

The Origin of
the Compelling State Interest Test
and Strict Scrutiny

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TABLE OF CONTENTS

Introduction	1
I. Situating the Compelling State Interest Test and Strict Scrutiny	5
II. The Birth of the Compelling State Interest Test and Strict Scrutiny	11
A. First Mention of the Compelling State Interest Test	16
B. Second Thoughts About the Compelling State Interest Test	22
C. Third Time's a Charm	33
III. The Spread of the Compelling State Interest Test and Strict Scrutiny	42
A. Strict Scrutiny in Name Only	43
B. Heightened But Not Strict Scrutiny	49
C. Strict Scrutiny At Last	57
IV. The Origin of the Compelling State Interest Test and the Purpose of Strict Scrutiny	62
V. Conclusion: The Origin of The Compelling State Interest Test and the "Core Value" of the Equal Protection Clause	77

The Origin of
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by
A. Siegel*

Introduction

The principle that some governmental actions are permissible only if they promote a "compelling state interest," and the doctrine of strict scrutiny of which it is an integral part, are among the most important and distinctive tenets and of modern constitutional law.¹ They come into play, for example, whenever government employs a suspect classification, burdens a fundamental interest, or adopts a content-based regulation of speech.² Yet, recent developments, stemming largely from affirmative action litigation, have led some commentators to

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¹ See *infra* text accompanying notes 35-48 (discussing the three branches of strict scrutiny).

² See, e.g., *Johnson v. California*, 125 S.Ct. 1141, 1146 (2005) (suspect classification); *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (fundamental interest); *Republican Party of Minnesota v. White*, 536 U.S. 765 774-75 (2003) (content-based speech regulation); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 645, 767, 902-03 (2d ed. 2002) (discussing various applications).

speculate about a fundamental shift in the compelling interest test's and strict scrutiny's underlying purpose and future direction.³ As a contribution to the debate, this Article traces the origin of the compelling state interest standard and strict scrutiny, seeking to clarify their history and the concerns that shaped their development.

Conventional wisdom locates the origin of strict scrutiny and the compelling state interest test in equal protection litigation,⁴ tracing them initially to comments in Skinner v. Oklahoma⁵ and Korematsu v. United States⁶ and, after a hiatus of twenty years, to late Warren Court cases involving government

³ See *infra* text accompanying notes 287-88 (discussing the cases and commentators). The same developments have led some commentators to anticipate the doctrines' wholesale demise. See, e.g., Suzanne Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481 (2004); Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 Wm. & Mary Bill Rts. J., 65, 96-97 (2003); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, U. of Pa. J. of Const. L., 945, 970-80 (2004). The predictions of fundamental changes in, and collapse of, strict scrutiny analysis trace back at least to Jeffrey Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161 (1984). Calls for sliding-scale, rather than tiered, review trace back to the 1970s. *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70, 98-99, 109-10 (1973) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting); Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 Harv. L. Rev. 1146 (1987).

⁴ See, e.g., Melvin Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-53*, at 89-90 (1997); Goldberg, *supra* note 3, at 496-503; Greg Robinson and Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 Law & Contemp. Problems 29, 30-39 (2005); Larry Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban against Racial Discrimination*, 15 San Diego L. Rev., 1041, 1068 (1978) (saying strict scrutiny developed in cases challenging segregation).

⁵ 316 U.S. 535, 541 (1942).

⁶ 323 U.S. 214, 216 (1944).

actions that employed suspect classifications or burdened fundamental interests.⁷

This Article locates the development of the compelling interest standard and strict scrutiny in a substantially different place: litigation over First Amendment freedoms, such as speech, religion, and association in the late 1950s and early 1960s. Skinner and Korematsu are famous, among other reasons, for being the first cases to employ the terms "strict scrutiny"⁸ and "most rigid scrutiny."⁹ But they did not employ the test itself or any element of it.¹⁰

As other historians have recently pointed out,¹¹ for a quarter of a century after Justice Stone indicated in United States v. Carolene Products¹² that some constitutional interests

⁷ See, e.g., Shapiro v. Thompson, 394 U.S. 618, 627, 634 (1969) (using the standard and tracing its development); *id.* at 660-61 (Harlan, J., dissenting) (tracing development of the standard). See also Adarand Constructors v. Peña, 515 U.S. 200, 213-18 (1995) (tracing development strict scrutiny analysis of federal statutes); E. Chemerinsky, *supra* note 2, at 649, 668 (treating Skinner and Korematsu as early strict scrutiny cases); Owen Fiss, Groups and the Equal Protection Clause, 5 *Phil. & Publ Affairs* 107, 147-48 (1975) (saying paradigmatic strict scrutiny cases involve "equal protection" disputes "in the racial context").

⁸ 316 U.S. 535, 541 (1942).

⁹ 323 U.S. 214, 216 (1944).

¹⁰ See *infra* text accompanying notes 196-204; John Ely, Democracy and Distrust: A Theory of Judicial Review 146 n. 38 (1980) (saying Skinner failed rationality review); Michael Klarman, An Interpretive History of Modern Equal Protection, 90 *Mich. L. Rev.* 213, 232 (1991) (saying Korematsu used "rationality review").

¹¹ See, e.g., Howard Gillman, Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence, 47 *Political Res. Quart.* 623, 644-48 (1994); G. Edward White, The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America, 95 *Mich. L. Rev.* 299, 301-02 (1996).

¹² 304 U.S. 144 (1938).

would receive "more searching judicial inquiry,"¹³ the locus of that "more exacting ... scrutiny"¹⁴ was the First Amendment, not equal protection.¹⁵ But unlike these historians, this Article discusses the operational doctrines through which the Court, in First Amendment litigation, effectuated what G. Edward White has called "bifurcated review."¹⁶

The compelling state interest standard was a comparatively late development in the evolution of bifurcated review. Although the compelling state interest test has roots that reach back to the 1940s,¹⁷ it first appeared in First Amendment litigation in the late 1950s.¹⁸ Its birthing process was not complete until 1963,¹⁹ at which time it coalesced with other doctrines²⁰ to form modern strict scrutiny analysis. It took another six years for all the component parts of strict scrutiny to migrate from the First Amendment to the Equal Protection

¹³ Carolene Products, 304 U.S. at 152 n. 4.

¹⁴ *Id.*

¹⁵ See Gillman, *supra* note 11, at 644-48; Klarman, *Interpretive*, *supra* note 10, 232-35, 254-57 (saying that strict scrutiny in equal protection cases began in the mid-1960s); White, *supra* note 11, at 327-57 (discussing heightened scrutiny of First Amendment cases from the 1940s to the 1960s).

¹⁶ White, *supra* note 11, at 327 (discussing the Court's "bifurcated review project," which gives heightened protection to favored constitutional interests and minimal protection to all others).

¹⁷ See *infra* text accompanying notes 199-214 (discussing Korematsu and Oyama); Stephen Siegel, *The Death and Rebirth of the Clear and Present Danger Test* (manuscript on file with the author).

¹⁸ See *infra* text accompanying notes 69-94 (discussing appearance of the test).

¹⁹ See *infra* text accompanying notes 145-89 (discussing the development of the test).

²⁰ The other doctrines are "burden shifting" and "narrow tailoring." They are discussed *infra* text accompanying notes 36-48.

Clause. The compelling state interest standard was the last component to make the move.²¹ When it did, strict scrutiny rapidly blossomed into one of the late-twentieth century's most fundamental constitutional doctrines.²²

Part I of this Article discusses the compelling state interest test and strict scrutiny analytically, situating them as one of many doctrines through which the Court gives heightened protection to favored constitutional interests. Part II describes the compelling interest test's and strict scrutiny's origin in the First Amendment, while Part III recounts their slow and piecemeal spread to the Equal Protection Clause. Part IV discusses the revised history for the light it sheds on strict scrutiny's rationale, arguing that strict scrutiny began as a tool of cost-benefit analysis, not as a means to ferret out illicit governmental motive. Part V concludes the Article by canvassing the revised history for the light it sheds on the Court's shifting understanding of whether the Equal Protection Clause's "core value"²³ is the proscription of racial subordination or racial classification.

I. Situating the Compelling State Interest Test and Strict Scrutiny

The compelling state interest test, and the doctrine of strict scrutiny of which it is a part, are only two of a host of techniques by which the Supreme Court, since the New Deal, has bifurcated judicial review into heightened protection for favored rights and minimal protection for the rest.

²¹ See *infra* text accompanying note 237-77.

²² Indeed, after blossoming in the Equal Protection Clause, strict scrutiny returned to First Amendment jurisprudence with even greater vigor and centrality. See, e.g., E. Chemerinsky, *supra* note 2, at 902-04 (discussing the centrality of the distinction between "content-based" and "content-neutral" laws in First Amendment analysis); Edward Heck, *Justice Brennan and Freedom of Expression Doctrine in the Burger Court*, 24 *San Diego L. Rev.* 1153, 1177-80 (1986) (commenting on the increasing use of strict scrutiny in First Amendment analysis after 1975).

²³ Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 *Harv. L. Rev.* 1470, 1505 (2004).

By "heightened protection," I mean any rule, standard, or analytic approach that gives a constitutional right more security than the minimal protections of rationality review.²⁴ Strict scrutiny is just one form of heightened protection. As is well appreciated, in addition to strict scrutiny, there are the doctrines of "intermediate scrutiny"²⁵ and "minimal scrutiny with bite."²⁶ These doctrines increase the protection for

²⁴ On rationality review, see E. Chemerinsky, *supra* note 2, at 651-53. Rationality review upholds any governmental action that rationally promotes a legitimate purpose. Rationality review is permissive because, at least since the New Deal, the legitimate ends of government are so boundless, and the Court is so deferential in ascribing legitimate purpose to governmental action, that few laws can be said to violate this standard. *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949); E. Chemerinsky, *supra*, at 654-59.

Still, it is important to note that there are limits and even rationality review may result in overturning sufficiently egregious government action. At times, even a deferential court may conclude that government action had an illicit purpose. A classic example is *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where the Court held that Alabama's decision to change the boundaries of Tuskegee, Georgia "from a square to an uncouth twenty-eight-sided figure," *id.* at 340, with the consequence of fencing out all but a handful of its African-American voters, was meant to exclude the voters because of their race. When this happens, government action has run afoul the Constitution's "valid purpose" requirement. Under the valid purpose requirement government action is unconstitutional when the Court determines that the end it promotes is one of few ends that are denied to modern government.

²⁵ On intermediate scrutiny, see E. Chemerinsky, *supra* note 2, at 645, 723-38. In intermediate scrutiny, the government has the burden of establishing that its actual purpose substantially promotes an important government interest.

²⁶ Jeffrey Shaman, *Constitutional Interpretation: Illusion and Reality* 104 (2001). See also Robert Farrell, *Successful Rational Basis Claims in the Supreme Court from 1971 through Romer v. Evans*, 32 *Ind. L. Rev.* 357, 361-63, 370 (1999) (discussing the concept); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal*

constitutional rights by subjecting governmental action to more intense judicial examination, but do so by employing standards that are different, and more forgiving, than strict scrutiny.²⁷

More importantly, the whole regime of varying the tiers of scrutiny is itself but one of the techniques by which the modern Court gives differential protection to constitutional norms. Most frequently, the Court gives heightened protection to favored constitutional values simply by adopting a stringent standard or rule to adjudicate cases burdening those values. The rule of New York Times v. Sullivan,²⁸ for example, that government officials may sue for defamation only when the defamer acted "with reckless disregard of whether [his statement] was false or not"²⁹ is a stringent standard that substantially protects freedom of speech. But it protects speech through a metric that is entirely different from what is meant by strict scrutiny.³⁰

Beyond adopting stringent substantive rules, the Court occasionally strengthens the protection of favored constitutional norms by relaxing procedural requirements that limit the opportunity to assert them. "Overbreadth" doctrine is an example of this approach. "Overbreadth," which allows facial challenges to statutes brought by individuals who are objecting to how the law applies to third parties,³¹ gives First Amendment

Protection, 86 Harv. L. Rev. 1, 18-19 (1972) (same). The Court is never forthright about whether it is employing "minimal scrutiny with a bite" or the "valid purpose requirement." There will be no need to distinguish between them in this Article.

²⁷ See *infra* text accompanying notes 35-37 (discussing strict scrutiny's standards). Because of these alternative doctrines, not every instance of intensified scrutiny is an instance of "strict scrutiny."

²⁸ 356 U.S. 254 (1964).

²⁹ New York Times, 356 U.S. at 280.

³⁰ A similar instance is Reynolds v. Sims, 377 U.S. 533 (1964), which adopted the stringent rule of "one person, one vote" to protect voting rights).

³¹ See, e.g., E. Chemerinsky, *supra* note 2, at 912-17 (discussing overbreadth); Daniel Farber, The First Amendment 49-53, 74-75 (2d ed. 2003) (same); Morton Horowitz, The Warren Court

liberties increased protections through means that are not at all related to strict scrutiny.

In short, there are a variety of doctrines that give constitutional values heightened protection without employing the approach that has come to be known as "strict scrutiny."³² Indeed, the opinions that introduced the term "strict scrutiny" into constitutional discourse did not actually use it.³³ In Skinner v. Oklahoma, for example, Justice Douglas subjected a sterilization statute to heightened review. But he did so through a non-deferential inquiry into whether the statute's classifications actually had a rational basis, employing the form of review that today would be called "minimal scrutiny with bite."³⁴

If strict scrutiny is but one of the approaches that give enhanced protection to constitutional rights, the compelling state interest standard is just one part of strict scrutiny analysis. Strict scrutiny varies from ordinary scrutiny³⁵ by imposing three hurdles on the government. It shifts the burden of proof to the government;³⁶ requires the government to pursue a

and the Pursuit of Justice 71-75 (1998) (discussing overbreadth and facial challenges); Robert McKay, The Preference for Freedom, 34 N.Y.U. L. Rev., 1182, 1217-18 (1959) (discussing "standing to sue").

³² See M. Horwitz, Warren, supra note 31, at 68-73 (discussing a variety of techniques used in First Amendment litigation); McKay, supra note 31, at 1203-1222 (same).

³³ See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Korematsu v. United States, 323 U.S. 214, 216 (1944) ("most rigid scrutiny"); infra notes 34, 196-204 (discussing Skinner and Korematsu).

³⁴ J. Ely, Democracy, supra note 10, at 146 n. 38 (saying Skinner failed rational relation test).

³⁵ Ordinary scrutiny, the form of analysis which differentially reviews most governmental action, is minimal scrutiny. Minimal scrutiny upholds all action that is a rational means to accomplish to a legitimate government purpose. See E. Chemerinsky, supra note 2, at 645-46.

³⁶ See, e.g., E. Chemerinsky, supra note 2, at 645.

"compelling state interest;" and demands that the regulation promoting the compelling interest be "narrowly tailored."³⁷

Shifting the burden of proof is an expression of strict scrutiny's assumption that in certain situations the judiciary should not accord the normal presumption of constitutionality to government action. The burden shifting aspect of strict scrutiny traces to the Supreme Court's decision, in the late 1930s, to accord governmental action that burdened First Amendment liberties a reduced presumption of constitutionality.³⁸ In 1958, the reduced presumption of constitutionality in First Amendment cases grew into full-fledged burden shifting. In that year, Justice Brennan decided Speiser v. Randall³⁹ by shifting the burden of proof to the government and justified doing so on the ground that, when facts are unclear, properly protecting First Amendment rights requires imposing the cost of erroneous conclusions on the government.⁴⁰ A decade later, burden shifting migrated into equal protection cases.⁴¹

³⁷ See, e.g., E. Chemerinsky, *supra* note 2, at 645 (discussing strict scrutiny).

³⁸ See United States v. Carolene Products, 304 U.S. 144, 153 n. 4 (1938) (citing First Amendment cases); McKay, *supra* note 31, at 1212-13. See also Klarman, *Interpretive*, *supra* note 10, at 234 (tracing the "inver[sion] of the ordinary presumption of constitutionality" in First Amendment cases to U.S. v. CIO, 335 U.S. 105, 140 (1948) (Rutledge, J., concurring)).

³⁹ 357 U.S. 513 (1958).

⁴⁰ Speiser v. Randall, 357 U.S. 513 524-26 (1958). See McKay, *supra* note 31, at 1221 (describing burden shifting as "a distinctively new variation of the [First Amendment's] preferred position [that] was imaginatively supplied by Justice Brennan in Speiser v. Randall").

⁴¹ It is difficult to date precisely when burden shifting entered equal protection analysis. The comment in Korematsu v. United States, 323 U.S. 214, 216 (1944) that racial classifications are "immediately suspect" and subject to "the most rigid scrutiny" certainly hints that racial classifications will be accorded less of a presumption of constitutionality. But the outcome of the case involved complete deference to, and not a demand for proof from, the government. Perhaps the best evidence that burden shifting was not established in equal protection analysis until fairly late is that the Harvard Law Review's classic note on Developments in the Law - Equal

Strict scrutiny's "narrow tailoring" requirement provides a means to examine the government's "precision of regulation,"⁴² allowing the Court to uphold government action "only if ... it is necessary to achieve ... [the] compelling interest" that the government has asserted as the purpose of its action.⁴³ Narrow tailoring demands that the fit between the government's action and its asserted purpose be "as perfect as practicable."⁴⁴ Strict scrutiny's narrow tailoring requirement means that legislation must be neither overinclusive nor underinclusive.

Narrow tailoring is the oldest branch of strict scrutiny.⁴⁵ Tracing back to Gilded Age Commerce Clause adjudication, and frequently used in Lochner-era police power cases, the "narrow tailoring" doctrine gave meaningful protection to constitutional norms well before the development of either modern bifurcated

Protection, published in March 1969, cited only a California Supreme Court case for the proposition that "the ordinary presumption of validity is reversed when a suspect classification is made." *Developments in the Law - Equal Protection*, 82 Harv. L. Rev. 1065, 1101 (1969) (citing Sei Fujii v. State, 242 P.2d 617 (Cal. 1952)).

If, as the Harvard Editors seem to do, we equate cases that impose a heightened burden of justification with cases that shift the burden of proof, see *id.* (citing Loving v. Virginia, 388 U.S. 1, 9 (1967)), then we may say that burden shifting entered equal protection analysis in 1964.

⁴² NAACP v. Button, 371 U.S. 415, 438 (1963).

⁴³ E. Chemerinsky, *supra* note 2, at 645.

⁴⁴ John Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 933 n. 85 (1983). See also J. Ely, *Democracy*, *supra* note 10, at 146 (speaking of strict scrutiny's "demand for an essentially perfect fit").

⁴⁵ On the history of narrow tailoring, see Guy Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463 (1967); Francis Wormuth and Harris Mirkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464 (1969).

review or strict scrutiny.⁴⁶ By 1940, the New Deal Court had made narrow tailoring analysis a prominent part of First Amendment jurisprudence.⁴⁷ The Warren Court made it a part of equal protection analysis in 1964.⁴⁸

Thus the burden shifting and narrow tailoring branches of strict scrutiny analysis originated outside of strict scrutiny, and were vibrant facets of constitutional law and First Amendment jurisprudence before their appearance in equal protection litigation in the 1960s. But what of the "compelling state interest" standard? When and where did it originate? And when and where did the three strands of strict scrutiny coalesce into that central doctrine of modern constitutional law?

In answering these questions, this Article demonstrates that the compelling state interest standard and strict scrutiny originated not in the Equal Protection Clause's racial discrimination cases, but in First Amendment litigation in the late 1950s and early 1960s. Rather than being the earliest area in which the compelling state interest standard appeared, racial classification cases were among the last.

II. The Birth of the Compelling State Interest Test and Strict Scrutiny

The notion that government needs "a compelling state interest" to justify infringing of constitutionally protected

⁴⁶ See Wormuth and Mirkin, *supra* note 45, at 257-70 (discussing the development of the doctrine).

