

A HARD LOOK AT EXACTING SCRUTINY

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I. INTRODUCTION

Exacting scrutiny is a standard constitutional test that has, curiously, received little critical attention. Some murkiness and ambiguity most assuredly attach to the idea of exacting scrutiny.¹ Setting aside the various complications, though, the exacting scrutiny test often requires something like a substantial relationship between the challenged government regulation and a government interest that is somehow judged to be of sufficient importance.²

To this point, the judicial test of exacting scrutiny has been applied most frequently in electoral campaign funding and variously related cases.³ But exacting scrutiny should certainly not be thought of as applicable only to campaign or election-related cases. Nor, even more importantly, should exacting scrutiny be thought of as either a synonym for traditional strict scrutiny,⁴ or as an awkward compromise between traditional strict judicial scrutiny on the one hand and either mid-level or minimum scrutiny on the other.⁵

Once this Article establishes a preliminary understanding of exacting scrutiny, the Article then turns more particularly to the relationship between exacting scrutiny and the proportionalist,⁶ balancing-oriented, multi-faceted, and

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¹ See *infra* Section II.

² See *id.* for this and similar formulations.

³ See *id.* for related cases.

⁴ See *infra* Section II.

⁵ See *id.*

⁶ For the most useful concise background discussion, see generally AHARON BARAK, PROPORTIONALITY, IN THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & Andras Sajó, eds.) (2012), www.oxfordhandbooks.com/view/10.1093/oxfordhb (last visited October 5, 2015). Initially, though, we might say simply that proportionality in its most general sense involves something like a fitting, permissible, or appropriate measure or relationship.

Classically, Aristotle ties a broad idea of proportionality to distributive justice itself. See ARISTOTLE, THE NICOMACHEAN ETHICS BOOK V, 1131a, 1131b, 1132b (J.A.K. Thomson trans., 1953) (rev. ed. 2004) (~350 BCE).

Narrower conceptions of proportionalism inform particular ethical traditions. See, e.g., CHRISTOPHER KAZOR, PROPORTIONALISM AND THE NATURAL LAW TRADITION (reprint ed. 2010) (2002). See also GARTH HALLETT, GREATER GOOD: THE CASE FOR PROPORTIONALISM (1995); BERNARD HOOSE, PROPORTIONALISM: THE AMERICAN DEBATE AND ITS EUROPEAN ROOTS (1987).

For typical formulations of contemporary European constitutional proportionalism, see, e.g., Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CON. L. 572 (2005); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131 (2003); Grant Huscroft, Bradley W. Miller & Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning: Introduction* (2014), <http://ssrn.com/abstract=2434504>; Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174 (2006).

For a distinction between “priority of rights” proportionalism and “optimization of values in conflict” proportionalism, see Luc B. Tremblay, *An Egalitarian Defense of Proportionality-Based Balancing*, 12 INT'L J. CONST. L. 844 (2014). For criticism of European

checklist-style jurisprudence often favored by, most prominently, Supreme Court Justice Stephen Breyer.⁷ As it turns out, Justice Breyer's scholarship, and his judicial decisions in particular contexts, supply some impetus for applying exacting scrutiny, but only to a limited degree.

The Article then addresses some broader questions of exacting scrutiny in the contexts of constitutional rights absolutism; of entirely unfettered balancing; of problems of commensurability and the more general comparability of values, rights, and interests; and of the problem of case outcome unpredictability and indeterminacy.⁸

On this basis, the Article then ventures a summary of the most significant advantages and disadvantages of a broad judicial recourse to exacting scrutiny.⁹ As it turns out, the judicial standard of exacting scrutiny attractively offers the advantages of formulaic simplicity, built-in normativity, ready understandability, almost limitless flexibility, potential sensitivity to all relevant claims of right and interest, and a potentially universal scope and application.¹⁰

On the other hand, exacting scrutiny correspondingly lacks internal structure, internal differentiation, mediating elements, internal cues as to its proper application, and meaningful substantive guiding or directive principles.¹¹

constitutional proportionality, *see, e.g.*, Francisco J. Urbina, *A Critique of Proportionality*, 57 AM. J. JURIS. 49 (2012) [hereinafter *A Critique of Personality*]; Francisco J. Urbina, *Is It Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning'*, 27 CAN. J.L. & JURIS. 167 (2014) [hereinafter *Is It Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning'*].

For a sense of the roles of balancing and proportionality in the American constitutional law context, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094 (2015); Jud Mathews & Alex Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 101 (2011). Justice Breyer's own approach to proportionality has been reflected in several judicial contexts. *See infra* Section III.

For a sense of a mere portion of the subject-matter contextualized broader legal proportionality literature, *see* the discussions of proportionality in the law of punishment and self-defense in, *e.g.*, Larry Alexander, *Self-Defense, Punishment, and Proportionality*, 10 L. & PHIL. 323 (1991); Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OX. J. LEGAL STUD. 57 (2008); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); Jim Staihar, *Proportionality and Punishment*, 100 IOWA L. REV. 1209 (2015); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUSTICE 55 (2002). Some conception of proportionality is also central to the law of war. *See, e.g.*, Thomas M. Frank, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008); Thomas Hurka, *Proportionality in the Law of War*, 33 PHIL. & PUB. AFF. 34 (2005); Keith Pavlischek, *Proportionality in Warfare*, 27 NEW ATLANTIS 21 (2010).

⁷ *See infra* Section III.

⁸ *See infra* Section IV.

⁹ *See id.*

¹⁰ *See id.* Exacting scrutiny barely avoids collapsing into utterly unconstrained balancing largely by virtue of its explicit references, however vaguely, to the sufficient importance of some interest, and to the idea of substantiality of relationship. *See id.*

¹¹ *See id.*

This does not mean, though, that exacting scrutiny must sink into practical indeterminacy and unpredictability. Instead, the near emptiness of the judicial standard of exacting scrutiny, in cases where no close precedents are available, invites the often predictable exercise of judicial biases of various sorts. The near emptiness of the test may thus lead to judicial results that are quite predictable, but for dubious reasons. Whatever we choose to think about each of the advantages and disadvantages of exacting scrutiny, it is thus clear that exacting scrutiny does not generally advance the basic values, including the consistent restraint of judicial decision making by preexisting rules, embedded in the idea of the rule of law.

II. EXACTING SCRUTINY IN THE AMERICAN CASE LAW

Like a number of other constitutional tests, exacting scrutiny incorporates elements of balancing and proportionality.¹² Exacting scrutiny as a judicial test is thus far most notably formulated in numerous and varied electoral campaign finance regulation and related cases such as *Buckley v. Valeo*¹³ and *Citizens United v. FEC*.¹⁴ Most typical exacting scrutiny formulations may require the governmental regulation at issue¹⁵ to bear something like a “substantial relation”¹⁶ to a sufficiently important governmental interest.¹⁷

¹² See *Ctr. For Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015). We thus do not suggest that the more familiar levels of constitutional scrutiny must be construed as avoiding any sort of balancing. Strict scrutiny, for example, may be thought to involve “a kind of marginal analysis.” Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1272 (2007). Professor Fallon thus suggests that strict scrutiny typically asks whether “a particular infringement of constitutional rights, measured by its nature and scope, [is] justifiable in light of the benefits likely to be achieved and the available alternatives[.]” *Id.* This flexible formulation is actually a better characterization of exacting scrutiny than of strict scrutiny, in that strict scrutiny less flexibly requires an apparently abstractly, absolutely, or generally strong government interest and careful tailoring, if not also exceptionally convincing evidence. See, e.g., *Wagner v. FEC*, 793 F.3d 1, 5 (D.C. Cir. 2015). The standard formulations of exacting scrutiny as opposed to strict scrutiny, in themselves, reflect no such requirements.

¹³ 424 U.S. 1, 64, 66 (1976) (per curiam).

¹⁴ 558 U.S. 310, 366-67 (2010).

¹⁵ Typically, but hardly exclusively, some sort of name or affiliation disclosure requirement. See, e.g., *Chula Vista Citizens For Jobs and Fair Competition v. Norris*, 782 F.3d 520, 535-36 (9th Cir. 2015) (en banc). Monetary thresholds that trigger a disclosure requirement may well receive only some form of minimum scrutiny, as in *Vote Choice v. DiStefano*, 4 F.3d 26, 32 (1st Cir. 1993).

¹⁶ This phrasing occurs in cases such as *Buckley*, 424 U.S. at 64; *Citizens United*, 558 U.S. at 366-67; *Chula Vista*, 782 F.3d at 536. In the alternative, courts sometimes refer to an apparently weaker tailoring requirement, that of a “relevant correlation” between the regulation and the government interest. See, e.g., *Davis v. FEC*, 554 U.S. 724, 744 (2008). But for an arguably somewhat more demanding tailoring requirement under exacting scrutiny, see *Arizona Free Enterprise Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (requiring that the restriction be “closely drawn” to serve the sufficiently important government interest) (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003)); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

¹⁷ This language is similarly found in, e.g., *Buckley*, 424 U.S. at 66; *Citizens United*, 558 U.S. at

Balancing and proportionality plainly inhere in the idea of a sufficiently important government interest, given that the sufficiency of the government interest must be with respect to some corresponding burden imposed upon constitutional rights.¹⁸

The requirements of a government interest that is judged to be sufficiently important in light of the imposed rights-burden and of something like a substantial relationship between the scope of the regulation and the government interests at stake are well established in certain legal contexts.¹⁹ Unfortunately, though, basic confusions and ambiguities regarding exacting scrutiny have already developed.

