

# WIPING AWAY THE TIERS OF JUDICIAL SCRUTINY

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## INTRODUCTION

Throughout much of constitutional law and beyond, courts often decide cases by applying some form of tiered or multilevel judicial scrutiny.<sup>1</sup> Tiered scrutiny exhibits remarkable variability and complexity.<sup>2</sup> At its simplest, tiered scrutiny involves a judicial inquiry into the legitimacy and the degree of importance of some public goal purportedly furthered by the government policy at issue. The courts then typically undertake a second step, inquiring into the degree of “tailoring” of the government policy—namely the policy’s overinclusiveness or underinclusiveness relative to its supposed purpose.<sup>3</sup> This simplified account of tiered scrutiny conceals, however, a number of important problems. The undue complications, manipulability, oft-mistaken emphases, and other costs of tiered scrutiny are, by now, conspicuous and remarkable. Tiered scrutiny review has decayed to the point to which its use is no longer justifiable.

Among other basic problems, tiered scrutiny now offers only the appearance, but not the reality of, reasonable efficiency and appropriate constraint on judicial subjectivity and discretion. The practice of tiered scrutiny today clearly undermines several basic rule of law principles.<sup>4</sup> This Article suggests that a simpler, more

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<sup>1</sup> See generally R. George Wright, *What If All the Levels of Judicial Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165 (2014).

<sup>2</sup> See *id.* at 170. For a sense of the historical development of the levels of judicial scrutiny, see generally Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J. OF L. & PUB. POL’Y 475 (2016); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005).

<sup>3</sup> For a relatively simple, but self-conscious and probing, application of a tiered scrutiny schema, see the explicit sex discrimination case of *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying a version of what is classified as intermediate scrutiny to the state statute at issue).

<sup>4</sup> For standard, and quite substantially overlapping, multiple-element accounts of the rule of law, see TOM BINGHAM, *THE RULE OF LAW* (Penguin Books 2011) (2010).

rule of law-friendly substitute for tiered scrutiny is realistically available,<sup>5</sup> and that such a substitute encourages more pragmatic lawmaking.<sup>6</sup>

This Article thus recommends replacing today's readily manipulable and otherwise crucially defective tiered scrutiny analysis with a substitute requiring fewer and better-working parts. In particular, this Article recommends a stronger judicial concern for a legislative policy's actual effectiveness in practice and far less concern for questions of tailoring.<sup>7</sup> This Article also recommends a more serious judicial accommodation of constitutionally fundamental rights.<sup>8</sup>

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*See also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270–71 (2d ed. 2011); LON L. FULLER, THE MORALITY OF LAW ch. 2 (2d ed. 1969); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 80–83, 90 (2004); Marc O. DeGirolami, *Faith in the Rule of Law*, 82 ST. JOHN'S L. REV. 573, 578–79 (2008); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 47–48 (1997); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1704–06 (1999); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7–8 (2008). A fuller account of typical presentations of the rule of law values appears *infra* at note 141.

<sup>5</sup> *See infra* Parts II–III.

<sup>6</sup> *See infra* Parts II–III. For some ironic complications of the idea of simplicity, see R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 735 (2000).

<sup>7</sup> Importantly, the degree of "tailoring" of the government policy to the scope of the problem sought to be remedied by that policy, as a matter of degrees of overinclusiveness or underinclusiveness, may actually have little to do with the severity or the constitutional insignificance of the policy's impact on persons inadvertently affected by the policy. *See infra* notes 58–69 and accompanying text. Degrees of tailoring between the scope of a perceived problem and the scope of the persons or interests actually affected by the policy at issue can be thought of in terms of typical Venn diagram degrees of overlapping, or lack thereof. *See, e.g., What is a Venn Diagram*, LUCIDCHART, <https://www.lucidchart.com/pages/venn-diagram> (last visited Oct. 12, 2019). But overlap, or degrees of overlap, in this "tailoring" sense, tells us virtually nothing about the nature, severity, or significance of the government policy's actual impact on any affected party. *See infra* notes 58–69 and accompanying text. A Venn diagram tells us about a merely two-dimensional overlap, but nothing about the three-dimensional depth, severity, gravity, inescapability, impact, or the mere superficiality of that overlap. *See infra* notes 58–69 and accompanying text. The real severity of any burden a policy imposes on an affected party, intentionally or unintentionally, is in contrast, much more usefully pursued by asking about the value of any alternative unregulated courses of action still available to the party challenging the government policy. What can the affected party still do, at appropriate cost? *See infra* notes 58–69 and accompanying text. *See generally* R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2090–96 (2015); R. George Wright, *The Unnecessary Complexity of Free Speech Analysis and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 77–80 (1989) [hereinafter *Unnecessary Complexity*].

<sup>8</sup> *See infra* notes 72–81 and accompanying text.

The aim of these recommended revisions is to channel judicial scrutiny in the most useful directions, to simplify and appropriately constrain judicial analyses, to encourage substantially effective legislative policies, and to otherwise better promote basic rule of law values.<sup>9</sup> None of these suggested reforms would authorize courts to usurp the proper legislative role or otherwise empower courts to stray beyond the area of judicial competency by second-guessing calculations of policy costs or by performing general cost-benefit analyses of statutes and regulations.<sup>10</sup>

#### I. TIERED SCRUTINY'S TYPICAL INDIFFERENCE TO ANY QUESTIONS OF THE ACTUAL EFFECTIVENESS OF A CHALLENGED GOVERNMENT POLICY

Where fundamental rights are unaffected and no suspect legislative classification is employed, courts ordinarily defer to a legislature's choice among policy options, at least.<sup>11</sup> This general rule of judicial deference to legislative policy judgments recurs, in particular, throughout equal protection case law applying what is known as minimum scrutiny of the legislative choice; this minimum scrutiny requires merely a rational, and often presumed, basis for the legislative policy choice.<sup>12</sup>

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<sup>9</sup> See *infra* Parts I–II.

<sup>10</sup> A focus on whether a policy has, in practice, substantially advanced some government interest does not, as discussed below, involve a broad cost-benefit assessment. See *infra* Parts II–III. Similarly, the focus herein deemphasizes mere *ex ante* predictions as to how effective a policy will eventually turn out to be in practice. See *infra* Parts II–III. Finally, judicial inquiry into whether a given aim has in practice been substantially advanced does not license courts to assess the degree of importance of the government interest sought to be advanced. See *infra* Parts II–III. As it turns out, significant analytical simplifications can be made at minimal cost in terms of the attractiveness of the judicial outcome on the merits. This Article then recommends a further simplification, in the form of avoiding a judicial balancing test, or a test of proportionality, especially when genuinely fundamental constitutional rights are being substantially burdened. See *infra* Parts II–III. For background on judicial proportionality, and on “exacting” and “strict” judicial scrutiny, see R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 207–08 (2016). For a classic defense of the status of genuinely fundamental rights, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* XI, 192 (1977).

<sup>11</sup> See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *Dandridge v. Williams*, 397 U.S. 471, 484–85 (1970).

<sup>12</sup> See, e.g., *Beach Commc'ns, Inc.*, 508 U.S. at 313; *Dandridge*, 397 U.S. at 484–85.

Thus the idea of equal protection, in particular, is typically “not a license for courts to judge the wisdom, fairness, or logic of legislative choices.”<sup>13</sup> Judicial resistance to “second-guess” legislative policy choices, absent any concern for fundamental rights or suspect legislative classifications, recurs throughout much of the pertinent case law.<sup>14</sup> Otherwise put, courts do not “sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”<sup>15</sup>

This judicial deference thus extends to questions of the “wisdom, fairness, [and] logic”<sup>16</sup> of the legislative choice. Typically, courts will not require a legislature to attack any social or economic ill in its full scope; a legislature may instead single out one aspect of a perceived problem without committing to any

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<sup>13</sup> *Beach Commc'ns, Inc.*, 508 U.S. at 313; *see also* *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>14</sup> *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 753–54 (2011) (public financing of elections); *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring); *Kelo v. City of New London*, 545 U.S. 469, 488–90 (2005) (a major eminent domain case reaffirming judicial deference to state governmental judgments without second-guessing their wisdom or efficiency); *Mansell v. Mansell*, 490 U.S. 581, 583, 594 (1989) (statutory protection of military retirees); *Rodriguez v. United States*, 480 U.S. 522, 525, 526 (1987) (per curiam) (“Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.”) (recognizing multiple statutory purposes); *W. & So. Life Ins. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 670 (1981); *U. S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 197 (1980) (Brennan, J., dissenting); *Pulte Home Corp. v. Montgomery Cty.*, 909 F.3d 685, 694 (4th Cir. 2018) (“It is not this court’s place to second-guess the wisdom of elected local officials in making inherently discretionary zoning decisions.”) (applying the deference principle not only to state governmental legislative determinations, but to state administrative agency decisions as well); *Cure Land, L.L.C. v. USDA*, 833 F.3d 1223, 1236 (10th Cir. 2016) (applying the deference principle to judicial review of a federal administrative agency’s substantive decision making priorities); *Sensational Smiles, L.L.C. v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) (upholding even “rent-seeking” legislation) (legislatures need not articulate their motivating reasons); *Bonidy v. USPS*, 790 F.3d 1121, 1128 (10th Cir. 2015) (applying the deference principle to a postal service regulation); *Gordon v. Holder*, 721 F.3d 638, 657 (D.C. Cir. 2013) (addressing congressionally-chosen means of addressing illicit mail deliveries of tobacco); *Martin v. Haas*, 556 S.W.3d 509, 515 (Ark. 2018) (state court applying the deference principle to state legislative enactments).

