

Note

Interest Definition in Equal Protection: A Study of Judicial Technique

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I. INTRODUCTION: CLASSIFICATION AND ITS DISCONTENTS

In the 1960s and 1970s, the Supreme Court developed the three-tiered framework of judicial scrutiny that now dominates equal protection jurisprudence.¹ As this tripartite scheme evolved, its emphasis on group-based classifications sparked impressive debates over which groups qualified as “suspect classes,”² but it also led many to overlook the role of government

1. According to this system, most government policies receive permissive, “rational basis” scrutiny, while policies that classify on the basis of gender receive “intermediate scrutiny,” and those that classify based on race receive “strict scrutiny.” *See, e.g.,* *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995) (applying strict scrutiny to racial classifications); *FCC v. Beach Communications*, 508 U.S. 307, 309 (1993) (applying rational basis review to commercial distinctions); *Craig v. Boren*, 429 U.S. 190, 199-204 (1976) (applying intermediate scrutiny to gender-based classifications); *see also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (extending intermediate scrutiny to classifications disfavoring children born out of wedlock); *Graham v. Richardson*, 403 U.S. 365, 474 (1971) (extending strict scrutiny to classifications disfavoring aliens).

Despite the recent vintage of the tiered framework, *see Craig*, 429 U.S. at 199-204 (applying intermediate scrutiny to gender-based classifications for the first time); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (applying strict scrutiny to racial classifications for the first time); *cf. Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (invoking the rhetoric of strict scrutiny while actually applying very relaxed standards of scrutiny), it is now so well established that even the most powerful critics of the conventional model concede its predominance. *Compare Craig*, 429 U.S. at 464 (Stevens, J., concurring) (attacking tiered scrutiny in favor of a unified standard of equal protection), *with Miller v. Albright*, 118 S. Ct. 1428, 1437 n.11 (1998) (Stevens, J.) (applying tiered scrutiny), *and Adarand*, 515 U.S. 200, at 247 (Stevens, J., concurring) (admitting that tiered scrutiny accurately represents the state of the law).

2. *See, e.g.,* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-13 to 16-59 (2d ed. 1988); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-70 (1976); Cass R. Sunstein, *The Right to Die*, 106 YALE L.J.

interests.³ This oversight is especially surprising because the class-based⁴ model itself depends on government interests.⁵ In applying any level of judicial scrutiny, courts must both define the government interests at stake and weigh them on scales of constitutional "importance" and "relatedness."⁶

1123, 1155 (1997). A possible counterexample of this obsession with classification is the "fundamental rights strand" of equal protection, under which the Warren Court construed equal protection to guarantee certain individual rights. *See generally* GERALD GUNTHER, *CONSTITUTIONAL LAW* 819-77 (12th ed. 1985) (using voting access, judicial procedures, and interstate migration as examples of this branch of equal protection). These cases will not receive much attention here for two reasons. First, such cases have become decreasingly significant as modern courts refuse to expand the scope of individual rights. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *MICH. L. REV.* 213, 285-88 (1991). *But cf.* Brad Snyder, Note, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Proceedings*, 107 *YALE L.J.* 2211, 2225 (1998) (arguing that the fundamental rights strand should be reinvigorated). Second, since fundamental rights cases operate within the three-tiered framework of scrutiny, they are analytically identical to classification-based cases that require strict scrutiny.

3. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 *CAL. L. REV.* 297, 318 (1997):

[T]he past few years have . . . seen increasing, though still somewhat embryonic, academic commentary on the nature of government interests and how courts should analyze those interests. . . . Other than a single student note, [Stephen] Gottlieb's 1988 article appears to have been the first substantial examination of the theory underlying governmental interests . . . (footnote omitted).

See also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1248 (1970) ("Hopefully in time . . . goal definition will come to be recognized as a crucial step in the review of any choice, and a process of reasoning will be undertaken and exposed to view."); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 *B.U. L. REV.* 917, 917-18 (1988) ("The validity of the process of inferring interests, the validity of the interests inferred, and the validity of the use of governmental interests as a basis to override constitutional rights have all been virtually ignored."); Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 428 (1997) (criticizing the current emphasis on choice among classification-based standards of review); Symposium, *Conference on Compelling Governmental Interests: The Mystery of Constitutional Analysis*, 55 *ALB. L. REV.* 535 (1992); Symposium, *When Is a Line as Long as a Rock Is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 *HASTINGS L.J.* 707 (1994); *cf.* Hopwood v. Texas, 78 F.3d 932, 964-65 (5th Cir. 1996) ("[Given] the minimal guidance in *Adarand*, the definition and application of the compelling interest inquiry seems to be suspended somewhere in the interstices of constitutional interpretation."); GUNTHER, *supra* note 2, at 600-877 (failing even to mention government interests in the course of an otherwise extensive introduction to equal protection jurisprudence).

4. The word "class" will be used exclusively in the judicial sense of a category of persons, as in a "suspect class," never in the of sense of socioeconomic demographic brackets.

5. The phrase "government interest" will be used consistently in order to avoid debates about whether equal protection scrutiny applies to the effects of government policies, their intentions, or both. The word "interest," as opposed to terms such as "motive," "purpose," or "objective," aptly refers both to a subjective state of mind and to the object that inspires such a state. *See* WEBSTER'S *ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* 741 (1989). The muddiness between subjective intentions and objective effects may be terminologically frustrating, but it accurately reflects the Supreme Court's ambivalence on the issue. *Compare* *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) (noting the myriad "hazards of declaring a law unconstitutional because of the motivations of its sponsors"), *with* *Washington v. Davis*, 426 U.S. 232, 245 (1976) (holding that discriminatory purpose is a necessary element of equal protection claims). *See generally* GUNTHER, *supra* note 2, at 704-10 (arguing that the "purposeful discrimination requirement" may be satisfied by proof of certain types of objective effects).

6. Strict scrutiny, for example, requires an interest that is compelling (importance) and narrowly tailored (relatedness). *See, e.g., Adarand*, 515 U.S. at 235. Similarly, rational basis review requires a legitimate interest that is rationally related to the challenged policy, and heightened scrutiny requires an important interest that is substantially related to the policy. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985).

This Note will examine two judicial techniques that are used to define government interests.⁷ The first technique is “generality manipulation,” by which judges adjust the generality with which interests are defined and deliberately cause them to fail applicable tests of scrutiny. The second involves “excluded-interest rules,” which judges use to bar certain government interests from judicial consideration altogether. Judge Sloviter has observed that “how a question is framed [often] determines the answer that is received.”⁸ Likewise, these techniques of interest definition determine constitutional outcomes in individual cases, and they delimit the doctrinal potential of equal protection as a whole.⁹

Part II will argue that generality manipulation has exposed three-tiered judicial scrutiny to significant instability and abuse. Just as an individual right can be described broadly or narrowly to provide broader or narrower constitutional protection, a government interest also can be defined at various levels of generality. Judges’ choice among these levels of generality often

Conventional wisdom might suggest that interest analysis is only an exercise in post hoc rationalization because courts decide cases solely on the type of classification at issue. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (casting strict scrutiny as uniformly “fatal” and minimal scrutiny as “virtually none in fact”). Such an argument would emphasize that no Supreme Court majority has upheld a racial classification since World War II. Cf. *Korematsu*, 323 U.S. at 223-24 (allowing internment of Japanese Americans); *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943) (approving a curfew imposed against Japanese Americans). But cf. *Fullilove v. Klutznick*, 448 U.S. 448, 480, 491-92 (1980) (Burger, J., plurality) (upholding a racial affirmative action program for federal contractors under strict scrutiny).

Recent Supreme Court precedent, however, belies the common assumption that classification is the only important element of equal protection analysis. In *Adarand Constructors v. Peña*, for example, the Court applied strict scrutiny to a racial affirmative action program. 515 U.S. at 235. Nevertheless, it also remanded the case for further findings of fact regarding the *government’s interest* at stake and explicitly rejected characterizations of strict scrutiny as “fatal in fact.” *Id.* at 237-39; see also *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (using rational basis scrutiny to strike down a state policy that did not serve a legitimate government interest); cf. Cass Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 77 (1996) (arguing that the Court’s 1995 decisions mark an important shift in equal protection).

7. Some might suggest that judges do not define interests; litigants do. Such a view, however, assumes an overly static view of doctrinal development. Lawyers make arguments that they expect courts to accept, and courts have substantial control over these expectations through rulings and written opinions. Also, judges decide constitutional law on the basis of their own view of the law, not on the views of the parties. If litigants’ briefs laid out all conceivable bases for decisions, the demand for judicial law clerks would be significantly reduced.

A related proposal is that courts should read government interests directly from the government itself—from the text of a statute, for example. Cf. Gunther, *supra* note 6, at 44 (proposing that legislators or government attorneys should be forced to articulate the government interest at stake). A “plain language” approach to interests would, however, operationally subjugate constitutional protection to legislative will. By misrepresenting the government interest at stake, for example, Congress could arbitrarily cast a government interest as important or narrowly tailored enough to survive even strict constitutional scrutiny. Gerald Gunther has argued that political accountability will guard against this “creative drafting” problem. See *id.* at 47. In cases involving very popular statutes, however, the majority is likely to support, rather than condemn, such political tactics.

8. *Taxman v. Board of Educ.*, 91 F.3d 1547, 1567 (3d Cir. 1996) (Sloviter, J., dissenting).

9. This Note will focus entirely on interest definition in equal protection jurisprudence. Since parallel systems of tiered scrutiny have developed in free speech and substantive due process, however, the analysis presented here is readily applicable to these other contexts as well. See Bhagwat, *supra* note 3, at 304-06.

determines whether a particular interest satisfies the importance and relatedness tests of judicial scrutiny. Thus, the power to manipulate interests' generality implies corresponding discretion over whether government policies will survive constitutional challenge.

To guide this powerful judicial discretion, Section II.C proposes a "border points" theory of generality determination that is based on relationships among generality, importance, and relatedness. The theory's conceptual goal is to direct attention away from analytically irrelevant levels of generality toward those that allow constitutional decisions to be logically complete. In practice, this border points approach would allow three-tiered scrutiny to be applied more honestly¹⁰ and would clarify existing categories of importance and relatedness.¹¹

Part III will present excluded-interest rules as vital, albeit unrecognized, constitutional doctrines used to protect norms that conventional judicial scrutiny cannot, such as "one person, one vote" and opposition to stereotypes. Discussion will focus on two types of excluded-interest rules: "mandatory interest rules" and "forbidden interest rules."

Mandatory interest rules exclude all government interests except one from judicial consideration, constitutionally requiring a government policy to serve the one "mandatory interest" that is not excluded. Their basic structure allows mandatory interest rules to craft "pure" legal instruments that can protect spheres of political impartiality. The clearest example of a mandatory interest rule arises in voting apportionment. Courts currently require that electoral districts be drawn to support fair representation; no other government interest will suffice. This means that although ordinary political interests such as increasing employment or environmental quality are adequate to justify most government classifications, such interests are wholly inappropriate in the context of electoral reapportionment. Because of the mandatory interest rule, voting policies are constitutionally reserved for the service of democratic impartiality, a value that cannot be alloyed without being lost.

Forbidden interest rules exclude government interests, such as racial bigotry, that contradict constitutional norms of equal protection. There are

10. For an analysis of the practical desirability and dangerousness of judicial candor, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 172-81 (1982).

11. Current application of judicial scrutiny has been widely criticized as doctrinally unstable and analytically unsound. *See, e.g.,* *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("How is this Court to divine what objectives are important? . . . [Such] phrases . . . are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . ."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting in part) (finding the conventional model to be "rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges"); *Trimble v. Gordon*, 430 U.S. 762, 777 (1972) (Rehnquist, J., dissenting) ("[T]he Court's decisions [aside from those concerning race and national origin] can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle."); *see also* Richard H. Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 *MO. L. REV.* 587, 616 (1983) ("Unless some manageable equal protection test is devised, it seems likely that either equal protection will cease being the chosen judicial tool for enforcing social justice or the Court will . . . [suffer] loss of respect and institutional independence.").

weaker and stronger forms of such rules. The weak form bars forbidden interests but allows courts to evaluate any other, non-forbidden interests that the policy might serve. The weak forbidden interest rule against gender-based stereotypes, for example, has formally excised such stereotypes from equal protection jurisprudence. However, policies can survive this rule if they promote some other government interest that is not based on gendered stereotypes. The stronger form of forbidden interest rules invalidates policies that serve forbidden interests, regardless of other interests that the policy might promote. For example, a policy might be unconstitutional per se if it served an interest in denaturalizing racial minorities. Such an interest might be so constitutionally unacceptable as to poison other, satisfactory interests that the government policy also served.

Without providing a comprehensive theory of when excluded-interest rules should be applied, Part III will illustrate doctrinal possibilities that such rules allow. Mandatory interest rules permit judges to craft institutions, such as in voting procedure, that embody and protect core political impartiality. Forbidden interest rules allow judges to shape our constitutional culture by marking certain government interests as irredeemably corrupt.

Part IV will consider the doctrinal interaction between the border points theory and excluded-interest rules. Currently, judges uphold constitutional values, even if they are not protected by class-based scrutiny, by manipulating the generality of the interests at stake. *Romer v. Evans*¹² exemplifies this tactic. If excluded-interest rules were thoughtfully applied in cases like *Romer*, equal protection could protect various constitutional values in a stable and intellectually honest way. Just as eliminating generality manipulation should bring constitutional norms into the open, excluded-interest rules should make generality manipulation doctrinally unnecessary.