The first such confusion flows from the understandable temptation to think of exacting scrutiny, as formulated above,²⁰ as occupying a position between strict scrutiny and either intermediate or minimum scrutiny.²¹ Certainly, the now classic language of a “substantial relation,”²² as distinct from either genuinely narrow-tailoring, or a merely rational relationship, promotes such a misunderstanding. But to begin with, the strength or importance required of the government interest under exacting scrutiny actually need not be, in a given case, any less than that required under strict scrutiny. The circumstances of a given case may lead judges applying exacting scrutiny to conclude that only a genuinely compelling governmental interest can be sufficiently important.

In fact, the logic of exacting scrutiny may well sometimes call for a government interest test that is even more demanding than the classic compelling government interest test under strict scrutiny. Imagine, merely for example, a case in which a lack of narrow tailoring is real, but realistically unavoidable. The ideas of balancing and proportionality might then suggest that any laxity in the substantial relationship requirement under exacting scrutiny may increase the

366-67; *Chula Vista*, 782 F.3d at 536; *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 477 (7th Cir. 2012).

¹⁸ For the explicit reference to balancing in connection with the interest-sufficiency requirement, see *Harris*, 784 F.3d at 1312. ‘Sufficiency’ in itself can refer to very specific contexts, or to sufficiency in a broad range of cases and contexts.

¹⁹ See Fallon, *supra* note 12; *Harris*, 784 F.3d at 1312; *Wagner*, 793 F.3d at 5; *Buckley*, 424 U.S. at 66; *Citizens United*, 558 U.S. at 366-67; *Chula Vista*, 782 F.3d at 535-36; *Davis* 554 U.S. at 724; *Arizona Free Enterprise*, 131 S. Ct. at 2817 (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003)); *Vote Choice*, 4 F.3d at 32; *McCutcheon*, 134 S. Ct. at 1444; *Center for Individual Freedom*, 697 F.3d at 477; see also, e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010); *Libertarian Party v. Husted*, 751 F.3d 403, 414 (6th Cir. 2014); *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013); *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 277 (4th Cir. 2013); *National Org. For Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011); *National Org. For Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) (explicitly distinguishing exacting and strict scrutiny).

²⁰ See *id.*; see also *supra* text accompanying notes 15-19.

²¹ See *Vermont Right to Life Committee v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014) (“exacting scrutiny” as a form of “intermediate scrutiny”) (quoting *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012)); *The Real Truth About Abortion, Inc.*, 681 F.3d at 549 (“disclosure obligations are reviewed under the intermediate scrutiny level of ‘exacting scrutiny’”).

²² See *supra* Section II.

costs, in terms of foregone rights, of some particular regulation. Given these significant costs flowing from an unavoidably imperfect fit between the scope of the regulation and its purpose, a court might then insist on compensating an especially vital or critical government interest, advanced perhaps to an unusual degree.

Such an interest would have to be of the truly highest, and presumably rarest, order. A court might also require exceptionally strong evidence that the regulation will in fact dramatically promote that nearly uniquely indispensable interest. And in an extreme case, a court might decide that even aside from any issue of tailoring, a state interest of even greater importance than is often required under strict scrutiny—something more than, say, pedestrian or traffic safety—is minimally required, in light of some uniquely severe burden on rights.

The second confusion flows predictably from the literal sense of the word “exacting.”²³ As a matter of ordinary English use, there will often seem little difference between “exacting” and “strict.” Some tendency to think of the terms as more or less synonymous seems inevitable. It hardly seems logically amiss to describe strict scrutiny as a form of exacting scrutiny.

Thus it is not surprising that the Court has declared that “[w]e have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest.”²⁴ The Court here refers to exacting scrutiny, but then applies the standard strict scrutiny test.²⁵ This accounting of exacting scrutiny in classic strict scrutiny terms is not unique.²⁶ On other occasions, courts have explicitly equated exacting and strict scrutiny,²⁷ with the appropriate judicial standard being that of classic strict scrutiny.²⁸ To further cloud the

²³ The Oxford English Dictionary suggests the special intensity or the demanding quality of the idea of ‘exacting’ standards. See the entry for ‘exacting’ available at www.oed.com/view/Entry/65522 (last visited October 5, 2015).

²⁴ *William-Yulee v. Florida Bar*, 135 S. Ct. 1565, 1664 (2015).

²⁵ *E.g.*, *Riley v. National Fed. of the Blind*, 487 U.S. 781, 798 (1988).

²⁶ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (exacting scrutiny as implicitly amounting to strict scrutiny); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“exacting scrutiny” as requiring that a core political speech restriction be “narrowly tailored to serve an overriding state interest”); see also Richard M. Cardillo, Note, *I Am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnell*, 80 NOTRE DAME L. REV. 1929, 1933 (2005).

²⁷ See *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) (referring to “[t]he strict or exacting scrutiny standard”).

²⁸ See *id.* (requiring that the regulation be “substantially related to a compelling government interest and . . . narrowly tailored to achieve that end,” leaving unclear what work the substantial relation requirement actually does). For further discussion, see *RECENT CASE: First Amendment - Campaign Finance Disclosure - Eighth Circuit Grants Injunction Against Minnesota Reporting Requirement for Independent Corporate Political Expenditures - Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 126 HARV. L. REV. 1715, 1716 (2013) (referring to the “alchemy” of transforming exacting scrutiny into strict scrutiny).

distinction, the Supreme Court²⁹ and other courts³⁰ have occasionally sought to bridge the gap adverbially by referring explicitly to “the most exacting scrutiny.”³¹

Despite these occasional judicial confusions, we shall continue to pursue the carefully separable idea of exacting scrutiny,³² as distinct from strict, intermediate, and minimum judicial scrutiny. Crucially, exacting scrutiny involves a balancing³³ or proportionality test that is open and adaptable beyond that attributable to any discrete standard level of scrutiny. A number of the cases acknowledge at least a portion of the breadth and flexibility of exacting scrutiny balancing by reciting that “the strength of the government interest must reflect the seriousness of the actual burden on First Amendment rights.”³⁴

Recognizing the need for balancing under exacting scrutiny does not, however, ensure that the balancing will be conducted in satisfactory fashion. It is tempting, for example, to think of an electoral campaign contribution identity disclosure requirement as typically less burdensome on constitutional rights than, say, fixed dollar limitations on campaign spending or contributions.³⁵ In many

²⁹ See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion) (apparently equating “exacting scrutiny” with “most exacting scrutiny,” and both with the standard strict scrutiny test). The *Alvarez* plurality cites *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1984), a mid-level scrutiny case, for the language of “most exacting scrutiny.” *Id.* at 644. For further discussion of *Alvarez* on this point, see *281 Care Committee v. Arneson*, 766 F.3d 744, 783 (8th Cir. 2014); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012).

³⁰ See, e.g., *Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014) (“the most exacting scrutiny” as equivalent to strict scrutiny); *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995) (content-based speech restrictions as evoking “the most exacting scrutiny”).

³¹ See *Frudden*, 742 F.3d at 1207; *Alvarez*, 132 S. Ct. at 2548; *Turner Broadcasting System*, 512 U.S. at 644; *281 Care Committee*, 766 F.3d at 783; *Minn. Citizens Concerned for Life*, 692 F.3d at 876; *National Amusements*, 43 F.3d at 736.

³² See, e.g., *Harris*, 784 F.3d at 1312; *Wagner*, 793 F.3d at 5; *Buckley*, 424 U.S. at 66; *Citizens United*, 558 U.S. at 366-67; *Chula Vista*, 782 F.3d at 535-36; *Davis*, 554 U.S. at 724; *Arizona Free Enterprise*, 131 S. Ct. at 2817 (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003)); *Vote Choice*, 4 F.3d at 32; *McCutcheon*, 134 S. Ct. at 1444; *Center for Individual Freedom*, 697 F.3d at 477; *John Doe No. 1*, 561 U.S. at 196; *Libertarian Party*, 751 F.3d at 414; *Iowa Right to Life Committee*, 717 F.3d at 591; *Center for Individual Freedom*, 706 F.3d at 277; *National Org. For Marriage*, 654 F.3d at 118; *Ezell*, 651 F.3d at 707; *National Org. For Marriage*, 649 F.3d at 55 (explicitly distinguishing exacting and strict scrutiny).

³³ See, e.g., *Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015).

³⁴ See, e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010); *Davis*, 554 U.S. at 744; *Yamada v. Snipes*, 786 F.3d 1182, 1194 (9th Cir. 2015); *Harris*, 784 F.3d at 1312; *Ezell*, 651 F.3d at 707; *Swanson*, 640 F.3d at 315-16.