<sup>15</sup> *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam)); *see also* *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1999) (rejecting the judicial “superlegislature” role); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978) (paying deference to Maryland state statute); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.* 414 U.S. 156, 165 (1973) (“We refuse to sit as a ‘superlegislature to weigh the wisdom of legislation[.]’” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963))).

<sup>16</sup> *Beach Commc'ns, Inc.*, 508 U.S. at 313.

further legislative response.<sup>17</sup> The courts in such cases also do not typically insist on any articulation by the legislature of its reasons, purposes, or aims in enacting a statute.<sup>18</sup> Nor need the legislature typically offer any findings of fact to explain or to justify, as of the time of its enactment,<sup>19</sup> the statute in question.<sup>20</sup> The courts seek to justify this broad deference to legislative action in part based on the belief that “absent some reason to infer antipathy, even improvident [legislative] decisions will eventually be rectified by the democratic process . . . .”<sup>21</sup> A basic problem with this optimistic belief, however, is that statutes and regulations which utterly fail to serve any of their supposed public purposes—or which actually make the perceived social problem worse—may be quite stable and difficult to politically reverse if the policy distinctly benefits some small and well-organized groups.<sup>22</sup>

This typical judicial reluctance to question whether a statute or rule somehow advances one or more of its presumed purposes, even after the statute or rule has been fully implemented and its actual results can be readily investigated, is certainly not confined to the equal protection context. The actual results of a challenged government policy are also deemed largely irrelevant in, for example, eminent domain cases.<sup>23</sup> It has also been argued, however ironically, that this broad judicial deference to legislatures whenever basic constitutional rights are not at stake “provides guidance and discipline for the legislature, which is

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<sup>17</sup> See *id.* at 316; *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

<sup>18</sup> See, e.g., *Beach Commc'ns, Inc.*, 508 U.S. at 315; *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

<sup>19</sup> It is, for our purposes, important that the cases focus almost entirely on the justifiability of the statute at the time of legislative deliberation and enactment, rather than on any degree of effectiveness of the statute post-enactment, after its implementation, and thus in actual practice.

<sup>20</sup> See, e.g., *Beach Commc'ns, Inc.*, 508 U.S. at 315; *Nordlinger*, 505 U.S. at 15; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

<sup>21</sup> *Beach Commc'ns, Inc.*, 508 U.S. at 314 (quoting *Vance*, 440 U.S. at 97) (internal quotation marks omitted).

<sup>22</sup> As classically argued in MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 3 (2012); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 17 (1982); GORDON TULLOCK, *THE RENT-SEEKING SOCIETY* 185 (Charles Rowley ed. 2005); and in summary form in William F. Shughart, II, *Public Choice*, ECONLIB, <https://www.econlib.org/library/Enc/PublicChoice.html> (last visited Sep. 14, 2019).

<sup>23</sup> See, e.g., *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 544–45 (2005); *Kelo v. City of New London*, 545 U.S. 469, 488–89 (2005) (focusing on merely predictive, *ex ante*, preimplementation, prospective judgments by the public officials involved); *Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984).

entitled to know what sorts of laws it can pass.”<sup>24</sup> It is, however, unfortunately quite unclear how broad judicial deference to legislatures in social and economic matters provides either concrete “guidance”<sup>25</sup> or meaningful “discipline”<sup>26</sup> for legislatures. One might well say, in the alternative, that judicial deference commonly authorizes legislative or administrative action even where that action can be shown to have failed in practice to substantially advance any of its inferable purposes.

In some cases, fully appropriate post-enactment judicial redress to injured parties may not be possible, even if it is now clear that the policy is a complete failure. Even if a court officially declared the failure of, say, the eminent domain scheme in *Kelo v. City of New London*,<sup>27</sup> it might not be feasible to reconstruct the vanished homes and properties, let alone an entire community.<sup>28</sup> But in most cases, some sort of creative judicial relief, in terms of a carefully crafted injunction, monetary damages, or declaratory relief, should be available to reduce the otherwise accumulating private and public harms of evidently failed policies. Legislative and administrative policies that have failed to substantially or otherwise meaningfully advance any plausible public purpose should thus be considered vulnerable to appropriate judicial redress.

Perhaps the idea of judicially requiring merely a “realistically conceivable”<sup>29</sup> legislative public interest fairly expresses a single uniform, less readily manipulable judicial review standard around which courts should rally. Often, the legislative purposes sought by a piece of legislation or rule will not be clear.<sup>30</sup> But we need not

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<sup>24</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 545 U.S. at 487–88. The development project in question metaphorically collapsed. See Susette Kelo, *I Still Feel the Pain of Losing My ‘Little Pink House,’* USA TODAY (Apr. 16, 2018, 6:00 AM), <https://www.usatoday.com/story/opinion/2018/04/16/private-land-seizure-pfizer-new-london-little-pink-house-column/507608002/>; Ilya Somin, *Give Susette Kelo Her Land Back*, REASON: THE VOLOKH CONSPIRACY (May 25, 2018, 3:15 PM), <https://reason.com/2018/05/25/give-susette-kelo-back-her-land/>.

<sup>28</sup> But see Somin, *supra* note 27, for a constructive remedial suggestion in that specific context.

<sup>29</sup> As adopted in *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (emphasis omitted), *cert. denied sub nom Fitzgerald v. Racing Ass’n of Cent. Iowa*, 541 U.S. 1086 (2004); *Horsfield Materials, Inc., v. City of Dyersville*, 834 N.W.2d 444, 459 (Iowa 2013) (citation and internal quotation omitted).

<sup>30</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972) (“The legislative purposes that the statute is meant to serve are not altogether clear.”). The plurality in *Eisenstadt*

insist on evidence in legislative history that one or more legislators consciously endorsed any particular purpose at the time of legislative enactment.<sup>31</sup> Ascertaining any specific statutory intent is, of course, often problematic.<sup>32</sup> Even if a contemporaneous legislative intent could be determined, though, it might also be sensible to consider post-enactment grounds and justifications.<sup>33</sup> More radically, courts might begin to insist broadly upon at least minimal legislative statements of intended legislative purpose.

A further complication is that any statute might well have a number of purposes, whether those multiple purposes are specified, ranked, or neither.<sup>34</sup> As well, the legislative purposes at issue may be of somewhat different sorts. Statutes may differ in their emphasis on substantive purposes,<sup>35</sup> as supposedly distinct from what we might call symbolic,<sup>36</sup> expressive,<sup>37</sup> or public identity-related, purposes.<sup>38</sup> In some cases, a government policy

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evidently found the likely dubious future effectiveness of the contraceptive restriction to be evidence that certain specified purposes could not plausibly be ascribed to the enacting legislature. *See id.* at 442–43.

<sup>31</sup> *See, e.g.*, *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 560 (5th Cir. 2006).

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 560–61. Not all unforeseen consequences of a statute need be adverse, after all. Consider a tree planting program intended solely to promote local aesthetics that also turns out to promote a healthier local environment and even local business activity.

<sup>34</sup> *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466–70 (1981); *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981). Consider, as well, the possible multiple purposes of governmental affirmative action programs, as elaborated in R. George Wright, *Cumulative Case Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1, 12–14, 19 (2002). It is also certainly possible that the multiple legislative purposes may be, to one degree or another, in conflict.

<sup>35</sup> A statute aimed at, say, flood control or infrastructure enhancement, will typically have mostly substantive purposes.

