis corporate political expenditures but not unincorporated entities or media corporations); *Carey*, 447 U.S. at 457, 461-62 (prohibiting residential picketing but exempting on the basis of content peaceful labor picketing of places of employment). *See generally* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1116-22 (2005) (discussing the neutrality principle in freedom of speech jurisprudence). On an interesting side note, all six cases arose from regulations passed by either Illinois or Michigan, or a political subdivision therein. *See* cases cited *infra* notes 227-28.

[222] *See Mosley*, 408 U.S. at 92-93; *Grayned*, 408 U.S. at 107; *Carey*, 447 U.S. at 457, 461-62.

[223] *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); *Austin*, 494 U.S. at 655-57.

[224] *See Am. Mini Theatres*, 427 U.S. at 52.

[225] *Compare Austin*, 494 U.S. at 666 ("Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be *narrowly tailored* to serve a *compelling* governmental interest." (emphasis added)), *with Carey*, 447 U.S. at 461-62 (requiring the law "be *finely* tailored to serve *substantial* state interests" and referencing *United States v. O'Brien*, 391 U.S. 367 (1968) (emphasis added)).

[226] *See Austin*, 494 U.S. at 666, 668; *Am. Mini Theatres*, 427 U.S. at 63, 71 (finding a zoning ordinance banning the clustering of pornographic movie theaters was "consistent with the Equal Protection Clause" because it "is justified by the city's interest in preserving the character of its neighborhoods"). For an empirical critique of the secondary effects rationale behind many of the sexually explicit zoning ordinances, see Roger Enriquez et al., *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 AM. U. J. GENDER SOC. POL'Y & L. 1, 10-11, 34-41 (2006) (discussing a study that links the impact of "local institutions with crime," specifically institutions with human display or alcohol).

District invalidated a law restricting school district election voting to those either with kids in public school or those renting or owning taxable property.[227] An untailored interest in limiting an election to interested members could not suffice: the law "permit[s] inclusion of many persons who have . . . a remote and indirect interest, in school affairs and . . . exclude[s] others who have a distinct and direct interest in the school meeting decisions."[228]

Classifications are doing much of the work in the vote-burdening classification realm: heightened scrutiny is only triggered by severe restrictions[229] on voting for polities exercising general governmental power.[230] And some illegitimate criteria for restricting the franchise, such as race, may never pass constitutional muster.[231] Further, the Court abstained from deciding whether a law must face a presumption of unconstitutionality in cases where the state could not even pass rational review.[232] Nevertheless, with six cases total, franchise-infringing distinctions constitute 3% of scrutiny jurisprudence, although none of these laws survived heightened review.[233]

11. Fifth and Fourteenth Amendment Equal Protection:

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[227] 395 U.S. 621, 622 (1969).

[228] *Id.* at 632.

[229] *See* Burdick v. Takushi, 504 U.S. 428, 433, 434 (1992). *Burdick* enunciates a bifurcated framework whereby "the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Severe restrictions prompt strict scrutiny while reasonable, nondiscriminatory burdens are presumptively valid. *Id.*

[230] *Cf.* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 727-30 (1973) (determining water storage districts are so limited in governing scope and disproportionate in affecting landowners the franchise could be limited to district property holders under rational basis review).

[231] U.S. CONST. amend. XV, § 1; Rice v. Cayetano, 528 U.S. 495, 512 (2000).

[232] Zobel v. Williams, 457 U.S. 55, 60-61 (1982) ("[I]f the statutory scheme cannot pass even the minimal test proposed by the State, we need not decide whether any enhanced scrutiny is called for."); *cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) (deciding "at the outset the level of scrutiny" to apply).

[233] *See infra* app., figs.1 & 5; *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 353 (1972) (imposing residency requirement for voter registration was not justified by an interest in preventing fraud and encouraging informed voting decisions). More recent cases impacting voting are more likely to rely on First Amendment speech or association grounds than equal protection, perhaps because legislatures wised up to the neutrality principal behind fundamental right restrictions. *See* Norman v. Reed, 502 U.S. 279 (1992); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

Federal and state laws imposing residency requirements for welfare benefits sparked the first heightened review of classifications burdening interstate movement in *Shapiro v. Thompson*.[234] These proffered rationales could not justify the infringement of the right to travel: deterring indigent influxes to save money and allocating resources based on tax contributions were constitutionally impermissible purposes;[235] facilitating budget planning, determining residency status, and encouraging early entrance of new workers into the labor force were not necessary to promote a *compelling* governmental interest.[236]

Shapiro claims have gone on to comprise 2% of elevated scrutiny cases;[237] the cases challenged laws tying residency to preferential treatment in civil service employment,[238] free nonemergency medical care,[239] voter registration,[240] and welfare assistance.[241] Uniformly applying strict scrutiny to classifications burdening interstate movement,[242] no case sustained a law penalizing

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[234] Shapiro v. Thompson, 394 U.S. 618, 622-23, 627 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974). See Todd Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 VAL. U. L. REV. 893 (1997), for an argument that *Shapiro* and its progeny are a doctrinal mess and should be discarded.

[235] *Shapiro*, 394 U.S. at 627-29, 632-33.

[236] *Id.* at 633-38 (emphasis added).

[237] *See infra* app., figs.1 & 5.

[238] Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 899, 911-12 (1986); *cf.* Hooper v. Bernalillo County Assessor, 472 U.S. 612, 620 (1985) (allowing a state to give tax benefits based on veteran status).

[239] Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 269-70 (1974). *But see* Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J.L. & MED. 121, 128-30 (1993) (arguing states may be deterred from offering generous health care benefits for the uninsured to begin with due to the risk of attracting the out-of-state uninsured).

[240] Dunn v. Blumstein, 405 U.S. 330, 344 (1972).

[241] *Shapiro*, 394 U.S. at 621-22.