II. MANIPULATING GENERALITY

One technique used in defining government interests is manipulation of the generality at which they are described. Defining an interest more or less generally affects its constitutional importance and relatedness; thus, judges' power to choose among levels of generality entails substantial control over whether an interest can satisfy judicial scrutiny. This Part will propose a model to limit arbitrariness and abuse in determining government interests' generality, in the hope of clarifying tiered judicial scrutiny.

12. 517 U.S. 620 (1996).

A. *Basic Concepts*

Issues concerning generality are omnipresent in legal interpretation,¹³ and recent scholarship in the context of substantive due process¹⁴ should provide a useful introduction for generality in equal protection.

To understand what it means for a right to be more or less “general,” imagine a series of concentric circles.¹⁵ Each circle represents one possible basis for vindicating individual rights in a substantive due process suit. Different diameters represent different levels of generality at which the right might be articulated; the center represents the narrowest conceivable right, one that would only protect the plaintiff’s own actions. Wider circles, representing more general rights, would not only protect the plaintiff’s conduct but would also shield a range of related activities.¹⁶

The Supreme Court in *Griswold v. Connecticut*,¹⁷ for example, could have articulated its holding using any of several different levels of generality. The Court could have established a narrow right to buy contraceptive foam, a broad right to plenary sexual freedom, or a right of intermediate generality.¹⁸ Despite its conceptual importance, generality was never explicitly mentioned in *Griswold*, nor in any other due process landmark, because discussion of generality alone could not answer the operational question of how broadly to define Ms. Estelle Griswold’s rights. The interpretive tools that might otherwise have specified “proper” levels of generality for due process rights (tradition, original intent, and political theory, for example), proved to be far

13. See, e.g., *United States v. Lopez*, 514 U.S. 549, 565 (1995) (noting that describing an activity as commercial or noncommercial depends entirely on the generality with which the activity is defined); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922) (finding an unconstitutional taking under the so-called “diminution-in-value” test by defining the estate’s total value at a narrow level of generality); CALABRESI, *supra* note 10, at 14 (recognizing generality as a basic analytical engine for common law and constitutional adjudication); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091-92 (1981) (“[A]ll adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral.”).

14. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065 (1990) (calling characterizations of generality the “principal weapons” in interpretive battles surrounding individual rights); see also David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 778 (1994) (“[T]he interpretive debate concerning the level of abstractness at which [a] right is conceptualized . . . is endemic throughout constitutional adjudication.”).

15. I am grateful to Matthew Waxman for this metaphor.

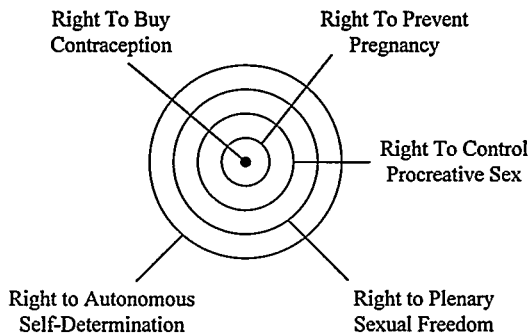
16. See Chart 1; see also Tribe & Dorf, *supra* note 14, at 1058.

17. 381 U.S. 479 (1965) (invalidating a statute that prohibited the use of birth control based on a substantive due process right of privacy).

18. See Tribe & Dorf, *supra* note 14, at 1058. The Court’s choice among these levels of generality in *Griswold* critically influenced subsequent rulings concerning the limits of individual privacy. The most general articulation of these rights, for example, would have constitutionally invalidated anti-sodomy laws, while the least general articulation of such rights would not. As a matter of positive law, the Court in *Bowers v. Hardwick* interpreted *Griswold*’s privacy right at an intermediate level of generality, proclaiming a right “to decide whether or not to beget or bear a child” and upholding Georgia’s sodomy statute. 478 U.S. 186, 190 (1986); see also Tribe & Dorf, *supra* note 14, at 1066.

more controversial than helpful.¹⁹ Thus, although generality is now a familiar part of due process scholarship,²⁰ its recognition has not significantly affected the adjudication of constitutional cases.

CHART 1. POSSIBLE LEVELS OF GENERALITY
FOR THE DUE PROCESS RIGHTS IN *GRISWOLD*



On the other hand, generality is hardly ever discussed in the context of government interests.²¹ Applying the metaphor of concentric circles, broader circles would represent more general interests—that is, interests that could conceivably support a range of related policies aside from the one under challenge.²² And the narrowest conceivable interest, enacting the policy for its own sake, would lie at the center.²³

19. Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1988), and *ROBERT H. BORK, THE TEMPTING OF AMERICA* 150 (1990), with *LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION* 79-80 (1991), and *Tribe & Dorf, supra* note 14, at 1058-59, and *Gene R. Nichols, Jr., Bork's Dilemma*, 76 VA. L. REV. 337, 344-45 (1990) (book review). Even Tribe and Dorf's model, which draws rights' generality from the "essential facts" of judicial precedents, does not claim to provide an objectively correct level of generality; it only claims to be honest in admitting its substantive content and assumptions. See *Tribe & Dorf, supra* note 14, at 1105.

20. See, e.g., *William K. Kelley, Inculcating Constitutional Values*, 15 CONST. COMMENTARY 161, 180 (1998) (reviewing *GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW* (13th ed. 1997) and *GEOFFERY R. STONE ET AL., CONSTITUTIONAL LAW* (3d ed. 1996)) (noting that issues surrounding generality have become a canonical element of substantive due process education); *Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1173-74 (1988) (discussing the malleability of generality in due process jurisprudence); *Tribe & Dorf, supra* note 14, *passim*.

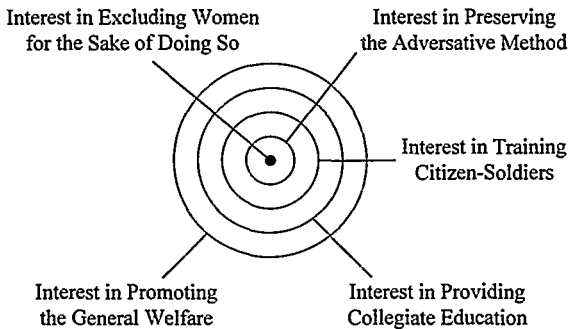
21. The only work to address generality's influence on equal protection is *Robert C. Farrell's* article, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 15-16 (1992). Farrell recognized generality as a highly manipulable concept in equal protection jurisprudence, but he did not consider whether such manipulation could be contained.

22. The parallel between individual rights and government interests is one of analogy, not of identity. In the discussion of due process rights, for example, the center point was defined as protecting the plaintiff's own conduct; thus, each circle represented a favorable outcome for the plaintiff. See *supra* note 14. In the context of government interests, on the other hand, the center point represents an interest in enacting the policy for its own sake; thus, each circle does not necessarily represent a favorable outcome for either party. While the similarities between due process and equal protection may usefully illuminate discussions of government interests, an exploration of relevant distinctions between equal protection and due process lies far beyond the scope of this Note.

23. See *Chart 2*. As Judge Easterbrook has astutely recognized, words such as "generality" and "abstraction" are themselves generalized abstractions. *Frank H. Easterbrook, Abstraction and Authority*, 59 U. CHI. L. REV. 349, 353 (1992). Different speakers use them in different ways, and each is

United States v. Virginia,²⁴ which struck down the Virginia Military Institute's (VMI) all-male admissions policy, demonstrates how generality can be applied to government interest analysis. The government interest in *Virginia* could have been described in at least three different ways. In order of increasing generality, women could have been excluded from VMI (i) for no reason other than a bare desire to exclude them; (ii) in order to train VMI cadets as citizen-soldiers;²⁵ or (iii) in order to produce an educated citizenry in Virginia.²⁶

CHART 2. POSSIBLE LEVELS OF GENERALITY
FOR THE GOVERNMENT INTERESTS IN *VIRGINIA*



Each of these interests could be evaluated using the conventional importance and relatedness tests of judicial scrutiny. The narrowest interest, excluding women from VMI just for the sake of doing so, would be absolutely

contingent upon the use to which the terms would be put. *Compare id.* (using generality to express greater or lesser dependence on the facts of a legal dispute), with Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 346-48 (1992) (using generality to express greater or lesser connection with constitutional grants of power).

This Note uses the term "generality" deliberately to suit its application to equal protection analysis: An interest's generality describes its analytical distance from the narrow interest in enacting a policy for its own sake. This definition is logically parallel to defining an individual right's generality as its distance from the right protecting only the litigating plaintiff's actions. *See supra* note 16.

24. 518 U.S. 515 (1996).

25. *See id.* at 545.

26. *See id.* at 576 (1996) (Scalia, J., dissenting). Two complications deserve mention. First, these three interests do not constitute a list of all conceivable levels of generality. Second, there are many different "types" of generality that can be measured along many different axes. *See* Tribe & Dorf, *supra* note 14, at 1067-68. For example, an interest in "educating the citizenry of Virginia" is more general than an interest in "educating Virginia's citizenry in the field of Mathematics" and is also more general than an interest in "educating the citizenry of Richmond." But this interest in "educating the citizenry of Virginia" is more general than each of the other two in different ways. Thus, it is difficult to determine whether teaching everyone mathematics is more or less general than teaching all subjects to a smaller group.

These different "types" of generality could ultimately be integrated with the present analysis by adding more dimensions to the model—one for scope of subject matter and another for scope of citizenry, for example. The technical methods of this integration, which would include aggregating interests' constitutional importance and relatedness across each of these dimensions, are too complex for current expository purposes. *Cf. id.* at 1067-70 (acknowledging multiple dimensions of abstraction in descriptions of due process rights' generality).

related to the challenged policy because the policy and interest are logically inseparable. Such a narrow interest would also be absolutely unimportant from a constitutional viewpoint, since it provides no justification except a restatement of the classification itself, resembling a childish “just because” more than a viable legal argument.²⁷

The two more general interest definitions—training cadets and educating Virginians—are of greater importance than the narrowest interest definition because they appeal to broader social values. However, these two interests are also less related to VMI’s admissions policy because they could also be served by policies that do not discriminate on the basis of gender. The relationship between interests’ generality and their constitutional force may be summarized as follows: First, as interests are defined more narrowly, they become less important. Second, as interests are defined more generally, they become less related to the government policy at issue.

B. *Judicial Discretion*

Courts possess enormous discretion over how broadly or narrowly government interests are defined. The existence of such discretion may be inevitable, but its application should be analyzed and contained. In the absence of any theoretical guide, judges have used their control over generality to strike down government policies that they just as easily could have upheld. This practice has taken two contrasting forms.

1. *Narrowing Interests*

By defining a governmental interest narrowly, courts can prevent it from satisfying the importance prong of judicial scrutiny. Although this narrowing tactic has been used sparingly, *Romer v. Evans*²⁸ is an important example of its application.²⁹ *Romer* concerned a Colorado constitutional amendment (the “Amendment”) that prevented state agents from protecting gays from discrimination. The Supreme Court struck down the Amendment as a classification of persons undertaken for its own sake³⁰ and, therefore, described the government’s narrow interest as mere “animus.”³¹ Such an

27. See, e.g., *Romer v. Evans*, 517 U.S. 620, 633 (1996) (requiring some “independent and legitimate legislative end” aside from the classification itself); cf. *infra* note 31 (arguing that the *Romer* Court branded the lack of such interests as unconstitutional “animus”).

28. 517 U.S. at 620.

29. For an older pair of cases that use this “narrowing” technique, see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

30. *Romer*, 517 U.S. at 635.

31. *Id.* at 632. Many might sensibly object that the term “animus” signifies much more than simply the absence of a legitimate, rationally related government interest. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203 (describing *Romer* as involving a status-based bill of attainder); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS J. 89, 89-94 (1998) (arguing that the Amendment presumptively embodied unconstitutional animosity against homosexuals); cf. WEBSTER’S ENCYCLOPEDIA UNABRIDGED

interest is certainly not important enough to satisfy rational basis review,³² but the Court did not have to define Colorado's interest so narrowly.

From one perspective, Colorado actually might have limited homosexuals' access to antidiscrimination suits for the pleasure of doing so—from mere "animus," to use the *Romer* Court's term—but such a narrow interpretation of the interest at stake ignores the Amendment's broader purposes and effects. Viewed at a more general level, the State's interest might have been to contain the social and economic costs of litigating such suits.³³ Viewed still more generally, the Amendment might have been part of a profound "Kulturkampf," a vigorous cultural struggle between basic moral values and disruptive sexual deviance.³⁴

At present, no vocabulary exists to discuss which, if any, of these descriptions is correct.³⁵ The danger of *Romer*'s argument, however, is that it could invalidate any policy of which the Court disapproved.³⁶ Why did

DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 5, at 54 (defining animus as "hostile feeling or attitude").