<sup>36</sup> For background, see MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 1–2 (2d ed. 1985). Perhaps every significant statute, though, has some element of symbolic or expressive intent, whether the courts recognize this or not. Thus, it may be a mistake to view, say, teenage video game anti-pornography ordinances as intended solely to reduce some tangible, material harm, such as violent crime. *But see* *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799–801 (2011) (focusing largely on evidence of some form of aggressiveness, or the lack thereof, apart from any more symbolic or expressive purposes).

<sup>37</sup> *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–23 (1996).

<sup>38</sup> Identity-establishing or identity-confirming legislation, as perhaps in the case of immigration policy, can be motivated by a sense of “who we are,” which is understood largely as a matter of who we presumably should be. Jamshed Dastur, *This Is Not Who We Are as Americans. Or Is It?*, L.A. TIMES (Jul. 5, 2018),

may involve an inseparable mixture of the substantive and the nonsubstantive purposes.<sup>39</sup> We can accept any reasonable account of the nature of the purposes associated with a rule or statute.

Our primary concern, though, is not with the nature of the interests cited in support of a given policy, but with whether any such policy is, in practice, substantially advanced after its implementation. Relatively narrow questions of whether there has been substantial advancement of a given legislative purpose can still, admittedly, be politicized to some limited degree. But such questions are less readily, less broadly, and less uninhibitedly manipulable by judges than the typically more complex and multifaceted, if not largely arbitrary, inquiries as to tailoring and the other dimensions of tiered scrutiny judgments.

Also, a court that adopts, in advance, even a general test for determining the substantial versus insubstantial advancement of a legislative policy is thereby more constrained by that simple test than by typical forms of tiered scrutiny. And crucially, a judicial inquiry into the substantial advancement of a legislative purpose as merely a binary inquiry renders any further judicial concern about *degrees* of advancement of a legislative purpose utterly irrelevant. In classical tiers of scrutiny analysis, the court may use an indefinite, if not infinite, number of degrees of purpose fulfillment, importance of legislative purpose, and tailoring.

As it turns out, courts sometimes do require evidence, largely or entirely pre-implementation, that a policy will have some meaningful impact on the presumed social evil in question. In general, the greater the significance of constitutional-level considerations in a case, the greater the chances that a court will probe the predicted likelihood that a legislative policy will have some desired future effect.

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<https://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-commentary-america-20180705-story.html>. The contrast would be with the familiar claim that some unattractive phenomenon “is not who we are.” *Id.*

<sup>39</sup> Consider the local downtown Christmas display policy litigated in the Establishment Clause case of *Lynch v. Donnelly*, 465 U.S. 668, 670–71 (1984). One could easily argue that the combined religious and secular elements of the seasonal display had various purposes ranging from the purely commercial—to enhance local downtown spending—to promoting civic and community pride, to the generally celebratory, to symbolic, expressive, and local identity-confirming purposes, and then to religious preference, favoritism, and advancement. It is even possible that the most purely commercial motivations could not be optimized over time without the presence of at least some perceivably religious symbols. *See id.* at 680–84.

Judicial inquiries into the substantiality of the advancement of a purported government interest arise, in particular, in the dormant commerce clause cases. Among the familiar dormant commerce clause cases, for example, we find judicial scrutiny of a state statute's likely future effects, as distinct from actual current effects, in *Kassel v. Consolidated Freightways Corporation*,<sup>40</sup> *Hunt v. Washington State Apple Advertising Commission*,<sup>41</sup> and *Southern Pacific Company v. Arizona*.<sup>42</sup> Typically, this judicial inquiry into a state statute's likely future effects then triggers a largely unconstrained judicial balancing test,<sup>43</sup> with the assumed value of the state regulatory interest being somehow weighed against the likely future adverse effects on the flow of interstate commerce.<sup>44</sup>

The language of these dormant commerce clause cases legitimizes a general judicial inquiry into the extent of a state policy's advancement. Judicial balancing then often follows. Thus, "Regulations . . . may further the purpose so marginally and interfere with commerce so substantially, as to be invalid under the Commerce Clause."<sup>45</sup> A challenged state statute may predictably do "remarkably little"<sup>46</sup> to further the abstractly permissible state interest and thus fail a generalized interest balancing test.<sup>47</sup> Even if only through prediction, courts thus consider the likely effectiveness of the policy.

In cases moving toward the realm of individual federal constitutional rights, the courts again tend to inquire, usually predictively, into the fulfillment of the state regulatory purposes. Thus in the commercial speech area, cases such as *Central Hudson Gas and Electric Corporation v. Public Service Commission*,<sup>48</sup>

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<sup>40</sup> 450 U.S. 662, 670–71, 674–75, 677–78 (1981).

<sup>41</sup> 432 U.S. 333, 350–54 (1977), *superseded in part by statute* 42 U.S.C. § 2000e-5(f)(1), *as recognized in* *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 556–57 (1996).

<sup>42</sup> 325 U.S. 761, 781–82 (1945).

<sup>43</sup> *See Kassel*, 450 U.S. at 670–71; *Hunt*, 432 U.S. at 352–53; *S. Pacific Co.*, 325 U.S. at 775–76.

<sup>44</sup> *See Kassel*, 450 U.S. at 670–71; *Hunt*, 432 U.S. at 352–53; *S. Pacific Co.*, 325 U.S. at 775–76.

<sup>45</sup> *Kassel*, 450 U.S. at 670.

<sup>46</sup> *Hunt*, 432 U.S. at 353.

<sup>47</sup> *See, e.g., S. Pacific Co.*, 325 U.S. at 775–76. For an example of a much less critical and more deferential judicial approach to the likely promotion of state statutory interests in the dormant commerce clause context, see generally the local baitfish case of *Maine v. Taylor*, 477 U.S. 131 (1986).

<sup>48</sup> 447 U.S. 557, 561 (1980).

*Edenfield v. Fane*,<sup>49</sup> and *44 Liquormart, Inc., v. Rhode Island*<sup>50</sup> allow for judicial inquiry into whether a regulation “provides only ineffective or remote support,”<sup>51</sup> for the government regulatory interest at stake,<sup>52</sup> or into whether the regulation “will in fact alleviate [the targeted social harm] to a material degree.”<sup>53</sup> The court may thus require evidence of a future significant advance of the government interest.<sup>54</sup> In these and other areas,<sup>55</sup> the courts may in some instances<sup>56</sup> require predictive evidence that the government policy at issue will substantially advance a cognizable government purpose.

Remarkably, some courts impose a similar predictive standard, but under the grossly misleading rubric of a “tailoring” inquiry.<sup>57</sup> In these cases, the court’s assessment of the future degree of success of the policy occurs, as in tiered scrutiny analysis, through a judicial inquiry into the required degree of “tailoring” of the state regulatory policy.

This odd judicial confusion of supposed policy effectiveness with the supposed degree to which the regulation is tailored to its target—and thereby to one supposed degree or another overinclusive or underinclusive—occurs in various important

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<sup>49</sup> 507 U.S. 761, 765 (1993).

<sup>50</sup> 517 U.S. 484, 495 (1996).

<sup>51</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564. It is not entirely clear why support that is “remote” should be entirely discounted, in contrast with “direct” support.

<sup>52</sup> *See id.*

<sup>53</sup> *Edenfield*, 505 U.S. at 771.

<sup>54</sup> *See 44 Liquormart*, 517 U.S. at 505. For recent applications of a similar requirement of a predicted alleviation of the targeted social harm to some material degree, see, e.g., *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1177 (9th Cir. 2018); *Missouri Broads. Ass’n v. Lacy*, 846 F.3d 295, 301 (8th Cir. 2017); *Kiser v. Kamdar*, 831 F.3d 784, 789 (6th Cir. 2016).

<sup>55</sup> *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 755 (1984) (regarding constitutional standing). *Allen* required the plaintiffs, at an early stage of the lawsuit, to show a stronger likelihood that the sought-after change in IRS enforcement policy would make a relevant and appreciable difference with respect to the plaintiffs’ interests. *See id.* at 758.

<sup>56</sup> *But see, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 148, 151–52 (1986), and in the judicial standing area, the more accommodating mood in *United States v. SCRAP*, 412 U.S. 669, 683–90 (1973). *See also* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466–68 (1981) (on the equal protection issue, but also more generally, disclaiming any concern for any likely future impact of the statute in practice, as distinct from merely whether the legislature “could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives”). This is clearly a more deferential, less inquisitorial, more backward-looking judicial standard.

<sup>57</sup> For a sense of the basic confusion, see *supra* text accompanying note 7.

contexts. These contexts include equal protection,<sup>58</sup> commercial speech,<sup>59</sup> and due process.<sup>60</sup> The judicial confusion of tailoring with questions of the policy's impact can manifest in two ways. First, questions of policy tailoring can be confused with questions of the severity, inescapability, or weight of the policy's burden on any affected party, whether that burden was legislatively intended or not. And second, questions of the policy's tailoring may be confused with questions of the policy's effectiveness or the practical purpose-fulfilling impact of the policy.