³⁵ Disclosure requirements are classified as often relatively benign in *Citizens United*, 558 U.S. at 366-67. See also *Protectmarriage.com—Yes On 8 v. Bowen*, 752 F.3d 827, 832 (9th Cir. 2014) (“disclosure is generally ‘a less restrictive alternative’”) (quoting *Citizens United*, 558 U.S. at 366-67); *Iowa Right to Life Committee*, 717 F.3d at 591 (“[d]isclosure requirements that ‘impose no ceiling on campaign-related activities and do not prevent anyone from speaking’ are . . . subject to exacting scrutiny not requiring a governmental interest that is narrowly tailored”) (quoting *Citizens United*, 558 U.S. at 366).

cases, would-be campaign supporters will indeed be indifferent to, if not favorably disposed toward, publicizing their association with the relevant electoral candidate or cause. Others, however, will not.³⁶ For some persons, including some of the marginalized and less powerful,³⁷ the perceived risks of identity disclosure may be substantial. Some may indeed be deterred from speaking by disclosure requirements. And it may well be difficult for any court to reasonably estimate the number of those who would prefer anonymity, the likely gravity of any adverse consequences of mandated disclosure, the messages that those who are deterred would otherwise have conveyed, or the realistic availability and value of other ways of speaking, whether anonymously or not.³⁸

More fundamental than the complications of applying exacting scrutiny, though, is the question of the proper scope and limits of the exacting scrutiny test itself. It may seem natural to apply strict scrutiny in cases in which the stakes, in terms of the conflicting constitutional rights and interests, seem relatively high, and to instead apply exacting scrutiny only when the stakes seem somewhat lower.³⁹ Relatedly, if we believe that content-based regulations of speech are generally worse than content-neutral regulations of speech, we may opt for what we imagine to be a more restrictive test—strict scrutiny—in the case of content-based regulations,⁴⁰ and a supposedly less restrictive test—some form of mid-level scrutiny—in the case of content-neutral regulations.⁴¹

Applying strict scrutiny in constitutional high stakes cases, and exacting scrutiny only in somewhat lower stakes constitutional cases, however, would reflect basic misunderstandings of the exacting scrutiny test. Crucially, exacting scrutiny is, again, not unequivocally less stringent than strict scrutiny, even if we

³⁶ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (noting the possibility of official and unofficial retaliation or ostracism); *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012) (noting the possibilities of various forms of unofficial retaliation, intimidation, ostracism, and prohibitions on speaking); Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POLITICS 589, 597-98 (2001).

³⁷ See, e.g., *Talley v. California*, 362 U.S. 60, 64 (1960) (anonymous speech as in part an historic refuge for “[p]ersecuted groups and sects”); *McIntyre*, 514 U.S. at 357 (“[a]nonymity is a shield from the tyranny of the majority”) (citing the work of John Stuart Mill).

³⁸ For broader context, see the discussion of “defensive” anonymous book publishing in ARTHUR M. MELZER, *PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING* 248 (2014).

³⁹ For collected case references, see *Worley v. Florida Sec. of State*, 717 F.3d 1238, 1242-43 (11th Cir. 2013) (less onerous restrictions on speech are to be tested by exacting scrutiny, as distinct from strict scrutiny). See also *Chula Vista Citizens*, 782 F.3d at 535-36 (“strict scrutiny applies only where the challenged law severely burdens the ability to place an initiative on the ballot”) (emphasis in the original).

⁴⁰ For background, see *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); R. George Wright, *Why the Content-Based/Content-Neutral Distinction Does Not Matter*, 67 FLA. L. REV. 333 (2015); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

⁴¹ See *id.*

assume that exacting scrutiny always requires substantial tailoring and never more than substantial tailoring.⁴² As we have seen,⁴³ exacting scrutiny on its own logic might in a given case require the government to prove, by an appropriately elevated quantum of evidence,⁴⁴ the exceptional promotion of a concrete and specific government interest of the distinctly highest and most genuinely compelling nature. In such cases, exacting scrutiny, on its own terms and logic, could be more stringent than strict scrutiny, as strict scrutiny is applied in practice—as in, say, a typical traffic or pedestrian safety case.

The more general point is that on its own terms, exacting scrutiny offers greater built-in, formal, legitimate adaptability, or inherent flexibility, than does strict scrutiny, or than standard fixed intermediate scrutiny, or than any version of minimum scrutiny. Exacting scrutiny offers the flexibility, in light of the stakes and circumstances, of a broad and genuinely multi-dimensional sliding scale test. As well, exacting scrutiny can adopt sliding scales whose extremes can extend, where appropriate, beyond the limits set by both strict scrutiny on one end and typical forms of minimum scrutiny on the other.⁴⁵

A basic implication of these observations is that whatever its ultimate faults and limitations, exacting scrutiny amounts to a single, general formulation adaptable to any circumstance in which a court would otherwise have to choose among typical forms of strict, intermediate, or minimum scrutiny. To put the point another way, given the availability of exacting scrutiny, there is no reason for a court to change the formal test, or the formal level or degree of constitutional scrutiny, depending upon the rights and interests thought to be at

⁴² Often, exacting scrutiny requires that the regulation be “closely drawn” to effect its purpose. *See, e.g.,* *McCutcheon*, 134 S. Ct. at 1444; *Buckley*, 424 U.S. at 25.

⁴³ *See supra* text accompanying notes 12-19; Fallon, *supra* note 12; *Harris*, 784 F.3d at 1312; *Wagner*, 793 F.3d at 5; *Buckley*, 424 U.S. at 66; *Citizens United*, 558 U.S. at 366-67; *Chula Vista*, 782 F.3d at 535-36; *Davis* 554 U.S. at 724; *Arizona Free Enterprise*, 131 S. Ct. at 2817 (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003)); *Vote Choice*, 4 F.3d at 32; *McCutcheon*, 134 S. Ct. at 1444; *Center for Individual Freedom*, 697 F.3d at 477; *see also, e.g.,* *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010); *Libertarian Party v. Husted*, 751 F.3d 403, 414 (6th Cir. 2014); *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013); *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 277 (4th Cir. 2013); *National Org. For Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011); *National Org. For Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) (explicitly distinguishing exacting and strict scrutiny).

⁴⁴ The Court has held that the “quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised.” *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 391 (2000). *See also Wagner*, 793 F.3d at 21.

⁴⁵ We leave unexamined, for the moment, all questions regarding the indeterminacy in practice of exacting scrutiny, and about the comparative indeterminacy of exacting scrutiny and other traditional levels of scrutiny. More specifically, though, on our understanding, it need not be assumed that strict scrutiny and minimum scrutiny “put a thumb on either side of the constitutional scale,” but that exacting scrutiny in practice does not. Anthony Johnstone, *A Madisonian Case For Disclosure*, 19 GEO. MASON L. REV. 413, 419-20 (2012). For background, *see id.*

stake in the particular case.⁴⁶ Instead, a single general formulation of exacting scrutiny can be logically applied to any set of rights and interests.

A better sense of how exacting scrutiny currently operates in American constitutional cases can be developed in a more specifically focused context. As it happens, Justice Stephen Breyer, in both his non-judicial and in his judicial capacities, has recurrently considered exacting scrutiny in particular contexts. Justice Breyer's own understanding of the proper role of exacting scrutiny is explored below in the context of related notions, including proportionalism, balancing, and the role of plural considerations and of checklists and explicit factor listings in judicial decision-making. We therefore examine Justice Breyer's reflections on exacting scrutiny below, in the context of these related notions.

III. JUSTICE BREYER'S LIMITED JUDICIAL USE OF EXACTING SCRUTINY

The Supreme Court's leading theorist regarding constitutional exacting scrutiny, along with ideas such as balancing, proportionalism, plural lines of inquiry, and judicial-decision-making "checklists," has been Justice Stephen Breyer.⁴⁷ Justice Breyer in his extra-judicial role has encouraged the use of some form of proportionalism, if not specifically exacting scrutiny, even in the context of some important individual rights,⁴⁸ partly on the realistic grounds that "important rights and interests can conflict."⁴⁹ As we shall see, contrasted with proportionalism and balancing, the more absolutist⁵⁰ approaches to constitutional rights adjudication tend toward rigidity⁵¹ and toward insensitivity to the costs of absolutism in the form of other rights and interests unnecessarily sacrificed.⁵²

On Justice Breyer's view, proportionalism may be called for "when a statute restricts one constitutionally protected interest in order to further some comparably important interest."⁵³ This sort of proportionalism inescapably

⁴⁶ Elsewhere, an argument has been made for requiring not only that the gravity of any rights-restriction be matched by a proportionately weighty government interest, but also that the degree of judicial deference be inversely correlated with the gravity of the rights restriction. See Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 177 (2006).

⁴⁷ For Justice Breyer's most significant discussions of such matters outside the context of his judicial decision making, see, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 159-71 (2010); [hereinafter MAKING OUR DEMOCRACY WORK]; STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 40-51 (2005); [hereinafter ACTIVE LIBERTY]; Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002). [hereinafter *Our Democratic Constitution*].