⁴⁷ Wormuth and Mirkin, *supra* note 45, at 271-77; *infra* text accompanying notes 298-302 (mentioning narrow tailoring as part of 1940s First Amendment jurisprudence). For Wormuth's and Mirkin's complete discussion of narrow tailoring in First Amendment cases, see *id.* at 270-93.

⁴⁸ See *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *id.* at 197 (Harlan, J., concurring). Professors Tussman and tenBroek argue that narrow tailoring should be an important part of equal protection analysis but the absence of case citation shows that in 1949, when they wrote their seminal article, that development had not yet occurred. See Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344-53 (1949) (discussing reasonable classification).

values was established in First Amendment litigation in the late 1950s and early 1960s. In those years, immersed in Cold War fears, concerns about national security, and anti-communist hysteria,⁴⁹ the Court was bitterly divided between Justices who favored quite modest protection⁵⁰ of First Amendment values and Justices who favored robust protection.⁵¹ The low-protectionists were led by Justice Felix Frankfurter who had been advancing this position since the early 1940s.⁵² Justice John Marshall Harlan was so closely associated with this endeavor that, in First Amendment matters, contemporaries regarded him as "Frankfurter-lite."⁵³ Justices Clark, Stewart, and Whittaker composed the rest of the low-protectionist bloc.⁵⁴ The high-

⁴⁹ See Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 247-49, 252, 258 (1992); M. Horwitz, *Warren*, supra note 31, at 56-65, 67-68; Lucas Powe, *The Warren Court and American Politics* 75-103, 135-56 (2000); Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* 108-11 (1966); Geoffrey Stone, *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism* 330-419 (2004).

⁵⁰ I will hereinafter refer to this group of Justices as low-protectionists.

⁵¹ I will hereinafter refer to this group of Justices as high-protectionists. On the Court's division into low- and high-protectionists, see M. Horwitz, *Warren*, supra note 31, at 62-65 (recounting First Amendment cases decided by a 5-4 vote); id. at 117 (Appendix) (listing the Court's 4 liberal and 5 conservative Justices); L. Powe, supra note 49, at 88-90.

⁵² See *Kovacs v. Cooper*, 336 U.S. 77, 89-96 (1949) (Frankfurter, J., concurring) (disputing the First Amendment's "preferred position"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); Wallace Mendelson, *Clear and Present Danger - From Schenck to Dennis*, 52 *Columb. L. Rev.* 313, 320 (1952); M. Urofsky, supra note 4, at 165-66; White, supra note 11, at 337-40; Alpheus Mason, *The Core of Free Government, 1838-1940: Mr. Justice Stone and "Preferred Freedoms"*, 65 *Yale L.J.* 597, 614-66 (1956).

⁵³ L. Powe, supra note 49, at 143.

protectionist group consisted of Chief Justice Warren and Justices Black, Douglas, and Brennan.⁵⁵

As the low-protectionists were in the majority, their views predominated until 1962 when Justices Frankfurter and Whittaker retired for reasons of health.⁵⁶ Whittaker and Frankfurter were replaced by Byron White and Arthur Goldberg.⁵⁷ Because Goldberg consistently favored first amendment claimants,⁵⁸ his appointment gave high-protectionists a reliable majority for the first time in Supreme Court history.⁵⁹ It was Goldberg's appointment that launched the First Amendment on its course of sustained growth that continues to this day.⁶⁰

Nonetheless, before Goldberg's appointment, during the years in which low-protectionists composed the majority,⁶¹ the

⁵⁴ See, e.g., M. Horwitz, Warren, supra note 31, at 117 (Appendix) (listing the Court's 5 conservative Justices).

⁵⁵ See M. Horwitz, Warren, supra note 31, at 117 (Appendix) (listing the Court's 4 liberal Justices); L. Powe, supra note 49, at 88-90.

⁵⁶ L. Powe, supra note 49, at 205, 209-10.

⁵⁷ M. Horwitz, Warren, supra note 31, at 63-66; L. Powe, supra note 49, at 210-12.

⁵⁸ M. Horwitz, Warren, supra note 31, at 65-66; L. Powe, supra note 49, at 211-12. Justice White was not a consistent civil libertarian. See M. Horwitz, Warren, supra note 31, at 71, 117 (saying Justice White did not generally protect civil liberties and listing him among the Warren Court's conservatives); L. Powe, supra, at 210-11, 304.

⁵⁹ L. Powe, supra note 49, at 209-11, 303-35. In the 1940s, high-protectionists had a solid bloc of four Justices which, because they frequently attracted votes from the moderate center, prevailed in a wide-variety of cases. They did not, however, have a majority. See Mendelson, Clear, supra note 52, at 320; Siegel, Death, supra note 17, at *.

⁶⁰ See M. Horwitz, Warren, supra note 31, at 65-73; L. Powe, supra note 49, at 209-16, 497-501.

⁶¹ The entire period of low-protectionist dominance dates from 1949 to 1962. In the 1940s, high-protectionist had more

Warren Court ruled against First Amendment claimants in many high profile cases.⁶² There were exceptions,⁶³ of course, and in six cases, decided between 1957 and 1960, the state's failure to assert a compelling interest was among the reasons given for why the First Amendment claimant should prevail.⁶⁴ As the opinions

influence, but they lost it when two of their numbers, Justices Murphy and Rutledge, died. See Siegel, *Death*, supra note 17, at *.

⁶² See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding the enforcement of Sunday closing laws against Orthodox Jews); *In re Anastaplo*, 366 U.S. 82 (1961) (upholding denial of bar admission for refusing to answer questions about communist affiliation); *Barenblatt v. United States*, 360 U.S. 109 (1959) (upholding contempt of Congress conviction of college professor for refusing to answer HUAC questions); *Lerner v. Casey*, 357 U.S. 468, 477-79 (1958) (upholding firing a subway conductor for failure to answer questions about Communist Party membership); *Bauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding group libel laws); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of Communist Party leadership for conspiring to advocate the necessity of overthrowing the government); *M. Horwitz, Warren*, supra note 31, at 62-65 (discussing the cases); *L. Powe*, supra note 49, at 135-56 (same).

⁶³ See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (voiding statutes requiring that teachers reveal all organizations to which they belong or contribute); *Talley v. California*, 362 U.S. 60 (1960) (voiding laws banning anonymous leafleting); *Yates v. United States*, 354 U.S. 298 (1957) (overturning Smith Act conviction of "second-tier" Communist Party officials); *Watkins v. United States*, 354 U.S. 178 (1957) (overturning contempt of Congress conviction for refusing to answer HUAC questions when their pertinency was not explained to witness).

⁶⁴ *Talley v. California*, 362 U.S. 60, 66 (1960) (Harlan, J., concurring); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Scull v. Commonwealth of Virginia ex rel. Committee on Law Reform and Racial Activities*, 359 U.S. 344, 352 (1959); *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234, 262, 265 (1957) (Frankfurter, J., concurring). The compelling interest standard was also set out in a dissent. See also *Braunfeld v. Brown*, 366 U.S. 599, 610

in four of these cases were written by low-protectionists,⁶⁵ who also set out the compelling interest standard in two cases in which they ruled against First Amendment claimants,⁶⁶ the seminal appearances of the compelling interest standard in Supreme Court jurisprudence require close analysis to determine what the concept meant to the Justices who first used it.

This section undertakes that analysis and concludes that the compelling state interest test, when employed by low-protectionist Justices between 1957 and 1960, was not meant to be a stringent standard. Moreover, it was in the process of being abandoned when Goldberg's appointment turned majority control over to Justices who favored First Amendment values. Thus despite its appearance before Goldberg's appointment, the compelling state interest standard was not established in the First Amendment until 1963. In that year, it was used in three opinions written for a transformed Court by the high-protectionist Justices Brennan and Goldberg.⁶⁷ These opinions, which established the compelling state interest test and strict scrutiny as part of First Amendment jurisprudence, also announced the birth of what commentators have called "history's Warren Court."⁶⁸

(1961) (Brennan, J., concurring and dissenting) (using the compelling standard as the standard for his dissent).

⁶⁵ See *Talley*, 362 U.S. at 66 (Harlan, J., concurring) (discussed *infra* note 115); *Bates*, 361 U.S. at 517 (discussed *infra* text accompanying notes 122-26); *NAACP*, 357 U.S. at 451 (discussed *infra* text accompanying notes 120-224); *Sweezy*, 354 U.S. at 255 (Frankfurter, J., concurring) (discussed *infra* text accompanying notes 69-94).

⁶⁶ *Barenblatt v. United States*, 360 U.S. 109, 127 (1959) (discussed *infra* text accompanying notes 106-12); *Uphaus v. Wyman*, 360 U.S. 72, 79-81 (1959) (discussed *infra* text accompanying notes 101-05).

⁶⁷ *Sherbert v. Verner*, 374 U.S. 398, 399, 403, 406 (1963) (discussed *infra* text accompanying notes 182-89); *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539, 540, 546 (1963) (discussed *infra* text accompanying notes 172-81); *NAACP v. Button*, 371 U.S. 415, 417, 438, 439 (1963) (discussed *infra* text accompanying notes 163-71).

⁶⁸ See L. Powe, *supra* note 49, at 207. See also *id.* at 209-16, 497-501 (dating "history's Warren Court" to the 1962

A. First Mention of the Compelling State Interest Standard

The notion that the government needs "a compelling state interest" to justify an infringement of constitutionally protected values first appeared in 1957 in Justice Frankfurter's concurrence to Sweezy v. New Hampshire.⁶⁹ In Sweezy, the Supreme Court overturned Paul Sweezy's contempt conviction for refusing to answer questions put to him by New Hampshire's Attorney General who was investigating subversive activities on behalf of the state legislature.⁷⁰ Sweezy, who was a socialist and a professor at the University of New Hampshire, refused to answer questions about his classroom lectures and his involvement with the Progressive Party.⁷¹

In deciding Sweezy, Chief Justice Warren announced the judgment of the Court and wrote for himself and Justices Black, Douglas, and Brennan - his fellow high-protectionists. Warren's opinion ultimately rested on narrow grounds: that in questioning Sweezy, the Attorney General was acting beyond the legislature's authorizing resolution.⁷² Leading into this part of his opinion, however, Warren touched on the case's broader issues. The case involved a college professor's "right to lecture and his right to associate with others."⁷³ The state Supreme Court recognized this, but determined that Sweezy's First Amendment rights were "outweighed" by the legislature's interest in knowing whether "there exists a potential menace from those who would overthrow the government by force and

Term); M. Horwitz, Warren, *supra* note 31, at 10-12, 37-46, 65 (noting the importance of Goldberg's appointment but also indicating that outside of the First Amendment, a liberal majority did not "jell" until Thurgood Marshall's appointment).

⁶⁹ Sweezy v. New Hampshire, 354 U.S. 234 (1957). Sweezy is insightfully discussed in L. Powe, *supra* note 49, at 97-98.

⁷⁰ Sweezy, 354 U.S. at 237.

⁷¹ Sweezy, 354 U.S. at 238-44.

⁷² Sweezy, 354 U.S. at 253-55.

⁷³ Sweezy, 354 U.S. at 249.

violence."⁷⁴ Responding to this balancing analysis, Warren suggested

[w]e do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields. But we do not need to reach such fundamental questions of state power to decide this case.⁷⁵

Justices Frankfurter and Harlan made up the rest of the Sweezy majority.⁷⁶ Although they agreed that Sweezy's contempt conviction could not stand, as the Court's leading deferential Justices they could not assent to any part of Warren's rationale. Frankfurter and Harlan thought that Warren's narrow ground was essentially a matter of state law for which the New Hampshire Supreme Court's contrary decision was binding.⁷⁷ Nor could they abide Warren's hint of a non-deferential approach to the case's broader First Amendment issues.⁷⁸ Accordingly, Frankfurter, joined by Harlan, wrote a separate opinion that in many ways was a typical deferential balancing analysis.

Frankfurter began by noting that in cases like Sweezy

[o]urs is the narrowly circumscribed but exceedingly difficult task of making the final judicial accommodation between the competing weighty claims that underlie all such questions of due process.⁷⁹

⁷⁴ Sweezy, 354 U.S. at 251.

⁷⁵ Sweezy, 354 U.S. at 251.

⁷⁶ Two other low-protectionist Justices, Clark and Burton, dissented. Sweezy, 354 U.S. at 267-70 (Clark, J., dissenting). Justice Whittaker did not take part in the decision. *Id.* at 255.

⁷⁷ Sweezy, 354 U.S. at 257 (Frankfurter, J., concurring). See also *id.* at 268 (Clark, J., dissenting) (same).

⁷⁸ Frankfurter and Harlan were the leading low-protectionist Justices. See *supra* text accompanying notes 52-53.

⁷⁹ Sweezy, 354 U.S. at 256 (Frankfurter, J., concurring). Frankfurter's emphasis in the quoted language on general due process, rather than the more specific First Amendment, should be noted. It was part of his constant effort to liken free

The decision involved "balancing two contending principles - the right of a citizen to political privacy ... and the right of the State to self-protection." Striking the appropriate balance, he said,

must not be an exercise of whim or will. It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed. Such a judgment must be arrived at in the spirit of humility when it counters the judgment of the State's highest court.⁸⁰

Yet, for a low-protectionist jurist, Frankfurter's concurrence was unique in three respects. First, Frankfurter composed what Professor Lucas Powe has aptly described as "the most powerful First Amendment defense of academic freedom in the United States Reports that exists to this day."⁸¹ "For society's good," Frankfurter wrote,

inquiries into [the physical and social sciences], speculations about them, stimulation in others of reflection, must be left as unfettered as possible.

speech cases to review of economic regulations. See M. Urofsky, *supra* note 4, at 21, 165-55; White, *supra* note 11, at 338-40.

⁸⁰ *Sweezy*, 354 U.S. at 267 (Frankfurter, J., concurring).

⁸¹ L. Powe, *supra* note 49, at 97. See *Sweezy*, 354 U.S. at 261-64 (Frankfurter, J., concurring) (discussing the importance of academic freedom); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (drawing from *Sweezy's* discussion of academic freedom); *id.* at 362 (Thomas, J., concurring in part, and dissenting in part) (same); *Bd. of Regents of the Univ. of Wis. System v. Southworth*, 529 U.S. 217, 237-38 (Souter, J., concurring) (same); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835-36 (1995) (same); *Univ. of Pa. v. EEOC*, 493 U.S. 183, 196-97 (1990) (same). Even before *Sweezy*, Frankfurter had written at length about the importance of academic freedom, describing "teachers ... as the priests of our democracy" in *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

These pages need not be burdened with proof ... of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.⁸²

Second, Frankfurter's Sweezy concurrence is unusual because, although the case involved the government's security needs, Frankfurter ruled against the government, arguing that

When weighed against the grave harm resulting from governmental intrusion into the academic life of a university, [the government's] justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.⁸³

The final unique aspect of Frankfurter's Sweezy concurrence is the reason Frankfurter thought the balance of conflicting interests favored Sweezy. Frankfurter thought the balance of conflicting interests favored Sweezy because of the importance of academic freedom to a free society. Due to academic freedom's critical importance, Frankfurter asserted that the

⁸² Sweezy, 354 U.S. 261-62 (Frankfurter, J., concurring). Frankfurter also quoted at length from a recent "poignant ... [but] unheeded" statement of South African scholars to the effect that

[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. at 262-63 (quoting The Open Universities in South Africa 19-12 (n.d.)).

⁸³ Sweezy, 354 U.S. at 261 (Frankfurter, J., concurring).

state needed singularly important reasons for burdening it.⁸⁴ As Frankfurter put it:

Political power must abstain from intrusion into this activity of freedom ... except for reasons that are exigent and obviously compelling."⁸⁵

This is the first appearance of the "compelling state interest" test in Supreme Court precedent.⁸⁶

In light of Frankfurter's usual devotion to deferential adjudication, it is hard to accept that Frankfurter meant what he wrote in Sweezy. Later in his opinion, he did pull back a bit. When speaking of the Attorney General's inquiries, not into Sweezy's college lectures, but into his engagement with the Progressive Party, Frankfurter wrote:

For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling.⁸⁷

In this latter context, "compelling" is less forceful as it is not conjoined with the term "exigent," a term clearly indicating an urgent and pressing quality for the state interest.

⁸⁴ It is instructive to contrast Frankfurter's concurrence with the dissent of Justices Clark and Minton. In an opinion that was more typical of low-protectionists, those Justices simply said that they were

not convinced that the State's interest in investigating subversive activities for the protection of its citizens is outweighed by any necessity for the protection of Sweezy.

Sweezy, 354 U.S. at 270 (Clark, J., dissenting).

⁸⁵ Sweezy, 354 U.S. at 262. See also *id.* at 265 (quoted *infra* text accompanying note 87).

⁸⁶ The phrase had been used on a few occasions in non-civil liberties contexts. See *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (test for a city attempting to intervene in a suit brought by its state against another state); *Yakus v. United States*, 321 U.S. 414, 442 (1944) (test for summary action).

⁸⁷ Sweezy, 354 U.S. at 265.

Nevertheless, Frankfurter probably did mean what he wrote in Sweezy, as uncharacteristic as his undeferential stance may be. Frankfurter's Sweezy concurrence was uncharacteristic in several regards, not just in the extensive protection it offered the "academic freedom" branch of First Amendment values. Frankfurter usually did not write passionate opinions. He was the leading proponent of impersonal adjudication, something he called for in Sweezy itself.⁸⁸ Yet, it is not too much to suggest that Frankfurter's heightened standard for interest balancing in Sweezy, as well as his passion, reflected something highly personal: that he was a former academic who gloried in that life and role.⁸⁹ If so, the scope of Frankfurter's heightened "exigent and obviously compelling" state interest test would be limited to academic freedom cases.

It is also possible that Frankfurter was advancing something broader in Sweezy. Sweezy was handed down on June, 17 1957, which quickly was dubbed "Red Monday" because the Court released four decisions that day severely restricting the government's Cold War national security and loyalty programs.⁹⁰ In Sweezy, Frankfurter might have been drawing a constitutional line between advocates of communism and advocates of other left-wing ideologies, such as the groups to which Paul Sweezy belonged.⁹¹ "In the political realm, as in the academic," Frankfurter wrote,

⁸⁸ Sweezy, 354 U.S. at 267 (quoted supra text accompanying note 80). See also Ken Kersch, *Construction Civil Liberties* 86 (2004) (saying Frankfurter called for decision according to "objective standards").

⁸⁹ Frankfurter, for example, always acted as a professor towards his fellow Justices, to their great annoyance. See M. Urofsky, supra note 4, at 33-9 (discussing Frankfurter's temperament and friction on the Court). Religious freedom was another area that Frankfurter took personally and wrote impassioned opinions. See *People ex rel. McCollum v. Illinois*, 333 U.S. 203, 212-32 (1948) (Frankfurter, J., concurring); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

⁹⁰ See M. Horwitz, Warren, supra note 31, at 59-62 (discussing "Red Monday"); L. Powe, supra note 49, at 93-98 (same).