[242] Strict scrutiny was applied if heightened review was applied at all. *See Soto-Lopez*, 476 U.S. at 906 n.6 (stating the Court should first determine what level of scrutiny to apply when faced with an equal protection claim). However, the Court has carved out some burdens from heightened review on the basis of traditional state deference in adjudicating domestic relations. *See* Sosna v. Iowa, 419 U.S. 393, 409-10 (1975) (upholding a one-year residency requirement to file for divorce under rational review); *see also* Note, *Durational Residence Requirements from* Shapiro *Through* Sosna*: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622, 622-23 (1975); *cf. Dunn*,

interstate movement through residency requirements.[243]

12. First Amendment Freedom of the Press

"A free press cannot be made to rely solely upon the sufferance of government to supply it with information."[244] Hedging its bets by vaguely referencing violations of freedom of speech *and* freedom of the press, *Smith v. Daily Mail Publishing Co.* pioneered heightened review for press-oriented restrictions in 1979.[245] *Smith* held that punishing publication of legally obtained information must be necessary to further a *substantial* interest and merely keeping the identity of juvenile criminal offenders anonymous was not sufficient enough to justify the restraint.[246]

With five cases total, freedom of the press claims embody 2% of the heightened scrutiny landscape.[247] Similar to freedom of association, freedom of speech analysis often accompanies freedom of the press review;[248] two of the five cases simply state freedom of the press and freedom of speech were violated, complete with intertwined analyses of each.[249] Protecting the anonymity of juvenile offenders,[250] protecting

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405 U.S. at 342 ("[D]urational residence laws must be measured by a strict equal protection test . . . ."). Notice the parallel in deference to traditional institutional competencies found in alienage-based classification review. *See supra* notes 158-59 and accompanying text.

[243] For an interesting comparison of, and explanation for, the differences between the American and European legal approach to freedom of movement restrictions caused by welfare residency requirements, see A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT'L & COMP. L. 803, 850-52 (2002).

[244] Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979).

[245] *See id.* ("If the information is lawfully obtained, . . . the state may not punish its publication except when necessary to further an interest more substantial . . . .").

[246] *Id.* at 104-05. In addition, the information had already been leaked so the statute failed to further its interest of protecting anonymity regardless of the importance of the statute's purpose. *Id.* at 105.

[247] *See infra* app., figs.1 & 5.

[248] *See supra* Part VI.A.2. David Anderson contends in his article, *Freedom of the Press*, that the Press Clause does not have much independent significance in protecting the press as most protections are already secured under Speech Clause jurisprudence. 80 TEX. L. REV. 430, 430-32 (2002).

[249] *See, e.g.*, *Smith*, 443 U.S. at 100-06 (going back and forth between discussing the prior restraint doctrine of free speech and freedom of the press without delineating the two analyses); *cf.* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 545, 568-70 (1974) (balancing the defendant's need for a fair trial against the freedom of the press when a judge ordered the defendant's confession not be published); H. Glenn Alberich,

privacy and security interests of victims of sexual offenses,[251] raising revenue,[252] fostering communication,[253] and avoiding noncommercial broadcasting stations from serving as a vehicle for partisan propaganda [254] all failed to override the burden their respective laws imposed on the press. While regulations imposing selective taxation (two cases)[255] appear to be more closely scrutinized than regulations restricting information dissemination (three cases), not one of these laws has been upheld.[256]

13. Fourteenth Amendment Equal Protection: Illegitimacy-Based Classifications

Lalli v. Lalli answered the question of what level of review applies when first there is love, but then there is no marriage, announcing in 1977 illegitimacy status classifications get heightened scrutiny. "[C]lassifications based on illegitimacy are not subject to 'strict scrutiny,' [however] they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[257] *Lalli* represents the only case to uphold legitimacy-based classifications under the higher-scrutiny standard, finding a law requiring that illegitimate children provide a judicial order

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Comment, Nebraska Press Association v. Stuart*: Balancing Freedom of the Press Against the Right to a Fair Trial*, 12 NEW ENG. L. REV. 763, 767-72 (1977) (describing the Court's unique methodology for deciding the constitutionality of nondisclosure orders).

[250] *See Smith*, 443 U.S. at 98, 104.

[251] *See* Fla. Star v. B.J.F., 491 U.S. 524, 526, 537 (1989).

[252] *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223, 231-32 (1987); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 576, 586 (1983).

[253] *See Ark. Writers' Project*, 481 U.S. at 223, 231-32.

[254] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 366, 384-86 (1984).

[255] *See* cases cited *supra* note 252.

[256] *See* cases cited *supra* notes 249, 251. *See generally* Alec Hunter Boyd, Note, *Small Numbers and Strict Scrutiny: Differential Taxation of the Press*, 19 HASTINGS CONST. L.Q. 535, 535 (1992) (discussing the "potentially insurmountable barrier in the Press Clause of the First Amendment" that legislatures face).

[257] Lalli v. Lalli, 439 U.S. 259, 265 (1978); *accord* Clark v. Jeter, 486 U.S. 456, 461 (1988). Children's lack of volitional conduct was undoubtedly part of the driving force behind elevating the level of review triggered by illegitimacy distinctions. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."); *cf.* Gomez v. Perez, 409 U.S. 535, 538 (1973) (foreshadowing the Court's later holdings by suggesting lingering problems with proof of paternity may justify treating children differently based on whether their parents were married).

of filiation issued during the father's life valid—the rule was substantially related to the State's substantial interest in distributing intestate property in a fair, orderly manner by providing the means to issue notice to successors.[258]

Each of the four cases constituting the universe of legitimacy-based classifications has the same contextual background: state limitations on paternity proof (and by extension, rights arising out of familial status).[259] Time and again the government proffered the rationale of avoiding litigation of stale or fraudulent claims and with equal consistency the Court found the law was insufficiently circumscribed; paternity establishment actions could not be limited to one year, two years, or six years as scientific advances continued to reduce the paternity proof conundrum.[260]

14. First Amendment Right of Access of the Public and Press to Criminal Proceedings

Extra! Extra! Read all about it! In 1982, *Globe Newspaper Co. v. Superior Court* not only declared an implied First Amendment[261] right of the public and the press to access criminal trials,[262] but announced strict scrutiny applies to restrictions of that right.[263] Massachusetts' categorical requirement of excluding the public and

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[258] *Lalli*, 439 U.S. at 270-72, 275-76. Establishing proof of paternity is likely the *only* acceptable justification for imposing differential burdens on illegitimate and legitimate children; punishing the choices of parents may never form the requisite basis for unequal treatment of children born out of wedlock. *Clark*, 486 U.S. at 461 (quoting *Weber*, 406 U.S. at 175).