These judicial confusions are understandable as long as the courts insist on addressing many constitutional problems through one form or another of tiered scrutiny. Tiered scrutiny, after all, normally involves an inquiry, first into the existence of a governmental interest, and, second into the policy's degree of tailoring or fit.<sup>61</sup> But crucially, these two inquiries tell us very little about whether the policy is actually effective in practice or about the real and inescapable severity of its constitutional impact on any party.

Tiered scrutiny, in its most typical forms,<sup>62</sup> thus largely misses crucially important concerns. Often, we will want to know whether a burdensome policy is effective, is largely ineffective, or else amounts to a classic backfire that makes the initial problem worse.<sup>63</sup> There will likely be some public pressure for courts

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<sup>58</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 632–33 (1996) (“The search for the link between classification and objective gives substance to the Equal Protection Clause . . . [b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”).

<sup>59</sup> See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417–18 (1993) (discussing trivial, “minute,” or “paltry” effect of the commercial speech regulation on the perceived social problem as supposedly a matter of tailoring, or “the ‘fit’ between the city’s goal and its method of achieving it”).

<sup>60</sup> See *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (requiring, in the context of limiting classic economic substantive due process, that “the [regulatory] means selected shall have a real and substantial relation to the object sought to be attained”).

<sup>61</sup> For systematic and historical accounts of the development of tiered scrutiny, see Wright, *supra* note 1, at 169; White, *supra* note 2, at 65–80.

<sup>62</sup> See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986). In a very limited class of cases, the courts may apparently ignore matters of tailoring or fit and focus instead on questions of any alternative courses of action that may remain available to a plaintiff affected by a policy.

<sup>63</sup> See Prashant Bharadwaj, Leah K. Lakdawala & Nicholas Li, *Perverse Consequences of Well Intentioned Regulation: Evidence From India’s Child Labor Ban 1*, 1 NAT’L BUREAU OF ECON. RES. 2013 (discussing the problem of policy measures with perverse unintended consequences); Tess Wilkinson-Ryan, *The Perverse*

to consider such an obviously practical question, even if the tiered scrutiny interest and tailoring inquiries do not call for such consideration. And we will often want to know not merely whether a party is unintentionally affected by a policy, but the constitutional severity or weight of that effect, as well as whether the unintentionally affected party could realistically avoid the adverse effect at minimal constitutional value and financial cost.<sup>64</sup> Tiered scrutiny typically does not inquire into any of this.

More broadly, applications of tiered scrutiny do not naturally lend themselves to inquiring into a variety of practically crucial matters. The degree of importance of a government interest does not tell us whether the policy actually promotes that interest, substantially or otherwise. And tailoring inquiries do not naturally measure the actual, constitutional, or practical impact of the policy on any affected party.<sup>65</sup> Degrees of tailoring, fit, overlap, and underinclusiveness or overinclusiveness are, oddly, potentially infinite in distinguishing among the relevant degrees and are also merely two-dimensional. They can be fairly represented through a variety of merely two-dimensional Venn diagrams.<sup>66</sup> But the degree of effectiveness of a policy, in practice, or the severity of its impact, is unavoidably three-dimensional. Tiered scrutiny does not typically address these vital matters.

We might, by imperfect analogy, think of the case of a meteor impacting the earth. We will, in the aftermath, certainly want to know about the two-dimensional scope or the geographic surface area scope, coverage, or breadth of the meteor impact. But we will also want to know about the three-dimensional matter of how superficial, or how deep or severe, the impact of the meteor turned out to be. But this analogy actually understates the problem for tiered scrutiny. In matters of the law, we will often care at least as much about the severity or weight of a burden on constitutional rights as we do about the scope of the persons who are affected, perhaps only trivially, thereby. In the law, some “meteor impacts” are minimal, trivial, or readily avoidable at low cost.

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*Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 167 (2017). More controversially, consider the conflicting assessments of the long-term effects of typical rent control regulation. See *infra* notes 83 & 129 and accompanying text.

<sup>64</sup> See *Unnecessary Complexity*, *supra* note 7, at 77. This inquiry is thus not merely into degrees of unintended burdening, but into the availability, the monetary and constitutional value costs, and the value of escape mechanisms for the adversely affected party. See *id.*

<sup>65</sup> See *id.* at 73.

<sup>66</sup> See *supra* note 7 and accompanying text.

Typically, tiered scrutiny analysis thus misses out on this important third dimension of actual impact, except when the scrutiny analysis is confusedly expanded to somehow take depth of impact or of policy fulfillment into account. Courts sometimes do consider the actual impact of a policy when the stakes are at their highest, in the course of applying either strict<sup>67</sup> or some forms of “exacting” or proportionate scrutiny.<sup>68</sup> In these heightened scrutiny cases, the court may seek to do a balancing of rights, interests, benefits, or harms at stake, and then inquire, however subjectively, into whether the policy is sufficiently tailored to the government interest in question.<sup>69</sup> For our purposes, the problems with proliferating varieties of strict, exacting, and proportionate tailoring are again their sheer manipulability and the lack of meaningful constraint on the courts.<sup>70</sup> Even in cases in which constitutionally fundamental rights or constitutionally suspect classifications are involved, courts tend to focus on readily manipulable inquiries into the sufficiency of the legislative tailoring.<sup>71</sup> When constitutionally fundamental rights are at stake, basic rule of law values instead require less judicial manipulability and greater predictability of outcomes.

Basic rule of law values suggest that cases involving constitutionally fundamental rights, in particular, should not be addressed primarily through any familiar form of readily-manipulable tiered scrutiny. Matters such as the judicially-perceived weight of the governmental regulatory

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<sup>67</sup> From among the wide range of strict scrutiny cases, see, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229, 236 (1995) (racial affirmative action and equal protection); *Texas v. Johnson*, 491 U.S. 397, 418–21 (1989) (flag burning as protected speech). For some fundamental complications, however, see generally R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 777–79 (2012).

<sup>68</sup> The meaning of “exacting scrutiny” is currently unclear. See Wright, *supra* note 10, at 207. But a sense of the intuitive balancing and proportionalism often involved therein is evident in cases such as *United States v. Alvarez*, 567 U.S. 709 (2012), and in particular Justices Breyer and Kagan’s opinion, *id.* at 730–39 (Breyer, J., concurring in the judgment).

<sup>69</sup> For background on the complications of narrow tailoring, see generally R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 67 (1997).

<sup>70</sup> See *supra* notes 67–69; see also R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 336 (2006).

<sup>71</sup> See, e.g., the comparative emphasis in the law school admissions case of *Grutter v. Bollinger*, 539 U.S. 306, 308–09 (2003) and the undergraduate admissions case of *Gratz v. Bollinger*, 539 U.S. 244, 246–47 (2003).

interest, the perceived degree of tailoring, and the extent to which the government interest is actually being advanced should be subordinated when genuinely fundamental rights are at stake. A genuinely fundamental right should not be subject, in particular, to broad judicial weighing, balancing, or proportionality inquiries,<sup>72</sup> with the fundamental constitutional rights perhaps being unpredictably balanced away.<sup>73</sup>

In this particular class of cases, the courts should either require the government to pursue its interest without substantially burdening the constitutionally fundamental right at stake<sup>74</sup> or establish that the right does not genuinely qualify as fundamental.<sup>75</sup> In an extreme case, a government with no other viable options might choose to substantially violate the genuinely fundamental right, mitigating the harm if possible, and then paying full and appropriate damages.<sup>76</sup> Tiered judicial scrutiny of a purportedly rigorous sort is also applied in cases where no constitutionally fundamental right is in jeopardy, but where some sort of suspect or historically dubious legislative classification is at stake.<sup>77</sup> The question here becomes how to reform tiered

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<sup>72</sup> Proportionality inquiries into supposedly fundamental rights are increasingly common. *See, e.g.*, Aharon Barak, *Proportionality*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 12–14 (Michel Rosenfeld & Andras Sajo eds., 2012); Luc B. Tremblay, *An Egalitarian Defense of Proportionality-Based Balancing*, 12 INT'L J. CONST. L. 864, 865 (2014); Robert Alexy, *Constitutional Rights, Balancing and Rationality*, 16 RATIO JURIS 131, 134 (2003).

<sup>73</sup> This argument is classically made in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198–99 (1977).