⁹¹ Sweezy was a Marxist-socialist and a member of the Progressive Party. Sweezy, 354 U.S. at 241-43.

thought and action are presumptively immune from inquisition by political authority. ... Until recently, no difference would have been entertained in regard to inquiries about a voter's affiliations with one of the various so-called third parties that have had their day, or longer, in our political history. ... Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party. A foundation in fact and reason would have to be established far weightier than the intimations that appear in the record to warrant such a review of the Progressive Party. This precludes the questioning that [Sweezy] resisted in regard to that Party.⁹²

Read this way, the scope of Frankfurter's uncharacteristically non-deferential concurrence in Sweezy was considerably broad. It protected members of perhaps all disfavored political associations, with the singular exception of communists, who were viewed more as a paramilitary organization than as a political movement.⁹³ This reading also meaningfully accounts for Frankfurter's difference with Warren's plurality opinion, which suggested stringent First Amendment protection even for members of the Communist Party.⁹⁴

B. Second Thoughts About the Compelling State Interest Test

Whatever Frankfurter meant by Sweezy's "exigent and obviously compelling" state interest standard, he and Justice Harlan (who had joined the Sweezy concurrence) quickly reverted to their low-protectionist, deferential-balancing approach.⁹⁵

⁹² Sweezy, 354 U.S. at 266.

⁹³ See, e.g., Dennis v. U.S., 341 U.S. 494, 577 (Jackson, J., concurring).

⁹⁴ See L. Powe, *supra* note 49, at 98; *supra* text accompanying note 75 (quoting Warren's absolutist rhetoric in Sweezy).

⁹⁵ Cases in which the Court defended the NAACP against attack by southern legislatures form a temporary exception to

The Court's four "Red Monday" decisions, along with its race and criminal procedure decisions, provoked an uproar in Congress.⁹⁶ In 1958, Congress considered, and came very close to passing, a host of anti-Court bills, including one that would strip the Court of its appellate jurisdiction in domestic security cases.⁹⁷ As Professor Powe recounts:

The anti-Court bills caused Frankfurter to get religion again. ... Frankfurter interpreted ... Congress as having questioned whether an independent judiciary might be too high a price to pay when the cost was the eradication of the loyalty-security programs. Thus, one of the two would have to give way Frankfurter was ready to save the Court; prudence dictated the Court yield in this area. His dalliance with the four liberals ... was over.⁹⁸

Frankfurter's and Harlan's reversion to the "government action is constitutional if it is reasonable"⁹⁹ standard was first manifested in a pair of 1958 cases involving public employees who relied on the Fifth Amendment to refuse to answer questions about Communist Party membership.¹⁰⁰ By 1959, their

this statement. See *infra* text accompanying notes 119-26 (discussing the cases).

⁹⁶ See M. Horwitz, Warren, *supra* note 31, at 64-65; L. Powe, *supra* note 49, at 127-35.

⁹⁷ Walter Murphy, Congress and the Court 127-223 (1962); L. Powe, *supra* note 49, at 127-35; C. Herman Pritchett, Congress Versus the Supreme Court 1957-1960 at 107-16 (1961); William Ross, Attacks on the Warren Court by State Officials, 50 Buffalo 483, 497-507 (2002).

⁹⁸ L. Powe, *supra* note 49, at 141-42. See also Michael Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 334-35 (2004) (discussing the Court's retrenchment on civil rights).

⁹⁹ L. Powe, *supra* note 49, at 142. See also M. Horwitz, Warren, *supra* note 31, at 62-64 (recounting the Court's "retreat").

¹⁰⁰ See L. Powe, *supra* note 49, at 137-38 (discussing *Lerner v. Casey*, 357 U.S. 468 (1958) and *Beilan v. Bd. of Education*, 357 U.S. 399 (1958)).

reversion to deferential analysis had spread to cases involving private citizens who premised their refusal to respond to questions posed by legislative investigating committees on the First Amendment.

The first of the 1959 decisions, Uphaus v. Wyman,¹⁰¹ involved a camp director who refused to divulge the list of speakers who had given talks at his leftist summer camp.¹⁰² Writing for a five Justice majority that included Justices Frankfurter and Harlan, Justice Clark said "we have for decision the ... question of whether the public interests overbalance [the] conflicting private ones."¹⁰³ After noting that "the academic and political freedoms discussed in Sweezy ... are not present here in the same degree, since [the camp] is neither a university nor a political party,"¹⁰⁴ Clark easily found that the governmental interest in "learn[ing] if subversive persons were in the State is sufficiently compelling to subordinate the interest in associational privacy."¹⁰⁵

Uphaus's "sufficiently compelling" state interest requirement said nothing about the quantum of the weight required for the state to override First Amendment rights. As used in Uphaus, the compelling interest standard meant only that to override First Amendment freedoms the state had to assert an interest that was important enough under circumstances. Uphaus's "sufficiently compelling" standard was a tautology requiring nothing more than that, on balance, the state interest outweigh the private interest.

¹⁰¹ 360 U.S. 72 (1959).

¹⁰² Uphaus, 360 U.S. at 73-75.

¹⁰³ Uphaus, 360 U.S. at 78.

¹⁰⁴ Uphaus, 360 U.S. at 77.

¹⁰⁵ Uphaus, 360 U.S. at 79-81. Clark approvingly cited Dennis v. United States, 314 U.S. 494, 509 (1951). Clark reasoned that determining the presence of subversive persons implicated the state's "interest of self-preservation." Uphaus, 360 U.S. at 80.

The other decision, Barenblatt v. United States,¹⁰⁶ involved a college professor who refused to answer questions about membership in the Communist Party and Communist-front clubs when he was called before the House Un-American Activities Committee.¹⁰⁷ After setting out a balancing of interests approach to the issues,¹⁰⁸ and noting that in First Amendment cases the "subordinating interest of the State must be compelling,"¹⁰⁹ Justice Harlan ruled (on behalf of the same five Justice majority that had decided Uphaus) that Barenblatt's contempt conviction was "beyond question."¹¹⁰ Despite Harlan's use of Sweezy's "compelling interest" rubric, commentators immediately began critically analyzing Harlan's opinion as a paradigmatic example of the Cold War Court's highly deferential approach to First Amendment disputes.¹¹¹ These commentators recognized that Harlan was using the "compelling interest"

¹⁰⁶ 360 U.S. 109 (1959).

¹⁰⁷ Barenblatt, 360 U.S. at 114.

¹⁰⁸ Barenblatt, 360 U.S. at 126-27.

¹⁰⁹ Barenblatt, 360 U.S. at 127 (quoting Sweezy; internal quotation marks removed).

¹¹⁰ Barenblatt, 360 U.S. at 133.

¹¹¹ M. Horwitz, Warren, supra note 31, at 68; L. Powe, supra note 49, at 144-45; M. Shapiro, supra note 49, at 83-87; Samuel Krislov, The Supreme Court in the Political Process 115-16 (1965); Laurent Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1438-40, 1443-44 (1962); Melville Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935, 939-41 (1968); Charles Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 718-20 (1963); Edmund Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464, 479-80 (1956) (describing deferential Justices as "laissez-faire jurists"); Frank Strong, Fifty Years of Clear and Present Danger: From Schenck to Brandenburg - and Beyond, 1969 Sup. Ct. Rev. 41, 57-59 (discussing the contemporary criticism); Siegel, Death, supra note 17, at * (on file with the author). Scholarly attention followed, in part, Justice Black's forceful dissent. See Barenblatt, 360 U.S. at 143-62 (Black, J., dissenting).

standard as it had been defined in Uphaus, the case with which Barenblatt was argued and decided.¹¹²

After Uphaus and Barenblatt, the deferential majority decided case after case employing a balancing analysis without mentioning a requirement for the state to have a "compelling" interest.¹¹³ Justice Harlan, for example, writing for the Court in Koningsberg v. State Bar of California,¹¹⁴ spoke of laws burdening First Amendment rights as permissible simply "when they have been found justified by subordinating valid governmental interests."¹¹⁵ As far as the deferential majority was concerned, Sweezy's "exigent and obviously compelling" state interest requirement was a sport that was on the road to oblivion.¹¹⁶

If the deferential majority had shown no commitment to Sweezy's "compelling state interest" standard, neither did half of the high-protectionist minority. Justices Black and Douglas were First Amendment absolutists. For them, even a stringent "exigent and obviously compelling" state interest standard would

¹¹² Uphaus and Barenblatt were argued and decided on the same days, with Uphaus as the first case in both instances. See Uphaus, 360 U.S. at 72; Barenblatt, 360 U.S. at 109.

¹¹³ See, e.g., In re Anastaplo, 366 U.S. 82 (1961) (bar membership); Konigsburg v. State Bar of California, 366 U.S. 36 (1961) (same); Braden v. U.S., 365 U.S. 431 (1961) (legislative investigation); Wilkenson v. U.S., 365 U.S. 399 (1961) (same).

¹¹⁴ 366 U.S. 36 (1961).

¹¹⁵ Konigsberg, 366 U.S. at 50 (1961). In the post-Uphaus world, it was the equivalence between the "compelling", "sufficiently compelling," and merely "subordinating" interest standards that allowed the deferential Justice Harlan to employ the "compelling" standard when he was not speaking for the Court. See Talley v. California, 362 U.S. 60, 66 (1960) (Harlan, J., concurring).

¹¹⁶ After Uphaus, the deferential majority mentioned the "compelling interest" standard once more in a case involving the NAACP, but that and other cases show the deferential majority was not employing it as a stringent standard. See *infra* text accompanying notes 122-26, 133-45 (discussing Bates v. Little Rock, 361 U.S. 516 (1960)).

be too low because it involved balancing.¹¹⁷ History showed that when tensions rose, balancing gave way to state power. As Martin Shapiro has written, Black and Douglas

repeatedly pointed out [that] ... balancing ... was most useful to those who were willing to ... allow ... freedom of speech to go by the boards. Because it allowed a flexible weighing in each case without enunciation of any principle to which the Court might have to stick even when Congress later violated it, and because it constantly repeated that it was constitutionally legitimate for Congress to violate the First Amendment, ad hoc balancing provided a jurisprudential screen behind which judges could always yield gracefully By overweighing the danger and minimizing and excusing the damage to free speech ... the Court can always simply surrender to hysteria, and in surrendering provide it with a cover of constitutional respectability which feeds its fires.¹¹⁸

The only exception to the demise of the Sweezy standard was the Court's use of it in cases involving attempts by various southern states to acquire the NAACP's membership lists, presumably to expose the organizations "rank-and-file ... to

¹¹⁷ Consider, for example, *Scull v. Commonwealth of Virginia ex rel. Committee on Law Reform and Racial Activities*, 359 U.S. 344 (1959) decided before Uphaus. Justice Black took the rare opportunity of his writing for the Court to tilt the law in a high-protectionist direction. Before deciding the case on nonconstitutional grounds, Black mentioned that the Court had held that the freedoms of speech, press, and association "cannot be invaded unless a compelling state interest is clearly shown." *Id.* at 352-53. But he immediately dropped a footnote to Warren's plurality opinion in Sweezy to the effect that "Four members of this Court adhere to the view they expressed in *Sweezy v. State of New Hampshire*, 354 U.S. 234, 251, ... and 'do not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields.'" *Scull*, *supra*, at 352.

¹¹⁸ M. Shapiro, *supra* note 49, at 110. In an unfortunately apt case, Justice Black once ruefully observed that "[t]he effect of the Court's 'balancing' ... is that any State may now reject an applicant for admission to the Bar if he believes in the Declaration of Independence ..." In *Re Anastaplo*, 366 U.S. 82, 112 (1961).

economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."¹¹⁹ Between the Sweezy and Uphaus decisions, Justice Harlan, writing for a unanimous court in NAACP v. Alabama ex rel. Patterson, answered the question of

whether Alabama has demonstrated an interest in obtaining [the NAACP membership list] ... which is sufficient to justify the deterrent effect which ... these disclosures may well have on the free exercise by [the NAACP's] members ... right of association¹²⁰

by noting that

Such a '... subordinating interest of the State must be compelling,' Sweezy v. New Hampshire, 354 U.S. 234, 265 ...¹²¹

Two years later, in Bates v. City of Little Rock, a case that involved the City's power to obtain the NAACP's membership list to check the NAACP's claim that it qualified for tax purposes as a charitable institution, Justice Stewart said: Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.¹²²

Perhaps these cases show that Sweezy's "compelling" interest standard was not entirely a sport, even for the Court's low-protectionist majority. Some contemporaries thought the Court was making a special exception to its generally

¹¹⁹ NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958). The cases discussed in the next paragraphs are insightfully set in the context of the Court's post-Brown v. Board of Education struggle with southern intransigence in M. Klarman, *supra* note 98, at 335-37; L. Powe, *supra* note 49, at 165-69. See also M. Klarman, *supra*, at 335-40, 382-84 (discussing the South's overall attack on the NAACP).

¹²⁰ NAACP, 357 U.S. at 463.

¹²¹ NAACP, 357 U.S. at 463.

¹²² Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). See M. Klarman, *supra* note 98, at 335 (treating Bates as an anti-NAACP case).

deferential jurisprudence in order to protect the NAACP in its (and the Court's) battle against massive southern resistance to school desegregation.¹²³ Still, it should be noted that:

(1) Patterson may itself have been part of the movement away from Sweezy's strict standard. In Patterson, Harlan did not quote or even cite Sweezy's first, clearly stringent, statement of its standard, which required not just a "compelling," but an "exigent and obviously compelling," interest.¹²⁴

(2) In Bates, although Justice Stewart did say the State needed a "compelling" interest to prevail, in the very next paragraph he concluded his discussion of the law by saying that in this case "it becomes the duty of this Court to determine whether the [City's] action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."¹²⁵ By using the "compelling" and "reasonable" standards interchangeably, Stewart's opinion intimated an equivalence between them. Indeed, just two weeks after Bates, most of the low-protectionist Justices showed that they understood Bates to stand for the "reasonable" standard when they cited and quoted only Stewart's second paragraph as providing "the requirements of our cases."¹²⁶

For these reasons it is proper to see Patterson and Bates as reflecting the Court's recession from Sweezy's stringent "exigent and obviously compelling" state interest standard.

¹²³ See M. Shapiro, *supra* note 49, at 82; L. Powe, *supra* note 49, at 169; The Supreme Court, 1962 Term - Leading Cases, 77 Harv. L. Rev. 81, 122-23 (1963).

¹²⁴ NAACP, 357 U.S. at 460-67. Similarly, the Bates case, in supporting the imposition of a "compelling" standard, did not cite Sweezy. Rather, it cited Patterson and a string of cases from the 1940s in which only modestly active balancing had been employed. Bates, 361 U.S. at 524.

¹²⁵ Talley v. California, 362 U.S. 60, 69 n. 1 (1960) (Clark, J., joined by Frankfurter, J., and Whittaker, J., dissenting).

¹²⁶ Talley v. California, 362 U.S. 60, 69 (1960) (Clark, J., joined by Frankfurter, J., and Whittaker, J., dissenting).

In the end, even if the Patterson and Bates cases gave Sweezy's "compelling" interest standard some extended life, the Court's deferential majority completely abandoned it in 1961¹²⁷ in two cases in which the NAACP once again sought protection from hostile southern legislatures.¹²⁸

One case, NAACP v. Button,¹²⁹ involved Virginia's attempt to apply to the NAACP a recently enacted law prohibiting solicitation of legal business. The legislation, which had been adopted in 1956 as part of Virginia's "massive resistance" to school desegregation,¹³⁰ prohibited "any person or organization not having a pecuniary right or liability in a lawsuit to

¹²⁷ For the 1961 date, see The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 317 (Del Dickson, ed. 2001) (dating the Court's conference on one of the cases, NAACP v. Button, as Nov. 10, 1961) (hereinafter D. Dickson); L. Powe, *supra* note 49, at 155 (stating the other case, Gibson v. Florida Legislative Investigation Committee, was argued in December, 1961; cases usually are discussed and voted on in conference shortly after their argument).

¹²⁸ The deferential majority's movement away from employing a heightened standard to protect the NAACP was foreshadowed in late 1960, in Shelton v. Tucker, 364 U.S. 479 (1960), when four of its members voted to allow Arkansas to require public school teachers to file annual affidavits disclosing "every organization to which he has belonged or contributed for the past five years." *Id.* at 480. The law was enacted to reveal whether teachers were NAACP members. L. Powe, *supra* note 49, at 168. The Court struck the statute down only because the usually deferential Justice Stewart voted with the high-protectionist minority on the grounds that the statute should have been more "narrowly" tailored given its impact on "fundamental personal liberties." Shelton, 364 U.S. at 488.

¹²⁹ 371 U.S. 415 (1963). See *infra* text accompanying note 146 (explaining why the case's decision date is 1963, rather than 1961, and why the NAACP won rather than lost). Button is tellingly discussed in M. Klarman, *supra* note 98, at 337-39; L. Powe, *supra* note 49, at 169-71.

¹³⁰ L. Powe, *supra* note 49, at 170; Note, The Supreme Court, 1962 Term - Leading Cases, 77 Harv. L. Rev. 81, 122 (1963).

solicit legal business for itself or for any attorney.”¹³¹ Given how the NAACP represented its clients, the law threatened to put an end to NAACP litigation.¹³²

The other case, Gibson v. Florida Legislative Investigation Committee,¹³³ arose when the Committee asked the NAACP to reveal whether “specific individuals, otherwise identified as, or suspected of being, communists were NAACP members.”¹³⁴ If allowed, the state would finally have found a way to chill the NAACP members’ freedom of association either by revealing their membership in the organization or by showing that the NAACP had members who also happened to be alleged subversives.¹³⁵

In both cases, the Court in conference voted 5-4 against the NAACP’s claim that its members’ First Amendment rights were impermissibly infringed.¹³⁶ Justice Frankfurter’s rationale for no longer treating NAACP cases as exceptions to his generally deferential stance was straightforward. In his view, the statute in Button was not “aimed at the Negroes as such” and he could not “imagine a worse disservice than to continue being the guardians of the Negroes.”¹³⁷ “Colored people are now people of

¹³¹ L. Powe, *supra* note 49, at 170; The Supreme Court, 1962 Term - Leading Cases, 77 Harv. L. Rev. 81, 122 (1963).

¹³² L. Powe, *supra* note 49, at 171.

¹³³ 372 U.S. 539 (1963). See *infra* text accompanying note 146 (explaining why the case’s decision date is 1963, rather than 1961, and why the NAACP won rather than lost). Gibson is tellingly discussed in M. Klarman, *supra* note 98, at 339; L. Powe, *supra* note 49, at 169-71.

¹³⁴ Gibson, 372 U.S. at 541 (internal quotation marks omitted). See also *id.* at 543 (refusal to identify 14 persons “previously identified as communists or members of communist front or affiliated organizations” as NAACP members).

¹³⁵ Gibson, 372 U.S. at 547-549, 555-57; L. Powe, *supra* note 49, at 155-56 (describing the case’s potential result as “every segregationist’s dream”); The Supreme Court, 1962 Term - Leading Cases, 77 Harv. L. Rev. 81, 120 (1963);

¹³⁶ D. Dickson, *supra* note 127, at 317-18 (giving the date of the conference as Nov. 10, 1961).

¹³⁷ D. Dickson, *supra* note 127, at 317 (conference notes).

substance. Colored people now have responsible positions," he said.¹³⁸

Justice Harlan, in turn, cast his vote to uphold the statutes because he believed both states had shown all the Constitution required: that the challenged "regulation has a reasonable relationship to a proper governmental objective and does not unduly interfere with ... individual rights."¹³⁹ Harlan's view "came straight from his normal First Amendment stance: Interests must be balanced with a heavy hand placed on the state's side."¹⁴⁰

Harlan's vote in the Virginia case is particularly telling that the deferential minority's putative exception for NAACP cases was over. Harlan, unlike Frankfurter, acknowledged that Virginia's "law was aimed at the NAACP" because of "the school problem."¹⁴¹ Still, he concluded the "state has that right" because it "applies in its statute the proper standards for law practice."¹⁴² Clearly, Harlan, who as much as any Justice at that time should be identified with opinions employing the compelling state interest standard,¹⁴³ found that the balance of

¹³⁸ D. Dickson, *supra* note 127, at 317-18. Other members of the Court had similar qualms, M. Klarman, *supra* note 98, at 337, reflecting a concern that, as "an Arkansas jurist" said, the Court had become "the guardian for the NAACP." *Id.* at 335.