[259] *See Clark*, 486 U.S. at 457; Pickett v. Brown, 462 U.S. 1, 3 (1983); Mills v. Habluetzel, 456 U.S. 91, 92 (1982); *Lalli*, 439 U.S. at 261.

[260] *See Clark*, 486 U.S. at 463; *Pickett*, 462 U.S. at 3, 12-14; *Mills*, 456 U.S. at 92, 100-02. *See generally* Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747 (1994) (discussing the legal implications of scientific paternity testing).

[261] *Gannett Co. v. DePasquale* clearly held that there is no *Sixth Amendment* right of the *public* to attend a criminal proceeding. 443 U.S. 368, 379-80, 391 (1979). However, *Gannett* explicitly left open the question of whether the public might have a *First Amendment* right to attend criminal trials. *See id.* at 392.

[262] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-06 (1982) (finding the recognition of an implicit First Amendment right of access to criminal trials is necessary to ensure informed discussions of government affairs, safeguard the integrity of the judicial process through public scrutiny, and foster respect for the judicial process by maintaining the appearance of fairness through public access).

[263] *Id.* at 606-07.

press from the courtroom whenever a minor victim testifies in a sexual offense trial could not pass constitutional muster: protecting minor victims from additional trauma and embarrassment is a compelling interest, but a *mandatory* closure order is an unjustified means of protection since case-by-case review can determine if total closure is necessary; encouraging victims to report crimes is not a compelling justification since there is no factual support for the claim that *automatic* closure would lead to increased reporting and prosecutorial cooperation.[264]

With four cases (spanning just over a decade), the relatively recent right of public access to criminal trials accounts for 2% of scrutinized review.[265] Strict scrutiny has uniformly applied and the state has yet to survive scrutiny of closure orders despite asserting such weighty interests as protecting the welfare of minor victims of sexual assault,[266] reducing the risk of pretrial prejudice,[267] and protecting jurors' privacy.[268] The factual variation between cases is minimal and mainly focused on whether a given proceeding is similar enough to a criminal trial to warrant a right of public access. Excluding the public or press from any portion of an actual trial,[269] voir dire testimony,[270] or preliminary hearing[271] has been deemed presumptively invalid and is answerable to strict scrutiny.[272]

15. Fourteenth Amendment Equal Protection: Classifications Affecting Marriage/Procreation

The first case to ever apply heightened review dealt with a

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[264] *Id.* at 607-11.

[265] *See infra* app., figs.1 & 5.

[266] *See Globe Newspaper*, 457 U.S. at 606-08.

[267] *See* Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 13-15 (1986).

[268] *See* Press-Enter. Co. v. Superior Court (*Press-Enter. I*), 464 U.S. 501, 510 (1984).

[269] *See Globe Newspaper*, 457 U.S. at 606-08.

[270] *Press-Enter. I*, 464 U.S. at 513 (concluding the judge erroneously closed six weeks of voir dire without considering other methods than closure and wrongly sealed testimony that did not implicate the privacy interests purportedly being protected by the seal order).

[271] *Press-Enter. II*, 478 U.S. at 13-15 (striking a law allowing closure of preliminary hearings upon a showing of substantial risk of unfair prejudice because it did not require consideration of less restrictive alternatives before barring the public from attending criminal proceedings); *see also* El Vocero de P.R. v. Puerto Rico, 508 U.S. 147 (1993) (per curiam) (invalidating a law presumptively keeping preliminary hearings private unless the defendant requests the hearing be public).

[272] *See* cases cited *supra* notes 270-71.

classification that impacts the very existence of mankind: the ability to reproduce. In 1942, *Skinner v. Oklahoma ex rel. Williamson* reviewed a habitual offender law providing for sterilization upon three convictions of several enumerated felonies; however, while larceny qualified as a predicate offense, embezzlement was explicitly exempted.[273] Reiterating the deference paid to ordinary police power regulations, the Court proclaimed: "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[274] Wholly lacking a colorable claim that undesirable, heritable traits tracked the statutory definition of theft but not embezzlement, the sterilization law flunked strict scrutiny.[275]

Dealing with the esteemed institution of marriage in the only other Equal Protection scrutiny case[276] addressing marital or procreative distinctions,[277] *Zablocki v. Redhail* found only direct, substantial interferences with marital rights trigger rigorous scrutiny.[278] A Wisconsin law refusing to recognize the marriage of residents who were violating noncustodial child support orders or unable to show noncustodial children would not become public charges sufficiently meddled with the fundamental right to marry, thereby giving way to

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[273] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536-37 (1942). For an article that illustrates the turn-of-the-century arguments in favor of sterilization that were based on false scientific principles, see C.E. Beech, *Sterilization of Criminals, Idiots, and Insane*, 4 LAW. & BANKER & BENCH & B. REV. 212, 212-13 (1911). *See also*, Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 410-11 (1998).

[274] *Skinner*, 316 U.S. at 541.

[275] *Id.* at 541-42.

[276] Any category with less than three cases omits a discussion of the percentage value the category makes up of all heightened scrutiny cases. If a given right or power has either one or two associated heightened scrutiny cases, the total percentage comprised is 1%.

[277] *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978). The *Zablocki* Court hinted that subjecting marriage-burdening classifications to heightened review might be a prophylactic means of protecting the ability to procreate stating "[i]f [the] right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." *Id.* at 386.