⁴⁸ See *Making Our Democracy Work*, supra note 47, at 160.

⁴⁹ *Id.* at 161.

⁵⁰ See *id.* at 160.

⁵¹ See *id.*

⁵² See *id.*

⁵³ *Id.* at 163.

involves some form of balancing.⁵⁴ And a reasonable balancing process necessarily requires some sort of sufficient comparability among the interests and rights at stake.⁵⁵

Justice Breyer's view is that the Court has thus far sought to avoid or minimize balancing in cases involving core political speech.⁵⁶ But in other areas of the law, including that of non-political speech, the Court has explicitly weighed⁵⁷ and balanced⁵⁸ potential harms and costs,⁵⁹ while factoring in the justifications for restricting rights,⁶⁰ the availability of less restrictive regulations,⁶¹ the importance of any countervailing state interests,⁶² and the presumed likely extent to which those state interests would be promoted by alternative regulatory approaches.⁶³

The balancing associated with a legal proportionality analysis is normally thought of as undertaken by the courts, but some forms of balancing can, of course, be undertaken by administrative agencies and by the drafters of constitutions and statutes. Justice Breyer thus suggests, for example, that a court might ask whether a challenged statute itself strikes a reasonable or otherwise permissible balance among the various relevant considerations.⁶⁴ Failure to strike such a permissible balance may mean that the statute in question imposes disproportionate harm.⁶⁵

Most typically, though, the focus of proportionalist inquiries, balancing, and of exacting scrutiny in particular has been on case adjudication. Justice Breyer in his judicial capacity has endorsed one form or another of broad proportionalism in a number of contexts.⁶⁶ Thus in a second amendment regulatory context, Justice Breyer declared that "[t]he ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."⁶⁷ This form of proportionalism

⁵⁴ See *id.* at 164.

⁵⁵ See *id.*

⁵⁶ See *id.* at 164; OUR DEMOCRATIC CONSTITUTION, *supra* note 47, at 255-56. But consider the classic Learned Hand-inspired free speech explicit balancing cases of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) and *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion). See also *LEARNED HAND, THE BILL OF RIGHTS* 58-61 (1958). A less explicitly balancing-oriented contemporary political speech test is adopted in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵⁷ See *MAKING OUR DEMOCRACY WORK*, *supra* note 47, at 164.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *ACTIVE LIBERTY*, *supra* note 47, at 49.

⁶⁵ See *id.*

⁶⁶ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 681, 690-93 (2008) (Breyer, J., dissenting); *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (Breyer, J., for the plurality).

⁶⁷ *Heller*, 554 U.S. at 693 (Breyer, J., dissenting).

seems to compare ultimate statutory costs and benefits, but Justice Breyer also uses the term “proportionality” to refer to a much more particularized inquiry into the degree to which the application of a statute is tailored to the statute’s purposes.⁶⁸

Justice Breyer, from his position on the bench, has also argued for proportionalism in a broad sense in a number of other constitutional contexts, particularly where strong constitutional presumptions either favoring or disfavoring regulation seem inappropriate,⁶⁹ or where judicial rigidity more generally seems inappropriate.⁷⁰ Importantly, Justice Breyer has argued that broad constitutional proportionalism enjoys some current case law support,⁷¹ and that the Court in general has already applied a broad constitutional proportionalism in a number of contexts.⁷²

On his own initiative, Justice Breyer has himself applied some form of proportionalist analysis in several constitutional and non-constitutional contexts. Merely for example, Justice Breyer has referred to the kind of proportionalism that is involved in criminal sentencing as “a key element of sentencing fairness.”⁷³ He has also spoken of the proportionality, or lack of proportionality, between a punitive damages award and the purposes of such an award.⁷⁴ Here, the plainly ambiguous idea of proportionality may mean something like fittingness, or broad compatibility and congruence.

Proportionalism for Justice Breyer is also manifested in some cases in which several unweighted factors, reasons, or considerations, as distinct from some single rule or principle, are somehow processed in order to arrive at a judicial result. The relevant factors in such cases may be either general and recurring,⁷⁵ or else more or less unique to the particular judicial context.⁷⁶ The stakes can be of either constitutional⁷⁷ or non-constitutional character.⁷⁸

⁶⁸ See *Randall*, 548 U.S. at 249 (Breyer, J., for the plurality). For background on broader sorts of cost-benefit analysis, see E.J. MISHAN & EUSTON QUAH, *COST-BENEFIT ANALYSIS* (5th ed. 2007); *COST-BENEFIT ANALYSIS: ECONOMIC, PHILOSOPHICAL, AND LEGAL PERSPECTIVE* (Matthew D. Adler & Eric A. Posner eds. 2001).

⁶⁹ See *Heller*, 554 U.S. at 690 (Breyer, J., dissenting).

⁷⁰ See *id.* (Breyer, J., dissenting).

⁷¹ See *id.* (Breyer, J., dissenting) (citing, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 339-49 (1976) (outlining the procedural due process three factor balancing text); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (interest balancing stage of an inquiry into the protection-worthiness of public employee speech)).

⁷² See *Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting). One conspicuous context is the congruence and proportionality test imposed by the Court on congressional enforcement of equal protection as against state actors. See, e.g., *City of Borne v. Flores*, 521 U.S. 507, 520 (1997).

⁷³ *Harris v. United States*, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part and concurring in the judgment). Proportionality here refers to something like the comparative culpability of defendants, more than to something like the appropriateness of a criminal sentence in light of a particular defendant’s own culpability. See *id.*

⁷⁴ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 596-97 (1996) (Breyer, J., concurring).

⁷⁵ See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Breyer, J., for the Court) (regarding the decision to apply either high level Chevron deference or else low level Skidmore deference to an

Of special interest, though, are Justice Breyer's reflections on proportionalism, balancing, plurality of considerations, factor-listing, and of a role for exacting scrutiny in some but not all free speech cases. In Justice Breyer's view, for example, mainstream commercial speech regulation involves a proportionality inquiry,⁷⁹ in the form of examining "the relation between restriction and objective, the fit between ends and means."⁸⁰ But commercial speech regulation is, according to Justice Breyer, only one of several speech contexts in which American⁸¹ and other⁸² courts have sensibly applied some sort of proportionality inquiry.⁸³

On Justice Breyer's analysis, in some free speech contexts, courts have understandably "sought to determine whether the harm to speech-related interests is disproportionate in light of the degree of harm, justifications, and potential alternatives."⁸⁴ Concisely put, Justice Breyer would in such cases ask "whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve."⁸⁵

When the idea of proportionality in such speech contexts is then more explicitly unpacked, a number of important considerations come into view. Justice Breyer presents a perhaps non-exhaustive listing of such considerations, including:

the seriousness of the speech-related harm the provision will likely cause, the importance of the provision's countervailing objectives, the extent to which the statute will tend to achieve

administrative interpretation).

⁷⁶ See *United States v. Comstock*, 560 U.S. 126, 149 (2010) (Breyer, J.) (five particular considerations "taken together" as indicating that post-imprisonment federal civil commitment is authorized under the Necessary and Proper Clause).

⁷⁷ See *id.*

⁷⁸ See *Barnhart*, 535 U.S. at 222.

⁷⁹ *Thompson v. W. St. Med. Ctr.*, 535 U.S. 357, 378, 388 (2002) (Breyer, J., dissenting) (interpreting the multi-stage mid-level scrutiny commercial speech test of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). An overall examination of state interests and any burdened speech rights presumably involves more than an inquiry merely into tailoring, or the degree of fit between ends and means.

⁸⁰ *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting).

⁸¹ See the Supreme Court cases cited *infra* note 83.

⁸² See the foreign and international cases cited *infra* note 83.

⁸³ See *Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 365, 367 (2009) (Breyer, J., concurring in part and dissenting in part). Among the American cases cited by Justice Breyer not referred to immediately above are *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring). Among the foreign and international cases cited by Justice Breyer are *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 (Canada) (campaign finance regulation context); *Bakri v. Israel Film Council*, HJC 316/303 (Israel 2003).

⁸⁴ *Ysura*, 555 U.S. at 368 (Breyer, J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 367 (Breyer, J., concurring in part and dissenting in part).

those objectives, and whether there are other less restrictive ways of doing so.⁸⁶

Most, if not all, of these considerations involve contestable valuations and tradeoffs, estimates of probability, disputable judgments of causation, comparisons of degrees of interest fulfilment, judicial ignorance or sheer dismissal of some consequences and alternatives, and more or less defensible choices of the relevant time frame in which all of these considerations are assumed to play out.