<sup>74</sup> This would not require any kind of tailoring. The requirement would simply be that the government policy not violate the fundamental right, with no further requirement of narrow or any other form of tailoring imposed on any government policy that does not also violate a constitutionally fundamental right.

<sup>75</sup> We need take no position on what in particular should count as a constitutionally fundamental right, as distinct from, say, a mere liberty interest, or on how to determine such questions. We can accept any reasonable approach thereto. For background and a sense of the ongoing contest, see, for example, *Duncan v. Louisiana*, 391 U.S. 145, 148–50 (1968) (on fundamentality for due process incorporation purposes); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (on the respective roles of history and tradition as distinct from emerging insights); *Washington v. Glucksberg*, 521 U.S. 702, 710–11 (1997) (emphasizing consensual recognition over time); *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (declining to be bound by history and tradition); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (also declining to be bound by history and tradition).

<sup>76</sup> This option can accommodate cases in which the broader public interest in the enforcement of the policy is itself of inescapably crucial importance.

<sup>77</sup> *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (explicit race discrimination as requiring strict scrutiny); *Craig v. Boren*, 429 U.S. 190, 209–10 (1976) (explicit gender discrimination as requiring intermediate scrutiny).

scrutiny when no fundamental constitutional right is at stake, but where the policy is intended to distinguish among persons on suspect grounds or where it refers explicitly to suspect classifications in distributing burdens and benefits.<sup>78</sup>

For the sake of simplicity, reduced scope for uncertainty, reduced manipulability, and other rule of law values, it would be ideal to remove suspect classification cases from the scope of tiered scrutiny analysis. Doing so would clearly come at some cost to some plaintiffs. But importantly, the most egregious suspect classification cases will already be accommodated by strong protection of constitutionally fundamental rights.<sup>79</sup> That is, one might reasonably judge a policy that is evidently intended to invidiously discriminate against an identifiable class to thereby violate a constitutionally fundamental right of that class.<sup>80</sup> Both material and dignitary concerns suggest that such invidious classifications are often likely to burden constitutionally fundamental rights. This category might even include some rare instances of benignly-intended policies that affect traditionally subordinated groups.<sup>81</sup>

Overall, then, we need something different than our current complex and readily manipulable system of tiered judicial scrutiny. And in minimizing plainly crucial issues of whether a given policy actually, and not merely predictively, has any substantial or otherwise meaningful impact on any social problem, the tiered scrutiny system is often unpragmatic, unrealistic, wasteful, and imprudent in operation.

In contrast, a judicial approach that avoids tiers of scrutiny could validate constitutionally fundamental rights without any manipulable inquiry into tailoring. The focus would be instead on a less micromanipulable inquiry into whether the policy has substantially or otherwise meaningfully advanced a cognizable public interest. On this suggested approach, degrees of tailoring,

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<sup>78</sup> Thus, not every adverse impact on suspect classification grounds evokes heightened scrutiny; proof of intent to discriminate, or at least an explicit reference to a suspect classification, must also be shown. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (racial public hiring case in absence of discriminatory intent applying less than strict scrutiny).

<sup>79</sup> *See supra* notes 70–76 and accompanying text.

<sup>80</sup> For some of the possible approaches to reaching this result, see the cases cited *supra* note 75.

<sup>81</sup> *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 311, 343 (2003) (law school racial affirmative action).

among other considerations, would generally not matter. We now turn to the question of how this form of judicial review could operate, with an enhancement of pragmatic and rule of law values.

## II. SUBSTANTIAL ACTUAL ADVANCEMENT OF A COGNIZABLE PUBLIC PURPOSE

Any replacement for the tiers of scrutiny, especially where fundamental constitutional rights are not at stake, should recognize the sheer waste and inefficiency that is currently encouraged by traditional minimum scrutiny review. The tiered scrutiny cases normally involve judicial deference even to minimally plausible, if not merely conceivable legislative predictions as to the consequences of their legislation in practice.<sup>82</sup> But legislation, no less than life itself, is rife with important unanticipated consequences.<sup>83</sup>

In certain contexts, courts have sometimes acknowledged the gulf between intended and actual policy consequences. Thus, courts in administrative cases have recognized the difference between an agency's best guess as to a commodity price a year into the future and the agency's simple and uncontroversial recognition of the actual price a year later.<sup>84</sup> Later and fuller information incorporating lived experience tends to be especially valuable for useful decision-making.<sup>85</sup> Actual implementation and enforcement may generate crucial new information.<sup>86</sup> This new information may expose prior information gaps, fallacies, basic misunderstandings, failures of the legislative imagination, and the magnitude of legislative cognitive biases.<sup>87</sup> In some instances,

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<sup>82</sup> See *supra* Part I. For a representative case, see, for example, *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 464 (1981).

<sup>83</sup> See, for example, Bharadwaj et al., *supra* note 63; Wilkinson-Ryan, *supra* note 63, as well as, classically, Frederic Bastiat, *That Which Is Seen, and That Which Is Not Seen* (1850), <https://bastiat.org/en/twistatwins.html>; Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 895 (1936). More particularly, see J.P. Mangalindan, *California Privacy Law Will Have 'Unintended Consequences': Google, YAHOO FIN.* (Jul. 1, 2018), <https://finance.yahoo.com/news/california-privacy-law-will-unintended-consequences-google-121038199.html>.

<sup>84</sup> See *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 390 (1932).

<sup>85</sup> See generally *id.*; see also Richard Morgenstern, *Retrospective Analysis of U.S. Federal Environmental Regulation*, 9 J. BENEFIT COST ANALYSIS 285, 287 (2018).

<sup>86</sup> See Morgenstern, *supra* note 85, at 287.

<sup>87</sup> See Morgenstern, *supra* note 85, at 287. See generally *How to Reduce Bias in Decision Making: A Part of the Comprehensive and Fully Integrated Framework for Critical Thinking at the USC Marshall School of Business*, USC MARSHALL CRITICAL

courts have encouraged, if not required, administrative agencies to revise their own rules based on the admitted differences between an agency's initial expectations and its later experiences with the rule in actual practice.<sup>88</sup> Courts often grant significant latitude to administrative agency rules that are presumably seeking to promote statutory goals.<sup>89</sup> Initially, an agency's largely predictive judgment may suffice to justify an administrative rule.<sup>90</sup> But at some point, accumulated experience with the actual consequences of agency rules should trump an agency's mere initial predictions.<sup>91</sup> An agency may thus sometimes be under a "duty"<sup>92</sup> to reassess and revise its own rules if the rules do not "actually produce the benefits the [agency] originally predicted they would."<sup>93</sup> A sensible pragmatism requires attention to actual, as well as predicted, consequences of fallible administrative agency judgments. Any other course merely sustains and compounds initial policy mistakes. A judicial failure to assess new and crucial experience in a litigated case may unfortunately reflect the sunk cost fallacy,<sup>94</sup> a status quo bias,<sup>95</sup> institutional role misunderstandings, or some other generally wasteful tendency.

It should be difficult to argue against the logic of greater judicial attention to actual consequences of policies, as distinct from fallible—and perhaps biased and self-serving—initial predictions of consequences. Following through on this pragmatic logic, however, coheres with our proposed requirement that

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THINKING INITIATIVE 1, 4 (last visited Oct. 11, 2019), <http://info.marshall.usc.edu/faculty/critthink/Supplemental%20Material/Reducing%20Bias.pdf> (listing and briefly describing some of the most common and legislatively relevant decision-making biases). See generally IRVING L. JANIS, *GROUPTHINK* (2d ed. 1982).

<sup>88</sup> See *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 659–60 (D.C. Cir. 1989); *Delta Air Lines, Inc. v. Export-Import Bank*, 85 F. Supp. 3d 387, 418 (D.D.C. 2015) (internal quotation omitted).

<sup>89</sup> See the statutory term interpretation case of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), along with *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

<sup>90</sup> See, e.g., *Bechtel*, 957 F.2d at 881; *Syracuse Peace Council*, 867 F.2d at 660.

<sup>91</sup> See *Bechtel*, 957 F.2d at 881.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> The sunk cost fallacy can involve compounding an investment in what has recently been discovered to have been a bad or inaccurate choice. See Jamie Ducharme, *The Sunk Cost Fallacy Is Ruining Your Decisions. Here's How*, *TIME* (July 26, 2018), <https://time.com/5347133/sunk-cost-fallacy-decisions/>.