The *Romer* Court, however, used either a very strange meaning of the term "animus" or a grossly inadequate means of proving it. The Court's *only* justification for applying the deprecatory term "animus" was the absence of a satisfactory government interest: "[The Amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632 (emphasis added); see also Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 495 ("[T]he Court seems to treat the absence of a rational basis for Amendment 2, and the existence of animus toward gays and lesbians, as two sides of the same coin."); cf. Barbara J. Flagg, "Animus" and Moral Disapproval: A Comment on *Romer v. Evans*, 82 MINN. L. REV. 833, 851 (1998) ("If it is a 'conventional and venerable' proposition that animosity is not a legitimate state interest, it is not at all equally clear precisely how the *Romer* majority came to identify that 'purpose' as the impetus behind Amendment 2."); Koppelman, *supra* note 31, at 135-36 (noting the sparse indicia of actual discriminatory animus); Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL OF RTS J. 167, 171-72 (1998) (same). In another section, the Court repeats the language of animus: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. Later in the same paragraph, however, the Court concludes that this purported animosity is unconstitutional because it violates the "conventional and venerable" principle that "a law must bear a rational relationship to a legitimate governmental purpose . . ." *Id.* at 635 (citation omitted). Thus, as the Court used the term in *Romer*, "animus" seems simply to mean a government interest in imposing a class-based burden for the mere sake of doing so.

32. See *Cleburne*, 473 U.S. at 446-47 ("[S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group,'—are not legitimate state interests." (quoting *Moreno*, 413 U.S. at 534) (citation omitted)). Indeed, if such a government interest were allowed to satisfy rational review, then no policy could ever fail to do so; nonsuspect classifications would literally be self-justifying. Cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1710 (1984) (arguing that equal protection may be understood as a "basic prohibition of naked preferences" for all legislative classifications).

33. The petitioners seriously erred by not proposing this government interest to the Court directly. Instead, the State implausibly argued that it was trying to conserve resources currently spent on homosexuals' antidiscrimination suits in order to defend racial minorities' rights more aggressively. See Petitioner's Brief at *41, No. 94-1039, 1995 WL 310026, *Romer v. Evans*, 517 U.S. 620 (1996).

34. *Romer*, 517 U.S. 620, 636 (Scalia, J., dissenting).

35. The basis for such a vocabulary will be explored *infra* Section II.C.

36. A related but separate problem surrounds a court's ability to manipulate generality in order to uphold policies that should properly be held unconstitutional. If a court can inflate a particular interest's importance by defining it broadly, that court may rely upon the exaggerated urgency and magnitude of the interest to finesse or overlook questions of constitutional relatedness. Indeed, this is the

Colorado pass its Amendment? To hurt homosexuals. Why did VMI exclude women? To hurt women. Why did Congress cut federal welfare benefits? To hurt poor people. The argument's easy pattern reveals its doctrinal weakness. Resort to animus is always sufficient to explain a government classification, but it is never necessary. Broader, more important interests are always available if courts are willing to seek them.³⁷

2. Broadening Interests

Romer marks one end of the spectrum of generality manipulation, defining the interest so narrowly that it fails the importance prong of judicial scrutiny. At the other end, courts can define government interests so broadly that they fail the relatedness prong. In *United States v. Virginia*,³⁸ for example, the Court described Virginia's government interest as educating "citizen soldiers . . . imbued with love of learning, confident in the functions and attitudes of leadership . . . and ready . . . to defend their country in time of national peril."³⁹ Justice Ginsburg held that the broad government interest in "creating citizen-soldiers" was important enough to satisfy intermediate scrutiny, but she found that this interest was inadequately related to the challenged admissions policy: "Surely that goal is great enough to accommodate women. . . . [Thus, it] is not substantially advanced by [their] categorical exclusion."⁴⁰ By describing Virginia's goal in such illustrious terms, the Court implicitly ensured that it would not be "substantially related" to the admissions policy and thus that the interest would not satisfy intermediate scrutiny.

lesson of *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). It should be obvious that the language of strict scrutiny—without constraining judicial discretion over generality—is no solution at all if exceedingly important interests are permitted to elude standards of relatedness. See *Romer*, 517 U.S. at 632 ("The search for the link between classification and objective gives substance to the Equal Protection Clause; . . . it marks the limits of our own authority.").

The popular phrase, "[t]he Constitution . . . is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), has been interpreted as meaning that ordinary restraints like relatedness might no longer apply to policies undertaken in pursuit of certain vital governmental interests such as national survival. If one accepts any category of governmental interests as being above constitutional judgment, see generally Stephen E. Gottlieb, *Introduction: Overriding Public Values*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW 1-7* (Stephen E. Gottlieb ed., 1993) (affirming the historical basis for accepting constitutionally overpowering necessity), then rationalizing generality becomes even more important. In times of social stress, even comparatively small issues can be interpreted as issues of raw survival. If this manipulation of generality exaggerates the importance of such interests and allows them to transcend constitutional constraints of tailoring, then strict scrutiny will be futile.

37. Every policy can be justified by at least one interest other than animus because every policy can be analytically broken into at least two parts: whom it affects and what it does. The first of these is animus, but the second is not. A tax on luxury cars, for example, both burdens owners of such cars (animus) and increases tax revenues (not animus). An ordinance barring white people from public parks both burdens white people (animus) and reduces park populations (not animus). Cf. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 *YALE L.J.* 123, 128 n.34, 129 (1972) (arguing that at least one legislative purpose can always be defined that is rationally related to a policy under challenge).

38. 518 U.S. 515 (1996).

39. *Id.* at 545 (internal quotation marks and citations omitted).

40. *Id.* at 545-46.

Justice Scalia's dissenting opinion stridently criticized the majority's definition of the supporting government interest, arguing that Justice Ginsburg had interpreted that interest too broadly:

What the Court describes as 'VMI's mission' is no less the mission of all Virginia colleges. . . . To be sure, those general educational values are described in a particularly martial fashion in VMI's mission statement, in accordance with the military, adversative, and all-male character of the institution. But *imparting those values in that fashion*—i.e., in a military, adversative, all-male environment—is the distinctive mission of VMI.⁴¹

This last, limiting phrase is crucial. Having conceded that a general interest in creating citizen-soldiers was not sufficiently related to VMI's admissions policy, Justice Scalia challenged the Court to consider a narrower, more closely related interest: creating citizen-soldiers in a military, adversative, *all-male* environment.

Virginia illustrates the operational power of generality manipulation in interest definition, even as it reveals the technique's theoretical obscurity. Justices Ginsburg and Scalia used different levels of generality to define Virginia's government interest, and these different generalities were pivotal in justifying the Justices' divergent conclusions. Nevertheless, no member of the Court (and no academic commentator) recognized generality as the analytical core of the dispute. Thus, although Justices Ginsburg and Scalia deftly framed the government interest to support their respective positions, neither could explain why one interpretation of the government's interest should be legally preferred to another.

A second example of this broadening form of generality manipulation is Judge Wiener's concurrence in *Hopwood v. Texas*.⁴² *Hopwood* invalidated a race-conscious admissions policy at the University of Texas Law School ("the Law School") that had favored Mexican American and African American applicants.⁴³ Judge Wiener defined the Law School's government interest broadly, as a "broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."⁴⁴ Judge Wiener termed this interest "student body diversity."⁴⁵

By defining the Law School's interest so broadly, Judge Wiener guaranteed that the interest would not be related enough to satisfy strict

41. *Id.* at 587 (emphasis added).

42. 78 F.3d 932, 962-68 (5th Cir. 1996) (Wiener, J., concurring).

43. *See id.* at 962.

44. *Id.* at 965 (internal quotations and citations omitted).

45. Judge Wiener borrowed much of his terminology and analysis from Justice Powell's dicta in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.). *Cf. id.* (acknowledging that a broad definition of diversity would be a compelling interest but striking down the challenged affirmative action policy on relatedness grounds); *Hopwood*, 78 F.3d at 965-66 (same). Neither Justice Powell nor Judge Wiener justified their shared, broad interpretation of the government interest in diversity.

scrutiny. Judge Wiener noted that the Law School's policy neither increased the student body's nonracial diversity nor encouraged the inclusion of other racial groups such as Native Americans or Asian Americans.⁴⁶ These conclusions are indisputably correct, as far as they go. The Law School's policy did not serve any all-inclusive notion of diversity, nor was it ever intended to do so. The hidden and technically unanswered question concerned whether the policy *had to* satisfy such broad visions of diversity in order to satisfy strict scrutiny.

A dissent in *Hopwood*, had there been one, might have defined the Law School's interest more narrowly, thereby diminishing its importance but increasing its level of relatedness. The Law School's policy obviously did not increase nonracial diversity, and it equally obviously did not include all racial minorities. The government interest needed to be defined more modestly. For example, the policy could conceivably have supported a government interest in preventing African Americans and Mexican Americans from being excluded from the first-year class, an interest in sustaining African American and Mexican American communities within the Law School, or an interest in producing African American and Mexican American lawyers to populate the ranks of the next generation of judges, business executives, and politicians in Texas. There is no guarantee that any of these interests would have satisfied the importance prong of strict scrutiny, but at least such interests would have better answered Judge Wiener's objections concerning relatedness.⁴⁷

Just as a court can narrow any policy's interest until it fails for importance,⁴⁸ it can also broaden any interest until it fails for relatedness.⁴⁹ Under the current legal regime, there is no guide for deciding which levels of generality should be considered.

46. See *id.* at 966.

47. Other possibilities include racial inclusion for African Americans and Mexican Americans in the upper echelons of Texas's bar; preventing such groups from feeling marginalized and alienated at the Law School; and counteracting present racism against such groups in the Texan professional community. Each of these interests is of questionable importance and relatedness, and each might well fail the hefty requirements of strict scrutiny. The important point is that Judge Wiener's analysis of his concept of "diversity" by no means exhausted the range of government interests that might have sustained the policy.

48. See *supra* text accompanying notes 29-37.

49. Cf. Robert F. Nagel, "Unfocused" Governmental Interests, in PUBLIC VALUES IN CONSTITUTIONAL LAW, *supra* note 36, at 45, 55-57 (demonstrating that any governmental interest can be abstracted at the interpreter's discretion to the point of becoming "unfocused"). For a concrete example of this phenomenon, consider *Adarand Constructors v. Peña*, 965 F. Supp. 1556 (D. Colo. 1997), in which Senior Judge Kane asserted that he would *never* find a race-conscious policy constitutional. "Contrary to the Court's pronouncement that strict scrutiny is not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such program is both underinclusive and overinclusive." *Id.* at 1580. This last sentence either admits Senior Judge Kane's willful determination to manipulate any government interest until it is found unsatisfactory, or it implies that Senior Judge Kane has in mind a short list of all conceivable interests that affirmative action could possibly serve. This second interpretation, that only a limited range of interests may be considered in affirmative action cases, will be criticized below. See *infra* Subsection III.A.3 (discussing mandatory interest rules).

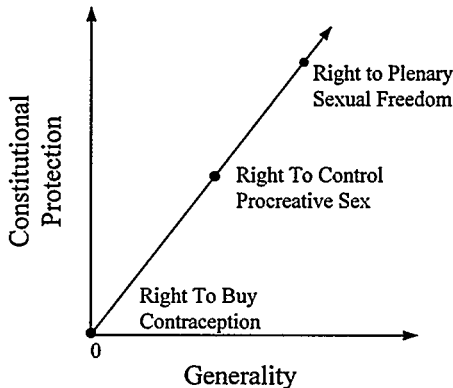
C. *A Theory of Generality*

1. *Background Precepts*

Before proposing a model for determining interests' generality, I should briefly revisit the character of generality itself. This Subsection will use basic mathematical graphs to make previous arguments more rigorous and transparent. Since mathematics is exceedingly rare in equal protection theory, a word of warning seems appropriate: The following illustrations are intended neither to quantify equal protection jurisprudence nor (far worse) to reduce complex judgments to rigid formulae. Their goal is only to capture elementary aspects of generality analysis in a logically precise form.

For example, in discussions of substantive due process rights, broader rights were shown to produce constitutional protection for a wider range of individual activities.⁵⁰ Thus, in the context of *Griswold's* privacy rights, a declared right of sexual self-determination would be more general and more protective than the narrowest right, a right to buy contraceptives. This principle can be expressed in a graph that plots every possible level of generality against the scope of that level's constitutional protection.⁵¹

CHART 3. CONSTITUTIONAL PROTECTION AS A
FUNCTION OF GENERALITY: *GRISWOLD*



In contrast, government interests' constitutional stature may be subdivided into two components: importance and relatedness. As discussed previously, an interest's importance increases as it is defined more generally,⁵²

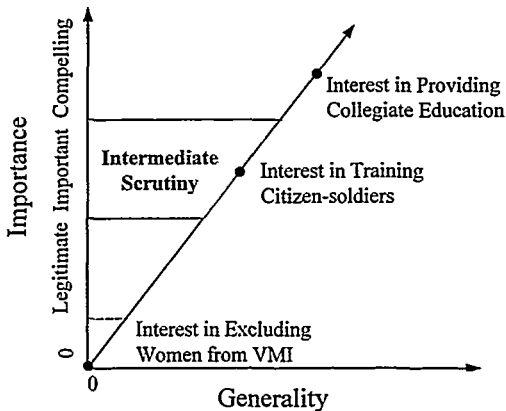
50. See *supra* text accompanying notes 15-16 (describing this relationship metaphorically using concentric circles).

51. See Chart 3. This graph makes two assumptions. First, it places all levels of generality on a straight line with a slope of one. Second, the graph assumes that levels of generality are continuous, such that a creative thinker faced with any two levels of generality could theoretically always conceive of an intermediate right between them. These assumptions can be relaxed without consequence provided only that the line (or the disconnected series of dots) continues to slope upward: $CP = f(G) \mid \delta CP / \delta G > 0$.