¹³⁹ NAACP, 372 U.S. at 454 (Harlan, J., dissenting). See also *id.* at 453 ("general regulatory statutes" may burden First Amendment rights "when they have been found justified by subordinating valid governmental interests"); Gibson, 372 U.S. at 578-80 (Harlan, J., dissenting). I am using the dissent Justice Harlan eventually wrote to indicate his rationale when he voted in conference with what was then the deferential majority. See *infra* text accompanying note 146 (discussing the shift in majority and minority personnel).

¹⁴⁰ L. Powe, *supra* note 49, at 219.

¹⁴¹ D. Dickson, *supra* note 127, at 318

¹⁴² D. Dickson, *supra* note 127, at 318

¹⁴³ Harlan joined Frankfurter's Sweezy concurrence, *supra* text accompanying note 76, wrote Patterson, *supra* note accompanying note 120, and joined Stewart's opinion for the Court in Bates, *supra* note accompanying note 122. See also

interests favored the government whenever its "regulation[s] ha[ve] a reasonable relationship to a proper governmental objective and does not unduly interfere with individual rights."¹⁴⁴ That was his test, and perhaps it was all he ever meant by saying the government needed a "subordinating interest" that was "compelling."¹⁴⁵

C. Third Time's a Charm

Only a number of fortuities saved the NAACP and breathed life into Sweezy's compelling state interest standard.¹⁴⁶ Before either decision was final, Justice Whittaker resigned for health reasons. Whittaker's resignation changed the vote to a 4-4 tie, and both cases were returned to the Court's calendar for reargument in the 1962 Term. Then in the summer of 1962, Justice Frankfurter suffered a stroke and retired. President Kennedy selected Byron White to fill Whittaker's seat and appointed Arthur Goldberg to the second vacancy. Goldberg proved to be a reliable vote in favor of First Amendment values. High-protectionists now dominated the Court.

The last fortuity was how the new majority developed the law to implement its high-protectionist vision of the First Amendment. Justices Black and Douglas were First Amendment absolutists who spurned any balancing approach to the Bill of Rights.¹⁴⁷ Their approach, however, had little appeal in the

Talley v. California, 362 U.S. 60, 66 (1960) (Harlan, J., concurring) (stating the compelling interest standard). He also joined Brennan's opinion in Speiser v. Randall, 357 U.S. 513 (1958), which is discussed *infra* text accompanying notes 151-52.

¹⁴⁴ NAACP v. Button, 371 U.S. 415, 454 (1963) (Harlan, J., dissenting) (speaking of cases that did not involve "speech alone").

¹⁴⁵ NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463 (1958) (quoting Sweezy v. New Hampshire, 354 U.S. 234 (1957)).

¹⁴⁶ For the remarks in this paragraph, see M. Horwitz, Warren, *supra* note 31, at 65-66; L. Powe, *supra* note 49, at 205, 209-10.

¹⁴⁷ See *supra* text accompanying notes 117-18.

wider legal culture.¹⁴⁸ Chief Justice Warren typically was not too concerned with the jurisprudence he used to reach the constitutionally correct decision, by which he meant the "fair" result.¹⁴⁹ By default, as well as by temperament, it fell to Justice Brennan to develop the doctrinal structure that would reach First Amendment friendly results through a generally acceptable jurisprudence.

The "compelling state interest" doctrine, it turns out, was congenial to Justice Brennan. Part of its appeal was that, as a balancing test, it mediated the "deadlock" between the Court's deferential-balancing and absolutist camps.¹⁵⁰ On the one hand, as a form of balancing, the compelling interest standard recognized that constitutional rights could be subordinated to governmental needs in a particular case. On the other hand, Justice Brennan recognized that if the compelling standard could be such a rigorous criterion that its application in almost all cases upheld First Amendment claims without the need for additional weighing of interests in the particular case. If applied by high-protectionists, the gap between the government's asserted interest and a stringent "compelling interest" requirement was so vast as to enable a ruling favorable to First Amendment values through a seemingly nondiscretionary application of a pre-existing rule to the facts at bar.

Brennan had been using the compelling interest standard since shortly after the Sweezy decision. In 1958, in writing for the Court in Speiser v. Randall,¹⁵¹ Brennan mentioned the "compelling" standard in passing in ruling that California had adopted a procedurally defective means to limit its veterans'

¹⁴⁸ See, e.g., M. Shapiro, *supra* note 49, at 87; Frantz, *supra* note 111, at 1435-38; Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Cal. L. Rev. 821, 825 (1962); Strong, *supra* note 111, at 59 (commenting that critics of balancing also rejected "Black's absolutist approach"). But see for its support.

¹⁴⁹ See, e.g., Ed Cray, *Chief Justice 11* (1997); G. Edward White, *Earl Warren: A Public Life* 228 (1982); Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. Rev. 748, 767 (1995).

¹⁵⁰ M. Horwitz, *Warren*, *supra* note 31, at 68.

¹⁵¹ 357 U.S. 513 (1958).

property tax exemption to "loyal" veterans.¹⁵² In 1961, arguing in dissent in Braunfeld v. Brown¹⁵³ that Sunday closing laws violated the free exercise rights of Orthodox Jews, Brennan used the compelling interest standard in a way that anticipated its future stringency.¹⁵⁴ First he quoted Justice Jackson's classic statement in West Virginia State Board of Education v. Barnette¹⁵⁵ that

The right of the state to regulate, for example, a public utility may well include ... power to impose all the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restrictions only to prevent grave and immediate danger to interests which the state may lawfully protect.¹⁵⁶

¹⁵² Speiser, 357 U.S. at 529. Today Speiser is regarded as the origin of the modern "unconstitutional conditions" doctrine, see E. Chemerinsky, *supra* note 2, at 535, 946 (classic decision); Charles Bogle, "Unconscionable" Conditions, 94 Colum. L. Rev. 193, 200 n. 27 (1994) (origin); Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1433 (1989) (seminal decision). It is also regarded as the case to which the First Amendment "chilling effect" doctrine and burden shifting in strict scrutiny traces. See L. Powe, *supra* note 49, at 136 (discussing "chilling effect" and burden shifting). The future significance of the case was not immediately apparent. See, e.g., *The Supreme Court, 1957 Term - Leading Cases*, 72 Harv. L. Rev. 98, 188 (1958) (commenting that the opinion left open the substantive question of whether the loyalty oath was permissible if the procedures were corrected); L. Powe, *supra* note 49, at 135 (describing Speiser as a "case[] of no immediate significance").

¹⁵³ 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting).

¹⁵⁴ Professor Powe describes Braunfeld as reflecting Brennan's "emerging" jurisprudence. L. Powe, *supra* note 49, at 185.

¹⁵⁵ 319 U.S. 624 (1943).

¹⁵⁶ Braunfeld v. Brown, 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)). Erasing a dozen

Then he asked:

What, then, is the compelling state interest which impels the [state] to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justified this substantial, though indirect, limitation on appellant's freedom?¹⁵⁷

Brennan's answer was that there was none. In thrashing out that answer, Brennan noted that Sunday closing laws did promote valid state interests. It was "convenient," he admitted, for "everyone to rest on the same day."¹⁵⁸ He allowed, also, that "granting ... an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult."¹⁵⁹ Still, in Brennan's view, these interests were not "high enough to justify"¹⁶⁰ the "substantial"¹⁶¹ burden on "non-Sunday observers."¹⁶²

In 1963, in writing for the Court's new majority in NAACP v. Button,¹⁶³ the first of the two re-argued cases to be decided, Brennan reiterated the approach of his Braunfeld dissent.¹⁶⁴ In

years of Supreme Court precedent, Brennan claimed that "[t]his exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First amendment." *Id.*

¹⁵⁷ Braunfeld, 366 U.S. at 613-14 (Brennan, J., concurring and dissenting).

¹⁵⁸ Braunfeld, 366 U.S. at 614 (Brennan, J., concurring and dissenting).

¹⁵⁹ Braunfeld, 366 U.S. at 614 (Brennan, J., concurring and dissenting).

¹⁶⁰ Braunfeld, 366 U.S. at 615-16 (Brennan, J., concurring and dissenting).

¹⁶¹ Braunfeld, 366 U.S. at 616.

¹⁶² Braunfeld, 366 U.S. at 615.

¹⁶³ 371 U.S. 415 (1963).

¹⁶⁴ Professor Powe has also noted that the decision in the two re-argued cases involved a shift from deferential balancing

Button, Brennan conceded that Virginia had a "valid ... interest"¹⁶⁵ in regulating the legal profession, but he insisted that

The decisions of this Court, have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.¹⁶⁶

Thus Virginia's interest in regulating the legal profession, particularly the "traditionally illegal practices of barratry, maintenance and champerty,"¹⁶⁷ was unavailing because Virginia had not demonstrated "a serious danger ... of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent."¹⁶⁸

Sensing that the Court was headed in a new direction in Button, Harlan entered a long, impassioned dissent for himself and Justices Clark and Stewart, the remaining members of the former majority.¹⁶⁹ The gist of Harlan's dissent was that "a

to a stringent compelling state interest test. L. Powe, *supra* note 49, at 221. The Harvard Law Review immediately noticed a heightening of judicial review. See *The Supreme Court, 1962 Term - Leading Cases*, 77 Harv. L. Rev. 81, 122 (1963) (suggesting that "associational interests will be weighted more heavily in the future and that legislative motives may be subject to close judicial scrutiny").

¹⁶⁵ Button, 371 U.S. at 439.

¹⁶⁶ Button, 371 U.S. at 438. See also *id.* at 439 (quoting *Bates v. Arkansas*, 361 U.S. 516, 524 (1960) that "[w]here there is significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling"). See *supra* text accompanying notes 122-26 (discussing Bates).

¹⁶⁷ Button, 371 U.S. at 439.

¹⁶⁸ Button, 371 U.S. at 443.

¹⁶⁹ Button, 371 U.S. at 448-71 (Harlan, J., dissenting). Justice White concurred and dissented, finding much in common with Justice Harlan. *Id.* at 447-48 (White, J., concurring and dissenting).

sufficiently compelling subordinating state interest has been shown to justify Virginia's ... regulation"¹⁷⁰ because all the Constitution required was that "the particular regulation ... ha[ve] a reasonable relation to the furtherance of a proper state interest, and [that] ... that interest outweighs any foreseeable harm to the furtherance of protected freedoms."¹⁷¹ Harlan was voicing the now supplanted deferential balancing approach to First Amendment problems.

The new majority's decision in the second of the two re-argued cases, Gibson v. Florida Legislative Investigative Committee,¹⁷² was cut from the same cloth as Button. The opinion was written by Justice Goldberg, the Court's most junior member. At the outset of his analysis, Goldberg laid out the Constitution's requirements as he understood them:

[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutional protected rights of speech, press, association, and petition that the State convincingly show a substantial relation between the information being sought and a subject of overriding and compelling state interest.¹⁷³

He then "assum[ed]" that the prior legislative investigation cases, which included Upaus v. Wyman¹⁷⁴ and Barenblatt v. United States,¹⁷⁵ were correctly decided, but distinguished them on the

¹⁷⁰ Button, 371 U.S. at 452 (Harlan, J., dissenting) (reviewing the majority's conclusion).

¹⁷¹ Button, 371 U.S. at 455 (Harlan, J., dissenting). See also *id.* at 454 (saying indirect regulation of First Amendment freedoms "will be sustained if the regulation has a reasonable relationship to a proper governmental objective and does not unduly interfere with such individual rights").

¹⁷² 372 U.S. 539 (1963). Gibson was handed down two months after Button.

¹⁷³ Gibson, 372 U.S. 546.

¹⁷⁴ 360 U.S. 72 (1959). See *supra* text accompanying notes 101-05 (discussing Upaus).

¹⁷⁵ 360 U.S. 109 (1959). See *supra* text accompanying notes 106-12 (discussing Barenblatt).

unconvincing ground that they involved uncovering whether an individual was a member of the Communist Party, not whether individual communists were members of an otherwise legitimate organization.¹⁷⁶ He then held that the

record in this case is insufficient to show a substantial connection between the ... NAACP and Communist activities ... which is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry into the membership lists of the association.¹⁷⁷

And he concluded:

The ... Committee has failed to demonstrate the compelling and subordinating government interest essential to support direct inquiry into the membership records of the NAACP.¹⁷⁸

Once again, Justice Harlan issued a rejoinder for himself and the remaining deferential Justices.¹⁷⁹ Harlan thought that cases like Uphaus and Barenblatt should govern because he saw no difference between investigations involving "Communist infiltration of organizations and Communist activity by organizations."¹⁸⁰ He concluded, a bit wearily, with the deferential jurists' mantra that:

There can be no doubt that the judging of challenges respecting legislative or executive investigations in this

¹⁷⁶ Gibson, 372 U.S. 547-48. See also L. Powe, *supra* note 49, at 221 (saying Harlan was "correct" in stating that "the Court's reasoning is difficult to grasp"); The Supreme Court Term, 1962 Term - Leading Cases, 77 Harv. L. Rev. 81, 120-21 (1963) (critiquing Justice Goldberg's decision).

¹⁷⁷ Gibson, 372 U.S. at 551.

¹⁷⁸ Gibson, 372 U.S. at 557. Justices Douglas and Black concurred on absolutist grounds. Gibson, 360 U.S. at 558 (Black, J., concurring); *id.* at 559 (Douglas, J., concurring).

¹⁷⁹ Gibson, 372 U.S. at 576 (Harlan, J., dissenting). Justice White joined Harlan's opinion but also dissented separately. *Id.* at 583 (White, J., dissenting).

¹⁸⁰ Gibson, 372 U.S. at 579 (Harlan, J., dissenting).

sensitive area demands the utmost circumspection on the part of courts But this surely carries with it the reciprocal responsibility of respecting legitimate state and local authority in this field. With all respect, I think that in deciding this case as it has the Court has failed to keep in mind that responsibility.¹⁸¹

Two months after Gibson, whatever doubt might exist that the Court had entered a new era and that the "compelling state interest" requirement was being taken up by the new majority in earnest was erased by Justice Brennan's opinion for the Court in Sherbert v. Verner.¹⁸² Sherbert voided, on free exercise grounds, South Carolina's denial of unemployment compensation to a Seventh-day Adventist who refused to work on Saturday, which was her Sabbath. Although Justice Brennan distinguished Braunfeld v. Brown,¹⁸³ his analysis was a stunning departure from the approach that had governed that case. Sherbert made Brennan's Braunfeld dissent the law of the land.

Just like Braunfeld, Sherbert involved a general law that promoted secular objectives but whose application in the particular case incidentally burdened religious practice. In Braunfeld, six Justices held that indirect burdens on religion required only reasonable basis review.¹⁸⁴ In Sherbert, Brennan, joined by five other Justices, employed the compelling state interest test to void the law.¹⁸⁵ In his opinion, after

¹⁸¹ Gibson, 372 U.S. at 582-83 (Harlan, J., dissenting).

¹⁸² 374 U.S. 398 (1963).

¹⁸³ Sherbert, 374 U.S. at 408. The concurring and dissenting Justices mentioned Braunfeld. The dissenting Justices found Brennan's distinction insupportable, *id.* at 421 (Harlan, J., dissenting). So did Justice Stewart, who concurred only in the result and urged that Braunfeld be overruled, *id.* at 417 (Stewart, J., concurring). See also L. Powe, *supra* note 49, at 370-71 (discussing the relation of the two cases).

¹⁸⁴ Braunfeld, 366 U.S. 599, 600 (1961) (opinion by Warren joined by Black, Clark, and Whittaker); McGowan v. Maryland, 466 U.S. 420, 459 (1961) (concurrence by Frankfurter, joined by Harlan, applies to Braunfeld was well).

¹⁸⁵ Sherbert, 372 U.S. at 403, 406. Justices Douglas and Stewart concurred without indicating their agreement with Brennan's standard. *Id.* at 410 (Douglas, J., concurring); *id.*

determining that Sherbert's free exercise rights were significantly burdened,¹⁸⁶ Justice Brennan asserted:

We must next consider whether some compelling state interest ... justified the substantial infringement of appellant's First Amendment right. It is basic that no showing of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation."¹⁸⁷

In applying this stringent standard, Brennan not only found that "[n]o such abuse or danger has been advanced in the present case," but he also declared that even if there were "it would plainly be incumbent upon the [State] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."¹⁸⁸ Sherbert was the first clear, succinct, and complete statement of what constitutional lawyers have come to mean by the phrase "strict scrutiny."¹⁸⁹

at 413 (Stewart, J., concurring in result). Why Justice Black, who preferred an absolutist approach, and Justice Clark, who tended to be a low-protectionist, joined Brennan's majority opinion is not clear.

¹⁸⁶ Sherbert, 374 U.S. at 403-06.

¹⁸⁷ Sherbert, 372 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

¹⁸⁸ Sherbert, 372 U.S. at 407.

¹⁸⁹ Although strict scrutiny became a majority-backed doctrine of First Amendment law in 1963, it was just one of the many techniques by which the Warren Court's new majority's substantially heightened protections for First Amendment liberties. Between 1964 and 1969, only a handful of First Amendment cases relied on the compelling state interest test to void governmental regulations. William v. Rhodes, 393 U.S. 23, 31 (1968) (political association); DeGregory v. Attorney General, 383 U.S. 825, 829 (1966) (legislative investigation); Lamont v. Postmaster General, 381 U.S. 301, 308-09 (1965) (Brennan, J., concurring) (right of addressees to receive communist propaganda). See also NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (Douglas, J., joined by Warren, C.J., Brennan, J., and Fortas, J., dissenting from cert. denial); U.S. v.

III. The Spread of the Compelling State Interest Test and Strict Scrutiny

With Sherbert's stunning departure from Braunfeld, the compelling state interest test's and strict scrutiny's long birthing process came to an end. After Sherbert, the compelling state interest standard and strict scrutiny began to spread beyond the First Amendment, the situs of their gestation and birth, into equal protection analysis. Their spread, however, was surprisingly slow, given the conventional understanding that traces strict scrutiny back to Skinner v. Oklahoma¹⁹⁰ and Korematsu v. United States¹⁹¹ and sees that doctrine as underlying the Court's landmark voting rights and racial discrimination precedents, Reynolds v. Sims¹⁹² and McLaughlin v. Florida,¹⁹³ in 1964.¹⁹⁴

O'Brien, 391 U.S. 367, 376 (1968) (discussing but rejecting using the compelling standard to decide symbolic speech cases)

In other words, beginning in 1963, strict scrutiny was a part of the Court's First Amendment toolkit, but rarely was the tool of choice. The prominent place of strict scrutiny in First Amendment law is a consequence of its having become prominent elsewhere, and then, like the prodigal son, returning to the land of its birth. The prominent use of strict scrutiny in First Amendment analysis dates from the mid-1970s. See First Nat. Bk. of Boston v. Bellotti, 435 U.S. 765, 786, 795 (1978); Buckley v. Veleo, 424 U.S. 1, 66, 74-75 (1976). Consider that the centrally important "content-based / content-neutral" distinction, with the compelling state interest standard applied to the former but not the latter, is commonly traced back to Police Department v. Mosley, 408 U.S. 92 (1972). But Mosely employs strict scrutiny as part of an equal protection, not First Amendment, analysis.

¹⁹⁰ 316 U.S. 535, 541 (1942).

¹⁹¹ 323 U.S. 214, 216 (1944).

¹⁹² 377 U.S. 533 (1964) (voting rights), discussed *infra* text accompanying note 231.