Justice Breyer has also briefly addressed the question of the proper range of application of a general proportionalist analysis in free speech cases. Interestingly, Justice Breyer evidently does not wish to apply a proportionality analysis to free speech cases that currently seem to call for strict scrutiny and thus seem to require a compelling governmental interest and narrow tailoring test.⁸⁷ Nor does he wish to apply a proportionality analysis when there seems little reason not to defer to a legislature's judgment.⁸⁸

Thus at least in the speech context, Justice Breyer seems to link proportionality to what is referred to as intermediate scrutiny.⁸⁹ The point of proportionality is thus evidently to help the courts structure and apply something like traditional intermediate scrutiny.⁹⁰ The assumption seems to be that, at least as a general rule, strict scrutiny will as a practical matter more typically involve striking down the challenged regulation,⁹¹ while minimum scrutiny on the other hand will more ordinarily result in upholding the regulation in question.⁹²

Of course, the Court has been known to uphold some speech and other regulations even under strict scrutiny.⁹³ The Court has also occasionally struck

⁸⁶ *Id.* at 368 (Breyer, J., concurring in part and dissenting in part). Justice Breyer in this context cites the commercial speech proportionality requirement in the tailoring case of *Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989). *See also* *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring in the judgment with Kagan, J.).

⁸⁷ *See Ysura*, 555 U.S. at 368 (Breyer, J., concurring in part and dissenting in part); *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring in the judgment). Some other leading constitutional proportionalists may also be reluctant to apply proportionalism to some standard areas of free speech law. *See, e.g.,* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENTARY 803, 848 (2004) (book review).

⁸⁸ *See Ysura*, 555 U.S. at 368 (Breyer, J., concurring in part and dissenting in part); *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring in the judgment).

⁸⁹ *See Ysura*, 555 U.S. at 368 (Breyer, J., concurring in part and dissenting in part); *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring in the judgment).

⁹⁰ *See Ysura*, 555 U.S. at 368 (Breyer, J., concurring in part and dissenting in part).

⁹¹ *See Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring in the judgment).

⁹² *See id.*

⁹³ *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-29 (2010); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion). In the equal protection area, *see Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). *See also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (rejecting the idea that strict scrutiny is "strict in theory but fatal in fact").

down particular regulations despite applying, at least formally, only minimum scrutiny.⁹⁴ Such cases would seem to suggest a possible role for a proportionality analysis in at least some cases in which strict scrutiny or minimum scrutiny is currently applied, whether rightly or wrongly. A proportionality analysis in such cases might, on Justice Breyer's own assumptions, either guide the courts more flexibly and sensitively through either strict or minimum scrutiny, or suggest the application of intermediate scrutiny instead.

Perhaps the thinking in this regard is that in most cases, either strict scrutiny or minimum scrutiny will arrive at the right result, respectively striking down and upholding the regulation at issue, and that the rare exceptions can somehow be accommodated without introducing, across the board, a broad and multi-dimensional proportionalism, perhaps in the form of exacting scrutiny. On the other hand, Justice Breyer clearly thinks of the various distinct levels of constitutional scrutiny as merely providing guidance to courts, rather than as rigid formulas to be uniformly predictably and mechanically applied.⁹⁵

At least in the free speech context, Justice Breyer thus seems to think of proportionalism as linked to, if not synonymous with,⁹⁶ or as a component element of,⁹⁷ intermediate scrutiny.⁹⁸ Intermediate scrutiny, however, even as a set of guidelines rather than a mechanical test,⁹⁹ typically involves the burden of showing a government interest that is important generally or in itself,¹⁰⁰ and a substantial relation between that interest and the scope of the regulation.¹⁰¹ This intermediate scrutiny language seems somewhat more determinate and specific than a mere general invitation to engage in unconstrained across the board

⁹⁴ See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (purportedly applying equal protection minimum scrutiny regarding developmentally disabled claimants); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (detecting no legitimate legislative interest underlying the eligibility distinction at issue).

⁹⁵ See *William-Yulee*, 135 S. Ct. at 1673 (2015) (Breyer, J., concurring) ("I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied") (judicial election speech regulation case).

⁹⁶ See *Alvarez*, 132 S. Ct. at 2251 (Breyer, J., concurring in the judgment).

⁹⁷ See *id.* (Breyer, J., concurring in the judgment) (referring ambiguously to questions of "fit").

⁹⁸ See *id.* at 2551-52. (Breyer, J., concurring in the judgment). For discussion of Justice Breyer's proportionalism in *Alvarez*, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3141, n.222 (2015) (emphasizing Justice Breyer's intermediate scrutiny-oriented weighing and balancing in the light of the burden of persuasion). For broader discussion of *Alvarez*, see R. George Wright, "What Is That Honor?": *Re-Thinking Free Speech in the "Stolen Valor" Case*, 60 *CLEV. ST. L. REV.* 847 (2013). The *Alvarez* "Stolen Valor" case illustrates the ineffable complexity, if not the sheer arbitrariness, subjectivity and logical indeterminacy, of typical forms of constitutional proportionalism.

⁹⁹ See *William-Yulee*, 135 S. Ct. at 1673 (2015) (Breyer, J., concurring); see also *supra* text accompanying note 95.

¹⁰⁰ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁰¹ See *id.* For intermediate scrutiny tests in the free speech area, see, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. CCNV*, 468 U.S. 288, 293 (1984); *Central Hudson Gas*, 447 U.S. at 566 (four part commercial speech regulation test).

balancing. Proportionality in general is open to other forms and interpretations. Thus proportionality, in its typical senses, really cannot be confined only to cases of intermediate scrutiny, or to cases where some form of intermediate scrutiny would otherwise be employed.

Also, Justice Breyer's specific interest in developing various sorts of judicial tests referring to multiple listed factors, reasons, or considerations¹⁰² is not itself a manifestation of any standard form of proportionalism. Providing courts with, say, five substantive considerations, general or specific in nature, and however contextualized, may aid the courts in carrying out a proportionalist analysis. But such substantive guidance could certainly be factored into various tests based on rules or principles, as well as tests involving explicit proportionalism. Thus, we can imagine, say, five specific considerations guiding a court in deciding whether a libel plaintiff has established the necessary element of actual malice.¹⁰³

Thus, what amounts to pre-existing judicial checklists—perhaps akin, in format and purpose, to an airplane pilot's pre-takeoff checklist¹⁰⁴—may be of value whether the judge is applying a rule, or some form of explicit proportionalism and balancing, or else what we have referred to as exacting scrutiny¹⁰⁵ in particular.

In sum, Justice Breyer may well be the academic and judicial leader, in the American context, among proportionalists in general. But his affinity for distinctly intermediate scrutiny, and for multi-consideration formulae in appropriate cases, does not point to an exceptionally prominent role for any variety of exacting scrutiny as a dominant and broadly applicable constitutional test. If we are to develop a more nuanced and broader understanding of exacting scrutiny, we must turn our attention to the unavoidable assumptions embedded within exacting scrutiny, including problems of balancing and absolutism,

¹⁰² See, e.g., *Comstock*, 560 U.S. at 149; *Barnhart*, 535 U.S. at 222; *Thompson v. W. St. Med. Ctr.*, 535 U.S. at 378, 388 (Breyer, J., dissenting) (interpreting the multi-stage mid-level scrutiny commercial speech test of *Central Hudson Gas*, 447 U.S. at 566; see also *supra* text accompanying notes 75-78.

¹⁰³ For the classic actual malice rule in public official libel plaintiff cases, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). A public official presumably cannot prevail under current law, and obtain damages in such a case, absent a clear and convincing showing of actual malice, even if a balance of reputational and free speech interests, along with narrowness of tailoring and various empirical, valuational, causal, probabilistic, and alternative speech channel considerations suggest otherwise. Consider also that a requirement that speech be on a matter of public interest is a rule that might be better applied if courts had a valid and reasonably specific multi-factor checklist to guide their judgment in that respect. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (decided in the absence of any such checklist).

¹⁰⁴ Note that standard airline pilot checklists may be segmented by phase of the particular flight. For a brief discussion of the value of such checklists, and a simple example thereof, see Ralph Butcher, *Before Takeoff Checklist*, FLIGHT TRAINING, <http://flighttraining.aopa.org/students/presolo/skills/checklist.html> (last visited Sept. 22, 2015).

¹⁰⁵ See *supra* Section II on formulations of exacting scrutiny.

commensurability and broader comparability, and of unpredictability and indeterminacy. We turn to these crucial assumptions below.

IV. THE KEY ASSUMPTIONS OF EXACTING SCRUTINY AND THE PROBLEMS OF ABSOLUTISM, COMMENSURABILITY, AND INDETERMINACY

If we are to understand exacting scrutiny, and to appreciate its scope, strengths, and limitations, we must consider its own distinctive basic assumptions. To begin with, we should qualify just a bit the sensible assumption that exacting scrutiny should count as a form of judicial balancing, and thus, as invariably opposed to all forms of moral and judicial absolutism.

Technically, though, there is no inherent conflict between exacting scrutiny and typical forms of judicial absolutism, or exceptionless moral or legal rules. Absolutism, after all, can be viewed as merely the extreme or limiting case of exacting scrutiny. Exacting scrutiny asks crucially whether any governmental interest has been presented that should count as “sufficiently important”¹⁰⁶ to override or outweigh the burden on rights involved in the case.