52. See *supra* text accompanying notes 29-37.

and the narrowest conceivable interest, a policy enacted for its own sake, is of no constitutional importance at all.⁵³ These two principles may be illustrated by a graph of importance as a function of generality. Using *Virginia* as a concrete example, an interest in excluding women for the sake of doing so would be insufficiently important for any tier of scrutiny; thus, it would have an importance level and a generality level of zero. A more general interest in producing citizen soldiers would satisfy the importance prong of intermediate scrutiny; and an extremely general interest in providing education for Virginia's citizenry might even qualify as compelling.⁵⁴

CHART 4. IMPORTANCE AS A FUNCTION OF
GENERILITY: *VIRGINIA*



On the other hand, an interest's relatedness decreases as the interest's generality increases, and the narrowest interest—enacting a policy for its own sake—is absolutely related to the government policy.⁵⁵ A graph of relatedness as a function of generality crisply illustrates these two ideas. Returning to *Virginia*, VMI's interest in excluding women is infinitely tailored to its discriminatory admissions policy, and this interest is of zero generality.⁵⁶ The more general interest in producing citizen-soldiers was not substantially related to the admissions policy under Justice Ginsburg's interpretation of intermediate scrutiny,⁵⁷ and a more general "duty to educate" would be even more tenuously related.

53. See *supra* text accompanying note 31.

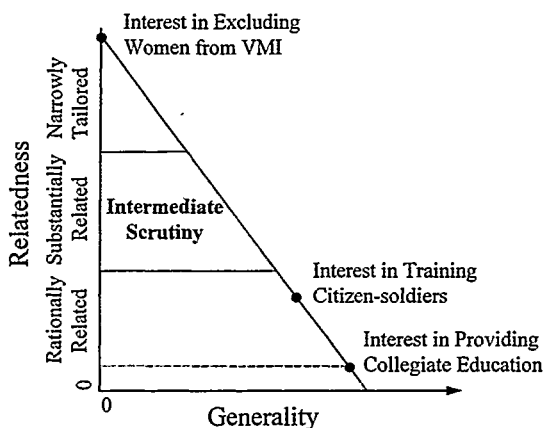
54. See *Hunter v. Regents of the Univ. of Cal.*, 971 F. Supp. 1316, 1327-30 (C.D. Cal. 1997) (finding a state interest in operating a laboratory school for educational research to be compelling).

55. See *supra* text accompanying notes 24-27.

56. $(R,G) = (\text{Max.}, 0)$.

57. See *United States v. Virginia*, 518 U.S. 515, 546 (1996).

CHART 5. RELATEDNESS AS A FUNCTION OF
GENERALITY: *VIRGINIA*



The above discussion reveals the vital difference between the effect of generality on equal protection interest definition and its effect on due process rights definition. Substantive due process rights turn on only one question: whether they are “fundamental.”⁵⁸ The relationship between generality and constitutionality is, therefore, logically simple. The more generally a right is construed, the more broadly fundamental social values inhere, and the more activities receive constitutional protection. For equal protection, however, governmental interests are defined by two variables: importance and relatedness. Since generality affects each of these components in opposite ways, generality’s effect on interests’ constitutional power is fundamentally complex. As an interest is defined more generally, it becomes more important, but it also becomes less related. As the following section will demonstrate, this bidirectional effect allows an interpretive solution to generality problems in the context of government interest analysis that could never occur in the context of substantive due process.

2. *Applying Generality to Equal Protection*

As a technical matter, equal protection cases must be decided by determining whether any interest exists, at any level of generality, that satisfies applicable standards of importance and relatedness.⁵⁹ Finding one

58. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

59. See *FCC v. Beach Communications*, 508 U.S. 307, 313-14 (1993) (“Where there are ‘plausible reasons’ for Congress’ action, ‘our inquiry is at an end.’” (citation omitted)). This simple principle highlights another difference between generality in equal protection and generality in due process. In discussing substantive due process, it would be senseless to ask if some level of generality exists at which *Griswold*’s right to privacy would constitutionally invalidate sodomy regulations. Of course there is. Although the Supreme Court declined to adopt such a broad interpretation of the right to privacy in *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986), the Court could conceivably have announced a plenary right to biological self-determination that would certainly have protected the practice of sodomy.

interest or a series of interests that *fails* to satisfy these standards of scrutiny is, therefore, a logically inadequate basis for striking down a policy because proof that some interests fail cannot determine whether another interest might not succeed. Nonetheless, almost every judicial invalidation has rested upon exactly this type of negative proof.⁶⁰

The theoretical challenge is to explain how a court possibly can strike down a policy when there are far too many levels of generality to evaluate individually.⁶¹ Without testing every conceivable interest for importance and relatedness, how can a judge know if a government interest exists that satisfies judicial scrutiny? Fortunately, based on the principles of generality advanced above,⁶² only two levels of generality need to be examined: Gen_{B1} and Gen_{B2}.⁶³ Gen_{B1} is the level of generality that describes the most important government interest that still satisfies the relatedness prong of judicial scrutiny. Conversely, Gen_{B2} is the most closely related interest that still satisfies the importance prong of judicial scrutiny.

Because the relationship between generality and constitutionality in due process is unidirectional, there is no countervailing limit to check the effect of any hypothesized interpretive principle. To interpret rights “as broadly as possible” would paralyze governmental policy making; every government act would violate the extended fringe of some individual right. On the other hand, to interpret rights “as narrowly as possible” would define rights out of existence entirely. *Cf. Tribe & Dorf, supra* note 14, at 1098 (criticizing Justice Scalia’s effort to define constitutional “traditions” as narrowly as possible because consistently doing so would eliminate individual rights altogether).

Not so in equal protection. Because generality both increases interests’ importance and decreases their relatedness, and because constitutionality depends on both of these factors simultaneously, increasing an interest’s generality will only increase its constitutional force up to a certain point. The interplay of these two criteria is what makes a heuristic of “trying” to find a constitutionally satisfactory interest possible.

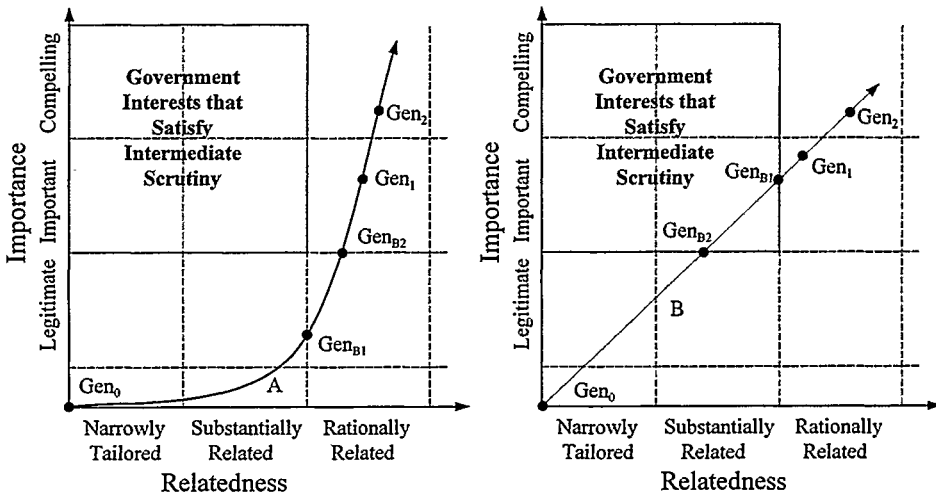
60. *See, e.g., United States v. Virginia*, 518 U.S. at 534-46 (basing an invalidation on having found two government interests that failed to satisfy applicable standards of judicial scrutiny); *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (same); *Adarand Constructors v. Peña*, 965 F. Supp. 1556, 1579-84 (D. Colo. 1997) (basing an invalidation on having found one government interest that failed to satisfy applicable standards of judicial scrutiny).

61. *Cf. supra* note 51 (arguing that levels of generality are continuous and infinite).

62. *See supra* text accompanying note 27.

63. *See* Chart 6.

CHART 6. IMPORTANCE AND RELATEDNESS AS FUNCTIONS OF GENERALITY: *VIRGINIA*



Legend:

Gen₀: Interest in excluding women for the sake of doing so.
 Gen₁: Interest in training citizen-soldiers.
 Gen₂: Interest in providing collegiate education.

Gen_{B1}: The most important government interest that fulfills intermediate scrutiny's standard for relatedness.
 Gen_{B2}: The most related government interest that fulfills intermediate scrutiny's standard for importance.

If the border points do not satisfy intermediate scrutiny, then Line A represents the range of interests supporting VMI's admission policy. If the border points do satisfy intermediate scrutiny, then Line B more accurately describes the government interests at stake.

These "border points"—so named because they rest on the border between adjoining categories of importance and relatedness—are theoretically essential to equal protection decisionmaking because only these points can conclusively determine whether any interest satisfies both prongs of judicial scrutiny. If either border point satisfies the two constitutional standards, then judicial scrutiny is satisfied by that border point itself. On the other hand, if either one of these border points does *not* satisfy both prongs of judicial scrutiny, then no level of generality can do so.⁶⁴

64. The following proof shows that if Gen_{B1} fails to satisfy judicial scrutiny, no other government interest can succeed in doing so:

Gen_{B1}, by definition, lies at the very edge of failing to satisfy the relatedness prong of scrutiny. Since relatedness decreases as generality increases, any interest that is more general than Gen_{B1} will also be less related and fall below the requisite level of relatedness. If Gen_{B1} fails to satisfy judicial scrutiny,

Without considering the applicable border points, a decision to strike down a government policy could always be arbitrary. As we have seen, a court can always narrow the interest to the point at which it fails for importance, or it can broaden the interest to the point of inadequate relatedness. Since levels of generality can always be found at which an interest fails to satisfy constitutional scrutiny, no number of failing interests can justify holding a policy unconstitutional.⁶⁵ Only by testing a border point can courts satisfactorily determine whether *all* levels of generality fail judicial scrutiny, and only this type of strong demonstration can logically justify invalidating a challenged government policy.

Although the border points approach may seem difficult as a matter of theory, it could be practically implemented through one operational principle: If a court finds a government interest that satisfies only one prong of judicial scrutiny, it should seek an interest of higher or lower generality in an effort to satisfy the other prong as well. This process should be repeated until either a satisfactory interest or a constitutional border point is found. For example, if the court found an interest that satisfied the relatedness prong, but lacked importance, it should continue to search for a more general interest either until discovering some interest that satisfied both prongs of scrutiny or until encountering an unsatisfactory Gen_{B1} . If, on the other hand, the court found an interest that satisfied the importance prong, but lacked relatedness, it should search for a less general interest until discovering an interest that satisfied both prongs or until it demonstrated that Gen_{B2} failed to do so.

In *Virginia*, for example, the Court considered an interest in “creating citizen-soldiers” that was sufficiently important but insufficiently related. According to the border points theory, the Court should have proceeded to evaluate narrower, more related interests. For example, the Court could have considered interests in avoiding costs of additional physical facilities, in creating *male* citizen-soldiers, in preserving an organic barracks experience, in retaining one-tiered physical training regimens,⁶⁶ or in providing single-sex education to VMI cadets.⁶⁷ Without determining whether such interests would

it must fail the importance prong. Since importance decreases as generality decreases, any interest that is less general than Gen_{B1} will also be less important than Gen_{B1} . If Gen_{B1} is not sufficiently important, then every interest that is less general than Gen_{B1} will be inadequately important as well. A parallel proof can be constructed by substituting Gen_{B2} for Gen_{B1} and by switching “relatedness” for “importance.” These two proofs, taken together, show that if either Gen_{B1} or Gen_{B2} fails judicial scrutiny, then no conceivable level of generality will pass.

65. See *supra* Section II.B.

66. See *United States v. Virginia*, 976 F.2d 890, 896 (4th Cir. 1992) (“Based on evidence about the experience of the service academies and the Marine Corps, the district court was justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order to subject women to a program equal in effect to that of men, and that, as found by a study conducted at West Point, cadets of both sexes would nevertheless perceive the treatment of them as unequal, leading to jealousy and resentment.”), *aff’d*, 518 U.S. 515 (1996).

67. The state alleged a broader interest in “diversity” for all citizens, which the Court dismissed as inconsistent with the history of Virginia’s educational development. *Id.* at 898-99. Possible justifications for excluding this interest from consideration will be taken up *infra* Subsection III.B.1.

have been important enough to satisfy intermediate scrutiny,⁶⁸ the crucial point here is that only by testing these narrower, more closely related interests could the Court have ensured that its decision was not based upon mere manipulation of generality.⁶⁹

3. *Practical Consequences for Doctrinal Development*

Adopting a border points theory of generality would yield two doctrinal benefits. First, it would impart direction to a completely rudderless area of equal protection decisionmaking. At present, there is neither guidance for nor discussion among courts concerning generality in interest definition.⁷⁰ Recognizing the importance of constitutional border points may steer legal debates away from analytically irrelevant interests—that is, interests that are drawn too broadly or narrowly—toward those that can answer the pivotal doctrinal question: whether any supporting interest can satisfy judicial scrutiny.