¹⁹³ 379 U.S. 184 (1964) (racial classification), discussed *infra* text accompanying notes 236, 241-46 and n. 231 .

¹⁹⁴ See, e.g., See, e.g., Adarand v. Peña, 515 U.S. 200, 223 (1995) (associating McLaughlin v. Florida, 379 U.S. 184

In fact, after strict scrutiny's appearance in the First Amendment in 1963, its various branches migrated piecemeal into the Equal Protection Clause. The compelling state interest test, which was the last branch of strict scrutiny to make the move, was not employed in equal protection analysis until 1969.¹⁹⁵ When the compelling interest standard appeared in the Equal Protection Clause, it was in fundamental rights cases. It was not used in racial discrimination cases for another decade.

A. Strict Scrutiny in Name Only

Strict scrutiny traces back to Skinner v. Oklahoma¹⁹⁶ in name only. Although Skinner used the term "strict scrutiny," it employed an analysis that we would call "minimal scrutiny with bite."¹⁹⁷ In Skinner, Justice Douglas straightforwardly determined that the classification at bar, which had the effect of sterilizing recidivist chicken thieves but not recidivist embezzlers, did not have a rational basis.¹⁹⁸ His strict scrutiny analysis made no mention of any requirement of burden shifting, narrow tailoring, or a compelling state interest.

Korematsu's relation to the development of strict scrutiny is more complex. In Korematsu, Justice Black famously said not only that racial classifications "are immediately suspect" and "subject to the most rigid scrutiny," but allowed that "[p]ressing public necessity may sometimes justify" them.¹⁹⁹ This intimates that, like in modern strict scrutiny, an exceedingly important state interest may outweigh the Fourteenth

(1964) with strict scrutiny); E Exxon v. Eagerton, 462 U.S. 176, 195 (1983) (same); Goosby v. Osser, 409 U.S. 512, 519 (1973) (tracing the compelling state interest standard back to Reynold v. Sims, 377 U.S. 533 (1964) for voting rights, and to McLaughlin v. Florida, 379 U.S. 184 (1964) for racial classifications).

¹⁹⁵ See infra text accompanying notes 265-77.

¹⁹⁶ 316 U.S. 353, 541 (1942).

¹⁹⁷ See supra text accompanying note 26 (describing minimal scrutiny with bite).

¹⁹⁸ Skinner, 316 U.S. at 538-39.

¹⁹⁹ Korematsu, 323 U.S. at 216.

Amendment's ban on racial discrimination. Black never defined the notion of "[p]ressing public necessity" with greater precision. Most likely, if Black had elaborated on its meaning he would have pointed to the clear and present danger test. That is the test Justice Murphy, in dissent, expressly imposed on the government and said it had failed to meet.²⁰⁰

Perhaps Black's intimation in Korematsu that the state had a higher burden of justification was of no moment. The analysis he employed in the case was a form of rational basis review that was exceedingly deferential to the military's claims.²⁰¹ In large measure, Korematsu was predicated on Hirabayashi v. United States²⁰² which was decided on rational basis grounds.²⁰³ In Korematsu, Black neither placed the burden of proof on the government nor required that its internment order be narrowly tailored. Although he intimated a heightened state interest requirement for racial classifications, he entirely deferred to the government's assertion that it was met.²⁰⁴

²⁰⁰ Korematsu, 323 U.S. at 234 (Murphy, J., dissenting) ("The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger"). On the prominence of the "clear and present danger" test as the 1940s paradigmatic stringent standard, see Mendelson, *Clear*, supra note 52, at 320-28, 332; Siegel, *Death*, supra note 17, at *.

²⁰¹ See David Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986*, at 292 & 292 n. 98 (1990) (saying Black's scrutiny in Korematsu was quite deferential to the military).

²⁰² 320 U.S. 81 (1943).

²⁰³ *Id.* at 101. See Korematsu, 323 U.S. at 218-19; *id.* at 224 (Frankfurter, J., concurring) ("I am unable to see how the legal considerations that led to the decision in ... Hirabayashi ... fail to sustain the military order which made the conduct now in controversy a crime").

²⁰⁴ Klarman, *Interpretive*, supra note 10, at 232.

Then again, perhaps Black's intimation had greater significance. Black's Korematsu intimation had an echo, four years later, in Oyama v. California.²⁰⁵ Oyama involved a California statutory presumption that discriminated against Japanese-Americans. The presumption was a prophylactic rule that helped enforce the state's ban on alien land ownership.²⁰⁶ In Oyama, the Court assumed that the anti-alien land ownership law was legitimate, and seemed to accept that the prophylactic rule was a rational means to enforce it.²⁰⁷ Nevertheless, the Court voided the rule. In writing for the Court, Chief Justice Vinson alluded, without citation, to Black's Korematsu intimation, saying "we start with the proposition that only the most exceptional circumstances can excuse discrimination" on "the basis of ... racial descent."²⁰⁸ Then he explain the prophylactic rule's invalidity on the grounds that:

In the light most favorable to the State, this case presents a conflict between the State's right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin.²⁰⁹

²⁰⁵ 332 U.S. 633 (1948).

²⁰⁶ California law prohibited aliens who were ineligible for citizenship from owning land. At the time of the case, Japanese were the most prominent of a small group of aliens who were ineligible for American citizenship. The prophylactic presumption was that a transaction was made to evade the ban on alien land ownership if it resulted (1) in a citizen who was a child (2) receiving land paid for by his or her parents (3) when his or her parents were aliens ineligible to own land themselves. *Id.* at 635-44.

²⁰⁷ *Id.* at 646. See also *id.* at 684-86 (Jackson, J., dissenting). But see *id.* at 663 (Murphy, J., concurring) (attacking the prophylactic rule's rationality because "it stems directly from racial hatred and intolerance").

²⁰⁸ *Id.* at 646.

²⁰⁹ *Id.* at 647.

Oyama was a balancing-of-interests decision that voided a racial classification, not because its basis was irrational, but because it was of insufficient weight to "subordinate" the "right of American citizens to own land anywhere in the United States."²¹⁰ Oyama required the state to have more than a rational basis for discriminating among its citizens on the basis of race.²¹¹

In light of Oyama, perhaps Black's Korematsu intimation may be explained by acknowledging that during the time that the civil libertarian quartet of Black, Douglas, Murphy, and Rutledge sat on the bench, there was some drift toward heightening the state's burden of justification in racial classification cases.²¹² If so, that development would parallel and reflect (though very slightly) the civil libertarians influence on First Amendment jurisprudence.²¹³ It may be that during the 1940s, there was some movement toward according the Fourteenth Amendment's guarantee of freedom from invidious racial discrimination sufficient weight to prevent it from being

²¹⁰ Id.

²¹¹ But see Klarman, *Interpretive*, supra note 10, at 235-36 (explaining Oyama on the ground that it involved the right to own property, which was a fundamental right, and although the pre-Brown Court did not ban racial classifications generally, it did ban them in the limited area of fundamental rights). Professor Klarman reads Oyama as not applicable to racial classifications generally. While significant, Klarman's limitation does not fully account for Black's "pressing necessities" comment in Korematsu which Chief Justice Vinson alludes to as the basis for the ruling in Oyama. Korematsu did not involve a fundamental right.

²¹² See M. Urofsky, supra note 4, at 16-18, 21-26, 28-29 (discussing the liberalism of these Justices); Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 Wash. U. L. Rev. ____ (2006, forthcoming) (available at SSRN_ID905587_code497260.pdf.) (discussing Rutledge's civil libertarianism).

²¹³ M. Horwitz, *Warren*, supra note 31, at 56 (discussing the influence of these Justices on the First Amendment in the 1940s) Mendelson, *Clear*, supra note 52, at 320-28 (same); Siegel, *Death*, supra note 17, at *.

"subordinated merely because" the state was pursuing a legitimate goal.²¹⁴

Nevertheless, any intimation that the government faced a heightened burden of justification in racial classification cases disappeared in 1949 when Murphy and Rutledge died and power on the Court passed to more deferential Justices.²¹⁵ After their death, although the Court did not forget that racial classifications were "constitutionally suspect,"²¹⁶ it ceased demanding more than that a state, in enacting a racial classification, pursue a legitimate end through reasonable means.²¹⁷

The NAACP understood the deferential stance of the Court's dominant Justices in the 1950s. Its argument in Brown v. Board of Education presumed that segregation was justified if it was a reasonable means to promote a permissible state end.²¹⁸ In 1954, the Court momentarily ruled that "[s]egregation in public education is not reasonably related to any proper governmental objective."²¹⁹ Over the next decade, in a series of Per Curiam

²¹⁴ Oyama v. California, 332 U.S. 633, 646 (1948).

²¹⁵ M. Horwitz, *supra* note 31, at 56 (discussing the new Justices Clark and Minton); Mendelson, *Clear*, *supra* note 52, at 328 (same).

²¹⁶ Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

²¹⁷ See, e.g., Bolling, 347 U.S. at 499-500 (quoted *infra* text accompanying note 219); Klarman, *Interpretive*, *supra* note 10, at 227, 229-30, 232-40 (saying that in the 1940s, the general thinking of the Court, even in racial classification cases, was the Equal Protection Clause required that government action be a reasonable means to promote a legitimate state end except where a limited group of fundamental rights were concerned). Note also that between 1948 and 1964, the Court never mentioned that it reviewed racial classifications using "rigid" scrutiny. "Strict scrutiny" was mentioned only once, in Justice Harlan's dissent to *Poe v. Ullman*, 363 U.S. 497, 548 (1961), which was a substantive due process case.

²¹⁸ Klarman, *Interpretive*, *supra* note 10, at 233 n. 86 (citing Richard Kluger, *Simple Justice* 671-72, 674 (1976)).

²¹⁹ Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

opinions, the Court extended that judgment to a wide variety of governmental activities, actions and regulations.²²⁰

Thus, until 1964, the Court's remarkable achievement in overturning the system of Jim Crow legislation followed from a shift in the universe of legitimate state goals and permissible means recognized by the Court. Although at the time the Court was coy about it,²²¹ with hindsight it is fair to say that before 1954 racial segregation was a reasonable means to pursue legitimate state ends; after 1954 it was not. With that shift in the universe of licit ends and means, the court was able to strike down racial segregation without changing burden of proof requirements, insisting on narrow tailoring, or demanding a compelling state interest. It could void race-based segregation based on the simple truth that those laws were not "reasonably related to any proper governmental objective."²²² All those cases were rational basis, not strict scrutiny, overrulings.²²³

²²⁰ *Tancil v. Woolls*, 379 U.S. 19 (1964) (public records); *Johnson v. Virginia*, 373 U.S. 61 (1963) (court room seating); *New Orleans Parks Ass'n v. Detiege*, 358 U.S. 54 (1958) (public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (city buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses).

²²¹ See Siegel, *Equality*, supra note 23, at 1481-84 (discussing the post-Brown rulings).

²²² *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). See also *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam reversal of contempt of court conviction for refusing to comply with segregated seating arrangement of a court room, saying simply "a State may not constitutionally require segregation of public facilities").

²²³ See, e.g., *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam reversal of contempt of court conviction where on ground that "it is no longer open to question that a State may not constitutionally require segregation of public facilities"); Klarman, *Interpretive*, supra note 10, at 226-27, 238-43 (discussing absence of rule that racial classifications were "presumptively unconstitutional" before 1964).

B. Heightened But Not Strict Scrutiny

The Court did not attempt more until 1964, the year after strict scrutiny was established in its First Amendment cases. And even when, in 1964, the Court began to import strict scrutiny analysis into equal protection, its progress was slow and piecemeal. Strict scrutiny's slow spread into equal protection is readily apparent if we recall that strict scrutiny is but one of a number of distinct forms of intensified review,²²⁴ and that strict scrutiny contains three branches: burden shifting, compelling state interest, and narrow tailoring requirements.²²⁵

Thus, when the new Warren Court majority emerged in 1963, it had in its jurisprudential toolkit a number of analytic approaches and doctrines with which to increase the Court's protection of constitutional norms in equal protection cases. It could, for example, create stringent rules, consider whether government action rationally advanced legitimate state ends, and demand that government action be narrowly tailored to achieve a permissible purpose.²²⁶ It could also simply employ a general balancing approach to adjudicating the clashing interests involved in Equal Protection litigation.²²⁷ All this was in addition to the possibility of requiring, as it had just done in the First Amendment cases of Button, Gibson, and Sherbert, that the government's action promote a compelling state interest.²²⁸

²²⁴ See supra text accompanying note 24-34 (discussing the forms of heightened scrutiny).

²²⁵ See supra text accompanying note 35-48 (discussing strict scrutiny).

²²⁶ There are, of course, many other techniques for enhancing constitutional protections, including interpreting statutes to avoid burdening favored rights. See, e.g., *Ex Parte Endo*, 323 U.S. 283, 299-301 (1944); *Mendelson, Clear*, supra note 52, at 321 (discussing the First Amendment).

²²⁷ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943 (1987) (discussing balancing in constitutional law); *Developments*, supra note 41, at 1103-04, 1122-23 (discussing Equal Protection cases).

²²⁸ See supra text accompanying notes 163-89 (discussing Button, Gibson, and Sherbert).

Between 1964 and 1968, the new majority drew on many of these approaches and doctrines in ramping up the Equal Protection Clause to give ever increasing protection to constitutional values.²²⁹ In Reynolds v. Sims,²³⁰ for example, the Court created a new stringent rule, the requirement of "one person, one vote" to adjudicate the constitutionality of population disparities among legislative districts.²³¹ In Harper v. Virginia State Board of Elections,²³² the Court struck down the century old institution of conditioning the right to vote on the payment of poll taxes, arguing that since "[w]ealth ... is not germane to one's ability to participate intelligently in the electoral process,"²³³ taxing the right to vote had "no relation" to any legitimate public purpose.²³⁴ And in McLaughlin v.

²²⁹ The Court had been redeveloping the Equal Protection clause from even before Earl Warren's tenure. The point is that after 1962, that development increases exponentially. See L. Powe, *supra* note 49, at 202, 248, 262, 266, 288, 384, 449, 451 (recounting Warren Court's equal protection rulings after 1963); Klarman, *Interpretive*, *supra* note 10, at 250-82 (same).

²³⁰ 373 U.S. 533 (1964).

²³¹ For another example of the Court voiding state action under the Equal Protection Clause using a stringent rule see Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam reversal of contempt of court conviction where on ground that "it is no longer open to question that a State may not constitutionally require segregation of public facilities"). See also Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming Hamm v. Va. St. Bd. of Elections, 230 F. Supp 156 (D.C.E.D. Va. 1964) which voided racially separate voting and property assessment rolls on grounds that "decisional law has made it axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color"); Klarman, *Interpretive*, *supra* note 10, at 254-57 (saying it was in McLaughlin v. Florida, 379 U.S. 184 (1964) that the Court finally adopted a rule that racial classifications were presumptively invalid).

²³² 383 U.S. 663 (1966).

²³³ Harper, 383 U.S. at 668.

²³⁴ Harper, 383 U.S. at 666. See also *id.* at 670 ("wealth or fee paying has, in our view, no relation to voting

Florida,²³⁵ the Court ended the equally well-established institution of punishing interracial fornication more heavily than same-race fornication, reasoning that such laws were not narrowly tailored. Even though the Court was willing to indulge the assumption that differential punishment of interracial and same-race fornication was "enacted pursuant to a valid state interest," it voided the law because it was not "necessary" to the accomplishment of that permissible purpose.²³⁶

In no case, however, did the Court rely on the compelling state interest standard. It would be inaccurate to say that, in these years, the compelling state interest standard was entirely absent from Equal Protection litigation. Only two months after using the compelling state interest standard to decide the First Amendment case, Gibson v. Florida Legislative Investigation Committee,²³⁷ Justice Goldberg mentioned the compelling interest standard when he wrote for the Court in Watson v. City of Memphis.²³⁸ In Watson, Memphis argued that it could delay desegregating its municipal recreation facilities because of "good faith" fears of "interracial disturbances, violence, riots, and community confusion and turmoil."²³⁹ In beginning his

qualifications"). For another example of the Court voiding state action under the Equal Protection Clause for the absence of any rational relation to a legitimate state interest, see Glonn v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Gunther, supra note 26, at 30-33 (discussing Glonn).

²³⁵ 379 U.S. 184 (1964).

²³⁶ McLaughlin, 379 U.S. at 196. For other examples of the Court voiding legislation under the Equal Protection Clause because the law did not precisely target the evil it was directed against, see Carrington v. Rash, 380 U.S. 89, 94-97 (1965) (absolute prohibition of voting by military personnel who live on bases in the state ruled invalid; state could have adopted administrative procedures to determine which servicemen and women were not bona fide residents).

²³⁷ 372 U.S. 539 (1963). See supra text accompanying notes 172-81 (discussing Gibson).

²³⁸ 373 U.S. 526 (1963).

²³⁹ Watson, 373 U.S. at 535. Memphis relied on Brown v. Bd. of Education, 347 U.S. 483 (1954), for its argument that a slow pace was permissible. Id. at 530-33. The Court

opinion, Goldberg set the stage for a ruling against Memphis's plea by stating "The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."²⁴⁰

The following year, however, in McLaughlin v. Florida,²⁴¹ the more conservative Justice White enunciated a standard whose stringency was more ambiguous. At the outset of his opinion striking down the state's differential punishment of interracial and same-race fornication, he said:

Our inquiry ... is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise.²⁴²

Three years later, in voiding anti-miscegenation laws in Loving v. Virginia,²⁴³ Chief Justice Warren picked up Justice White's, not Justice Goldberg's, turn of phrase, saying: "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."²⁴⁴

These cases did not, however, establish the compelling interest standard as part of equal protection analysis. Goldberg's comment in Watson and White's and Warren's remarks in McLaughlin and Loving, were not the ratio decedendi of their respective cases. Justice Goldberg mentioned the compelling interest standard in his peroration in Watson, but he decided the case by applying to the maxim "that constitutional rights

distinguished schools because of their complexity and treated Brown as an "significant" departure from "the usual principle." Id at 532.

²⁴⁰ Watson, 373 U.S. at 533.

²⁴¹ 379 U.S. 184 (1964).

²⁴² McLuaghlin, 379 U.S. at 192.

²⁴³ 388 U.S. 1 (1967).

²⁴⁴ Loving, 388 U.S. at 11.

may not be denied simply because of hostility to their assertion."²⁴⁵ Similarly, whatever Justice White meant by his invocation of the ambiguous and inherently less stringent "overriding" purpose requirement in McLaughlin, he decided the case by holding:

There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.²⁴⁶

Loving is similar. Chief Justice Warren decided the case on the rule, paraphrased from McLaughlin, that if

racial classifications in criminal statutes ... are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.²⁴⁷

He mentioned the "overriding purpose" standard only in passing. It had no consequential role in disposing of the case.

Finally, it should be noted that Justice Harlan wrote a special concurrence in McLaughlin stating his agreement with the Court's decision to import the First Amendment's narrow tailoring principle into racial discrimination cases.²⁴⁸ "The necessity test," he said,

²⁴⁵ Watson, 373 U.S. 535.

²⁴⁶ McLaughlin, 379 U.S. at 196 (emphasis added).

²⁴⁷ Loving, 388 U.S. 11 (emphasis added). See also Note, Mental Illness: A Suspect Classification?, 83 Yale L.J. 1237, 1245-51 (1974) (saying Loving required only narrow tailoring and a permissible state objective, and finding this consonant with the Court's other suspect classification cases).

²⁴⁸ McLaughlin, 379 U.S. at 197 (emphasis supplied). McLaughlin was the first time this had occurred. Previously, whenever the Court had voided segregation statutes, it had done so by finding that the statute did not pursue a legitimate state

which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination - prohibition of which lies at the very heart of the Fourteenth Amendment.²⁴⁹

Yet, there is nothing in Harlan's thoughtful concurrence to indicate that he understood that White's opinion also imported any other aspect of First Amendment law.