But, there is no reason why courts applying exacting scrutiny could not decide, in an individual case, or in some narrow class of cases, that no realistically jeopardized government interest could count as sufficiently important to justify the rights deprivation. In principle, perhaps, substantially promoting some sufficiently important government interest could override the rights to be sacrificed. But in practice, in such a case no such sufficiently important government interest would be thought to be genuinely at stake.¹⁰⁷ Upon careful judicial investigation, the idea of a government interest sufficiently important to justify the burden on rights would thus be ruled out for some class of cases.

Rights that are sometimes thought of as inviolable, or as protected by exceptionless moral norms, may or may not also seem to be of the highest moral or practical importance. It has thus been suggested, for example, that the right not to be lied to, where truth is, in context, reasonably expected, is exceptionless.¹⁰⁸ It has also been argued that “[a] mother’s right not to be tortured to death by her own son is beyond any compromise. It is absolute.”¹⁰⁹ It has been suggested as

¹⁰⁶ See *supra* Section II on mainstream exacting scrutiny formulations.

¹⁰⁷ On the view of Professor John Finnis, exceptionless moral norms are not necessarily also supreme or fundamental norms, and we can easily imagine violating such norms, but any such violation would be morally unjustified. See JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 3 (1991). See also Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 28 (1978) (“acts of some kinds are always wrong”). For a very brief summary of Professor Finnis’ logic, see Alasdair MacIntyre, *Review of Moral Absolutes: Tradition, Revision, and Truth*, 103 ETHICS 811, 811 (1993).

¹⁰⁸ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 225 (2d ed. 2011).

¹⁰⁹ Alan Gewirth, *Are There Any Absolute Rights?*, 122 PHIL. Q. 1, 8 (1981).

well that “[t]he social body . . . does not have the right to . . . decree the death of a man for the salvation of the city.”¹¹⁰

Again, exacting scrutiny can technically accommodate a form of absolutism by declaring that while it stands ready to override a right deemed to be absolute, in reality no sufficiently important jeopardized government interest actually presents itself, leaving the right in question effectively absolute in some class of cases. This resolution, however, in which no interest sufficient to override the right in question arises, likely will not satisfy either committed absolutists or committed non-absolutists.

The most obvious problem from the perspective of non-absolutists is that absolutism implausibly seems to defy its opponents to so much as imagine even extreme cases, air-tight by stipulation, in which a single violation of an assumed absolute right—say, a lie to a tyrant—would by assumption assuredly save an innocent population, if not the world.¹¹¹ It is hardly surprising that consistent adherence to such a rigid absolutism, even if the world thereby collapses, seems rare.

On the other hand, the idea of a well-conceived and carefully formulated, perhaps narrow absolute right retains a certain appeal, and there is an understandable fear of entirely unconstrained judicial balancing, especially during socially stressful or threatening times.¹¹² And even in ordinary times, completely unconstrained interest balancing may seem to pay insufficient regard to the nature and meaning of a right. A right—particularly a constitutional right—may not be properly reducible in status merely to the weight of whatever interests it may barely offset.

Thus it seems desirable to avoid both dogmatic rights-absolutism, whatever the costs, and the reduction of genuine constitutional rights to merely the same value as the interests in the opposite balancing pan just before those interests begin to outweigh the rights at stake. At least a sort of judicial thumb on the scales in favor of basic constitutional rights may instead seem appropriate.

Such a thumb on the scales approach may reflect the thinking of Professor Ronald Dworkin, despite Professor Dworkin’s famous and apparently more decisive references to rights as “trumps.”¹¹³ The metaphor of outright

¹¹⁰ JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 68 (John F. Fitzgerald, trans., 1966 ed. 1946); see also the example of a universal installation of home surveillance cameras by the government, as discussed in Timothy Endicott, *Proportionality and Incommensurability*, OXFORD LEGAL RESEARCH PAPER SERIES (Feb. 2013), <http://ssrn.com/abstract=2086622> (last visited Oct. 2, 2015).

¹¹¹ On the legal status of lies in extreme circumstances, see R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131. See generally THOMAS L. CARSON, *LYING AND DECEPTION: THEORY AND PRACTICE* (2010).

¹¹² Justice Black articulated such concerns in Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 878 (1960). For some related concerns, see generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

¹¹³ See RONALD DWORIN, *RIGHTS AS TRUMPS*, IN *THEORIES OF RIGHTS* 152, 164 (Jeremy Waldron

trumping certainly seems to conflict with the metaphor of balancing.¹¹⁴ But it is also possible that Professor Dworkin really intends only that constitutional rights be upheld at some net cost in overall utility or collective well-being, but not at some arguably prohibitive or morally disastrous such cost.

Professor Dworkin thus argues that “the general benefit cannot be good ground for abridging rights,”¹¹⁵ but follows with the apparently modest claim that “[t]here would be no point in the boast that we respect individual rights unless that involved some sacrifice.”¹¹⁶ Some sacrificial loss in collective utility or welfare thus may be an appropriate price, where collective disaster might not. This would accommodate Professor Dworkin’s similarly modest language regarding the opportunity cost of free speech: “When someone claims a right of free speech, . . . he claims that it would be wrong for the state to prohibit him from speaking on some matter even if the general welfare would be improved by preventing him from speaking.”¹¹⁷ Not all overall welfare losses rise to the level of moral catastrophes. Not all welfare improvements also avoid moral catastrophes. Presumably only the more dramatic catastrophic circumstances and outcomes sometimes justify constitutional rights restriction.¹¹⁸

This approach suggests that there is some attractive middle ground between apparent rights absolutism and the supposed mere counting up and incremental comparison of the supposed consequences of alternative judicial outcomes.¹¹⁹ A judge who seeks to apply exacting scrutiny, generally or in a particular kind of case, can accommodate such an attractive middle ground approach, whether we call the exacting scrutiny approach a limited constraint on individual rights enforcement, or a limited constraint on otherwise completely uninhibited balancing.

The crucial point is that exacting scrutiny requires that the government establish the presence of an interest that is, in some context, sufficiently important. What in particular would establish sufficiency of importance is thus left unspecified under the basic formulas of exacting scrutiny. Some exponents of

ed., 1984); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 364 (1978).

¹¹⁴ See Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301, 303 (2000).

¹¹⁵ DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 113, at 193.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 364.

¹¹⁸ For an interpretation of Dworkin’s theory as similarly modest, see Philip Petit, *Rights, Constraints and Trumps*, 47 ANALYSIS 8, 10 (1987).

¹¹⁹ For similar expressions of this middle-ground view, see, e.g., BERNARD WILLIAMS, *A CRITIQUE OF UTILITARIANISM*, IN *UTILITARIANISM: FOR AND AGAINST* 75, 90 (J.J.C. Smart & Bernard Williams eds., 1973); JAMES GRIFFIN, *ON HUMAN RIGHTS* 64 (2008) (arguing that “[t]here must be some level of suffering and some level of importance of an exercise of autonomy at which the suffering outweighs the loss of autonomy”). Professor Griffin distinguishes among “right-right conflicts, right-welfare conflicts, right-justice conflicts, and possibly more.” *Id.* at 66; see also Judith Jarvis Thomson, *Precis of The Realm of Rights*, 53 PHIL. & PHENOMENOLOGICAL RES. 159, 161 (1993) (discussing a duty to act in a particular way “unless a sufficiently large and appropriately distributed increment of advantage would issue from failing to do it, how large an increment being fixed by the stringency of the claim [or duty]”).

exacting scrutiny may thus suggest that a government interest is sufficient—at least in some cases—if that government interest somehow just barely outweighs the moral harm involved in restricting the right in question.¹²⁰ But other exponents of exacting scrutiny could equally translate the “sufficiently important” interest requirement in some more demanding fashion.

Thus inspired by Professor Dworkin and others,¹²¹ advocates of exacting scrutiny could easily interpret the “sufficiently important” interest requirement as demanding an interest that quite substantially outweighs or clearly outranks any adverse effect on rights. A range of such positions is certainly possible. At one end of the range, as we have seen,¹²² would be the more or less absolutist position that no realistically jeopardized government interest can justify the substantial impairment of some particular constitutional right.

All forms of exacting scrutiny, along with all other popular approaches to contemporary constitutional adjudication, face problems of accounting for government interests and the rights claims and other interests with which they may conflict. Exacting scrutiny, no less than other constitutional tests, thus, faces problems of reasoned commensurability and incommensurability.

Incommensurability in the relevant sense involves, roughly, the inability of a decision maker to reasonably place or rank potentially conflicting rights, interests, reasons, or values on any appropriate common measuring scale or spectrum.¹²³ In a case of incommensurability, we thus cannot reasonably say of any two conflicting values that “either one is better than the other or that they are of equal value”¹²⁴ in the relevant respect.

The standard applications of various judicial weighing and balancing tests, including exacting scrutiny in particular, do indeed seem to involve holding rights and interests up to the light, for some sort of attempt at reasonable and

¹²⁰ However unrealistically, this and other examples ignore the possibility of several overlapping or related government interests being at stake, the possibility of several more or less related, and perhaps mutually conflicting rights of numerous right-holders, many of whom may not be before the court.

¹²¹ See *supra* notes 113-119 and accompanying text.