The second benefit addresses an obvious objection to the border points method itself. Skeptical readers might ask how anyone can determine which levels of generality are border points and which are not. Although this question is an important one, the practical difficulty of locating border points only illustrates how hazy the existing categories of importance and relatedness are. This categorical haziness is not a flaw in the border points theory; it is another dimension of the doctrinal problem that the theory is designed to solve. The lines that currently divide legitimate, important, and compelling interests are extremely unclear.⁷¹ One reason for this confusion may be the heretofore universal inattention to interest analysis.⁷² Another reason, however, is that courts currently can decide cases by distorting generality, thus failing to explain the vital terms of their decision. If a court decides to invalidate a government policy, for example, it can decide not to evaluate one level of generality, *X*, which might be only barely inadequate under

68. If any of these government interests is *not* important enough for intermediate scrutiny, then Gen_{B2} (which lies on the border between the categories of acceptable and unacceptable importance) must lie between this newly discovered, inadequately important interest and the original interest in “creating citizen-soldiers.”

69. The argument is not that *Virginia* was wrongly decided, but rather that the Court’s analysis does not adequately support its holding. Despite this Note’s repeated use of *Virginia*, that case is only one representative example. Just as generality manipulation can occur in any equal protection case at any tier of judicial scrutiny, the border points method applies to all types of equal protection cases as well.

70. Cf. Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 994 (1994) (“[T]he nature . . . of the process of defining an interest . . . [is] relatively unknown. Significantly, the lower courts are thus left with little guidance, and the system as a whole is insufficiently predictable. . . . Without a more comprehensive approach to the analysis of interests, the irrational, attitudinal, or ad hoc approach must govern, leaving an appearance of both unpredictability and illegitimacy.”).

71. Nor are the distinctions between interests that are rationally related, substantially related, or narrowly tailored substantially clearer. See sources cited *supra* note 11.

72. See sources cited *supra* note 3.

appropriate scrutiny, and might instead attack level *Y*, which might be far more (or less) general and therefore much more obviously inadequate.

The cost of this evasiveness is that courts fail to draw doctrinal lines that are necessary to give the tripartite framework substantive content. By condemning only interests that are obviously unimportant or that are clearly unrelated, courts gloss over important constitutional questions such as: which kind of government interests are legitimate, which are compelling, and how intimate is a substantial relationship. For anyone who is troubled by the rampant indeterminacy in these doctrinal categories,⁷³ a principled approach to generality is at least a partial solution. The border points method is difficult because, in the process of identifying border points, it would *require* courts to find (or to create) coherent constitutional borders. More importantly, from a pragmatic point of view, the border points approach would achieve these goals in a typically judicial way: allowing constitutional principles to emerge incrementally and accretively.⁷⁴ Every policy that a court struck down would require identification of some Gen_{B_1} or Gen_{B_2} and would mark one more concrete point along the border between two categories of constitutional importance or relatedness. Over time, the accumulation of equal protection precedents should trace coherent, principled categories. If they do, the tripartite framework will be vindicated as based upon solid, workable legal categories.⁷⁵

III. EXCLUDED-INTEREST RULES

Even as attention to interest definition sharpens analytic distinctions within the class-based model of judicial scrutiny, it also provides an opportunity to examine the conventional model's normative limitations. This Part will look beyond classification-based equal protection to identify two ways that government interests are excluded from judicial scrutiny altogether. First, courts require that certain types of policies serve one government interest to the exclusion of all others. These requirements will be called "mandatory interest rules." Second, courts flatly bar some government

73. See sources cited *supra* note 11; cf. Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW*, *supra* note 36, at 219, 231 ("Upon examination, this two-dimensional model [of importance and relatedness] proves about as accurate as a flat-earth road map—good enough for highway driving but no practical use to miners, navigators, mountain hikers, or oil drillers, nor to lawmakers and state courts.").

74. For a structural description of the gradualist mechanics of judicial lawmaking, see CALABRESI, *supra* note 10, at 96-101. For a discussion of the economic costs and benefits of this process, see Sunstein, *supra* note 6.

75. This Part has been deliberately portrayed as a constructive project, trying to perfect or modify a framework of class-based scrutiny that is presumed to be fundamentally sound. However, if the border points approach fails to reveal identifiable borders between categories of importance and relatedness, the current frame of judicial scrutiny will be exposed as practically unworkable and of questionable moral weight. This deconstructive possibility should not be dismissed out of hand, but the border points method should serve either to close important gaps in conventional jurisprudence—if such gaps can indeed be closed—or to undermine tattered doctrines of judicial scrutiny in favor of equal protection doctrines that transcend group-based classification altogether.

interests from judicial consideration as constitutionally unacceptable, regardless of their importance or relatedness.⁷⁶ These bars will be called “forbidden interest rules.” In the course of describing how excluded-interest rules operate outside of class-based equal protection, this Part will sketch tentative principles describing when and how they should be applied.

A. *Mandatory Interest Rules*

This Section will use *Gulf, Colorado & Santa Fé Railway Co. v. Ellis*⁷⁷ to introduce the basic structure of mandatory interest rules. These rules shelter institutions such as voting apportionment and jury selection that protect democratic impartiality from the influence of ordinary political interests. Finally, discussion of *City of Richmond v. J.A. Croson Co.*⁷⁸ will demonstrate the potential harms of applying mandatory interest rules too broadly.

1. *Inglorious Beginnings*

Mandatory interest rules first arose under a legal theory that is now thoroughly outdated. In the late nineteenth and early twentieth centuries, different “types” of government actions derived their legitimacy from distinct “sources” of governmental power.⁷⁹ Thus, in equal protection, it seemed quite natural that different types of policies (debt law, corporate law, tort law, etc.) could only be justified by government interests that matched the policies’ legal character.⁸⁰

In *Ellis*, for example, the Court struck down a statute that awarded attorneys’ fees to tort claimants who had prevailed against railroad companies. The dissent argued that this fee-shifting statute served a legitimate interest in deterring railroad defendants from pursuing aggressive, dilatory litigation

76. Forbidden interest rules must be firmly distinguished from decisions that simply hold certain interests, like “animus,” insufficiently important to satisfy traditional levels of scrutiny. See *supra* text accompanying notes 29-37 (explaining “animus” cases). Determining importance is a standard part of traditional equal protection doctrine. Forbidden interest rules, on the other hand, function wholly outside of this standard model.

77. 165 U.S. 150 (1897).

78. 488 U.S. 469 (1989).

79. See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 713 & n.3 (1994) (“In this era, . . . courts [first] defined the boundaries between distinct spheres of authority by articulating the appropriate principles that could legitimate state action in each sphere. . . . [and then] evaluated the specific governmental action in question by focusing on the principles that justified it.”).

80. The Court’s designation of particular government interests as “proper” captures this historical connection between policies’ perceived character and their supporting government interests. Cf. *Smith v. Cahoon*, 283 U.S. 553, 566-67 (1931) (“In determining what [legislative classifications are] arbitrary, regard must be had to the particular subject of the state’s action. . . . [T]he regulation as to the giving of a bond or insurance policy . . . in order to be sustained, must . . . relate to the public safety.”); *F.S. Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (invalidating a taxation policy that was unrelated to the degree of government protection provided because “the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation”). For a contrary argument that the limitations on government interests in *Smith* and *F.S. Guano* were simply arbitrary, see Note, *supra* note 37, at 133-36.

strategies.⁸¹ The majority rejected this argument out of hand, without disputing the proposed interest's empirical premise, its importance, or its relatedness. Instead, the fee-shifting policy was curtly branded as "arbitrary" discrimination against railroads.⁸²

A careful reading of *Ellis* uncovers three legal moves. First, the Court held that tort judgments were ordinary debt obligations and that the fee-shifting provision was only their enforcement mechanism.⁸³ Second, the Court applied its mandatory interest rule. The Court held that, since the fee-shifting provision fell within an implicit category of "debt law," the policy *must* be justified by only one government interest: upholding legal duties to pay.⁸⁴ Third, since railroads had the same obligation to pay debts as any other entity, no legitimate grounds was found for singling them out for particular legal burdens.⁸⁵

The particular rule in *Ellis*, which rested on a constitutional distinction between interests that may support "debt policies" and those that may support "tort policies," does not comport with modern constitutional deference to economic regulation.⁸⁶ However, the methodology of mandatory interest rules has continued to play an influential role in equal protection jurisprudence to this day.

2. *Mandatory Interest Rules and Political Impartiality*

a. *Voting Apportionment*

The most widely accepted use of mandatory interest rules involves voting apportionment. The leading case, *Reynolds v. Sims*,⁸⁷ struck down electoral policies that had skewed legislative representation in favor of rural voters. The *Reynolds* Court held that any apportionment policy would violate equal protection "unless relevant to the permissible purposes of legislative apportionment."⁸⁸ The Court further defined "achieving . . . fair and effective

81. See *Ellis*, 165 U.S. at 166-67 (Gray, J., dissenting).

82. See *id.* at 157-59.

83. See *id.* at 158-59.

84. See *id.* at 157 ("[B]efore a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, *there must be some difference in the obligation to pay . . .*" (emphasis added)).

85. See *id.* at 157-59.

86. See, e.g., *FCC v. Beach Communications*, 508 U.S. 307, 309 (1993); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

87. 377 U.S. 533 (1964). Mandatory interests were first recognized in a 1972 student note by Robert Nagel. See Note, *supra* note 37, at 152. Since his work was concerned exclusively with the relatedness prong of rational review, the doctrinal function of mandatory interest rules was not considered.

An interesting sidelight concerning *Reynolds* is that it was decided in the same year as *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964), the first case to apply strict scrutiny to racial classifications. *But cf. Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (invoking the rhetoric of strict scrutiny while actually applying very relaxed standards of scrutiny). Thus, mandatory interest rules arguably have a precedential pedigree almost as venerable as the classificatory model itself.

88. *Reynolds*, 377 U.S. at 565.

representation for all citizens... [as] *the basic aim* of legislative apportionment”⁸⁹ By prescribing fair and effective representation as the only interest that voting policies could constitutionally serve, the Court erected a constitutional barrier preventing all other interests, no matter how compelling or narrowly tailored, from even being considered.⁹⁰

The Court fashioned the mandatory interest rule in *Reynolds* because traditional scrutiny, even at its most demanding, is ill-equipped to protect political impartiality. Conventional tests of importance and relatedness are designed safeguards against governmental arbitrariness; thus, they only require that government policies serve a public goal of specified importance with a certain degree of effectiveness. In electoral apportionment, however, the preeminent hazard is not governmental caprice; it is political bias. Mandatory interest rules are structurally necessary in cases where invaluable impartiality might otherwise be sacrificed to government interests that are sufficiently important and related to satisfy the applicable level of scrutiny.

For example, consider a gerrymander that diluted rural voters’ electoral power in order to fund urban development projects. No matter how vital such urban projects were and no matter how indispensable the gerrymander were to their success, such a policy would unconstitutionally interfere with “normal” voting patterns in pursuit of ordinary, political ends.⁹¹ By *Reynolds*’s constitutional lights, population-proportionate voting was held to be a peculiarly delicate political treasure, the very foundation of democratic legitimacy.⁹² Tinkering with voting districts for any end other than fair voting

89. *Id.* at 565-66 (emphasis added).

90. Whatever the means of accomplishment, the overriding objective *must be* substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. [N]either history . . . nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation.

Id. at 579-80 (emphasis added); *cf.* *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (“[T]he interest of the State, when it comes to voting, is limited to the power to fix qualifications.” (emphasis added)). The opinion listed a few interests that might justify deviation from population-proportionate voting, *see Reynolds*, 377 U.S. at 578, 580 (allowing consideration of districts’ compactness and of political subdivisions), but since these interests were explicitly justified as preempting or containing abusive gerrymanders, they are not contrary to a mandatory interest rule regarding fair representation.

91. The actual impartiality of geographical, population-proportionate voting systems is not essential to the present argument. Although the democratic myth surrounding geographic districting is a powerful one, *see, e.g., Gray v. Sanders*, 372 U.S. 368, 379 (1963) (“Once the geographical unit . . . is designated, all . . . are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.”), recent scholarship has mounted a powerful challenge to such systems as deeply biased, *see LANI GUINIER, THE TYRANNY OF THE MAJORITY* 71-156 (1994) (identifying racial partiality implicit in geographic voting districts). If our national mythology supporting geographic voting districts were abandoned, then the terms of *Reynolds*’s mandatory interest rule would have to change. The limited point here is simply that if the *Reynolds* mandatory interest rule is justifiable, it must be justified by an appeal to political impartiality.

92. *See, e.g., Reynolds*, 377 U.S. at 564 n.41 (“Free and honest elections are the very foundation of our republican form of government.” (quoting *MacDougall v. Green*, 335 U.S. 281, 288

itself would pollute this presumed purity and would violate equal protection by fundamentally undercutting representative politics.

b. *Judicial Procedure*

Another area in which the Supreme Court has recently considered mandatory interest rules is judicial procedure. Two important cases in this area are *Heller v. Doe*,⁹³ which rejected a mandatory interest rule concerning evidentiary burdens of proof, and *J.E.B. v. Alabama ex rel. T.B.*,⁹⁴ which proclaimed such a rule concerning jury selection.