What, then, is the meaning of the Court's occasional and ambiguous statements, made in Watson, McLaughlin, and Loving, that implied the state needed more than a merely legitimate purpose to enact racial classifications or burden fundamental interests? Perhaps it is best to rely on the conclusion reached by the editors of the Harvard Law Review in their classic note, "Developments in the Law - Equal Protection," published in March, 1969.²⁵⁰ Their encyclopedic and seminal project organized and crystallized much of the Warren Court's historic transformation of the Equal Protection Clause.²⁵¹ Their reading of the cases certainly reflects informed contemporary understanding. Moreover, their conclusion was reached without the distorting influence of hindsight.

Although the editors treated Watson as an important remedies case about the circumstances in which delaying desegregation orders were appropriate,²⁵² they never mentioned Goldberg's dicta regarding the compelling interest standard. In contrast, they took McLaughlin and Loving as significant statements of substantive law and treated them throughout their

interest. See, e.g, Johnson v. Virginia, 373 U.S. 61 (1963) (overturning contempt of court conviction for refusing to comply with courtroom segregation); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (municipal boundary drawing with no discernible purpose other than racial exclusion).

²⁴⁹ McLaughlin, 379 U.S. at 197.

²⁵⁰ Developments, supra note 41.

²⁵¹ It is one of the most cited student writings of all time.

²⁵² See Developments, supra note 41, at 1139-40 nn. 43, 48, 50.

"Standards of Review" section.²⁵³ Focusing on McLaughlin, most likely because it was the seminal precedent, the editors read that case as suggesting both a narrow tailoring principle,²⁵⁴ and a concern for whether

the public interest involved outweighs the detriments that will be incurred by the affected private parties. In calculating the magnitude of the public need for the measure, the courts must consider both the extent of the benefits accruing to society and the degree of risk which will be incurred if a measure of that nature is not permitted. Similarly, the actual cost of the measure must be determined by examining both the importance of the individual or group rights infringed and the extent to which the measure will have long-term adverse effects on those interests.²⁵⁵

Apparently, the editors understood McLaughlin's "overriding purpose" language as implicating a balancing approach to the state's burden of justification. Indeed, in analyzing the Equal Protection Clause's requirements for government action that created suspect classifications or burdened fundamental interests, the editors organized their discussion around three strands: a search for a legitimate purpose,²⁵⁶ narrow tailoring,²⁵⁷ and balancing.²⁵⁸ The editors never mentioned or

²⁵³ See, e.g., *Developments*, supra note 41, at 1076, 1081 nn. 24 & 26, 1090, 1091 n. 86, 1099 n. 132, 1102, 1124 (discussing and citing McLaughlin and Loving).

²⁵⁴ See *Developments*, supra note 41, at 1101-03 (discussing and citing McLaughlin).

²⁵⁵ *Developments*, supra note 41, at 1103.

²⁵⁶ *Developments*, supra note 41, at 1091 (speaking of "discriminatory purpose").

²⁵⁷ *Developments*, supra note 41, at 1101, 1121 (speaking of "relevance to purpose").

²⁵⁸ *Developments*, supra note 41, at 1103, 1122. The editors' analysis parallels the strands of modern strict scrutiny, see supra text text accompanying notes 35-37, except that it substitutes balancing for the compelling interest standard.

even hinted that strict scrutiny had a "compelling state interest" requirement.²⁵⁹

In short, the Developments editors ignored Watson's substantive standard, and read McLaughlin's "overriding purpose" language as instantiating a balancing approach to the state's burden of justification. Theirs is a sensible reading reflecting the understanding of their time. For decades, a concern for whether the state, in burdening constitutional rights, had an "overriding justification" was a staple of balancing of interests jurisprudence.²⁶⁰ In addition, in Tancil v. Woolls,²⁶¹ the Court had upheld, without opinion, Virginia's legislation requiring that divorce records reflect the racial heritage of the parties.²⁶² The significance of that decision was not lost on Justices Douglas and Stewart. When, in

²⁵⁹ The editors did say

It now seems doubtful that any objective short of the exigencies of war-time emergency would justify the imposition of any long-term burdens on a racial basis, especially racial segregation. Indeed, even under crisis conditions, it is not clear that a state would be permitted to impose serious deprivations because of an individual's race.

Developments, supra note 41, at 1090. But they saw this outcome as a result of the balancing approach, not the compelling interest standard.

²⁶⁰ See, e.g., H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 567 (1949) (Frankfurter, J., dissenting) (Commerce Clause balancing); Bridges v. California, 314 U.S. 252, 294 (1941) (Frankfurter, J. dissenting) (First Amendment balancing).

²⁶¹ 379 U.S. 19 (1964) (Per Curiam).

²⁶² See Hamm v. Virginia State Board of Election, 230 F. Supp. 156, 158 (D.C.E.D.Va. (1964), upheld, sub nom. Tancil v. Woolls, 379 U.S. 19 (1964) (Per Curiam). See also, Washington v. Lee, 263 F.Supp. 327 (D.C.M.D.Ala 1966), upheld sub nom. Lee v. Washington, 390 U.S. 333 (1968) (Per Curiam) in which the lower court struck down segregated prisons but allowed segregation in "isolated instances," such as Birmingham's drunk tank, where the need for "security and discipline necessitates segregation." Washington, 263 F.Supp. at 331.

McLaughlin, they joined in a concurrence advocating a rule of per se invalidity for racial classifications, Tancil drove them to limit their suggestion to "criminal offense[s]." ²⁶³ Balancing, not absolutism, seemed the order of the day. ²⁶⁴

C. Strict Scrutiny At Last

The Harvard Law Review editors' reading of the course of Equal Protection Clause litigation had a shelf life of one month. In April, 1969 in Shapiro v. Thompson, ²⁶⁵ the Supreme Court struck down Connecticut's and Washington, D.C.'s one-year residency requirement for receiving welfare benefits. Writing for the Court, Justice Brennan rejected the governments' argument that their residency requirement rationally promoted four legitimate state objectives. ²⁶⁶ "But, of course," Brennan wrote,

the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. ²⁶⁷

Indeed, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote compelling governmental interest, is unconstitutional." ²⁶⁸

Brennan's imposition of the compelling state interest standard, along with the narrow tailoring requirement, through the breezy and confident "[b]ut, of course" remark was belied,

²⁶³ McLaughlin, 379 U.S. 198 (1964). See also Loving, 388 U.S. at 13 (Stewart, J., concurring).

²⁶⁴ See Developments, *supra* note 41, at 1090-91 (saying the "overriding purpose" test rejects a "per se rule" and "will allow the courts more flexibility in appraising measures which have no discriminatory purpose").

²⁶⁵ 394 U.S. 618 (1969).

²⁶⁶ Shapiro, 394 U.S. at 633-64.

²⁶⁷ Shapiro, 394 U.S. at 638.

²⁶⁸ Shapiro, 394 U.S. 634.

however, and its novelty was revealed by the fact that the authority he cited for his proposition were four cases²⁶⁹ which he introduced with the tellingly weak "Cf." signal.²⁷⁰

Given the novelty of Justice Brennan's doctrine, Justice Stewart felt compelled to write a concurrence to specially defend the proposition that the "purposes ... offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a compelling governmental interest."²⁷¹ Stewart was defending the doctrine from the elaborate attack contained in Justice Harlan's dissent,²⁷² and he drove his point home by quoting Harlan's opinion for the Court in the 1958 First Amendment case, NAACP v. Alabama ex rel. Patterson:²⁷³

As Mr. Justice Harlan wrote for the Court more than a decade ago, "[T]o justify the deterrent effect ... on the free exercise ... of their constitutionally protected right

²⁶⁹ The four cases were Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942). Sherbert and Bates, though of recent vintage, were First Amendment cases. Korematsu and Skinner, though equal protection cases, were not particularly relevant, if only for the great hiatus between them and modern activism. In addition, Skinner discussed neither narrow tailoring nor a compelling interest requirement. See supra text accompanying notes 196-98. On Korematsu, see supra text accompanying notes 199-214.

²⁷⁰ "Cf." means the cited "authority supports a proposition different but sufficiently analogous to lend support." The Bluebook: A Uniform System of Citation 47 (18th ed. 2005). It is the weakest citation signal indicating support. Ira Robbins, Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed, 48 Duke L.J. 1043, 1045 (1999).

²⁷¹ Shapiro, 394 U.S. at 643-44 (Stewart, J., concurring).

²⁷² Shapiro, 394 U.S. at 642 (Stewart, J., concurring). Id. at 655-77 (Harlan, J., dissenting).

²⁷³ 357 U.S. 449 (1958). See supra text accompanying notes 119-24 (discussing Patterson).

... a ... subordinating interest of the State must be compelling.'

The Court today, therefore, is not 'contriving new constitutional principles.' It is deciding these cases under the aegis of established constitutional law.²⁷⁴

Two months later, the Court imported the compelling state interest standard into equal protection cases involving voting rights, Kramer v. Union Free School Dist.²⁷⁵ and Cipriano v. City of Houma.²⁷⁶ From there its spread within equal protection analysis, and throughout general legal consciousness, was rapid.²⁷⁷

²⁷⁴ Shaprio, 394 U.S. at 644 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463 (1958)).

²⁷⁵ Kramer v. Union Free School Dist., 395 U.S. 621 (1969). In commenting on the Kramer case, the Harvard Law Review editors observed that "[i]t might be argued Kramer is the first case clearly to hold [voting rights] denials entail strict review" because prior cases only "purported to use a strict standard." The Supreme Court, 1968 Term - Leading Cases, 83 Harv. L. Rev. 62, 83 n. 26 (1969).

²⁷⁶ Cipriano v. City of Houma, 395 U.S. 701 (1969).

²⁷⁷ To illustrate the spread, consider that prior to 1969, the term "compelling state interest" had been used in no equal protection cases and in only 6 cases, all of which involved the First Amendment. Westlaw search using the string "compelling state interest" & date(bef 1969). From 1969 to 1973, the term "compelling state interest" was used in 26 equal protection, due process, and first amendment cases. Westlaw search using the string "compelling state interest" & date(aft 1968 & bef 1974).

Prior to 1969, the term "compelling governmental interest" had been used in only 2 cases, both of which involved the First Amendment. Westlaw search using the string "compelling state interest" & date(bef 1969). From 1969 to 1973, the term "compelling governmental interest" was used in 12 equal protection, due process and equal protection cases. Westlaw search using the string "compelling governmental interest" & date(aft 1968 & bef 1974).

Prior to 1969, the term "compelling state interest" had been used in the Harvard Law Review in only 7 articles and

Ironically, racial classification was perhaps the last area of constitutional law expressly brought within the scope of the compelling state interest standard.²⁷⁸ In 1974, a student note in the Yale Law Journal maintained, accurately in my view, that the compelling interest standard was not part of strict scrutiny for suspect classifications.²⁷⁹ Not until Justice Douglas's dissent from the dismissal on mootness grounds of the Court's first affirmative action case did any Justice mention the "compelling state interest" standard in a case involving racial classification,²⁸⁰ and Douglas raised it only to argue that adopting the standard would be unfortunate. As First Amendment cases had shown, adopting the compelling, rather than an absolute, standard would permit "those who hold the reins" to give "constitutional guarantees" an undesirable "accordionlike quality."²⁸¹ It was not until 1978, when affirmative action returned to the Court, that a racial classification case was decided by the principle that the government regulations must be

notes. Westlaw search using the string "compelling state interest" & date(bef 1969). From 1969 to 1973, the term was used in 31 articles and notes. Westlaw search using the string "compelling state interest" & date(aft 1968 & bef 1974).

Prior to 1969, the term "compelling governmental interest" had been used in the Harvard Law Review in only 1 note. Westlaw search using the string "compelling governmental interest & date(bef 1969). From 1969 to 1973, the term was used in 11 articles and notes. Westlaw search using the string "compelling governmental interest" & date(aft 1968 & bef 1974).

²⁷⁸ The tradition of reading the compelling interest as implicitly part of the law of race cases since Korematsu v. United States, 323 U.S. 214, 216 (1944), and voting cases since Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) may date from Justice Harlan's dissent in Shapiro v. Thompson, 394 U.S. at 655 (Harlan, J., dissenting) (citing and quoting Korematsu and Harper).

²⁷⁹ Note, Mental, supra note 247, at 1245-51.

²⁸⁰ DeFunis v. Odegaard, 416 U.S. 312, 341, 343 (1974) (Douglas, J., dissenting).

²⁸¹ DeFunis, 416 U.S. at 343 (Douglas, J., dissenting).

"precisely tailored to serve a compelling governmental interest."²⁸²

In that case, Justice Powell spoke only for himself, even though he cast the deciding vote. Thus, it was not until 1984, in Palmore v. Sidoti,²⁸³ that an opinion for the Court declared that "to pass constitutional muster" racial classifications "must be" both narrowly tailored and "justified by a compelling governmental interest."²⁸⁴

While not exactly the completion of the spread of the "compelling state interest" standard - it took another five years for the Court to decide to employ it in affirmative action cases²⁸⁵ - Palmore does provide a convenient stopping point. By

²⁸² Regents of the University of California v. Bakke, 438 U.S. 265, 299 (1978) (per Powell, J.).

²⁸³ 466 U.S. 429 (1984).

²⁸⁴ Palmore, 466 U.S. at 432. See also Crawford v. Bd. of Educ. of the City of Los Angeles, 458 U.S. 527, 536 (1982) (assuming racial classifications must promote a compelling state interest); Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 482 n. 28 (1982) (same). For the point that strict scrutiny was not employed in racial classification cases prior to the affirmative action cases consider that the typical list of cases from the 1950s and 1960s that scholars cite as voiding racial classifications on strict scrutiny grounds employed neither narrow tailoring nor the compelling state interest standard. See, e.g., Simon, *supra* note 4, at 1071 and n. 52 (citing cases).

Although alienage is frequently spoken of as a suspect classification requiring strict scrutiny, see, e.g., Graham v. Richardson, 403 U.S. 365, 376 (1971); E. Chemerinsky, *supra* note 2, at 739-43, the cases evidence a weaker standard. See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 7 (1977) (narrow tailoring and "substantial" government interest); Examining Board v. Flores de Otero, 426 U.S. 572, 602 (narrow tailoring and "substantial" interest); In re Griffiths, 413 U.S. 717, 722 (1973) (narrow tailoring and "substantial" interest, but saying that interest has been described in various ways, such as "compelling," "important," and "overriding").

²⁸⁵ City of Richmond v. Croson, 488 U.S. 469 (1989). Unlike Croson, Palmore, 466 U.S. at 429 involved an invidious racial classification that burdened African-Americans.

1984, the compelling state interest standard, and the strict scrutiny analysis of which it was an important part, not only were keystone doctrines of constitutional law, but finally were part of the Equal Protection Clause's analysis of invidious racial classifications, which is where the conventional wisdom assumes they started.²⁸⁶

IV. The Origin of the Compelling State Interest Test and the Purpose of Strict Scrutiny

Ever since the Supreme Court decided to subject affirmative action legislation to strict scrutiny,²⁸⁷ there has been a stream of articles analyzing how that decision has altered the nature of this most stringent level of judicial review.²⁸⁸ One of the most frequently made claims is that the Supreme Court's application of strict scrutiny to affirmative action has compelled the Court to change strict scrutiny's underlying rationale.²⁸⁹

According to the Supreme Court, strict scrutiny has two purposes. It is, first of all, a device to "smoke out" illicit governmental motive. As Justice O'Connor has written:

²⁸⁶ For some discussion of the strict scrutiny's subsequent history, as well as the history of heightened scrutiny in the Burger and Rehnquist courts, see Richard Brisbin, Jr. and Edward Heck, *The Battle Over Strict Scrutiny: Coalition Conflict in the Rehnquist Court*, 32 Santa Clara L. Rev. 1049 (1992); Ira Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 998-1026 (1979).

²⁸⁷ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

²⁸⁸ E.g., Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 Tul. L. Rev. 1941, 1945-54 (2004); Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 6 U. Pa. J. Const. L. 260, 272-79 (2002); Pamela Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 Wm. & Mary L. Rev. 1569, 1573-94 (2002); Massey, *supra* note 3, at 975-80; Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 428, 436-44 (1997).

²⁸⁹ See *infra* text accompanying notes 292-95.

the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.²⁹⁰

²⁹⁰ City of Richmond v. Croson, 488 U.S. 469, 493 (1989). See also Johnson v. California, 125 S.Ct. 1141, 1142, 1146 (2005) (quoting Croson, 488 U.S. at 493); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (same); Adarand v. Peña, 515 U.S. 200, 225 (1995) (same).

As elaborated by Elena Kagan in the context of the First Amendment speech clause, the argument is:

the strict scrutiny standard--indeed, each component of it-- is best understood as an evidentiary device that allows the government to disprove the implication of improper motive This is true first of the compelling interest requirement: the stronger the state interest asserted, the more likely it is that the government would act to achieve that interest in the absence of antipathy toward the speech. Similar reasoning applies to the demand for close tailoring. If a restriction applies to more speech than necessary to achieve the interest asserted, the suspicion deepens that the government is attempting to quash ideas as ideas rather than to promote a legitimate interest. And if a restriction applies to less speech than implicates the asserted interest, so too the concern grows that the interest asserted is a pretext. But if a restriction fits along both dimensions--if it applies to all and also to only the speech that threatens the asserted interest--then there is an assurance that the government has acted for proper reasons. In this way, the strict scrutiny test operates as a measure of governmental motive. The showing that the government must make under that standard does not serve, as on a scale, to outweigh impermissible motive or counter its harms. The showing instead serves an evidentiary function: to disprove (again, of necessity indirectly) the inference of bad motive that arises from the ... face of a law.

In addition, strict scrutiny is a tool to determine whether there is a cost-benefit justification for governmental action that burdens interests for which the Constitution demands unusually high protection. Again, as Justice O'Connor has written:

[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection The application of strict scrutiny ... determines whether a compelling governmental interest justifies the infliction of that injury.²⁹¹

Scholars agree that the Court has used strict scrutiny for both these purposes.²⁹² However, they see "smoking out" as strict scrutiny's original purpose and the cost-benefit rationale as a recent shift in strict scrutiny's underlying principle brought about by the Court's determination to subject affirmative action legislation to its highest and most rigid level of review.²⁹³ Scholars disagree on whether to condemn or

Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 453-54 (1996) (discussing strict scrutiny for First Amendment liberties). See also, Rubinfeld, *supra* note 288, at 436 (discussing strict scrutiny for suspect classifications).

²⁹¹ *Adarand v. Peña*, 515 U.S. 200, 229 (1995). As restated by Jed Rubinfeld, the Court's position is that "strict scrutiny can be justified ... as a justificatory test - a test measuring whether ... constitutional costs are justified in a given case by offsetting social benefits." Rubinfeld, *supra* note 288, at 439. See also Adams, *supra* note 288, at 1943 ("balance society benefits against potential societal harms that are created by an affirmative action plan").

²⁹² E.g., Adams, *supra* note 288, at 1943; Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331, 2359-64 (2000); Rubinfeld, *supra* note 288, at 428, 436-44.