¹²² See *supra* notes 107-112 and accompanying text.

¹²³ ARISTOTLE, *supra* note 6, at 1133b. Aristotle noted the role of money in commensurating, for some purposes, the value of many sorts of goods and services. Thus, “money acts as a measure that, by making things commensurable, enables us to equate them.”

¹²⁴ Nien-He Hsieh, *Incommensurable Values*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 23, 2007), <http://plato.stanford.edu/entries/value-incommensurable2> (quoting the philosopher Joseph Raz). See also Joseph Raz, *Mixing Values*, 65 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 83, 83 (Supp. 1991) (“[w]hen of two sets of conflicting reasons neither is at least as weighty as the other they are incommensurable, and so are the actions they are the only reasons for”). There may also be cases in which two conflicting values, reasons, or interests may seem roughly equal, but we cannot reasonably say that they are precisely equal in value or rank, or that either one slightly outweighs or outranks the other. For discussion, see generally James Griffin, *Mixing Values*, 65 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 83, 103 n.3 (Supp. 1991). In fact, such cases may disproportionately make up the Supreme Court’s docket.

meaningful comparison, if not actual commensuration. The extent to which this means that exacting scrutiny, among other tests, must involve arbitrariness or rational indeterminacy requires some reflection.

Thus, the leading theorist Jurgen Habermas has argued that unlike any literal weighing process, when values are metaphorically weighed, “there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.”¹²⁵ As Habermas would have it, as a partial alternative courts might treat basic rights as exempt from such comparative valuing, or at least exempt from standard forms of cost-benefit analysis.¹²⁶ This would apparently involve some limited form of basic rights absolutism¹²⁷ or some alternative judicial resolution.¹²⁸

If we think of exacting scrutiny in particular as involving, in most instances, a non-absolutist approach, we must unavoidably be concerned about the broad problem of incommensurability. In particular, can we reasonably say under exacting scrutiny that one or more government interests are sufficiently important to override or outweigh the rights that would realistically have to be sacrificed in a given case? Or must such judgments of “sufficient importance” under exacting scrutiny inevitably lack any genuinely distinctive reasonable basis?

Exacting scrutiny, and the requirement of a sufficiently important government interest in particular, thus share in the problems of incommensurability, but they share in the reasonable alternative responses to the commensurability problems as well. In isolation, the question of whether the promotion of one or more government interests is sufficiently important to somehow override or outweigh some unavoidably sacrificed rights claims may well seem intimidatingly complex.

But similar such questions are often resolved without any hint of mysticism or irrationalism in daily life, whenever we reasonably trade off one value, in whatever measure, for the sake of some qualitatively quite different value. We may, for example, quite reasonably determine that the complex value of turning in a productive work performance tomorrow is somehow sufficiently important to justify now bringing a pleasant evening to a relatively early close.

¹²⁵ JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (William Rehg trans., 1996) (1992); see also Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1172 (1998).

¹²⁶ See HABERMAS, *supra* note 125, at 260.

¹²⁷ See *id.* at 260-61. For background, see generally *supra* notes 107-112 and accompanying text.

¹²⁸ See, e.g., Francisco J. Urbina, *Incommensurability and Balancing*, 35 O. J. L. S. 575, 576 (2015); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 6 n.2 (2006). Professor Murphy argues in particular that “[o]ne way to choose between options to promote incommensurable goods . . . is to rule out one of those options on independent grounds [i.e. not on grounds of lesser value]. Another way . . . is by employing norms of impartiality, for example, original position [or ideal observer] theory.”

Such reasonable assessments obviously follow no algorithms, nor is there any single compelling formula for broader reasonable resolutions of conflicting values, especially as the complications and qualitative dissimilarities mount. Consider, for example a comparative assessment of Lou Gehrig as a first baseman, or more generally as a baseball player, and of one's own current quite capable faculty colleague as a law professor. Could it not be entirely meaningful and reasonable to conclude that Lou Gehrig was better as a first baseman than one's capable colleague is as a law professor? And that the opposite is not true? And that the question is not beyond the legitimate scope of conclusive reasons? To seriously dispute the possibility of such a conclusion might itself seem not so much methodologically scrupulous, as itself arbitrary.

It is certainly possible to argue that the merits of Lou Gehrig and, say, a contemporary relief pitcher—let alone a law professor—are, technically, not relevantly commensurable. Many would respond that the realm of the commensurable evidently does not exhaust the realm of the reasonably comparable. It is certainly not as though there is a consensus on how such reasonable comparisons are technically to be made. But many people, and certainly most baseball fans, would express greater confidence in their belief in Gehrig's superiority in either case than in any particular method by which such belief could be arrived at or tested, or in the belief that we cannot reasonably think of Gehrig as comparatively great.

Some such comparisons seem uncontroversial as to their proper outcome, if not as to the precise methodology underlying the comparison. Suppose we are, in applying exacting scrutiny, seeking a governmental interest that is sufficiently important to justify the inescapable price of a day-long violation of one person's third amendment right that troops not be quartered in that person's home in time of peace. Suppose in particular that just such a constitutional third amendment violation were necessary in order to redirect a large meteor that would otherwise impact the earth, with attending adverse effects. We would, in such a case, reasonably conclude that an exacting scrutiny test, particularly with respect to a sufficiently important government interest, could be applied and passed. The broadly skeptical position, that applying exacting scrutiny in such a case would involve some logical flaw, seems itself artificial, contrived, and arbitrary.

Such an extreme hypothetical case is useful for establishing, or rebutting, broad theoretical claims. Admittedly, though, such a case does little to address less ambitious but still practically important critiques, including claims as to the indeterminacy in practice of exacting scrutiny, along with, to whatever degree, various other forms of balancing and judicial proportionality.

No doubt exacting scrutiny, along with balancing and proportionality more generally, often involves some indeterminacy of judicial outcome.¹²⁹ Of

¹²⁹ For issues of indeterminacy, among other concerns, raised in the context of proportionality in general, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3153 (2015).

course, case outcomes may be substantially indeterminate on the abstract merits, on a given test, yet quite predictable on the basis of, say, familiar judicial politics. But to one degree or another, exacting scrutiny, along with other forms of proportionalism, unavoidably suffers from general indeterminacy;¹³⁰ from problems in translating limited available data into well-justified findings of fact;¹³¹ from problems in determining and demonstrating the effectiveness and real necessity of a given means of pursuing a government interest;¹³² from problems in recognizing and properly accounting for all of the relevant rights and interests;¹³³ and from problems in particular of the improper multiple counting of the relevant interests and right-claims.¹³⁴

Whether judicial proportionalism in general suffers from these problems more severely than does absolutism, or than other alternatives, is a question of some importance. Whether exacting scrutiny in particular suffers from these problems more severely than does proportionalism in general, or than absolutism, is similarly important and worthy of extended investigation along various lines.¹³⁵ Not everyone's intuitions will be in accord on such obviously complex matters.¹³⁶ But we do tend to recognize that there is more than one sort of judicial predictability or unpredictability.

Let us then bear these questions of indeterminacy in mind as we think summarily of the general advantages and disadvantages of exacting scrutiny in general. Exacting scrutiny evidently offers the advantages of formulaic simplicity, a built-in normative quality, ready understandability at a verbal level, almost limitless flexibility, potential sensitivity to all relevant rights and interests, and potential universality of scope and applicability. If we choose to amend the

¹³⁰ See *id.*

¹³¹ See generally, NICHOLAS RESCHER, PLURALISM: AGAINST THE DEMAND FOR CONSENSUS 11 (1993).

¹³² See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 827 (1994) (referring to arguments about "what gets assumed without examination" in the balancing context); Bernard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. COMPAR. & INT'L L. 291, 299 (2012); see generally Jim Manzi, *What Social Science Does — and Doesn't — Know*, CITY JOURNAL (Summer 2010), www.city-journal.org/2010/20_3_social-science.html; John P. Ioannidis, *Why Most Published Research Findings Are False*, PLOS MEDICINE (Aug. 30, 2005), www.ncbi.nlm.nih.gov/pmc/articles/PMC1182327.

¹³³ See Urbina, *Is It Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning'*, *supra* note 6, at 168 (on the judicial tendency to ignore some, often the more difficult to manage, interests); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004-05 (1987).

¹³⁴ In the context of some typical balancing cases, see David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U.L. REV. 641, 693-94 (1994).

¹³⁵ For the merest beginning on some of these issues, see R. George Wright, *What If the Levels of Constitutional Scrutiny Were Abandoned?*, 45 U. MEMPHIS L. REV. 165 (2014).

¹³⁶ Consider, e.g., the argument that adopting proportionalism, as distinct from the Court's familiar tiered scrutiny levels approach, would restrict rather than expand or leave unaltered the realistic scope of judicial discretion. See Schlink, *supra* note 132, at 298.

traditional exacting scrutiny formula by replacing the typical substantial relationship¹³⁷ requirement with some more context-sensitive tailoring requirement, we can even further increase the flexibility and the range of applicability of exacting scrutiny.