Heller upheld a statute that established lower burdens of proof for commitment proceedings involving mentally retarded persons than for proceedings involving mentally ill persons. The Court held that mentally ill persons were more frequently subject to misdiagnosis; thus, the higher burdens of proof were justified by an interest in lowering the risk that they would suffer erroneous curtailments of liberty.⁹⁵

Although the state's interest in avoiding false commitments satisfied ordinary rational basis review,⁹⁶ Justice Souter and three other dissenting Justices argued for a mandatory interest rule. They contended that since burdens of proof typically balance liberty deprivations against public security, disparate burdens of proof must correspond to the relative weight of individual liberty or public goods at stake.⁹⁷ Since involuntary commitment is an equally significant liberty deprivation for mentally ill persons as it is for mentally retarded persons, the dissenters concluded that no government interest could justify the disparate burdens of proof. The majority's purported interest in avoiding erroneous diagnosis, even if true, lent "not a shred of rational support to the decision to discriminate against the retarded in allocating the risk of erroneous commitment."⁹⁸

The *Heller* majority rejected mandatory interest rules as applied to burdens of proof, but importantly, it did not criticize such rules' basic constitutional logic. In fact, only one year later, six Justices announced a mandatory interest rule in *J.E.B.* The *J.E.B.* Court invalidated sex-based peremptory strikes in jury selection, holding that "*the only question* is whether [this] discrimination on the basis of gender . . . substantially furthers the State's legitimate interest in achieving a fair and impartial trial. . . . [*T*]he *only legitimate interest* [the respondent] could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury."⁹⁹

(1948) (Douglas, J., dissenting)); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (proclaiming the right to vote to be "preservative of all rights").

93. 509 U.S. 312 (1993).

94. 511 U.S. 127 (1994).

95. See *Heller*, 509 U.S. at 321-24.

96. See *id.* at 322-28.

97. See *id.* at 339 (Souter, J., dissenting) ("[B]urdens of proof are assigned . . . not to reflect the mere *difficulty* of avoiding error, but the *importance* of avoiding it . . ." (emphasis added)).

98. *Id.* at 341 (Souter, J. dissenting).

99. *Id.* at 136-37 & n.8 (emphases added).

c. *Democratic Impartiality*

Although courts have never explained why mandatory interest rules are appropriate in some circumstances and not in others, a tentative theory may be drawn from this brief discussion of *Reynolds*, *J.E.B.*, and *Heller*. First, the conclusive difference between *Reynolds* and *Ellis* is the character of the political space that their mandatory interest rules are designed to preserve. Debt law is one of many multifunctional policy instruments, and its value is not significantly undercut by being harnessed to one government interest rather than another. Voting, on the other hand, is different. Impartial, fair voting is a fundamental social value that would be destroyed if it were tempered with any goal other than impartiality itself. Traditional scrutiny would be inadequate protection for such impartiality because even a compelling political interest would destroy voting's fundamentally apolitical detachment. Thus, the mandatory interest rule fits perfectly.

Similarly, consider the preemptory strikes in *J.E.B.* Jury selection procedures presumptively occupy and produce a zone of legitimating neutrality in the courtroom,¹⁰⁰ just as fair voting practices legitimate acts by elected branches. Imagine litigants that used race-based preemptory strikes to ease social tensions surrounding racially charged lawsuits or sex crime prosecutors who used gender-based strikes to boost their odds of obtaining convictions. These government interests might very well suffice for ordinary types of policies, but *using jury selection* to achieve them would compromise the integrity of the judicial process as a whole.

In contrast, the burdens of proof at issue in *Heller* could serve one goal just as easily as another, without affecting the trial's impartiality in any way. One may approve or disapprove of Kentucky's decision to favor mentally ill persons, but no additional wrong follows from expressing such favor using evidentiary standards rather than another legal instrument. Thus, the majority was correct to reject Justice Souter's arguments from history.

Electoral apportionment and jury selection are believed to stand in a sacred public space, the value of which is defined by its detachment from political interests. By ensuring that such policies are supported only by reference to interests in fairness and impartiality, mandatory interest rules defend the fundamental character of the neutral public space itself. Having considered several cases in which courts properly applied mandatory interest rules, I now turn to one in which they did not.

100. Again, the veracity of this image of judicial integrity is not essential to my argument. A colorblind judicial system might embody preexisting racial bias, *cf.* GUINIER, *supra* note 91 (arguing that similar bias exists in geography-based voting systems), and preemptory strikes might be unhelpful instruments for ensuring impartiality in any case, *see, e.g.*, Morris B. Hoffman, *Preemptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997). Nevertheless, the mandatory interest rule employed in *J.E.B.* both assumes and requires the importance of preemptory strikes in maintaining juries' impartiality.

3. *Affirmative Action and Doctrinal Abuse*

In 1995, a Supreme Court majority applied strict scrutiny to an affirmative action program for the first time.¹⁰¹ Seven circuit courts, however, have gone even farther and have applied a mandatory interest rule: racial classifications *may only serve* to remedy past discrimination committed by the defending government unit.¹⁰² Since these circuit courts relied heavily upon Justice O'Connor's plurality opinion in *City of Richmond v. J.A. Croson Co.*, I will call this mandatory interest rule "the *Croson* rule."¹⁰³

To understand the significance of *Croson's* mandatory interest rule, it must be sharply contrasted with ordinary strict scrutiny. If racial classifications are inherently invidious, conventional strict scrutiny would justify a court's demanding compelling, narrowly tailored justifications for their use.¹⁰⁴ The *Croson* mandatory rule, however, amounts to "strict scrutiny *plus*": First, a court must use strict scrutiny to eliminate all government interests that are not compelling or not narrowly tailored. Second, from any remaining interests, the court must eliminate all government interests except the mandatory interest in remedying the acting government agent's past discrimination. *Hopwood v. Texas* is a famous illustration of the *Croson* rule in practice.¹⁰⁵ The plaintiffs in *Hopwood* argued that the Law School's affirmative action policy served a compelling government interest in

101. See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

102. See *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997), *reh'g denied*, 138 F.3d 1270 (9th Cir. 1998); *Police Ass'n v. City of New Orleans*, 100 F.3d 1159, 1167-68 (5th Cir. 1996); *Contractors Ass'n v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162-63 (6th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1544 (11th Cir. 1994); *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991). *But see Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (rejecting a mandatory interest rule in a case involving a race-conscious hiring decision).

103. See 488 U.S. 469, 492 (1989) (plurality opinion) ("[T]he *Wygant* plurality indicated that the Equal Protection Clause required 'some showing of prior discrimination by the government unit involved.'" (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986))); *id.* at 493 ("Unless [classifications based on race] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *id.* at 492 ("[I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion, . . . [it] could take affirmative steps to dismantle such a system." (citation omitted)); see also *Monterey*, 125 F.3d at 713 ("For a racial classification to survive, . . . it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification." (citation omitted)). The Fifth Circuit has provided the clearest statement of this mandatory interest rule and its perceived basis in Supreme Court precedent:

To the extent that the court found that racial preferences are constitutional in the absence of remedial action to counteract past provable discrimination, it erred. The Supreme Court has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."

Messer v. Meno, 130 F.3d 130, 136 (5th Cir. 1997) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)).

104. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *cf. Adarand*, 515 U.S. at 228 (holding that strict scrutiny is a necessary and sufficient guard against potential malice hidden within "benign" racial classification).

105. 78 F.3d 932 (5th Cir. 1996).

remedying past discrimination committed by the state's entire educational system, from its elementary schools to its public universities.¹⁰⁶ The court dismissed this interest without reference to conventional categories of importance and relatedness. Instead, the court invoked *Croson's* mandatory interest rule: "In order for [state officials] to direct a racial preference program at the law school, it *must be* because of past wrongs at that school."¹⁰⁷

The analytical problem with *Croson's* mandatory interest rule is that it cannot be justified by the arguments that were used to support other instances of such rules.¹⁰⁸ In *Reynolds* and *J.E.B.*, mandatory interest rules were employed to protect politically sacred zones of neutrality that voting and jury selection are presumed to occupy. In marked contrast, American race relations stand thoroughly corrupted.¹⁰⁹ "Societal discrimination," as it is called, is commonly dismissed as "too amorphous a basis for imposing a racially classified remedy,"¹¹⁰ but it is more accurate to say that such discrimination is too *pervasive* a basis for imposing such remedies.¹¹¹ In the words of *Wygant v. Jackson Board of Education*, any court to address societal discrimination "could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."¹¹² Without considering the merits

106. *See id.* at 950-52.

107. *Id.* at 952 (emphasis added).

108. Defenders of the *Croson* rule might argue that the mandatory interest rule is justifiable, independent of the "impartiality" rationale advanced in other cases. Evaluation of such justifications would be premature, however, since they have not yet been advanced.

Moreover, it should be clear that the blunt arguments against racial discrimination that could support *Adarand* are insufficient to support *Croson*. For example, if government-imposed racial classification is so invidious as to be per se unconstitutional, then no exception should be made for remedying past discrimination. *Cf. infra* Section III.B (analyzing strong interest rules, which could implement such a categorical ban). Although remedying past discrimination is the only interest that the Supreme Court has credited as a compelling government interest thus far, *see Croson*, 488 U.S. at 493, there is no reason to think that it is the only compelling interest that could be legally conceived. As the Seventh Circuit explained:

A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a [racially] discriminatory measure unless every other consideration had been presented to and rejected by him. . . . It is not as if the rectification of past discrimination had a logical or equitable priority over other legitimate goals that discrimination might serve.

Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996). Perhaps it seems commonsensical only to allow racial discrimination as a remedy for past racial discrimination, but such common sense is not constitutional doctrine. Furthermore, even meeting commonsense constitutionalism on its own terms, racial classifications certainly should not be limited only to remedying *past* government discrimination; it should also be available to stop *present* government discrimination and to preempt *future* government discrimination.

109. *See Adarand*, 515 U.S. at 273-74 & nn.3-5 (1995) (Ginsburg, J., dissenting) (describing the continuing effects of racial discrimination); *Croson*, 488 U.S. at 494 ("Our continued adherence to the standard of [strict scrutiny] . . . does not, as Justice Marshall's dissent suggests, . . . indicate that we view 'racial discrimination as largely a phenomenon of the past'" (citation omitted)); *Wygant*, 476 U.S. at 276.

110. *Adarand*, 515 U.S. at 220 (quoting *Wygant*, 476 U.S. at 276).

111. *See Wygant*, 476 U.S. at 276 ("No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies . . . societal discrimination is . . . over expansive.")

112. *Id.*; *see also Hopwood*, 78 F.3d at 932 ("[T]he case against race-based preferences does not rest on the sterile assumption that American society is untouched or unaffected by the tragic oppression

of denying such remedies, the existence of such deep-rooted, widespread bias at least proves that impartiality cannot justify the *Croson* rule; there is simply no racial impartiality for such a rule to preserve.

The costs of misapplying a mandatory interest rule are especially high in contexts where such rules operate above and beyond the strictures of strict scrutiny, such as affirmative action. This increased social cost arises because the *Croson* rule would have no operational impact at all in an affirmative action case in which the government's interests were not compelling and narrowly tailored; strict scrutiny alone would invalidate the policy, regardless of the mandatory interest rule. Therefore, even if "racial discriminations are in most circumstances irrelevant,"¹¹³ the *Croson* rule would only have independent effect in cases where racial classifications *do* serve some compelling, narrowly tailored interest.

To envision such scenarios more concretely, imagine a series of educational, penological, or law enforcement programs that could not survive without race-conscious selection or promotion policies.¹¹⁴ Imagine further that one such policy (or, indeed, all such policies taken as a set) were conclusively proven necessary and sufficient to eradicate the effect and practice of racial discrimination in America. Under the mandatory interest rule, even mountains of evidence supporting this "Super Policy" would not lend it one shred of constitutional support, unless the particular government agents implementing the policy could argue (falsely) that they were only trying to remedy their own institutional history of discrimination.¹¹⁵

Although an interest in remedying the defendant-government's own discrimination could plausibly support a racial classification under the *Croson* rule,¹¹⁶ an interest in remedying all discrimination could not. This arbitrary technique of interest exclusion represents a destructive abuse of mandatory interest rules¹¹⁷ that has emerged from peculiarly troubling historical

of its past. Rather, it is the very enormity of that tragedy that lends resolve to the desire to never repeat it." (quoting *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1079 (4th Cir. 1993) (internal citation omitted)). A critic of the *Hopwood* opinion might note that legally barring societal discrimination as a state interest manifests a desire never constitutionally to *confront* the tragic oppression of our past, while making its repetition more, not less, likely.

113. *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

114. *Cf. Metro Broad. v. FCC*, 497 U.S. 547, 601-02 (1989) (Stevens, J., concurring) (comparing the interest in broadcast diversity to that of an integrated police force, a public school faculty, or a professional school student body); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (upholding a race-based promotion scheme for officers working in correctional boot camps as narrowly tailored to the compelling state interest in criminal rehabilitation and control); *Hunter v. Regents of the Univ. of Cal.*, 971 F. Supp. 1316 (C.D. Cal. 1997) (upholding an educational experiment that used racial standards in creating a sample student population that approximated the ethnic diversity of urban schools); *Adarand Constructors v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997) (finding a compelling state interest in remedying, through contracting set-asides, public and private discriminatory barriers that minority groups and women face in the highway and mass transit industries).

115. *Cf. Heller v. Doe*, 509 U.S. 312, 339 (1993) (invoking similar rhetoric in deciding whether disparate burdens of proof could be used in involuntary commitment proceedings for mentally ill and mentally retarded persons); *supra* notes 96-98 and accompanying text.

116. *See Croson*, 488 U.S. at 469.

117. Judge Posner criticized *Hopwood* and *Croson* insofar as they seemed to assign a "logical or equitable priority" to rectifying past discrimination as compared to other goals that affirmative action

circumstances¹¹⁸ and that continues to exert profound influence over the logic and practice of affirmative action litigation.¹¹⁹

might serve, concluding that “there is a reason that dicta are dicta and not holdings, that is, are not authoritative.” *Wittmer*, 87 F.3d at 919.