[278] *Id.* at 386-87, 387 n.12; *cf.* Loving v. Virginia, 388 U.S. 1, 12 (1967) (preventing marriages based on race violates due process given "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

scrutiny.[279] Establishing a child support counseling mechanism and protecting the welfare of noncustodial children could not save the law due to insufficient tailoring: the marriage ban was not lifted upon receiving counseling, other means of collecting support without impeding marriage rights were available, marriage might actually increase the funds available for child support, and the ban on marriage did not increase resources and perpetuated illegitimacy.[280] The state law was invalidated in both cases imposing a substantial infringement on reproduction or its (sometimes)[281] antecedent marriage.[282]

16. Sixth Amendment Right to a Public Trial

In contrast to the *implicit* constitutional right of access of the public and press to criminal proceedings derived from the First Amendment,[283] the Sixth Amendment *explicitly* provides that criminal defendants "shall enjoy the right to a . . . *public trial*."[284] However, it was not until 1984 in *Waller v. Georgia* that the Court announced strict scrutiny applied to closure of a criminal hearing over the objection of a criminal defendant.[285] Concluding defendants' right of openness was no less important than the right of access of the public and press, the Court required the state to meet the *Press-Enterprise Co. v. Superior Court* test by making a particularized showing that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[286] Strict scrutiny proved fatal in *Waller* as the State's vague interests in preventing the publication of wiretap contents that could render the evidence inadmissible and protecting the privacy of parties not before the Court did not justify total closure.[287] In deciding the case on remand, the Court directed the trial judge to make specific findings on what interests would be compromised by disclosing the wiretap in open court and what alternatives to complete closure of the hearing were available.[288] While *Waller* is the only heightened scrutiny case

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[279] *Zablocki*, 434 U.S. at 375.

[280] *Id.* at 388-91.

[281] *See supra* text accompanying note 273.

[282] *See supra* notes 27474-79 and accompanying text.

[283] *See supra* notes 261-62 and accompanying text.

[284] U.S. CONST. amend. VI. (emphasis added).

[285] Waller v. Georgia, 467 U.S. 39, 44-47 (1984).

[286] *Id.* at 45 (quoting *Press-Enter. I*, 464 U.S. 501, 510 (1984)).

[287] *See Waller*, 467 U.S. at 48-49.

[288] *See id.* at 48-50 ("[I]t seems clear that unless the State substantially alters the evidence it presents to support the searches and wiretaps here, significant portions of a new suppression hearing must be open to the public."). While a violation of the right

dealing with the Sixth Amendment right to a public trial, the Court impliedly adopted the holdings of the First Amendment public right of access line of cases therein.[289]

17. Fourteenth Amendment Privileges or Immunities Clause

Reviving the Fourteenth Amendment Privileges or Immunities Clause from a sixty-four year repose, in 1999 *Saenz v. Roe* went where only one case had gone before.[290] The residency-distinguishing statute involved in *Saenz* bore a remarkable similarity to the statute at issue in *Shapiro*, with a twist: in *Shapiro* new residents were completely barred from collecting welfare benefits for a year; whereas in *Saenz* new residents were only barred for a year from collecting benefits in excess of the amount the previous state of residence provided.[291] The divergence makes a doctrinal difference: the language of *Shapiro* was premised on penalizing the right to travel; California's laws merely preserved a newly arrived resident's status quo position with respect to welfare rights (as if he or she had never moved to California).[292]

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to a public trial was not subject to harmless error analysis, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006), the Court found the defendant was only entitled to a new trial if the outcome of the properly open suppression hearing yielded a different result than the first hearing or the position of the parties significantly changed. *Waller*, 467 U.S. at 49-50.

[289] *See Waller*, 467 U.S. at 44-47; *see also* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 253-60 (1995) (describing the distinction between the First Amendment cases applying heightened review and the Sixth Amendment case applying heightened review).

[290] The astonishment of the revival of an otherwise untouched constitutional provision did not escape criticism. Unabashedly revealing his distain for the Court's invocation of the Privileges or Immunities Clause of the Fourteenth Amendment, Chief Justice Rehnquist stated in his dissent "[b]ecause I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent." Saenz v. Roe, 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting).

[291] *Compare Saenz*, 526 U.S. at 492 (1999) (reviewing a California law "limit[ing] the amount payable to a family that has resided in the State for less than [twelve] months to the amount payable by the State of the family's prior residence"), *with* Shapiro v. Thompson, 394 U.S. 618, 621 (1969) (reviewing a Connecticut, Pennsylvania, and District of Columbia law "den[ying] welfare assistance to residents of the State or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance").

[292] *Saenz*, 526 U.S. at 504-05 (stating the incidental effect on movement might be dispositive under *Shapiro*, but the equality principle behind the Fourteenth Amendment Privileges or Immunities Clause makes the differential treatment itself a penalty).

Without the aid of the Privileges or Immunities Clause, the state law may have been subject to rational review.[293] In other words, the State would surely have prevailed.

Saenz may end up salvaging the long lost antidiscriminatory principle of the Privileges or Immunities Clause, arguably consistent with the Framers' intent,[294] from its previous annihilation by the *Slaughter-House Cases*.[295] *Saenz* announced a strict form of review for classifications between *state residents* (those who intend to remain indefinitely) based on length of domicile.[296] The State's only legitimate proffered rationale, preserving fiscal funds, was just as unconvincing as it was in *Shapiro*.[297] Given the limited nature of the domicile distinction in *Saenz*, it is yet to be seen whether the Privileges or Immunities Clause will have a meaningful impact on eliminating intrastate discrimination among state residents, and at what cost to the existing heightened scrutiny framework.[298]

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[293] *See id.* at 504-05.

[294] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 23 (1980) (noting the parallel between the Article IV Privileges and Immunities Clause and the Fourteenth Amendment Privileges or Immunities Clause and theorizing: "[m]ight it not be, then, that just as the Article IV clause had been directed to equality between locals and out-of-staters, so the similar clause inserted in the Fourteenth Amendment was intended to ensure equality among locals?").