<sup>95</sup> Status quo bias can be seen even when the costs, in this case to agencies and courts in particular, are low compared to the relatively high broader stakes. See William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 *J. RISK & UNCERTAINTY* 7, 8 (1989).

evidence that the challenged policy has substantially or otherwise meaningfully advanced at least one cognizable public policy interest in practice be proffered.<sup>96</sup>

The idea of “substantiality,” and in particular of “substantially” advancing an interest, is already familiar to us from substantive due process<sup>97</sup> and various other doctrines.<sup>98</sup> Similarly, the idea of “substantially” burdening a right or interest is familiar from various areas of the law.<sup>99</sup> In these cases, the idea of a “substantial” advance is what is known to philosophers as a “thick” concept,<sup>100</sup> in that it unavoidably partakes of both descriptive and evaluative components.<sup>101</sup> We need not here recommend any particular understanding, whether narrow or broad, rigorous or lax, of what constitutes a “substantial” advance of an interest. There would be little sense in attempting to guess in advance how to specify a concept when the point is, in part, to encourage greater attention to how legislative intentions work out

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<sup>96</sup> Our focus on actual, as opposed to merely predicted or hoped-for, advance of a cognizable interest borrows from and contributes to discussions of the proper role of the doctrine of the ripeness of a case for adjudication. In the administrative law context, there is a recurring issue as to whether a court should proceed to the merits of a challenge to a rule or should instead wait until further information about the actual impact of a rule, as felt in practice, has become available. Waiting for post-implementation evidence was deemed unnecessary in the largely purely legal case of *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). But in contrast, the Court insisted upon waiting for later-accruing, concrete evidence of a rule’s effect in practice in *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003) (citing *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 82 (1978)). Our approach, in mostly non-administrative contexts, understandably favors those challengers who, in the absence of any fundamental right claim, can point to the failure of a policy, in practice, on its own terms.

<sup>97</sup> See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–45 (2005) (addressing the idea of “substantially advanc[ing]” a proffered state interest in substantive due process cases, if not also in regulatory takings cases).

<sup>98</sup> See, for example, the commercial speech case of *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1678–79 (2015) (Scalia, J., dissenting) (citing recent free speech case law).

<sup>99</sup> For background, see generally R. George Wright, *Substantial Burdens in the Law*, 46 SW. L. REV. 1 (2015).

<sup>100</sup> See, e.g., THICK CONCEPTS (Simon Kirchin ed. 2013); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 140–42, 150–52 (1985). For clarity, one can more easily think of ideas such as courage and cowardice as involving both description of the actions in question and an assessment of their value or worthiness. Importantly, in typical cases, assessments of courage and cowardice as “thick concepts” do not especially lend themselves to manipulation. One could, in theory, refer to successfully landing a damaged passenger plane on a river as “cowardly.” And one could, in theory, refer to abandoning one’s family, in the face of a significant risk for some modest payoff, as “courageous.” But these concepts are not as generally manipulable as those involved in tiered scrutiny.

<sup>101</sup> See *supra* note 100.

in actual practice. Our recommendation thus would be that courts should initially feel free to explore the practical consequences of various approaches to what should count as a “substantial” advance of a public interest.

After experimentation and reflection, the courts within a given jurisdiction should ideally coordinate in adopting, as far as possible, a uniform approach to the idea of substantiality, as in substantial advance. This freely adopted and experientially grounded judicial uniformity would then serve rule of law values including simplicity, predictability, and justifiable constraint on judicial discretion. The idea here is again that it would be especially difficult for judges to game a specified idea of substantiality than it is to game even one of the dimensions of tiered scrutiny in such a way as to steer the outcome of a controversial case. There is certainly greater likelihood of a judicial consensus on the idea of “substantially” advancing an interest than on how the application of the tiers of scrutiny should be applied in given cases.

A similar approach should be applied to any significant differences among courts, at least within a given jurisdiction, as to how the courts should ascertain which possible governmental interests should be taken into account in a given case. Of course, the courts already face serious problems in determining the scope of cognizable interests, purposes, and goals associated with a given piece of legislation.<sup>102</sup> Legislative intent, whether actual or merely conceivable, may be obscure, divided, murky, self-contradictory, and perhaps self-serving.<sup>103</sup> The value of isolated or even post-enactment statements of legislative purpose is always debatable.<sup>104</sup> Our approach in this respect is again not to resolve such perennial issues on the merits here. The point is, for the sake of pragmatic and rule of law values, to encourage courts to voluntarily pursue increasing uniformity in ascertaining

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<sup>102</sup> For a recent survey of this inescapable general problem, see generally John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987).

<sup>103</sup> See generally Manning, *supra* note 102, at 2400; Starr, *supra* note 102, at 375; Posner, *supra* note 102; Radin, *supra* note 102, at 872.

<sup>104</sup> For a useful discussion of particular approaches to determining cognizable statutory purposes, see *Vill. of Arlington Heights v. Metro Hous. Dev.*, 429 U.S. 252, 266–69 (1977).

legislative interests and purposes. Again, the scope of judicially cognizable government purposes associated with a statute may always be controversial to some degree, but the questions involved do not match any obvious political or ideological divide. It seems fair to say that political and ideological commitments do not typically steer judges towards any consistent theory as to how to ascertain the actual purposes of typical statutes or administrative regulations. Legislative purposes can, on our approach, be somehow ascertained and then judged in individual cases to have been substantially advanced, in practice, with reduced opportunities for case-by-case judicial manipulation on political or ideological grounds.

It would certainly be useful, though, to have some tentative sense of how judicially requiring the substantial advancement of a cognizable public legislative purpose might work. In this regard, courts can draw upon the experiences now emerging from the administrative agency practice of what is called retrospective or “look-back” review.<sup>105</sup> An administrative agency’s retrospective

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<sup>105</sup> For discussions of retrospective review of an agency’s rules in the United States and internationally, see, for example, Joseph E. Aldy, *Learning From Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence For Improving the Design and Implementation of Regulatory Policy*, ADMIN. CONF. OF THE UNITED STATES 8–64 (Nov. 17, 2014), <https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf>; Cary Coglianese, *Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Reform*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 7 (August 2012), [https://www.oecd.org/gov/regulatory-policy/1\\_coglianese%20web.pdf](https://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf) [hereinafter *Measuring*]; Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. REG. 57, 58–59 (2013) [hereinafter *Moving Forward*]; Maureen Cropper, Arthur Fraas & Richard Morgenstern, *Looking Backward to Move Regulations Forward*, 355 SCIENCE 1375, 1375 (Mar. 31, 2017); HM TREASURY, THE MAGENTA BOOK: GUIDANCE FOR EVALUATION 5 (Apr. 2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220542/magenta\\_book\\_combined.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/220542/magenta_book_combined.pdf); Sofie E. Miller, *Learning from Experience: Retrospective Review of Regulations in 2014*, at 16–18 (Nov. 2015) (working paper on file with the George Washington University Regulatory Studies Center), [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/Retrospective%20Review%20in%202014\\_MillerS\\_11\\_3.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/Retrospective%20Review%20in%202014_MillerS_11_3.pdf); Richard Morgenstern, *Retrospective Analysis of U.S. Federal Environmental Regulation*, 9 J. BENEFIT-COST ANALYSIS 285, 296–300 (2018); Connor Raso, *Assessing Regulatory Retrospective Review Under the Obama Administration*, BROOKINGS (Jun. 15, 2017), <https://www.brookings.edu/research/assessing-regulatory>; *Regulatory Impact Analysis: A Tool for Policy Coherence*, OECD, *Regulatory Impact Analysis: A Tool for Policy Coherence* (2009), [https://read.oecd-ilibrary.org/governance/regulatory-impact-analysis\\_9789264067110-en#page1](https://read.oecd-ilibrary.org/governance/regulatory-impact-analysis_9789264067110-en#page1); *Retrospective Review of Agency Rules*, ADMIN. CONF. OF THE U.S. (Dec. 9, 2014), [www.acus.gov/recommendation/retrospective-review-agency-rules](http://www.acus.gov/recommendation/retrospective-review-agency-rules); Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 592–96 (2014); Jonathan Wiener & Daniel L. Ribiero, *Environmental*

review of an agency's current rules is typically conducted by the agency itself and thus often involves no cross-branch interaction.<sup>106</sup> Therefore, the guidance for the courts from the current practice of retrospective review is indirect and merely suggestive. But looking to the overall experience with retrospective agency review of administrative rules can nonetheless provide useful insights for courts reviewing statutes and rules.