118. Strict scrutiny is often lauded as the necessary brake against “invidious racial discrimination.” See, e.g., *Adarand*, 515 U.S. at 228; *Croson*, 488 U.S. at 493-95. Throughout the civil rights era, strict scrutiny was not only necessary, it was also sufficient protection against racial discrimination. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (using strict scrutiny to strike down an anti-miscegenation law); *McLaughlin v. Florida*, 379 U.S. 134, 192 (1964) (striking down prohibition on interracial cohabitation); see also *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam) (invalidating racial segregation in prisons). Only when affirmative action plans began to discriminate against whites, however, did the Court introduce a “strict scrutiny plus” mandatory interest rule. No court adopting the *Croson* standard has yet explained why a standard of review that was adequate to vindicate African American civil rights in the 1960s required an “extra” safeguard to deal with racial discrimination against whites in the 1990s.

119. The extent of this influence is most apparent from the viewpoint of government defendants. Under the *Croson* rule, only an interest in remedying the classifying agent’s past discrimination will even be considered as a constitutional justification for a racial classification. Thus, whatever the actual effects of an affirmative action policy may be, viable legal defenses only arise from the acting agent’s own history. The courtroom debate will hinge on whether the defendant can confess and demonstrate its own acts of discrimination that are sufficiently significant and sufficiently recent to justify a “temporary” racial remedy. As America’s most flagrant examples of government discrimination fade from popular memory, defendants that rely on such history-based justifications should become decreasingly likely to prevail.

Without the *Croson* rule, however, the government may defend its affirmative action policies by reference to public benefits, not historical wrongs. Any compelling interest could begin the court’s discussion, whether it were remedying past discrimination, eliminating racial subordination, providing prison control, preventing illiteracy, or delivering effective health services. Subsequent legal arguments would then center upon whether the challenged racial classification was truly necessary to attaining the proposed interest or whether there were a less restrictive means of serving the compelling government interest at stake.

From a social point of view, this second legal dynamic is far more productive because it would focus debate upon the social interests that particular racial classifications were designed to serve. On the one hand, abolishing the *Croson* rule would allow defendants to prevail where the government’s racial classification is truly indispensable to serving an urgent social need. On the other hand, plaintiffs under such a regime could strike down affirmative action policies only by suggesting some less restrictive means of achieving the underlying interest that the racial classification was designed to promote. The constitutional process of litigation and advocacy is thus transformed from one dominated by blame-oriented history to one focused on practical policy solutions.

Ideally, the Court would simply overrule *Croson*, thereby creating a national rule. Since civil rights advocates seem justifiably anxious about litigating before the present Court, however, this possibility seems remote. Cf. Kathleen M. Sullivan, *Supreme Court Avoidance; On Piscataway, Strategy and the High Court*, WASH. POST, Dec. 7, 1997, at A2 (discussing how the conservatism of the current Justices toward race has led litigants to settlement). On the other hand, circuit courts could independently use *Adarand*—which did not adopt *Croson*’s mandatory interest rule—as an opportunity to reexamine their previous commitment to *Croson*. Judge Posner, writing for the Seventh Circuit, appears to have undertaken precisely this type of reexamination. Compare *Milwaukee County Pavers Ass’n v. Fielder*, 922 F.2d 419, 421-22 (7th Cir. 1991) (employing the *Croson* rule to strike down minority business initiatives), with *Wittmer*, 87 F.3d 916, 919 (dismissing *Croson* and *Milwaukee County Pavers Ass’n* as nonbinding dicta).

B. *Forbidden Interests*¹²⁰

Whereas mandatory interest rules are primarily justified by the sanctified political institutions that they protect, the forbidden interest rules' legitimacy stems from the corrupt political forces that they reject. When the Court has confronted government interests that are constitutionally unacceptable, yet would be inadequately proscribed by ordinary judicial scrutiny, it has used forbidden interest rules to excise these offensive interests from judicial consideration altogether. Two versions of these rules deserve attention: a "weak" version and a "strong" one.

1. *Weak Forbidden Interest Rules*

Weak forbidden interest rules bar particular interests from being evaluated but leave all non-forbidden interests intact. Thus, even a policy that served many forbidden interests might still survive constitutional challenge if any one of its supporting interests were not forbidden. The Court recently applied a weak forbidden interest rule in *United States v. Virginia*,¹²¹ where VMI claimed an interest in saving its adversative method from disruptive coeducational integration.¹²² Justice Ginsburg dismissed this interest by constructing an analogy to arguments that had been used some decades before to oppose women's admission to law schools, medical schools, and military academies.¹²³ She then concluded that interests based on gendered stereotypes should not even be subjected to traditional scrutiny.¹²⁴ In dismissing VMI's

120. As a preliminary matter, forbidden interests must not be confused with interests that are simply not important enough to satisfy standard judicial scrutiny. *See supra* text accompanying notes 29-37 (discussing so-called "animus" cases). Forbidden interest rules bar particular interests because they contravene a substantive principle of equal protection, regardless of whether they are otherwise "important."

121. 518 U.S. 515 (1996).

122. *See id.* at 540-41.

123. *See id.* at 542-45.

124. *See id.* at 541-42 ("State actors controlling gates to opportunity... may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'... [They] may not rely on 'overbroad' generalizations to make 'judgments about people that are likely to... perpetuate historical patterns of discrimination.'" (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994))). In framing her argument, Justice Ginsburg identified and assembled a substantial line of precedent to support her forbidden interest rule. *See J.E.B.*, 511 U.S. at 139 n.11 ("Even if a measure of truth can be found in some of the gender stereotypes, ... gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."); *Mississippi Univ. for Women*, 458 U.S. at 725 ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *Craig v. Boren*, 429 U.S. 190, 201 (1976) (holding that gendered disparity in drunk driving "is not trivial in a statistical sense, [but] it hardly can form the basis for employment of a gender line as a classifying device."); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) ("[T]he Constitution forbids... gender-based differentiation premised upon assumptions as to dependency..."); *id.* at 645 ("Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work." (internal citations omitted)).

alleged interest in adversative education, the Court neither disproved the interest's empirical predicate¹²⁵ nor contested the interest's importance or relatedness.¹²⁶ The interest was disregarded—quite apart from its potential to satisfy conventional scrutiny—because it was corrupted by gender-based stereotypes.

A similar weak forbidden interest rule appears in *Palmore v. Sidoti*,¹²⁷ a child custody case in which a white three-year-old was removed from the home of her natural mother and black stepfather. The trial court had held that living in a multiracial household would inevitably expose the young child to damaging stigmatization; therefore, she would be better off living with her natural father.¹²⁸ The Supreme Court unanimously reversed, but it did not deny that racial stigma could jeopardize the child's well-being, nor did it dispute the State's compelling interest in protecting the child from harm.¹²⁹ Instead, the Court flatly barred all government interests grounded in racial bias from its decisional calculus.¹³⁰

Without justifying the weak forbidden interest rules used in *Virginia* and *Palmore*, the function of such doctrines should be clear: Courts use such rules to excise certain offensive interests that could otherwise push equal protection in substantively unacceptable directions. If judicial scrutiny could be satisfied by an interest that embodied stereotypes or by one that rested upon appeasing racist sentiments, the Equal Protection Clause might be captured by the very hierarchical biases and asocial backwardness that it strives to combat. If a white supremacist community made sufficiently credible threats demanding public school resegregation, for example, the public interest in avoiding violence and terrorism might pass strict scrutiny and thus permit *Brown v. Board of Education*¹³¹ itself to be reversed operationally. Because of its deep conviction that equal protection may not be a hostage to constitutionally offensive government interests, the Court has barred them from judicial evaluation altogether.

125. The Court did try to contest these factual claims. See *United States v. Virginia*, 515 U.S. at 542. ("The notion that admission of women would . . . destroy the adversative system . . . is a judgment hardly proved." (citation omitted)); *id.* at 544-45 ("Virginia's fears for the future of VMI may not be solidly grounded."). The record, however, did not support the majority's conclusions. The trial court found that women would materially affect VMI's barracks life, thereby altering what the majority conceded to be the "core experience" of VMI. *Id.* at 549. See *id.* at 585-89 (Scalia, J., dissenting). Although Justice Ginsburg did persuasively argue that women could survive the adversative method, she never showed how the method itself could survive the introduction of women.

126. See *id.* at 540-45.

127. 466 U.S. 429 (1984).

128. See *id.* at 430-31.

129. See *id.* at 433.

130. See *id.* at 433-34 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. . . . The effects of racial prejudice, *however real*, cannot justify a racial classification" (emphasis added)).

131. 347 U.S. 483 (1954).

2. *Strong Forbidden Interest Rules*

Strong forbidden interest rules brand certain government interests as so unacceptable that their presence would poison other government interests that might otherwise satisfy judicial scrutiny. To see how such a rule would operate, consider Derrick Bell's modern fable of "Space Traders," in which space aliens offer the United States enormous riches and astounding technology to solve pressing energy and environmental crises. In exchange, these Traders demand that all African Americans be surrendered to them as collective property.¹³² The government interests in such a case would certainly qualify as "compelling"; they might reasonably include halting ecological collapse and global resource wars. Furthermore, the aliens' nonnegotiable ultimatum would make the racial classification both sufficient and necessary to achieving these compelling interests. The Supreme Court believed itself to be facing just this kind of "do-or-die" national emergency during World War II, when they upheld in *Korematsu* the internment of Japanese Americans. The only way that equal protection can effectively prevent such scenarios from occurring would be to ignore the compelling, narrowly tailored government interests at stake and to reject the policy's devastating racial impact directly.¹³³

132. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 158-94 (1992).

133. Although strong forbidden interest rules have powerful intuitive appeal and are supported by a substantial body of scholarship, their precedential support is astonishingly scant. Any "anti-" theory of equal protection (anti-caste, anti-parochialism, etc.) rests on the premise that equal protection is defined best by the interests it forbids. See, e.g., KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION*, at x (1993) (advocating a principle of "equal citizenship" that would forbid stigmatizing an individual as a nonparticipant or a member of an inferior caste); Rubinfeld, *supra* note 3, at 428-29 ("Equal protection jurisprudence . . . does not purport to measure up and balance the social gains and losses a law will produce. The constitutional question is instead whether a law embodies an invidious or otherwise constitutionally impermissible purpose."); cf. Bhagwat, *supra* note 3, at 357 ("[T]he Equal Protection Clause creates certain principles . . . that render certain government purposes entirely illegitimate . . ."). The most popular of such theories concerns so-called "impermissible motives." See, e.g., Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184 (1986). Under such a theory, a law arising from or expressing an impermissible will to stigmatize or subordinate a class of citizens would be inherently unconstitutional.

That said, however, I have found only three lines of actual case law in which forbidden interests have undermined otherwise satisfactory interests. First, any policy dividing state "citizens into expanding numbers of permanent classes . . . would be clearly impermissible." *Zobel v. Williams*, 457 U.S. 55, 64 (1982). *Zobel* invalidated, under rational review, a plan prorating a state trust's distribution by recipients' terms of residency, despite Alaska's seemingly legitimate interest in rewarding nontransient residents for past contributions. See *id.* at 65. Second, classifications that "burden[] the property of nonresidents but not like property of residents are outside the constitutional pale. But this is not because no rational ground can be conceived . . ." *Allied Stores v. Bowers*, 358 U.S. 522, 533 (1959) (Brennan, J., concurring). Third, in *Plyler v. Doe*, the fact that a policy created a permanent subclass of illiterates by excluding illegal aliens from public schools was held to undercut the government's otherwise legitimate interest in fiscal security:

It is difficult to understand precisely what the State hopes to achieve by . . . [creating] a subclass of illiterates within our boundaries [W]hatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

457 U.S. 202, 230 (1981); see also *id.* at 234 (Blackmun, J., concurring) (observing that creating a "subclass of illiterate persons" makes the challenged policy unconstitutional as well as unwise (citations omitted)); *id.* at 239 (Powell, J., concurring) ("[T]he interests relied upon by the State would seem to be insubstantial in view of the consequences to the State itself of wholly uneducated persons living

3. *The Evolving Role of Forbidden Interest Rules*

The courts' present skepticism regarding both types of forbidden interest rules may comport with our judicially conservative intuitions, but it also risks abandoning our highest constitutional aspirations. For example, critics might rightly realize that articulating forbidden interest rules would necessarily require answering constitutional questions that extend beyond the particular case at bar.¹³⁴ However, concerns surrounding "advisory opinions" should not be overstated. Important questions cannot be ignored simply because they are difficult, and nothing in equal protection could be more important than whether to credit government interests based on stereotypes (*Virginia*), prejudices (*Palmore*), or minority oppression for greater social goods ("The Space Traders" or *Korematsu*).¹³⁵

No court has ever articulated a list of forbidden interests, and I will not attempt to do so here. Nonetheless, equal protection almost certainly contains *some* substantive content that is not captured within the tripartite framework and doctrines of suspect class. And to the extent that such values exist, forbidden interest rules are legitimate, constitutionally viable structures with which courts can shelter constitutional norms that otherwise might be doctrinally abandoned.