[295] *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); Washington v. Glucksberg, 521 U.S. 702, 760 n.6 (1997) (Souter, J., concurring) ("The *Slaughter-House Cases* are important, of course, for their holding that the Privileges and [sic] Immunities Clause was no source of any but a specific handful of substantive rights."). *See generally* Duncan E. Williams, Note, *Welcome to California, Tom Joad: An Historical Perspective on* Saenz v. Roe *Stirring the Privileges or Immunities Clause from Its* Slaughter-House *Slumber*, 58 N.Y.U. ANN. SURV. AM. L. 85 (2001) (discussing the implications of *Saenz*).

[296] *Saenz*, 526 U.S. at 504.

[297] *Id.* at 507.

[298] Justice Thomas, at least, seems open to reevaluating the Clause's role in rights-based scrutiny jurisprudence, but likely as a substitute for current doctrinal tools he opposes. Emphasizing the need to look to original intent, Justice Thomas asserted "[b]ecause I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case." *Id.* at 527-28 (Thomas, J., dissenting). However, Justice Thomas opines that the Court "should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence." *Id.* at 528.

Departing from the categorical tests dominating Establishment Clause jurisprudence,[299] the Court applied heightened review in the Establishment Clause arena just once in the 1982 case of *Larson v. Valente*,[300] which applied strict scrutiny to a law containing classifications explicitly favoring *one religious sect over another*.[301] The *Larson* Court found rampant religious discrimination in a law imposing registration and reporting requirements for religious groups deriving over half of their funds from nonmembers;[302] neutral language could not cure distinctions deliberately drawn to adversely impact less well off church groups.[303] The state failed to show the requisite close fit between the fifty-percent rule and its interest in protecting the public from fraudulent solicitation of charitable funds; there was no evidence members belonging to exempted groups were capable monitors of the assets donated, that members were effective fraud detectors, and that the need for disclosure increased based on the *percentage* rather than the *absolute* amount donated.[304] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[305] This message has apparently sunk in, as *Larson* remains the only case to apply heightened scrutiny to a law discriminating based on religious denomination.[306]

B. Powers Subject to Heightened Review

The story of heightened review of governmental powers is both more recent and much less prominent in the heightened review practice. With only one power, namely the Section 5 enforcement power, subject to a traditional form of heightened review, power scrutiny covers just

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[299] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (providing a three-step categorical framework for claims that the government is unconstitutionally advancing or endorsing a religion asking (1) if the statute has a "secular legislative purpose;" (2) if its "principal or primary effect [is] one that neither advances nor inhibits religion;" and (3) if the statute "foster[s] an excessive government entanglement with religion" (citations omitted and internal quotations marks omitted)).

[300] Larson v. Valente, 456 U.S. 228, 246 (1982).

[301] *Id.* (holding that state laws granting *denominational preferences* trigger strict scrutiny).

[302] *Id.* at 246, 247 n.23.

[303] *Id.* at 247 n.23.

[304] *Id.* at 248-51.

[305] *Id.* at 244.

[306] *See infra* app., fig.5.

less than 4% of scrutiny cases.[307] The allocation of heightened review capital is clear: rights-based review has dominated the scene.[308] However, congressional remedial power has gained increasing attention as of late,[309] and is complicated by the relationship between the applicable underlying rights scrutiny and the likelihood a remedial law will be upheld as a proper use of power. Congressional remedial power under the Fourteenth Amendment is briefly outlined with such information as which right the remedial law is fashioned to protect, the founding case, the proportion of scrutiny cases the power review comprises, and the kinds of government interests that justified the exercise of scrutinized remedial power.

1. Fourteenth Amendment Section 5 Enforcement Power

After having long abandoned the task of delineating enumerated legislative power,[310] the Court picked up its power-tracing pencil once again in 1997 in *City of Boerne v. Flores*, only this time interpreting Congress' Fourteenth Amendment Section 5 rather than Article I power.[311] "Congress shall have power *to enforce*, by appropriate legislation, the provisions of [the Fourteenth Amendment]."[312] In the name of maintaining separation of powers and federalism principles, the Court has heavily scrutinized such legislation.[313] *Flores* declares that when Congress acts under its Section 5 remedial power the Court will ask whether "[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[314] Invalidating Congress' Religious Freedom Restoration Act of 1993 (RFRA),[315] which essentially reversed *Employment Division v. Smith*[316] by mandating strict scrutiny of substantial burdens on religious

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[307] *See infra* app., fig.1.

[308] *See infra* app., fig.1 (demonstrating that cases involving some assertion of rights comprised the majority of the cases receiving heightened scrutiny by the Supreme Court).

[309] *See infra* app., fig.5 (revealing that before 1997 the Court heard no cases concerning congressional remedial power, but has since heard seven such cases).

[310] *See supra* Part II.C.

[311] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[312] U.S. CONST. amend. XIV, § 5 (emphasis added).

[313] *Flores*, 521 U.S. at 536.

[314] *Id.* at 520. The *Flores* Court also stated "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id.* at 527.

[315] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

[316] Employment Div. v. Smith, 494 U.S. 872, 883-85 (1990) (declining to apply

freedom, the Court found RFRA's sweeping breadth and lack of historical prophylactic need belied the claim it was remedial in nature.[317]

Congress has always been an entity of enumerated powers,[318] but in the realm of Section 5 enforcement power, the Court will scrutinize the law to decide if it is remedial (and therefore proper) or nonremedial (and therefore invalid) using the congruence and proportionality test.[319] With seven cases, proportionality review of congressional remedial power embodies 3% of the heightened scrutiny terrain.[320] The relevant variable in predicting heightened review success is the underlying right Congress is trying to protect.[321] Each case dealt with a different remedial goal, including: protecting free exercise of religion; providing patent-infringement damages; preventing age discrimination; combating violence against women; accommodating disabilities and suppressing disability-based discrimination; eliminating gender discrimination in the workplace; and enforcing the constitutional right of access to courts.[322]

Congress has not fared well under the Court's remedial power review: five of the seven cases invalidated the enacted law.[323] The definitive predictor of success seems to be tied to the level of heightened scrutiny of the underlying right sought to be protected: Congress faces an uphill battle in protecting groups or rights subject to rational basis review. The only two cases to withstand scrutiny involved laws protecting rights subject to heightened scrutiny.[324] The

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heightened scrutiny to general criminal prohibitions that have a secondary effect on religious practice).