Retrospective review experience, for example, indicates that a regulation—and by obvious implication, a statute—can be in some respect effective, or merely ineffective, but may also completely backfire<sup>107</sup> by making the perceived social problem worse than it might otherwise have been.<sup>108</sup> Rules and statutes can also initially be harmless or even beneficial in some respects but then become antiquated and obsolete.<sup>109</sup> Retrospective administrative agency review can also add to our understanding of how later-arriving information can dramatically improve upon initial perceptions and understandings that were formulated on largely speculative grounds.<sup>110</sup>

Importantly, studies of retrospective agency review, and in particular of the typical agency reluctance to undertake such review, illustrate the crucial need for other institutions to take up the review process where an agency or legislature is disinclined to

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*Regulation Going Retro: Learning Foresight from Hindsight*, 32 J. LAND USE & ENVTL. L. 1, 21–22 (2016). For a sense of some agency incentives toward something akin to retrospective review as more formally understood, see Wendy Wagner, et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 216–20 (2017). For discussion of a possible congressionally mandated judicial review of an agency's preenactment regulatory impact analysis, see Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725, 759–61 (2017).

<sup>106</sup> See *supra* note 105.

<sup>107</sup> See *Moving Forward*, *supra* note 105, at 57.

<sup>108</sup> See Bharadwaj et. al, *supra* note 63, at 1; Wilkinson-Ryan, *supra* note 63, at 167; Bastiat, *supra* note 83, at 2; Merton, *supra* note 83, at 894; Mangalindan, *supra* note 83, at 1; see also PETER M. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN 34–35 (2014) (“[C]ampaign finance regulation, which its advocates claimed would ‘take the money out of politics,’ has done pretty much the opposite . . .”).

<sup>109</sup> See *Moving Forward*, *supra* note 105, at 57–58; see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2–3 (Harvard Univ. Press Ed. 2009) (on the possible mechanics of addressing perceived statutory obsolescence).

<sup>110</sup> See Morgenstern, *supra* note 105, at 287 (explaining that while information on ex post circumstances is likely to be imperfect, our post-enactment understanding of the actual effects of a policy are clearly likely to be much more accurate than our understanding at the time of the enactment of a policy). For a judicial recognition of this phenomenon, see *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 389–90 (1932).

do so.<sup>111</sup> Agencies and legislatures may both reasonably believe that focusing on trending issues may score more political points than reexamining previously adopted rules or legislation.<sup>112</sup> There is, after all, a serious risk that previously adopted rules and legislation may be found to be ineffective, or even perverse, with respect to their touted purposes.<sup>113</sup> This could well involve awkward admissions. One obvious response to these incentives is to have other governmental entities, including the courts, legitimately assume increased initiative and responsibility.<sup>114</sup>

Agencies may thus shy away from serious retrospective analysis, even when formally required by statute to plan for and undertake such reviews.<sup>115</sup> The rewards to an agency, or to legislators, from showing<sup>116</sup> that its adopted policies indeed had some already anticipated, publicized, and desired effect may be outweighed by a showing<sup>117</sup> that the policy did not in fact meaningfully contribute toward any recognized public purpose. Thus, even an inexpert court, if adversarially well-informed, may often be a better source of a meaningful retrospective review.<sup>118</sup> The inevitable limitations of nonspecialized courts, however, also suggest limits on the scope of a court's authority to reassess the effects of legislative and regulatory enactments. Courts are relatively well-suited to determine the general goals of legislation. And courts can reasonably address the task of determining whether a challenged policy substantially advances, in actual practice, any specified public purpose, again absent any claims of fundamental constitutional rights violations.

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<sup>111</sup> See Wiener & Ribiero, *supra* note 105, at 7.

<sup>112</sup> See *id.* at 7, 23.

<sup>113</sup> See *id.* at 7.

<sup>114</sup> See *id.* at 7 n.44.

<sup>115</sup> See Miller, *supra* note 105, at 3.

<sup>116</sup> See, e.g., *Retrospective Review of Agency Rules*, *supra* note 105, at 3.

<sup>117</sup> See *id.*

<sup>118</sup> Of course, whether the consequences of a policy are investigated by the agency involved, by the courts, or by some other entity, the work of teasing out the most important causal relationships in a complex and constantly evolving social environment, making judgments as to the likely causal effects and as to what might have happened in the absence of the policy, or under some alternative to that policy, will always be difficult at best. See, e.g., *Measuring*, *supra* note 105, at 7; Cropper, *supra* note 105, at 1376 (noting that useful "control group[s]" will not always be available for comparison); THE MAGENTA BOOK, *supra* note 105, at 19. Beyond some point, of course, even the best-informed courts, with the fullest data, may rightly be unsure as to causality. See, for example, the discussion by Justice Breyer in the violent video game aggression case of *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 853 (2011) (Breyer, J., dissenting).

However, courts also lack any absolute or even any comparative advantage<sup>119</sup> over legislatures, agencies, or various nongovernmental associations beyond this initial threshold inquiry<sup>120</sup>. We should not replace the tiers of scrutiny with a system that authorizes generalized courts to try to broadly assess or compare the various tangible and intangible, short-term and long-term, direct and indirect costs of a policy and its alternatives and then somehow evaluate the policy's relevant qualities, costs, and benefits.<sup>121</sup> Of course, it is technically possible to think of a

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<sup>119</sup> See generally R. George Wright, *At What Is the Supreme Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535, 556 (2013).

<sup>120</sup> Thus, courts in a post-tiers of scrutiny regime should not seek to determine which policies would maximize social and economic benefits, let alone which policies would maximize benefits net of their costs. Such efforts, if undertaken at all, can best be left to agencies, whatever their own biases and limitations. See Aldy, *supra* note 105, at 15.

<sup>121</sup> For some of the remarkable, and often inescapable, complications of various forms of cost-benefit analysis, see, for example, MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 6 (2006) (distinguishing well-being from economic efficiency and emphasizing the important differences among kinds of preferences); E.J. MISHAN & EUSTON QUAH, *COST-BENEFIT ANALYSIS* (5th ed. 2007); B. GUY PETERS, ET AL., *DESIGNING FOR POLICY EFFECTIVENESS* 1 (2018) ("Effectiveness serves as the basic goal of any design, upon which other goals, such as efficiency and equity, are built."); CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018); Jennifer Baxter, Lisa Robinson & James Hammitt, *White Paper: Retrospective Cost Benefit Analysis*, DATA-SMART CITY SOLUTIONS (Apr. 20, 2015), <https://datasmart.ash.harvard.edu/news/article/white-paper-retrospective-benefit-cost-analysis-664> (noting the problem of the cumulative burdens of multiple policies); Rachel Bayefsky, Note, *Dignity as a Value in Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1738–39 (2014) (on the inclusion of incommensurable dignity, in an unmonetized form, in cost benefit analyses); Daniel A. Farber, *Breaking Bad? The Uneasy Case For Regulatory Breakeven Analysis*, 102 CAL. L. REV. 1469, 1472 (2014) (cognitive biases as commonly affecting a breakeven analysis); Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 S. CAL. L. REV. 195, 198–99 (2018) (contrasting consequentialist and deontological approaches; benefit and harm asymmetries; and considering optimal levels of grave harms); RICHARD LAYARD & STEPHEN GLAISTER, INTRODUCTION, IN *COST-BENEFIT ANALYSIS* (1994); Allan McConnell, *Policy Success, Policy Failure, and Grey Areas in Between*, 30 J. PUB. POL'Y 345 (2010) (on the multiple dimensions and magnitudes of a policy's success and failure, along with the multiplicity of possible causal influences and scenarios); Allan McConnell, *What Is Policy Failure? A Primer to Help Navigate the Maze*, 30 PUB. POL'Y & ADMIN. 221 (2015); David Marsh & Allan McConnell, *Towards a Framework For Establishing Policy Success*, 88 PUB. ADMIN. 564 (2010); Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87 (2016); Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 177–88 (2014) (discussing problems of wide disparities in the ranges of predicted costs and benefits; unascertainable probabilities; variability in cost-benefit ratios under alternative probability assumptions; crucial differences among alternative discount rates; risk reductions that lead to increased risks in other respects; quantification and the values of privacy and dignity; and the sheer magnitude of costs or benefits versus

fundamental rights violation as a kind of “cost.” But it is also still sensible to allow courts to determine, in particular, the presence or absence of a fundamental constitutional rights violation. This particular task is rightly recognized as properly the distinctive province of the courts.<sup>122</sup>

The limited task of judging whether a given legislative goal has been substantially advanced in practice is merely a single narrow element of the much more ambitious, complex, uncertain, and deservedly controversial process of broad cost-benefit analysis, which in turn comes in a wide range of varieties.<sup>123</sup> The exercise of expert policy discretion in the context of multiple basic uncertainties is close to the essence of cost-benefit analysis.<sup>124</sup> At this task, nonexpert general jurisdiction courts generally have no absolute or comparative advantage.<sup>125</sup> Generally permitting courts to subject legislative policy decisions to any form of cost-benefit analysis would again undermine basic rule of law values<sup>126</sup> such as simplicity, predictability, and constraint on judicial discretion and subjectivity. There would be costs as well

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ratios of costs and benefits); OFFICE OF MGMT. AND BUDGET, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COST AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 41 (2005), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/2005\\_cb/final\\_2005\\_cb\\_report.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/2005_cb/final_2005_cb_report.pdf) (“[P]eople may value actual lost benefits differently than anticipated benefits.”); Matthew Walmsley, *Cost-Benefit Analysis as a Commitment Device*, 87 TEMP. L. REV. 447, 455–61 (2015) (noting the increasing obsolescence over time of the assumptions underlying both cost and benefit assumptions).