IV. TECHNICAL SYNTHESIS: WHAT'S WRONG WITH *ROMER*

Thus far, generality manipulation and exclusionary interest rules have been explained and considered in isolation from one another, without addressing their interrelated constitutional consequences. The border points approach, for example, was advanced as a logical outgrowth of the basic structure of modern judicial scrutiny, while exclusionary rules were cast as useful, albeit limited, supplements to the conventional doctrinal framework. Each of these portrayals is true in a sense, but neither one is complete. *Romer v. Evans*¹³⁶ will illustrate how control over generality manipulation should accompany a broader and more principled application of various excluded-interest rules. Whereas thoughtful combination of border points and excluded-interest rules could produce a richer, more textured equal protection jurisprudence than that which currently exists, attention to border points alone would produce a thinner, weaker one.

indefinitely within its borders." None of these cases closely match any academic theory of government interests that should be strongly forbidden.

134. Cf. *Zobel*, 457 U.S. at 73 (O'Connor, J., concurring) ("By choosing . . . to declare [a state's] purpose wholly illegitimate, the Court establishes an uncertain jurisprudence. What makes [a] purpose illegitimate? Is the purpose illegitimate under all circumstances? What other state interests are wholly illegitimate?").

135. For a different analysis of judges' flexibility to decide cases narrowly, broadly, deeply, and shallowly, see Sunstein, *supra* note 6.

136. 517 U.S. 620 (1996).

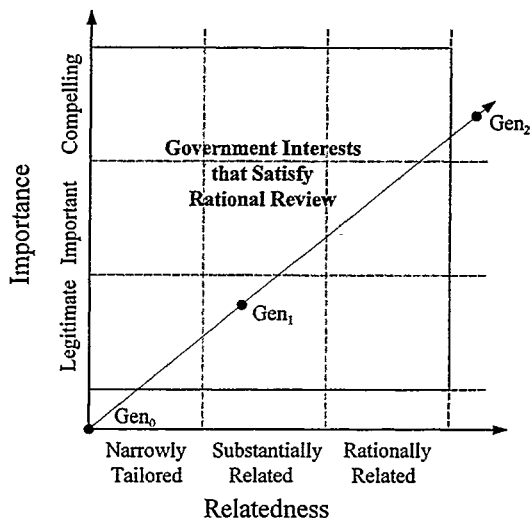
On a technical level, the border points approach is an attempt to apply the accepted framework of scrutiny honestly and to prevent judges from invalidating policies that they just as easily could have upheld. On a substantive level, however, the border points theory injects a significant dose of pro-government interpretive charity into current interest definition practice. Under a border points approach, invalidating a policy would require finding each of the policy's supporting interests constitutionally inadequate, even at its most nearly satisfactory level of generality. This methodology limits judicial flexibility that is occasionally used arbitrarily and incoherently. But it also prevents judges from using generality manipulation to shelter constitutional values that class-based scrutiny alone cannot protect. *Romer v. Evans* exemplifies this latter category.

In *Romer*, the Court defined Colorado's government interest so narrowly that only "classification . . . for its own sake" remained, and this interest was held to be inadequate even for rational basis scrutiny.¹³⁷ If the Supreme Court had applied the border points method, this extraordinarily narrow interest could not have justified invalidation because many more general interests existed that should have been evaluated.¹³⁸ The Court discovered one interest, the desire to classify, that was absolutely related to the challenged policy but that was insufficiently important. In accordance with the border points approach, the Court should have proceeded to consider more general, more important, and thus, more constitutionally adequate interests.

137. See *id.* at 635; see also *supra* notes 29-37 and accompanying text.

138. See *supra* note 37.

CHART 7. IMPORTANCE AND RELATEDNESS AS
FUNCTIONS OF GENERALITY: *ROMER*



Legend:

- Gen₀: Interest in harming homosexuals for the sake of doing so.
 Gen₁: Interest in reducing lawsuits alleging sexual orientation discrimination.
 Gen₂: Interest in defending basic moral values.

For example, the Court should have considered the government's interest in reducing the litigation costs of antidiscrimination suits brought by homosexuals. An interest in reducing legal expenses would almost certainly have been legitimate for purposes of rational basis review, and the state could have made two arguments that it would also have been rationally related: First the state could have asserted that the relative invisibility and mutability of sexual orientation presented a heightened risk of fraudulent litigation, at least when compared with other disadvantaged groups.¹³⁹ Second, the state could have argued that homosexuals are better politically and economically situated to defend themselves against discrimination than are other disadvantaged groups, such that specific causes of action based on homosexuals' sexual orientation are comparatively unnecessary.

Under the conventional view of equal protection, a proof that this (or any other) government interest satisfied judicial scrutiny would decide the case. Part II, however, showed that even a government interest that satisfies judicial scrutiny may not sustain a challenged policy if the policy violates a mandatory or forbidden interest rule. Without defending any particular doctrinal result, a

139. Such an argument could have drawn support from *Heller v. Doe*, 509 U.S. 312, 321-24 (1993), in which the Court justified disparate burdens of proof for involuntary commitment proceedings by reference to disparate risks of misdiagnosis for defendants with mental illness. For further discussion of *Heller*, see *supra* text accompanying notes 95-98.

brief investigation of the excluded-interest rules that could have been applied in *Romer* is instructive.

The Court could have adopted a mandatory interest rule, holding that basic legal instruments that “define the powers of political institutions” *must serve* an interest in “providing a just framework within which the diverse political groups in our society may fairly compete.”¹⁴⁰ Such a rule would have struck down Colorado’s Amendment, litigation costs notwithstanding, unless the State could show that the Amendment somehow improved the justice or diversity of the its political system.¹⁴¹ A mandatory interest rule of this type would presume state constitutions to be impartial and would prevent government agents from warping this basic political fabric for ordinary public ends such as reducing litigation costs.

An aggressive application of this mandatory interest rule would expose all provisions of state constitutions to equal protection challenge unless they served an interest in providing “a just framework for achieving political diversity.” A more moderate interpretation could have emerged, however, under which only *changes* to state constitutions would be subject to challenge, but the undergirding status quo would not. In the same way that geographic districting is presumed to be impartial in electoral apportionments¹⁴² and jury selection is presumed to be impartial in judicial procedure,¹⁴³ state constitutions could be assumed to be impartial or to be impartial within a certain constitutional range. Thus, a new mandatory interest rule of this sort would not necessarily have implied a radical shift in state governments’ current practices.

Alternately, the Court could have proposed a weak forbidden interest rule similar to that advanced in *Virginia*.¹⁴⁴ VMI’s argument concerning “adversative training” was found to have been stained by stereotypes of women as weak, timid, and otherwise incapable.¹⁴⁵ In *Romer*, the Supreme Court could have excluded an interest in curbing legal costs as linked with several stereotypes about homosexuals. First, the Court could have held that the asserted inability to recognize discrimination against gays reliably embodied a stereotype that sexual orientation is a mutable lifestyle choice that can be easily feigned or adopted. Second, the presumed hiddenness of homosexuality could have been viewed as resonating with stereotypes of gays as being, by default, “in the closet.” Third, the claims of gays’ prominent

140. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring); *cf. Evans v. Romer*, 854 P.2d 1270, 1279-81 (Colo. 1993) (using the arguments behind *Hunter*’s mandatory interest rule to justify using strict scrutiny), *rev’d*, 517 U.S. 620 (1996). Justice Scalia’s dissent derisively refers to this line of argument as a theory of “electoral-procedural discrimination” that “finds no support in law or logic.” *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

141. For a disturbing argument that the Amendment could have served a government interest in preempting efforts by antidemocratic “gay activists” to radically reform Colorado’s political environment, see Nagel, *supra* note 31, at 180-89.

142. *See supra* note 91 and accompanying text.

143. *See supra* note 100 and accompanying text.

144. *See supra* text accompanying notes 121-126.

145. *See United States v. Virginia*, 515 U.S. 518, 541-42 (1996).

socioeconomic status could have been linked with a stereotyped view of recognizing only those homosexuals who have the financial means to face social repercussions of openly acknowledging their sexuality. To establish a weak forbidden interest rule against anti-gay stereotypes, the Court could have provided a history of the distrust and hatred that homosexuals have endured¹⁴⁶ similar to *Virginia*'s historical examples of women's subordination.¹⁴⁷

The Court also could have proclaimed a strong forbidden interest rule that would have invalidated the Colorado initiative, regardless of other government interests that the Amendment might have served. The six-Justice majority in *Romer* occasionally seemed on the verge of adopting such a rule, but the precise interest to be forbidden remained only partially articulated. Was the offending interest imposition of a "broad and undifferentiated disability on a single named group?"¹⁴⁸ Was it erecting greater difficulties for "one group of citizens than for all others to seek aid from [its] government?"¹⁴⁹ Was it that the State made homosexual citizens "stranger[s] to [their own state's] laws?"¹⁵⁰ Any one of these government interests could have been held so offensive as to invalidate Colorado's Amendment, but the Court would have had to explain why such interests were so invidious as to fatally poison all others.

This Note does not advocate any of these doctrinal positions; the present goal is to outline some of the legal possibilities that mandatory and forbidden interest rules create. Judicial decisions that rest on generality manipulation not only obscure the meaning of terms like "rational review" and "legitimate interest,"¹⁵¹ they also obscure important principles regarding what constitutes a substantive constitutional wrong. By hiding mandatory and forbidden interest rules under willful generality manipulation, the *Romer* Court successfully brokered six votes for a bold constitutional holding,¹⁵² but it also took a significant step away from achieving a stable, rational jurisprudence of equal protection.

V. CONCLUSION

In a world of second-best solutions, it is too easy to remedy one doctrinal problem by inadvertently creating another. The Supreme Court constructed the three-tiered framework of judicial scrutiny as a reaction against the Internment Cases, attempting to protect racial minorities from government discrimination as it never had before. Whether or not this

146. See, e.g., Koppelman, *supra* note 31, at 114, 123-29 (providing a small evidentiary sample of the discrimination against and hatred toward homosexuals).

147. See *United States v. Virginia*, 515 U.S. at 542-45.

148. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

149. *Id.* at 633.

150. *Id.* at 635.

151. See *supra* Subsection II.C.3.

152. See Sunstein, *supra* note 6, at 20-21 (noting that the *Romer* Court prioritized attaining consensus over articulating legal theory).

framework succeeded in its original mission,¹⁵³ tiered scrutiny is now being pressed to serve every norm embodied in “equal protection of the laws,” and it is plainly not up to the task.

This Note does not propose a new theory of equal protection; rather, it analyzes techniques by which existing theories can be implemented openly and effectively. Conventional wisdom has accepted tiered scrutiny as a comprehensive expression of equal protection doctrine, creating enormous pressure for litigants and scholars to link perceived constitutional wrongs to some form of heightened scrutiny. The current problem, however, is that the doctrines of tiered scrutiny have rigidified around the concept of suspect classification.¹⁵⁴ Whereas it was once thought possible that poverty would be a quasi-suspect class or public housing a fundamental right, today’s more cautious Court has firmly limited heightened scrutiny to well-established classes and circumstances.¹⁵⁵

The current judicial response to this rigidity has been generality manipulation. By defining government interests broadly or narrowly, courts can reach the results that they prefer without explaining such preferences’ legal basis. Judges’ ad hoc tinkering has robbed equal protection of transparency and predictability, but it also has concealed conscious and unconscious efforts to remedy class-based scrutiny’s normative shortfalls. By limiting judicial discretion over generality determination, the border points theory attempts not only to reduce arbitrariness and clarify existing constitutional doctrines but also to expose other constitutional norms operating below the doctrinal surface.

Excluded-interest rules are the important next piece of the constitutional puzzle, designed to protect values and ideals that conventional scrutiny would

153. Cf. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (arguing that equal protection doctrines requiring discriminatory purpose allow the state-sanctioned persistence of powerful racial and gender hierarchies).

154. The late Justice Marshall’s protests against this crystallization have largely passed unheeded: The Court apparently seeks to establish . . . that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But . . . principled reading of what this Court has done reveals that it has applied a spectrum of standards . . . This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973). Compare *id.*, with sources cited *supra* note 1. For discussion of the Court’s simultaneous curtailment of the fundamental rights branch of equal protection, see sources cited *supra* note 2.

155. See *Romer v. Evans*, 517 U.S. 620 (1996) (declining to extend intermediate scrutiny to gays); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (declining to extend intermediate scrutiny to mentally retarded plaintiffs); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (declining to extend intermediate scrutiny to age discrimination); *San Antonio Sch. Dist.*, 411 U.S. at 1 (holding that primary and secondary education is not a fundamental right); *United States v. Kras*, 409 U.S. 434 (1973) (holding that entering into bankruptcy does not implicate any fundamental right); *James v. Valtierra*, 402 U.S. 137 (1971) (declining to extend intermediate scrutiny to the poor); *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that citizens’ basic economic needs do not implicate any fundamental right).

otherwise leave exposed. Mandatory interests, for example, are well-suited to free vital political institutions from political interest and partiality. Weak forbidden interest rules can reduce the corrupting influence of persistent biases by barring them from constitutional scrutiny. And strong forbidden interest rules are reserved to bar unconditionally particular outcomes seen as too horrible to permit under any circumstances.

By applying the border points theory and excluded-interest rules in conjunction with one another, judges can produce jurisprudential consistency and transparency without sacrificing norms of equality and fairness that equal protection should properly encompass. Although the contours and limits of these norms and of these techniques remain open for debate, such debate itself may carry equal protection into a phase of doctrinal development that reaches well beyond the confines of classification.