[317] *Flores*, 521 U.S. at 530-36.

[318] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

[319] *Flores*, 521 U.S. at 516-20.

[320] *See infra* app., fig.1.

[321] *See Flores*, 521 U.S. at 518-20.

[322] In the order listed, the cases assessing the remedial goals are *Flores*, 521 U.S. 507 (invalidating the enacted law); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 647 (1999) (invalidating the enacted law); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000) (invalidating the enacted law); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the enacted law); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (invalidating the enacted law); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (upholding the enacted law); and Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (upholding the enacted law).

[323] *See* cases cited *supra* note 326.

[324] *See Lane*, 541 U.S. at 533-34 (upholding Title II legislation that abrogated state

greater the burden on justifying infringement of the right being protected the *more* deference is given to the remedial power of Congress bestowed by the Fourteenth Amendment enforcement provision.

VII. CONCLUDING THOUGHTS: WHERE DO WE GO FROM HERE?

The Court utilizes heightened scrutiny to protect only a narrow subset of constitutional rights and governmental powers. Such heightened review does not always follow theoretical predictions of democratic failure or vulnerable rights; for example, heightened review for congressional remedial powers and distinctions based on travel do not necessarily follow the *Carolene Products* framework. However, from an efficiency standpoint, heightened review may be one of the Court's most valuable tools for constitutional interpretation. With heightened scrutiny parties know what to expect and can plan accordingly. Likewise, the government knows what to expect and can legislate accordingly. But perhaps most importantly, the Court can preserve its institutional legitimacy for the most pressing claims by abstaining from a host of irreconcilable or politically charged issues.

Scholars continually prophesized the demise of the scrutiny framework,[325] and the Court has plainly strayed from its three-tiered approach.[326] Nevertheless, the heightened scrutiny framework has remained a centerpiece of individual rights-based constitutional law for over sixty-five years, and there is no clear end in sight.[327] Hopefully, this article not only clarifies what exactly the Court has subjected to

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immunity from suits by disabled individuals who were denied access to courthouses, noting denial of such fundamental basic rights receives heightened judicial scrutiny); *Hibbs*, 538 U.S. at 736-37, 739-40 (sustaining Congress' authorization of money damages for violations of the Family and Medical Leave Act family-care provision given the history of gender-discrimination and the heightened level of review applicable to gender-based classifications). *But see Kimel*, 528 U.S. at 82-84, 86 (determining ADEA, a congressional act prohibiting age discrimination by the states, was nonremedial and thus invalid since state laws making distinctions based on age are only subject to rational basis review, and ADEA would "prohibit[] substantially more state employment decisions and practices" than rational basis review); *Fla. Prepaid*, 527 U.S. at 633-34 (concluding Congress transcended its Section 5 remedial powers given the lack of actual proof of denial of procedural due process in patent infringement suits, which does not trigger heightened review).

[325] *See* Shaman, *supra* note 100, at 163; Smith, *supra* note 105, at 513-14.

[326] Smith, *supra* note 100, at 513.

[327] *See infra* app., fig.6 (showing the number of Supreme Court decisions utilizing heightened scrutiny in five-year increments from 1942-2006).

elevated scrutiny, but also will further future normative and policy-based literature regarding judicial scrutiny in constitutional litigation.

As for possible additions to the heightened scrutiny lineup, there has been no shortage of scholars advocating for their favorite right or power to be next in line. Commentators have zealously argued heightened review should be used for the just compensation requirement,[328] public use requirement,[329] warrant requirement,[330] and right to bear arms,[331] among others. Meanwhile, some rights are likely impervious to heightened scrutiny because of either textual restraints or historical precedent.[332] The current heightened scrutiny doctrine is not set in stone as the practice continues to evolve. While the history of judicial review is a history of constant change, there is value in stepping back every now and then to see how far the Court has come, to recognize how far it has to go, and perhaps, to learn something from the path it has taken along the way.

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[328] *See* Daniel William Russo, Note, *Protecting Property Rights with Strict Scrutiny: An Argument for the "Specifically and Uniquely Attributable" Standard*, 25 FORDHAM URB. L.J. 575, 595 (1998).

[329] *See* Kristi M. Burkard, Comment, *No More Government Theft of Property! A Call to Return to a Heightened Standard of Review After the United States Supreme Court Decision in* Kelo v. City of New London, 27 HAMLINE J. PUB. L. & POL'Y 115, 161-62 (2005); Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 306 (2000); Michael A. Lang, Note, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449, 480 (2006).

[330] *See* Holly, *supra* note 86, at 565.

[331] *See* Jerry Bonanno, *Facing the Lion in the Bush: Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 HAMLINE L. REV. 463, 496 (2006).

[332] The Fifteenth Amendment ban on racial discrimination in voting is one example. *See* City of Mobile, Ala. v. Bolden, 446 U.S. 55, 65 (1980) (stating the Fifteenth Amendment imposes a single, categorical limitation on denying voting rights based upon race).