²⁹³ Adams, *supra* note 288, at 1943-44 (discussing a shift from an "antisubjugation" to an "antidiscrimination" rationale); Rubinfeld, *supra* note 288, at 437-38. The view that discovery of illicit motive is the original purpose of strict scrutiny predates the controversy over its use in recent affirmative

commend this development.²⁹⁴ But whether they approve or disapprove of the shift, scholars concur that "smoking out" was the original raison d'être of strict scrutiny and the "balancing" approach is a recent shift.²⁹⁵

This Article shows, however, that strict scrutiny's development is more complex than the standard account. Tracing the roots of strict scrutiny into the First Amendment when balancing of interests was its paradigmatic form of legal thought suggests that "cost-justification" was its original point. Balancing of interests essentially is a jurisprudence of cost-benefit analysis, not motive discovery. When the Court introduced narrow tailoring and the compelling state interest standard into First Amendment analysis, it did so as part of its general "balancing / cost-benefit justification" approach to First Amendment questions.²⁹⁶ Indeed, the Court's more absolutist Justices, Black and Douglas, concurred rather than joined in some of the early decisions employing strict scrutiny in the First Amendment because, in their view, no "objective can ever be weighed against an express [constitutional] limitation on the means available for its pursuit."²⁹⁷

decisions. See Simon, *supra* note 4, at 1067-76 (saying strict scrutiny is a system to discover improper motive).

²⁹⁴ See Adams, *supra* note 288, at 1946-47 (commending); Forde-Mizrui, *supra* note 292, at 2363-64 (commending); Rubinfeld, *supra* note 288, at 440 (condemning).

²⁹⁵ But see Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 *Colum. L. Rev.* 559, 565 n. 41 (1975) (citing seminal strict scrutiny cases for the proposition that "in some suspect classification cases, the Court has weighed ends, even though it has not been explicit about what it is doing").

²⁹⁶ See Aleinikoff, *supra* note 227, at 966-67; Siegel, *Death*, *supra* note 17, at * (discussing the cases); *infra* text accompanying note 300 (discussing narrow tailoring and Schneider).

²⁹⁷ Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 566 (1963) (Douglas J., concurring) (quoting Frantz, *supra* note 111, at 1441). See also *id.* at 558 (Black, J., concurring) (expressing agreement with Douglas's opinion); Bates v. Little Rock, 316 U.S. 516, 528 (Black, J., and Douglas, J., concurring) (saying "First Amendment rights are beyond

Black and Douglas were correct to understand strict scrutiny, when it was first formulated, as a form of cost-benefit analysis. Consider, for example, Schneider v. Town of Irvington,²⁹⁸ which is both a seminal First Amendment balancing case²⁹⁹ and one of the cases that introduced narrow tailoring into First Amendment analysis.³⁰⁰ Narrow tailoring was used in Schneider for cost-justification purposes.³⁰¹ In Schneider, the

abridgment"). Gibson, supra, is particularly important as it is one of the seminal cases in which the new Warren Court majority used a true strict scrutiny standard. See supra text accompanying notes 172-81 (discussing Gibson).

See also McLaughlin v. Florida, 379 U.S. 184, 197 (Stewart, J., and Douglas, J., concurring) (objecting to the idea that "some overriding statutory purpose" might validate a racial classification); Loving v. Virginia, 388 U.S. 1, 13 (Stewart, J., concurring) (reiterating his McLaughlin concurrence)

²⁹⁸ 308 U.S. 147 (1939).

²⁹⁹ Aleinikoff, supra note 227, at 966-67 & n. 146; Frantz, supra note 111, at 1425, 1431; White, supra note 11, at 333; Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum. L. Rev. 1022, 1045, n. 120 (1978).

³⁰⁰ McLaughlin v. Florida, 379 U.S. 184, 197 (1864) (Harlan, J., concurring) (Schneider is earliest cite given for narrow tailoring principle in First Amendment); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (same); Shelton v. Tucker, 364 U.S. 479, 492-94 (Frankfurter, J., dissenting) (same); Wormuth and Mirkin, supra note 45, at 272.

³⁰¹ Because Schneider is commonly regarded as a Jehovah's Witness case, e.g., Patrick Flynn, "Writing Their Faith into the Laws of the Land", 10 Tex. J. Civ. Lib. & Civ Rts. 1, 10, 13 (2004); White, supra note 11, at 333, there may appear the possibility of asserting, regardless of the Court's express analysis, that the case involved a concern for smoking out illicit motive regarding that unpopular religion. Schneider, however, was a consolidated case involving different handbill ordinances from four disparate municipalities. Of the four defendants, only Clara Schneider was a Witness. The other cases involved the "Friends of the Lincoln Brigade," a "labor picket," and someone protesting "the administration of State unemployment insurance." Schneider, 308 U.S. at 154-57. Only by

Court specifically accepted the municipality's claim that it was banning handbilling as a means to prevent littering, but said that purpose was "insufficient to justify" banning a traditional means of communication given the existence of other means to solve the littering problem.³⁰² Similarly, Talley v. California,³⁰³ which is among the cases that revived First Amendment narrow tailoring in the 1960s, was also a balancing, not a motive discovery, case.³⁰⁴

The same is true of the compelling state interest standard: It was introduced for cost-benefit justification, not motive

the happenstance of case naming is that adjudication thought of as a Witness case.

Moreover, the cases being discussed in the pages where narrow tailoring was introduced and applied are the three cases that did not involve Clara Schneider. *Id.* at 162. Thus, it seems fair to accept the Court's express pronouncement that the "motive of the legislation under attack" in those three cases was the legitimate motive of "the prevention of littering of the streets." *Id.*

³⁰² *Schneider*, 308 U.S. at 162.

³⁰³ 362 U.S. 60 (1960).

³⁰⁴ See *Talley*, 362 U.S. at 63-64 (mentioning various factors that affect the outcome); *id.* at 65 (Harlan, J., concurring) (saying "I do not believe that we can escape, as Mr. Justice Roberts said in Schneider ... 'the delicate and difficult task' of weighing 'the circumstances' and appraising 'the substantiality of the reasons advanced in support of the regulation of the free enjoyment of' speech"); *id.* at 69 (Clark, J., dissenting) (speaking of "weigh[ing] the interests of the public ... against the claimed right of *Talley*").

I do not rely on Shelton v. Tucker, 364 U.S. 479 (1960), which is conventionally cited as the seminal modern narrow tailoring case. Shelton, like Talley, speaks entirely in terms of costs and benefits. Shelton, *supra*, at 489-90. Nevertheless, Shelton's underlying facts involve a southern legislature attempting to expose NAACP membership among public school teachers. See L. Powe, *supra* note 49, at 168-69 (discussing Shelton). Because of the underlying facts, there is at least a possibility that the Court, without mentioning it, was influenced by a doubt about the legislature's motive.

discovery purposes. Justice Frankfurter, who introduced the concept to constitutional law,³⁰⁵ was not prone to concern himself with legislative motive.³⁰⁶ Moreover, in Sweezy, Frankfurter's determination that the importance of academic freedom left it uniquely beyond the reach of legislative questioning, "except for reasons that are exigent and obviously compelling,"³⁰⁷ was predicated entirely on a balancing analysis.³⁰⁸ Similarly, Sherbert v. Verner,³⁰⁹ the case that completed the process of introducing the compelling state interest standard into First Amendment law,³¹⁰ was a case in which there was no intimation that state officials had a hidden illicit motive.³¹¹

³⁰⁵ See supra text accompanying notes 69, 85-87 (discussing Sweezy v. New Hampshire).

³⁰⁶ See, e.g., McGowan v. Maryland, 366 U.S. 420, 468-69 (1960) (Frankfurter, J., concurring) (saying legislative motive "not open to judicial probing"); Communist Party v. SACB, 367 U.S. 1, 86 (1961) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power") (quotation marks removed); Tenny v. Brandhove, 341 U.S. 376, 377 (1951) (saying it is "not consonant with our scheme of government for a court to inquire into the motives of legislators"); Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948) ("We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives").

³⁰⁷ Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring).

³⁰⁸ Sweezy, 354 U.S. at 261, 266 (Frankfurter, J., concurring) (speaking of "weigh[ing]" the government's justification against the harm resulting from its "intrusion into the intellectual life a university" and of "balancing two contending principles").

³⁰⁹ 374 U.S. 398 (1963).

³¹⁰ See supra text accompanying notes 182-89 (discussing Sherbert).

³¹¹ See Rubinfeld, supra note 288, at 443 n. 62 criticizing the Free Exercise principle Sherbert introduced on just this ground.

Moreover, that strict scrutiny was formulated for cost-justification and not for motive discovery purposes is suggested by another facet of constitutional jurisprudence in the 1950s and early 1960s. Throughout the years that strict scrutiny was gestating in First Amendment litigation, the Court's general rule was that governmental motive was "irrelevant" to questions of governmental power.³¹² That rule did not begin to change until the early 1960s, when the Court "adjust[ed] constitutional ... doctrine[] in response" to the South's "intransigence ... disingenuousness endless evasion and bad faith" in desegregation and racial classification cases.³¹³ Gomillion v. Lightfoot³¹⁴ and Griffin v. County School Bd. of Prince Edward County³¹⁵ were the breakthrough cases in which the Court began to take legislative motivation into account.³¹⁶

The view that smoking out illicit motive was the original purpose of strict scrutiny arose for two reasons. First there was a politico-jurisprudential imperative. If strict scrutiny is a cost-justification device, the Justices who employ it are not acting as neutral observers merely seeking to determine if the legislature had a purpose that everyone would regard as

Brennan did point out that the state unemployment compensation scheme contained a discrimination in favor of Sunday worship "in times of 'national emergency'". Sherbert, 374 U.S. at 406. But that part of the law had no application to Sherbert's claim.

³¹² John Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1208 (1970); See also M. Klarman, *supra* note 98, at 340 ("in 1960, the weight of authority still rejected judicial inquiries into legislative motive").

³¹³ M. Klarman, *supra* note 98, at 342. See also Ely, Legislative, *supra* note 312, at 1209 (saying it was "no great surprise" that the Court "turned to the analysis of motivation" in the desegregation struggle).

³¹⁴ 364 U.S. 339 (1960).

³¹⁵ 377 U.S. 218 (1964).

³¹⁶ M. Klarman, *supra* note 98, at 340, 342; Ely, Legislative, *supra* note 312, at 1209 (discussing Establishment Clause precedent also).

improper. They are overruling the legislative determination that the benefit to society brought about by burdening a protected right is worth it in the particular instance. Although many contemporary Justices foreswear second-guessing legislatures, the high-protectionist Justices who developed our current generous protections for First Amendment values, and invented strict scrutiny, were comfortable with that activity. They thought it the essence of their role.³¹⁷

It is no accident that John Ely was the first constitutional theorist to rest strict scrutiny on ferreting out illicit motive.³¹⁸ Cost-benefit analysis, which inevitably involves judicial second-guessing of a legislature's or executive branches's balance among competing policy interests, was anathema to Ely's political process approach to constitutional law.³¹⁹ In other words, a large part of the appeal of strict scrutiny's "smoking out" rationale has been its ability to allow the Court to appear value-free. According to

³¹⁷ M. Shapiro, *supra* note 49, at 77; Kenneth Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 *UCLA L. Rev.* 1, 10 (1965).

³¹⁸ J. Ely, *Democracy*, *supra* note 10, at 145-48. Ely's grounding of strict scrutiny in discovering illicit motive, rather than cost-benefit analysis, traces at least to 1971. See John Hart Ely, *The Constitutionality of Reverse Discrimination*, 41 *U. Chi. L. Rev.* 723, 727 n. 26 (1974) (citing John Ely, *Judicial Review of Suspicious Classifications* (Spring, 1971) (unpublished manuscript)). Many contemporary discussions trace back to Ely. See, e.g., Adams, *supra* note 288, at 1945 n. 28; Rubinfeld, *supra* note 288, at 436 n. 48.

³¹⁹ J. Ely, *Democracy*, *supra* note 10, at 44-48, 165-66; Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *Va. L. Rev.* 747, 772 (1991) (saying political process theory's "basic notion is that the political process is subject to certain systemic flaws, and that judicial review should be directed at remedying those situations rather than superintending the outcomes of a properly functioning democratic system"). For this reason, Ely opposed the fundamental interest branch of strict scrutiny, except for voting rights. J. Ely, *Democracy*, *supra* note 10, at 1-72, 116-25, 247-49 n. 52. Ely favored active judicial protection of free speech, but he did not discuss that protection in terms of strict scrutiny. *Id.* at 105-16.

the "smoking out" rationale, all the Court is doing when it applies strict scrutiny is the politically neutral task of determining that no illicit purpose motivated the government action at bar.

The second reason for the view that smoking out illicit motive is strict scrutiny's original rationale is the belief that strict scrutiny originated in the Warren Court's racial discrimination cases.³²⁰ Although strict scrutiny can be, and has been, used as a cost-benefit justification device, the Warren Court did not use it that way in its racial discrimination cases. After the Warren Court's high-protectionist majority employed strict scrutiny in a number a First Amendment cases in 1963, its heightened scrutiny of racial discrimination cases involved the slow, piecemeal migration of strict scrutiny into the Equal Protection Clause. Beginning in 1964, the Warren Court integrated narrow tailoring into the equal protection clause, but not the compelling state interest standard.³²¹

In those cases, narrow tailoring was employed to demonstrate that the laws at bar were part of the system of White Supremacy, an illicit motive if ever the Warren Court saw one.³²² Cost-benefit analysis was not necessary to decide those

³²⁰ J. Ely, *Democracy*, supra note 10, at 145-48; Rubenfeld, supra note 288, at 453-59; Simon, supra note 4, at 1067-71; Note, *Mental*, supra note 247, at 1245-52.

³²¹ See supra text accompanying notes 237-64.

³²² Given the Court's newly adopted view that racial segregation was no longer a reasonable exercise of the police power, Klarman, *Interpretive*, supra note 10, at 229-30, 254-55, illicit motive analysis in these cases provided the most generally acceptable grounds for the decision. During this time, the Court upheld lower court decisions permitting racial segregation in municipal holding cells where drunks were placed until they sobered up, *Lee*, supra, and allowing states to require divorce decrees to state the race of the parties, *Tancil v. Woolls*, 379 U.S. 19 (1964). As these were Per Curiam decisions, whether the results were based on a motive or balancing analysis is impossible to say.

cases.³²³ Uncovering illicit motive provided the Warren Court with an easy and sufficient ratio decidendi.³²⁴

The Warren Court's focus, in such racial discrimination cases as McLaughlin v. Florida³²⁵ and Loving v. Virginia,³²⁶ on demonstrating illicit motive rather than the absence of cost-justification, helps account for that Court's failure to import the compelling state interest standard into its racial discrimination cases. A "compelling" state interest standard is too demanding to function simply as a means to ferret out covert illicit motive. As John Ely, who first explained the connection between smoking out and equal protection's increased demand for the strength of the state's justification, said:

[E]ven a perfect fit between the classification in issue and the goal the state is arguing shouldn't be enough to allay your initial suspicion if that goal is so unimportant that you have to suspect it's a pretext that didn't actually generate the choice. ... There may be nothing

³²³ Cost-benefit analysis was not entirely absent. See McLaughlin v. Florida, 379 U.S. 184, 197 (1964) (Harlan, J., concurring) (explaining why he agreed with the Court's use of the narrow tailoring principle, which "arose under the principles of the First Amendment," to decide an equal protection case, and citing cases which illustrate the cost-benefit rationale for narrow tailoring). See also Klarman, *Interpretive*, supra note 10, at 256-57, 296 (saying the Warren Court had no need, and did not, choose between the smoking out and cost-benefit rationales of heightened scrutiny in its racial classification cases).

³²⁴ See Klarman, supra note 288, at 1569, 1571 n. 13 (saying that for the Warren Court "rational basis review" had been sufficient to "eradicate explicit racial classifications"). Had the Court suggested reliance on the cost-benefit understanding of heightened scrutiny its unanimity may have fractured. At this time, there were three to four Justices who opposed any suggestion that the racial classifications could be justified by a balancing analysis, at least when criminal sanctions were involved. See supra note 322 (discussing Lee, McLaughlin, and Tancil).

³²⁵ 379 U.S. 184 (1964).

³²⁶ 388 U.S. 1 (1967).

wrong with the fit, but the goal is so trivial in context that you have to believe that it's a rationalization for a racially motivated choice.³²⁷

And after giving the example of temporarily separating the races during a prison race riot, he went on to "functionally" define the "compelling" standard "in terms of whether the claim that it was the actual motivation is credible."³²⁸

Ely's point, therefore, may be satisfied by state interests that, while more than trivial, are less than compelling.³²⁹ To

³²⁷ J. Ely, *Democracy*, supra note 10, at 147-48. See also, Note, *Mental*, supra note 247, at 1251 (drawing from Ely's unpublished manuscript on suspect classifications, see supra note 318, to say that the compelling interest standard is inappropriate in suspect classification cases where the Court is concerned with "purity of process" rather than substance; for this reason, the compelling standard is appropriate for fundamental rights cases).

³²⁸ *Id.* At 148. See also, 148 n. 46 (citing other scholars and discussing other examples). But see Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1, 15 n. 65 (1976) (defending the stringent standard on prophylaxis grounds). Prophylaxis as a justification for the compelling interest standard puts the error cost of not spotting a government decision based on illicit motive on the state rather than the individual. This justification understands the compelling standard as a cost-benefit supplement to the smoking out ability of a demand for a credible justification.

³²⁹ In other words, what has come to be called intermediate scrutiny functions fairly well as a test to smoke out illicit government motive. This is what the Court has done with intermediate scrutiny in the gender classification cases, the best account of which reflects a search for whether the government's action reflects real differences between men and women or traditional sex roles and gender stereotypes. See, e.g., *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53, 62-67 (2001); *Lehr v. Robertson*, 463 U.S. 248, 266 n. 24 (1983); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25, 729 (1982); *id.* at 736, 740-41, 743 (Powell, J., dissenting); E. Chemerinsky, supra note 2, at 737-38.

The success of intermediate scrutiny suggests that strict scrutiny, with its compelling interest requirement, may well be

satisfy the smoking out rationale, what we need is a state interest that is sufficiently important to "allay[]" the "suspicion of racially prejudiced behavior."³³⁰ That, of course, tracks what the Warren Court was doing in the mid- to late-1960s,³³¹ as it, for example, struck down racial designations of candidates on election ballots,³³² but not racial designations on vital records.³³³ In its race discrimination cases, the Warren

reserved for situations where the court is concerned not only with the government's motive, but also with second-guessing the social costs and benefits of what the government has done regardless of motive.

This analysis tracks historical development. As this Article shows, the Court imported the compelling state interest standard into racial discrimination cases when it turned to affirmative action cases. See *supra* text accompanying notes 285-88. It was at that point that the Court began to review the legislation not only for motivation, but for its cost-benefit justification. See *supra* text accompanying note 293.

³³⁰ J. Ely, *Democracy*, *supra* note 10, at 247 n. 46. As Ely continued,

Yes, it will inevitably involve balancing, but balancing with a standard, whether what the state is now arguing really could have been the motivation.

Id. See also, Simon, *supra* note 4, at 1071 (saying the state's interest must be "so important that we can with some confidence draw the inference that reasonable decisionmakers would have taken the challenged action whether they were affected by racial prejudice").

³³¹ Ely was writing to justify the ways of the Warren Court to the legal academy. Ely dedicated his book: "For Earl Warren. You don't need many heroes if you choose carefully." J. Ely, *Democracy*, *supra* note 10, at v.

³³² *Anderson v. Martin*, 375 U.S. 399 (1964).