Given the focus of exacting scrutiny on sufficiency, and in particular on the presence or absence of one or more sufficiently important governmental interests, exacting scrutiny carries an inherent advantage over most of the standard and somewhat more structured and determinate tiered scrutiny formulas. It is all very well, for example, if the state can advance a broadly or generally important government interest, as in the context of gender discrimination.¹³⁸ But knowing that a government interest is merely generally important does not establish whether it is also sufficiently important to override or outweigh some apparently conflicting more or less particular rights claim. An interest may in a general sense count as important without also being, in context, sufficiently important to override some conflicting rights values. A judgment that something is sufficient implies a contextual conclusion. No more is necessary. This is why the broad project of further characterizing the status of a generally important government interest in gender equal protection cases is of practical importance.¹³⁹

In contrast, if we happen to conclude, on whatever further basis, that a government interest is not merely generally important, but is actually sufficiently important in context, we have, tailoring issues aside, on that further basis largely decided the case. This is the crucial question that exacting scrutiny poses. It is perhaps barely possible to say that a government interest is indeed sufficiently important, morally or legally or practically, to justify the relevant restrictions on constitutional rights, but that justice somehow still requires that the court rule against the government. But that kind of case would seem odd and unusual at best. If justice really requires a judgment for the private party being regulated, why concede that the appropriately tailored government interest is in context indeed morally, or legally, or practically, sufficiently important? Exacting scrutiny at the 'sufficiently important interest' stage carries a distinctive normative quality and judicial impetus, once the court has decided that some government interest does or does not meet the exacting scrutiny standard of being of genuinely sufficient importance under the circumstances.

All the above qualities of standardly formulated exacting scrutiny are, taken together, quite considerable and quite valuable. But, precisely these various advantages of exacting scrutiny equally suggest important limitations on the overall value of exacting scrutiny. Summarily put, the formulaic simplicity, the built-in normative quality, the ready understandability at a verbal level, the

¹³⁷ See the exacting scrutiny tailoring requirement formula discussed by Schlink, *supra* Section II.

¹³⁸ See the mid-level scrutiny requirements adopted in *Craig*, 429 U.S. at 197.

¹³⁹ See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (mid-level gender equal protection scrutiny as requiring "an exceedingly persuasive justification" of the challenged policy); *id.* at 558-59 (Rehnquist, C.J., concurring in the judgment) (further characterizing the language at issue).

almost limitless flexibility, the potential sensitivity to all rights and interests, and the potential universality of scope and applicability of exacting scrutiny is only the more readily noticed side of the coin. These presumably desirable qualities, unfortunately, themselves imply a second, less attractive side of the exacting scrutiny coin.

These very qualities, with their overall general emphasis on openness, flexibility, and adaptability, rightly suggest that exacting scrutiny unfortunately lacks any meaningful internal structure or differentiation, any mediating elements, any concrete substantive principles, and any internal cues as to its application. The other side of the immense breadth, potential sensitivity, and exceptional adaptability of exacting scrutiny is its substantive near emptiness. Exacting scrutiny, independently and on its own terms, does little substantive work. Exacting scrutiny as a test does not begin to tell us what counts as a sufficient interest, or why, or how to begin to do a sufficiency calculation. Only after a court has decided to apply exacting scrutiny does the genuinely meaningful normative decision-making even begin to take place. The idea of sufficiency itself is hardly self-explicating and self-applying. The test itself is not far from empty.

This is not to suggest that the more familiar sorts of contextualized constitutional tests, or constitutional absolutism, or the standard levels of tiered constitutional scrutiny¹⁴⁰ invariably offer substantial decision-making structure and adjudicative guidance. Without overselling the meaningful guidance provided by alternative tests, however, it is important to recognize the remarkable limitations in this respect of exacting scrutiny.

A bit more concretely, the exacting scrutiny requirement that the government advance one or more interests that are individually or jointly sufficiently important to override or outweigh the jeopardized rights does not tell us anything about how to determine the importance of any governmental interest, or how important any conflicting rights claim may be, or how to do any necessary comparison, or the degree of seriousness of any rights violation.¹⁴¹ On its own terms, exacting scrutiny is not strict in theory,¹⁴² or semi-strict in theory, or particularly lax in theory, or any other characterization. Nor is exacting scrutiny fatal in fact,¹⁴³ or semi-fatal in fact, or particularly benign. Its adaptability and largely normative character, without further judgments, reduces

¹⁴⁰ For some skepticism along these lines, see Wright, *supra* note 135.

¹⁴¹ See Dimitrios Kyritsis, *Whatever Works: Proportionality as a Constitutional Doctrine*, 34 O. J. L. S. 395, 397 (2014) (in the context not of exacting scrutiny in particular, but of constitutional proportionality in general).

¹⁴² The allusion here is to the language of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995). See also *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2421 (2013).

¹⁴³ See the authorities cited *supra* note 142. Nor, for that matter, can we say that exacting scrutiny steers courts toward some middle ground, or to some middle range of receptivity to a plaintiff's complaint, as we might say of traditional mid-level scrutiny.

it to almost limitless malleability. By itself, exacting scrutiny does not tend to steer results in even the limited way that, say, strict or minimum scrutiny do.

The basic problem here, though, is not actually one of judicial unpredictability. The outcome of even an entirely empty judicial test, employed by an ideologically or politically driven judge, may be quite predictable. Rather, the basic problem with standard formulations of exacting scrutiny is the inherent lack of institutional legal guidance in characterizing, let alone resolving, the various arguably relevant moral, practical, predictive, scientific and other empirical, statistical, and deeply prudential problems that attend constitutional adjudication.¹⁴⁴ In itself, exacting scrutiny, more than other approaches to constitutional adjudication, comes uncomfortably close to a broad injunction to do the right or best thing. Whether such an injunction is useful or not, and whether outcomes under exacting scrutiny can be politically predicted or not, exacting scrutiny does not seem to manifest the advantages of an institutional rule of law,¹⁴⁵ focusing in part on the socially valuable constraint of judicial decision-making by pre-existing rules.¹⁴⁶

V. CONCLUSION

The judicial test known as exacting scrutiny has taken on increasing importance in American jurisprudence, without thus far attracting much extended notice and critique. Above, we have sought to clarify standard formulations of exacting scrutiny and to document the test's increasing significance, along with the continuing bounds on its current judicial use. We have also situated exacting scrutiny with respect to various forms of judicial absolutism, of utterly unconstrained judicial balancing, and of the standard multiple tiers of judicial scrutiny, particularly with respect to problems of incommensurability and of judicial unpredictability and indeterminacy.

Ultimately, we find that exacting scrutiny, in its standard formulations or as reasonably modified, promises certain significant advantages. Exacting scrutiny offers formulaic simplicity, a certain built-in normativity, ready understandability at a verbal level, nearly limitless flexibility in any given

¹⁴⁴ Cf. Urbina, *A Critique of Personality*, *supra* note 6, at 68 (“[i]f the law requires open-ended moral reasoning, then the law is not performing an important service it usually performs for judges and other adjudicators”).

¹⁴⁵ For recent characterizations and accounts of the value of the rule of law, *see* TOM BINGHAM, *THE RULE OF LAW* (2011); BRIAN Z. TAMANHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 *CAMBRIDGE L.J.* 65 (2004); Andrei Marmor, *The Rule of Law and Its Limits*, 23 *L. & PHIL.* 1 (2004); Jeremy Waldron, *How Law Protects Dignity*, 71 *CAMBRIDGE L.J.* 200 (2012).

¹⁴⁶ *See* the sources cited *supra* note 145; *see also* LON L. FULLER, *THE MORALITY OF LAW* Ch. 2 (2d ed. 1969); Joseph Raz, *The Rule of Law and Its Virtue* 3, 7 (1979), <http://nw18.american.edu/dfagel/Philosophers/Raz> (last visited Oct. 10, 2015) (particular orders to be derived through “open, stable, clear, and general rules”).

application, potential sensitivity to all relevant rights and interests, and a potentially universal scope of applicability.

Unfortunately, though, the advantages of exacting scrutiny also constitute or imply corresponding disadvantages. There is simply not much substance, inherently, to exacting scrutiny itself. Unlike in cases of utterly unconstrained balancing, there is under exacting scrutiny at least some reference to the ideas of interest importance and substantiality. Exacting scrutiny is, however, largely empty. There is in particular a lack of internal test structure, of internal differentiation, of mediating elements, of internal cues as to application, and of substantive guiding or directive principles. The idea of sufficiency in particular is not itself helpfully directive.

This does not mean, however, that exacting scrutiny will be grossly indeterminate as to its adjudicative outcomes, in the sense of sheer unpredictability. Actually, a nearly open constitutional test may allow judges to more uninhibitedly manifest their perhaps quite predictable biases, of whatever sort. Exacting scrutiny does, however, by itself leave nearly all of the significant moral, practical, and broadly empirical work to be done, without meaningful constraint flowing from the exacting scrutiny test itself. In particular, exacting scrutiny in itself cannot promise to systematically advance the judicial decision-making constraint values associated with the rule of law.