APPENDIX

Figure 1

All Heightened Scrutiny Cases

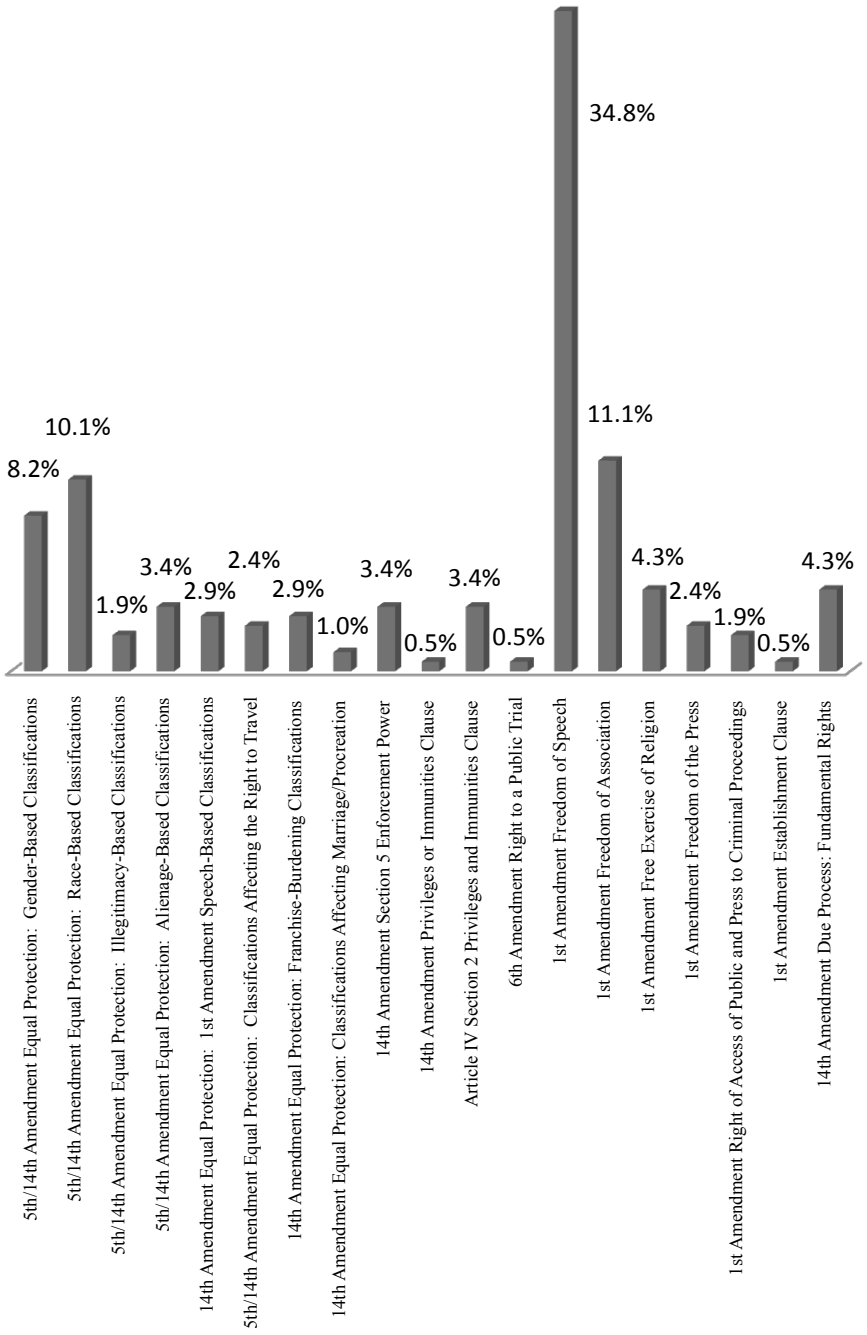

Figure 2

Subcategories of First Amendment Speech Subjected to Heightened Review

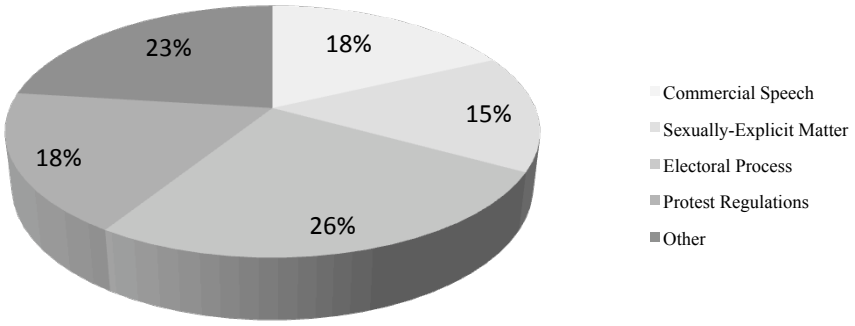

Figure 3

Subcategories of First Amendment Association Subjected to Heightened Review

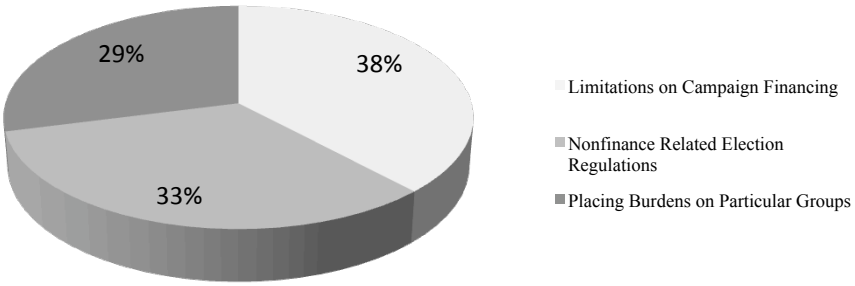

Figure 4

Subcategories of Fifth/Fourteenth Amendement Race-Based Classifications Subjected to Heightened Review

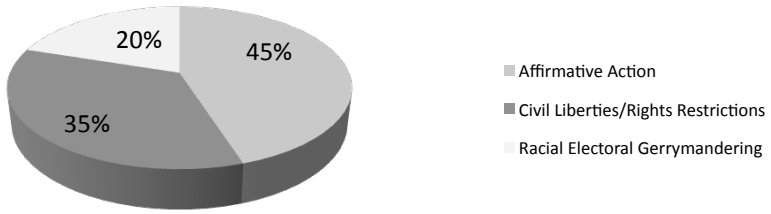

Figure 5

Comprehensive List of Cases Subjected to Heightened Scrutiny (207 cases)