³³³ *Tancil v. Woolls*, 379 U.S. 19 (1964), *aff'g* *Hamm v. Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D.Va. 1964). See also Siegel, *Equality*, *supra* note 23, at 1515 n. 158 and accompanying text (discussing *Martin* and *Tancil*); Simon, *supra* note 4, at 1075 (same). See also Greenawalt, *supra* note 295, at 565 n. 41 (saying "in some suspect classification cases

Court was looking for acceptable state goals, goals of sufficient weight to allay the suspicion of racial prejudice.³³⁴

The belief that modern strict scrutiny originated in the Warren Court's racial discrimination cases leads to the misconception that strict scrutiny originated as a means to ferret out illicit motive.³³⁵ But if strict scrutiny is a doctrine that requires both narrow tailoring and a compelling state interest, it not only did not begin in the Warren Court's racial discrimination cases, it was never used in them.³³⁶ Modern strict scrutiny began in First Amendment cases³³⁷ and

the [Warren] Court has weighed ends, even though it has not been explicit about what it is doing").

³³⁴ In other words, in its racial discrimination cases, the Warren Court was not looking for compelling state interests and never said it was. See Note, *Mental*, supra note 247, at 1245-52 (explaining suspect classification review as a search for narrow tailoring and a permissible purpose).

³³⁵ See, e.g., J. Ely, *Democracy*, supra note 10, at 145-48 (discussing strict scrutiny's rationale but only discussing racial discrimination cases). Ely's more extended discussion of strict scrutiny embraced only suspect classifications, *id.* at 148-72.

³³⁶ The Warren Court certainly employed heightened scrutiny, as I have defined it, see supra text accompanying note 24, in that the Court subjected racial classifications to close analysis, sometimes by requiring narrow tailoring, McLaughlin v. Florida, 379 U.S. 184 (1964), and sometimes by carefully parsing the facts, Watson v. Memphis, 373 U.S. 526, 536-38 (1963). See also Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960) (racial motive may be shown by the effect of a legislatively imposed change in municipal boundaries). See also Klarman, *Interpretive*, supra note 10, at 254-56 (saying the Warren Court did not adopt a "presumptive rule against racial classifications" until McLaughlin); Note, *Mental*, supra note 247, at 1251-52 (observing that in racial classification cases, the Court required narrow tailoring and permissible, not compelling state interest).

³³⁷ See supra text accompanying notes 49-189.

migrated to the fundamental rights branch of equal protection at the very end of the Warren Court.³³⁸

Tracing strict scrutiny's roots back to First Amendment narrow tailoring cases in the 1940s³³⁹ and compelling interest cases in the 1950s and early 1960s,³⁴⁰ establishes strict scrutiny as part of a constitutional paradigm in which, even for high-protectionist Justices, no constitutional right was "beyond limitation,"³⁴¹ and none could prevail over an appropriate subordinating governmental interest.³⁴² As Justice Rutledge wrote in Thomas v. Collins,³⁴³ in 1945, it was a paradigm in which for a few preferred rights "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."³⁴⁴ That was a formula for cost-benefit

³³⁸ See supra text accompanying notes 265-84.

³³⁹ See supra text accompanying notes 47-48, 298-300 (discussing narrow tailoring).

³⁴⁰ See supra text accompanying notes 49-189 (discussing the compelling standard).

³⁴¹ Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (speaking of rights of religion and parenthood). Justice Rutledge, who wrote the opinion in Prince, was one of the 1940s most civil libertarian Justices. See Mendelson, Clear, supra note 52, at 320 (associating an "era par excellence of civil liberties" with Rutledge's tenure on the bench). See also Minersville School Dist. v. Gobitis, 310 U.S. 586, 603 (Stone, C.J., dissenting) ("In ... cases ... where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that it is the function of courts to determine whether such accommodation is reasonably possible").

³⁴² See, e.g., Price, 321 U.S. at 166; Korematsu v. United States, 323 U.S. 214, 215 (1944).

³⁴³ 323 U.S. 516 (1945).

³⁴⁴ Thomas, 323 US at 530. See also Korematsu v. United States, 323 U.S. 214, 215 (1944) (saying "[p]ressing public necessity may sometimes justify the existence of [race-based]

justification. And when Justice Brennan quoted Rutledge's remark in Sherbert v. Verner,³⁴⁵ he announced the birth of modern strict scrutiny.

V. Conclusion: The Origin of The Compelling State Interest Test and the "Core Value" of the Equal Protection Clause

Strict scrutiny, defined by the dual requirements of narrow tailoring and the compelling state interest test, originated in the First Amendment. Beginning in 1963, and for the remainder of the Warren Court's tenure, strict scrutiny was among the many doctrines by which the Warren Court gave the freedoms of speech, press, and religion substantial protection from government interference. At that time, strict scrutiny did not play as prominent a part in First Amendment jurisprudence as it would in the Burger and Rehnquist Courts, but it certainly was among the Warren Court's doctrinal resources.

The "compelling interest" branch of strict scrutiny can be traced in First Amendment litigation back to 1957. It first appeared in Justice Frankfurter's concurrence in Sweezy v. New Hampshire,³⁴⁶ and was employed in six opinions for the Court before 1963.³⁴⁷ In those cases, however, the "compelling

restrictions ; id. at 234 (Murphy, J., dissenting) (saying "[t]he judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so immediate, imminent, and impending as not to admit of delay") (internal quotation marks removed).

³⁴⁵ 374 U.S. 398, 406 (1963) (quoting Thomas, 323 U.S. at 530).

³⁴⁶ Sweezy v. New Hampshire, 354 U.S. 234 (1957).

³⁴⁷ Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Scull v. Commonwealth of Virginia ex rel. Committee on Law Reform and Racial Activities, 359 U.S. 344, 352 (1959); Barenblatt v. United States, 360 U.S. 109, 127 (1959); Uphaus v. Wyman, 360 U.S. 72, 79-81 (1959); Speiser v. Randall, 357 U.S. 513, 529 (1958); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463 (1958). It was also used in another concurrence, Talley v. California, 362 U.S. 60, 66 (1960) (Harlan, J., concurring), and

interest" test was not part of a true strict scrutiny standard. But if this latter claim is wrong, it only means that the compelling state interest test and strict scrutiny originated in First Amendment litigation even earlier than 1963.

In other words, if strict scrutiny in First Amendment litigation dates back to 1957, it only amplifies this Article's most important finding: that the compelling state interest standard and strict scrutiny was an established aspect of First Amendment jurisprudence before their appearance in the Equal Protection Clause in 1969.³⁴⁸

When strict scrutiny did appear in Equal Protection Clause litigation, it was confined to cases which involved legislation that burdened fundamental interests. Strict scrutiny did not appear in equal protection racial discrimination cases until 1978. In that year, Justice Powell, who was not speaking for the Court, employed strict scrutiny in casting the deciding vote in Regents of the University of California v. Bakke.³⁴⁹ It was not until 1984 that an opinion for the Court employed strict scrutiny in a racial discrimination case.³⁵⁰

It is true that the Court first employed "narrow tailoring," which is part of the doctrine of strict scrutiny, in deciding the landmark racial discrimination cases, McLaughlin v. Florida³⁵¹ and Loving v. Virginia,³⁵² in 1964 and 1967 respectively. Due to the Court's use of narrow tailoring, in McLaughlin and Loving, as well as its announcement that

a dissent Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting).

³⁴⁸ See supra text accompanying notes 265-77 (discussing Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); and Shapiro v. Thompson, 394 U.S. 618 (1969)).

³⁴⁹ Regents of the University of California v. Bakke v. 438 U.S. 265, 299 (1978) (per Powell, J).

³⁵⁰ Supra text accompanying note 283-84 (discussing Palmore v. Sidoti, 466 U.S. 429 (1984)).

³⁵¹ 379 U.S. 184 (1964).

³⁵² 388 U.S. 1 (1967).

legislatures need "some overriding statutory purpose"³⁵³ in order to enact legislation with facial racial classifications, scholars have described those cases as seminal instances of strict scrutiny.³⁵⁴ But even if strict scrutiny in Equal Protection Clause litigation dates to McLaughlin in 1964, it still post-dates strict scrutiny's gestation and appearance in First Amendment controversies between 1957 and 1963.

Nonetheless, it is important to insist that McLaughlin and Loving are instances of heightened, but not strict, scrutiny. Acknowledging that McLaughlin and Loving employed only part of modern strict scrutiny is essential for understanding the drawn out and piecemeal migration of the branches of strict scrutiny into the Equal Protection Clause. It helps explain why commentators have mistakenly believed that smoking out illicit motive was the original purpose of strict scrutiny.³⁵⁵ It also highlights an important aspect of Supreme Court jurisprudence: that the Court, in creating doctrine to guide decisionmaking by

³⁵³ McLaughlin, 379 U.S. at 192. See also Loving, 388 U.S. 11 (same).

³⁵⁴ Klarman, *Interpretive*, supra note 10, at 296; Siegel, *Equality*, supra note 23, at 1502-03.

³⁵⁵ See supra text accompanying notes 237-64 (discussing the absence of the compelling interest requirement in the Warren Court's race discrimination decisions); J. Ely, *Democracy*, supra note 10, at 147-48 (describing the increased burden of justification on the state as requiring narrow tailoring and a "credible" state interest).

Perhaps, in light of the comments in the remainder of this paragraph I should not say in this article that cost-justification was the original purpose of strict scrutiny, but only that it was the original purpose of strict scrutiny for fundamental interests. In suspect classification cases, heightened scrutiny's original purpose was illicit motive discovery. In other words, the two main branches of strict scrutiny, fundamental interests and suspect classifications, were fashioned to serve different goals. See Note, *Mental*, supra note 247, at 1251 (explaining the compelling interest test's absence from suspect classification cases on ground that in suspect classification cases the Court is interested in motive not substance).

the lower courts, is often more particularistic than commentators recognize.³⁵⁶

Although commentators write of a doctrine of strict scrutiny that applies to suspect classifications and fundamental interests,³⁵⁷ the Supreme Court seems to have created a variety of heightened scrutinies, one for fundamental interests and another for suspect classifications. Until the Burger and Rehnquist Court's affirmative action decisions, heightened scrutiny of suspect classifications³⁵⁸ was used to ferret out illicit motive while strict scrutiny of fundamental interests focused on cost-justification.³⁵⁹

Even the categories "suspect classifications" and "fundamental interests" may be too broad. Although alienage is regarded, along with race, as a suspect classification,³⁶⁰ the burden of justification in alienage cases, as settled in the 1970s, requires narrow tailoring and a "substantial" state interest.³⁶¹ That standard is a mixture of elements of strict and intermediate scrutiny.³⁶²

³⁵⁶ But see, e.g., Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 48-54 (1987) (within the First Amendment's content-based / content-neutral framework spotting seven different formulations for content neutral review which belies the commentators' two-tiered approach). See also Frederick Schauer, *Comment: Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 85-86, 108-113 (1998) (discussing the tension between the desire to adjudicate cases by applying abstract categories or individuated considerations).

³⁵⁷ See, e.g., E. Chemerinsky, *supra* note 2, at 646, 648-49, 668, 739-42, 762-63, 767.

³⁵⁸ I say heightened scrutiny because this Article reserves the term "strict scrutiny" for the doctrine that has both the narrow tailoring and compelling interest requirements. See *supra* text accompanying notes 24, 37.

³⁵⁹ See Note, *Mental*, *supra* note 247, at 1251 (spotting the differential treatment of the two branches of strict scrutiny and saying they serve different purposes).

³⁶⁰ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971); E. Chemerinsky, *supra* note 2, at 739-43.

³⁶¹ See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (narrow tailoring and "substantial" government interest);

As for fundamental interests, a recent article by Adam Winkler shows that governmental action survives strict scrutiny far more than is realized and that the survival rates differ among subject areas.³⁶³ Averaging 30%, between 1990 and 2003 the survival rate for legislation burdening the free exercise of religion is 59%, while free speech restrictions prevail 22% of the time.³⁶⁴ This suggests that the stringency of strict scrutiny, and therefore the doctrine itself, varies from area to area.

Finally, acknowledging the delayed migration of the compelling interest standard into the Equal Protection Clause sheds light on a significant aspect of Fourteenth Amendment history. As Reva Siegel has demonstrated, the Warren Court conceived the constitutional violation redressed in Brown v. Board of Education as a racial classification that harmed a

Examining Board v. Flores de Otero, 426 U.S. 572, 602 (narrow tailoring and "substantial" interest); In re Griffiths, 413 U.S. 717, 722 (1973) (narrow tailoring and "substantial" interest, but saying that interest has been described in various ways, such as "compelling," "important," and "overriding").

³⁶² See E. Chemerinsky, *supra* note 2, at 645 (discussing strict and intermediate scrutiny). Recognizing that a variety of approaches have traditionally fit under the strict scrutiny umbrella may enhance our understanding of the Supreme Court's decision in Grutter v. Bollinger, 539 U.S. 306 (2003) which applies strict scrutiny to racial classifications in the context of University admissions with unusual deference to the views of governmental decisionmakers. *Id.* at 328. See also Johnson v. California, 125 S.Ct. 1141, 1157 (2005) (Thomas, J., joined by Scalia, J., dissenting) (saying they would accord prison officials such deference that strict scrutiny should not apply to racial classifications in prison).

³⁶³ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, ___ *Vand. L. Rev.* ___ (2006) (forthcoming) (SSRN file name: SSRN_ID897360_code109222.pdf)

³⁶⁴ Winkler, *supra* note 363, at 15, 17. The survival rate of freedom of association restrictions is 33%, while fundamental rights restrictions survive 24% of the time. *Id.* at 17. Winkler also found that suspect classification discrimination is upheld in 27% of the cases. *Id.*

traditionally subordinated minority.³⁶⁵ According to Professor Siegel, it was the politics of defending Brown against massive Southern resistance and critical scholarly commentary that drove the Court, in the early 1960s, to begin pursuing its struggle against the historic subordination of African-Americans through less politically controversial rhetoric.³⁶⁶ That new rhetoric spoke of the presumptive unconstitutionality of racial classifications per se, not of the evil of racial subordination; it was a rhetoric of individual rights, not group rights.³⁶⁷

To be sure, it was not until the Burger and Rehnquist Courts' attack on affirmative action, in the late 1970s, 1980s, and 1990s, that the Court found in the Equal Protection Clause a firm principle - the "colorblind Constitution"³⁶⁸ - that proscribed racial classifications even when their purpose and effect was to benefit historically oppressed minorities. Although it was the Burger and Rehnquist Court that turned the Equal Protection Clause from an anti-racial-subordination into an anti-racial-classification provision, it was the Warren Court's politically "cautious"³⁶⁹ rhetoric in McLaughlin and Loving that laid the groundwork.

In Reva Siegel's view, McLaughlin and Loving are important transitional cases that initiated the shift in the Court's vision of the purpose of the Equal Protection Clause from the norm of antisubordination to the norm of anticlassification.³⁷⁰ According to Professor Siegel, the Court that decided Brown conceived the constitutional problem of Jim Crow as a system of

³⁶⁵ Siegel, *Equality*, supra note 23, at 1480-89.

³⁶⁶ *Id.* at 1500-05.

³⁶⁷ *Id.* at 1472-76.

³⁶⁸ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)));

³⁶⁹ Siegel, *Equality*, supra note 23, at 1502.

³⁷⁰ For the comments in this paragraph, see Siegel, *Equality*, supra note 23, at 1500-05 (discussing McLaughlin and Loving).

laws that demeaned and subordinated minorities. It was not until McLaughlin and Loving that the Court began treating racial classification simpliciter as the gist of the constitutional wrong. In McLaughlin, the Court for the first time treated racial classification as “presumptively unconstitutional.”³⁷¹ In Loving, the Court voided an anti-miscegenation law both because it “enforced a system of racial hierarchy”³⁷² and because it violated the Constitution’s newly announced presumptive bar to racial classifications. Together, McLaughlin and Loving show the Court “revising its doctrinal framework” to be more politically cautious, while not entirely “abandon[ing] the concern with status harm that animated Brown.”³⁷³ Responding to political resistance, the Court’s equal protection jurisprudence was in transition. In McLaughlin and Loving, the Court’s anticlassification talk was still being driven by antisubordination theory. It was not until the Burger and Rehnquist courts that colorblindness, rather than preventing harm to racial minorities, became the Fourteenth Amendment’s core value.

Professor Siegel’s nuanced analysis correlates with this Article’s observation that in McLaughlin and Loving the Court imported narrow tailoring but not the compelling interest standard into the Equal Protection Clause’s analysis of racial discrimination cases. When the Warren Court imported narrow tailoring into the Equal Protection Clause in McLaughlin and Loving, it did so as a means to ferret out laws enacted with the illicit motive of subordinating minorities.³⁷⁴ Because the Warren Court did not have the goal of second-guessing the legislative judgment on whether laws that benefited racial minorities were cost-justified, it did not import the “compelling interest” requirement into its racial classification cases.³⁷⁵ The compelling interest standard increases the

³⁷¹ Siegel, *Equality*, supra note 23, at 1501.

³⁷² Siegel, *Equality*, supra note 23, at 1504.

³⁷³ Siegel, *Equality*, supra note 23, at 1504.

³⁷⁴ See supra text accompanying notes 320-24 (discussing the Warren Court’s racial discrimination cases between 1964 and 1969).

³⁷⁵ Support for this observation may be found in John Ely’s explication of strict scrutiny in racial classification cases. Ely wrote during the transitional era when the Court had

importance of the state's goal so much more than is necessary to police the state's motive that it must be understood as a tool of cost-benefit analysis.³⁷⁶

At least, that is how the Court has used it. The compelling interest requirement in First Amendment litigation, and in the fundamental rights branch of equal protection has been used as a cost-justification metric.³⁷⁷ It was when the Burger and Rehnquist courts imported the compelling state interest standard into the Equal Protection Clause that the Court finally ruled that all racial classifications caused dignitary harms that were proscribed by the Equal Protection Clause.³⁷⁸ When the Burger and Rehnquist courts did that, they began employing strict scrutiny in racial classification cases not as a means to "smoke out" illicit motive, but as a means to declare that, on balance, the harm to whites was not worth the benefit to historically subordinated groups.³⁷⁹ The Supreme Court's belated and controverted decision to impose the compelling state interest standard on affirmative action laws reflects its decision to shift the premises of the Equal

imported narrow tailoring, but not the compelling interest requirement, into racial classification cases. Ely, therefore, understood the purpose of strict scrutiny in racial classification cases as ensuring that the state had a proper motive. Accordingly, he thought the state needed to show only that the law's purpose was not so trivial that its assertion indicated a ruse. See *supra* text accompanying notes 327-30 (discussing Ely). Concomitantly, he was one of the first prominent scholars to write in support of the constitutionality of affirmative action. See John Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727, 741 (1974). Ely understood the Equal Protection Clause as effectuating an anti-racial-subordination, not an anti-racial-classification, policy.

³⁷⁶ See *supra* text accompanying notes 327-30 (discussing Ely's analysis of strict scrutiny).

³⁷⁷ See, e.g., *supra* text accompanying notes 182-88, 265-74 (discussing Sherbert v. Verner and Shapiro v. Thompson).

³⁷⁸ *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989).

³⁷⁹ See *supra* text accompanying note 291 (quoting Adarand v. Peña, 515 U.S. 200, 229 (1995)).

Protection Clause from antistatutory to anticlassification theory.³⁸⁰

Thus, the piecemeal migration of the branches of strict scrutiny into the Equal Protection Clause's racial discrimination cases evidences an important transition in constitutional law. As Oliver Wendell Holmes once observed, for good or for ill, "[t]he law is the witness and external deposit of our moral life."³⁸¹

³⁸⁰ As Reva Siegel points out, the relaxed application of strict scrutiny in Grutter reflects a Court that, without emphasizing it, has trimmed its commitment to anticlassification as the Equal Protection Clause's core value. The outcome and some of the analysis in Grutter reflect a concern for the legislative betterment of subordinated minorities even if it means upholding government action that classifies citizens according to their race. Siegel, *Equality*, supra note 23, at 1538-43.

³⁸¹ Oliver Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897), repr. 110 id. at 991, 992 (1997).