RIGHTS CASES

A. First Amendment Freedom of Speech (72 cases)

FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007)
Randall v. Sorrell, 548 U.S. 230 (2006)
Ashcroft v. ACLU, 542 U.S. 656 (2004)
McConnell v. FEC, 540 U.S. 93 (2003)
FEC v. Beaumont, 539 U.S. 146 (2003)
Republican Party of Minn. v. White, 536 U.S. 765 (2002)
City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002)
Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)
Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002)
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)
FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001)
Bartnicki v. Vopper, 532 U.S. 514 (2001)
Hill v. Colorado, 530 U.S. 703 (2000)
United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000)
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)
Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)
Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999)
Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997)
Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997)
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)

Denver Area Educ. Telcomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996)
Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996)
Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995)
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)
Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994)
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)
United States v. Edge Broad. Co., 509 U.S. 418 (1993)
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)
Edenfield v. Fane, 507 U.S. 761 (1993)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Burson v. Freeman, 504 U.S. 191 (1992)
Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
Rutan v. Republican Party of Ill., 497 U.S. 62 (1990)
Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)
United States v. Eichman, 496 U.S. 310 (1990)
Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989)
Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)
Ward v. Rock Against Racism, 491 U.S. 781 (1989)
Texas v. Johnson, 491 U.S. 397 (1989)
Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)
Frisby v. Schultz, 487 U.S. 474 (1988)
Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988)
Boos v. Barry, 485 U.S. 312 (1988)
Meyer v. Grant, 486 U.S. 414 (1988)
Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986)
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986)
FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986)
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)
FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984)
Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947 (1984)
Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)
Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)
Regan v. Time, Inc., 468 U.S. 641 (1984)
United States v. Grace, 461 U.S. 171 (1983)
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981)
Widmar v. Vincent, 454 U.S. 263 (1981)
Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)
Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)
Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980)
Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979)
First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)
In re Primus, 436 U.S. 412 (1978)
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)
Buckley v. Valeo, 424 U.S. 1 (1976)
Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976)
Grayned v. City of Rockford, 408 U.S. 104 (1972)

B. First Amendment Freedom of Association (23 cases)

Randall v. Sorrell, 548 U.S. 230 (2006)
McConnell v. FEC, 540 U.S. 93 (2003)
FEC v. Beaumont, 539 U.S. 146 (2003)
Republican Party of Minn. v. White, 536 U.S. 765 (2002)
FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001)
Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)
Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)
Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)
Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996)
Norman v. Reed, 502 U.S. 279 (1992)
Rutan v. Republican Party of Ill., 497 U.S. 62 (1990)
Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989)
Munro v. Socialist Workers Party, 479 U.S. 189 (1986)
Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986)
Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)
Anderson v. Celebrezze, 460 U.S. 780 (1983)
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981)
Widmar v. Vincent, 454 U.S. 263 (1981)
In re Primus, 436 U.S. 412 (1978)
Elrod v. Burns, 427 U.S. 347 (1976)
Buckley v. Valeo, 424 U.S. 1 (1976)
Kusper v. Pontikes, 414 U.S. 51 (1973)
United States v. Robel, 389 U.S. 258 (1967)

C. Fifth and Fourteenth Amendment Equal Protection: Race-Based Classifications (21 cases)

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007)
Johnson v. California, 543 U.S. 499 (2005)
Gratz v. Bollinger, 539 U.S. 244 (2003)
Grutter v. Bollinger, 539 U.S. 306 (2003)
Shaw v. Hunt, 517 U.S. 899 (1996)
Bush v. Vera, 517 U.S. 952 (1996)
Miller v. Johnson, 515 U.S. 900 (1995)
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)
Shaw v. Reno, 509 U.S. 630 (1993)
Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)
United States v. Paradise, 480 U.S. 149 (1987)
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)
Palmore v. Sidoti, 466 U.S. 429 (1984)
Fullilove v. Klutznick, 448 U.S. 448 (1980)
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)
Hunter v. Erickson, 393 U.S. 385 (1969)
Loving v. Virginia, 388 U.S. 1 (1967)
McLaughlin v. Florida, 379 U.S. 184 (1964)

Oyama v. California, 332 U.S. 633 (1948)
Korematsu v. United States, 323 U.S. 214 (1944)

D. Fifth and Fourteenth Amendment Equal Protection: Gender-Based Classifications (17 cases)

Nguyen v. INS, 533 U.S. 53 (2001)
Miller v. Albright, 523 U.S. 420 (1998)
United States v. Virginia, 518 U.S. 515 (1996)
J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994)
Heckler v. Mathews, 465 U.S. 728 (1984)
Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982)
Kirchberg v. Feenstra, 450 U.S. 455 (1981)
Rostker v. Goldberg, 453 U.S. 57 (1981)
Michael M. v. Superior Court, 450 U.S. 464 (1981)
Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980)
Orr v. Orr, 440 U.S. 268 (1979)
Califano v. Westcott, 443 U.S. 76 (1979)
Caban v. Mohammed, 441 U.S. 380 (1979)
Califano v. Goldfarb, 430 U.S. 199 (1977)
Califano v. Webster, 430 U.S. 313 (1977)
Craig v. Boren, 429 U.S. 190 (1976)
Frontiero v. Richardson, 411 U.S. 677 (1973)

E. First Amendment Free Exercise of Religion (9 cases)

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)
Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987)
Bob Jones Univ. v. United States, 461 U.S. 574 (1983)
United States v. Lee, 455 U.S. 252 (1982)
Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981)
McDaniel v. Paty, 435 U.S. 618 (1978)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Gillette v. United States, 401 U.S. 437 (1971)
Sherbert v. Verner, 374 U.S. 398 (1963)

F. Fourteenth Amendment Due Process: Fundamental Rights (9 cases)

Stenberg v. Carhart, 530 U.S. 914 (2000)
Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)
Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)
City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983)
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)
Moore v. City of E. Cleveland, 431 U.S. 494 (1977)
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)
Doe v. Bolton, 410 U.S. 179 (1973)
Roe v. Wade, 410 U.S. 113 (1973)

G. Fifth and Fourteenth Amendment Equal Protection: Alienage-Based Classifications (7 cases)

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Q. Fourteenth Amendment Privileges or Immunities Clause (1 case)

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R. First Amendment Establishment Clause (1 case)

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Figure 6