<sup>122</sup> See, for example, the unresolved complications referred to parenthetically *supra* note 121. For the merest inkling of some of complications of judicial examinations of cost-benefit analyses, see *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1222–23 (5th Cir. 1991). For a classic divided judicial response to some related problems, see the several opinions in *Ethyl Corp. v. EPA*, 541 F.2d 1, 6, 66, 68, 69, 70 (D.C. Cir. 1976) (en banc). For a confessedly rare endorsement of the court’s second guessing of the agency’s cost-benefit analysis in *Corrosion Proof Fittings*, see Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 955 (2018).

<sup>123</sup> For some indication of these further complications, see the literature referred to *supra* note 121.

<sup>124</sup> Consider merely the question of how to approach valuations and comparisons involving human dignity, as noted in Bayefsky, *supra* note 121, at 1735–36; Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369, 1377–78 (2014).

<sup>125</sup> See Wright, *supra* note 119, at 545.

<sup>126</sup> See the authorities cited *supra* note 4.

to the separation of powers, to matching discretionary political power with political accountability, and even in discouraging the judicial professional virtue of reasonable judicial humility.<sup>127</sup>

This means that courts should, unless otherwise authorized, avoid undertaking any familiar form of broad and largely discretionary cost-benefit analysis. There are admittedly some instances in which courts might, up to a point, usefully critique programs where the substantial advancement of a government interest comes at the expense of other important interests, or with an excess of sheer waste.<sup>128</sup> Consider, for example, the costs often associated with the assumedly substantial benefits, in some respects, of typical programs of residential rent control,<sup>129</sup> occupational licensing requirements,<sup>130</sup> attempts at educational

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<sup>127</sup> See generally Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY 178, 205–06 (2003); R. George Wright, *The Rule of Law: A Currently Incoherent Idea That Can Be Redeemed Through Virtue*, 43 HOFSTRA L. REV. 1125, 1142–43 (2015).

<sup>128</sup> As accounted for in MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 227–28 (1982); GORDON TULLOCK, *THE RENT-SEEKING SOCIETY* 4 (Charles K. Rowley ed., Liberty Fund 2005).

<sup>129</sup> Overall, typical residential rent control regulations are commonly disfavored by economists on various grounds. See, e.g., Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 ECON. J. WATCH 73, 106 (2009); Walter Block, *A Critique of the Legal and Philosophical Case for Rent Control*, 40 J. BUS. ETHICS 75, 75 (2002); Rebecca Diamond, Timothy McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence From San Francisco*, CATO INST. (April 18, 2018), [www.cato.org/publications/research-briefs-economic-policy/effects-rent-control](http://www.cato.org/publications/research-briefs-economic-policy/effects-rent-control); *Rent Control*, CHI. BOOTH IGM FORUM (Feb. 7, 2012, 8:08 AM), [www.igmchicago.org/surveys/rent-control](http://www.igmchicago.org/surveys/rent-control). But the Supreme Court of the United States has legitimized such rent control programs, at least under traditional minimum scrutiny standards. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 13–14 (1988). Such programs can also provide long-term, as well as short-term, benefits to some parties. See, e.g., Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?*, BROOKINGS INST. (Oct. 18, 2018), [www.brookings.edu/research/what-does-economic-evidence](http://www.brookings.edu/research/what-does-economic-evidence); Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 359–60, 370 (1986) (noting the value of maintained personal property and sustained community). For a broad survey, see generally Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RES. FOUND. (May 2018), <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf>.

<sup>130</sup> See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 129–31 (2002 ed.); Morris Kleiner & Alan B. Kruger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LABOR ECON. 173, 198 (2013) (noting the lesser impact of government certification, as opposed to mandatory licensing requirements). For a sense of the existing case law on current tiers of scrutiny analysis, *Niang v. Carroll*, 879 F.3d 870, 873 (8th Cir. 2018), *dismissed as moot sub nom.* *Niang v. Tomblinson*, 139 S. Ct. 319 (2018) (mem.); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (a statutory occupational barrier to entry into the trade of casket making as not rationally related to any legitimate state interest); Sensational Smiles,

quality reform,<sup>131</sup> and the so-called “war on drugs.”<sup>132</sup> But even in these subject matter areas, it is far from clear that courts would, in practice, typically outperform legislatures or specialized agencies, especially as the relevant actors are moved by newly emerging and increasingly political pressures.

### CONCLUSION

In some cases, political movements may inspire desirable policy change without any crucial judicial intervention.<sup>133</sup> Perhaps this should happen more often than it does.<sup>134</sup> But the replacement

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LLC v. Mullen, 793 F.3d 281, 286–87 (2d Cir. 2015) (citing cases to the contrary, including *St. Joseph Abbey*, but then upholding mere rent-seeking legal barriers to occupational entry by potential competitors); *Patel v. Texas Dep't Licensing & Regulation*, 469 S.W.3d 69, 90 (Tex. 2015) (licensing rules as violating the substantive due process rights of commercial eyebrow threaders in a “burdensome” and “oppressive” fashion).

<sup>131</sup> Note the actual consequences and aftermath of the once touted No Child Left Behind Act of 2001, as ultimately superseded by the Every Student Succeeds Act of 2015. *See generally, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002); Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (devolving much authority to the individual states); Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds*, 35 *TOURO L. REV.* 11, 12–14, 18–20 (2019). Note also the much broader option of the statutory “sunsetting” of legislation. *See generally* Brian Baugus & Feler Bose, *Sunset Legislation: Balancing the Legislature and the Executive*, MERCATUS CENTER (August 2015), <https://www.mercatus.org/publications/regulation/sunset-legislation-states-balancing-legislature-and-executive>.

<sup>132</sup> *See, e.g.*, Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), [www.cato.org/publications/policy-analysis/four-decades-and-counting](http://www.cato.org/publications/policy-analysis/four-decades-and-counting); *The War on Drugs*, ACLU (2019), <https://www.aclu.org/issues/smart-justice/sentencing-reform/war-drugs>; George P. Shultz & Pedro Aspe, *The Failed War On Drugs*, N.Y. TIMES (Dec. 31, 2017), [www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html](http://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html).

<sup>133</sup> Consider the congressional response to, for example, the No Child Left Behind Act, *supra* note 131. The electoral politics of the War on Drugs may also be shifting. *See, e.g.*, Tom Angell, *Kamala Harris Calls for Legalizing Marijuana and Ending the War on Drugs in New Book*, FORBES (Jan. 8, 2019), <https://www.forbes.com/sites/tom-angell/2019/01/08/kamala-harris-calls-for-legalizing-marijuana-and-ending-war-on-drugs-in-new-book/#65fb7dae2eee> (book review). It is, more broadly, possible for Congress to statutorily authorize courts to in effect repeal what is assumed to have been initially appropriate but is now thought to be “obsolete” or “outmoded” legislation, subject to possible legislative reenactment. This is the well-known proposal embodied in GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 59 (1982). For responses to Judge Calabresi’s proposal, *see generally* Archibald Cox, 70 *CAL. L. REV.* 1463 (1982); Allan C. Hutchison & Derek Morgan, *The Calabresian Sunset: Statutes in the Shade*, 82 *COLUM. L. REV.* 1752 (1982).

<sup>134</sup> *See* PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER* 59 (2014) (“Occasionally, government officials acknowledge that one of their long-standing policies has failed and should be abandoned. Such confessions of

for tiered judicial scrutiny argued for herein does not leave the public without crucial protections against well-entrenched but failed legislation.<sup>135</sup> On our approach, courts would not attempt to engage in broadly discretionary cost-benefit analysis<sup>136</sup> but would also certainly not defer generally to legislative action.<sup>137</sup> Our approach would insist, instead, on a showing that the legislation, in actual practice, substantially or otherwise meaningfully promotes any one or more of the public purposes or goals reasonably ascribable to the legislation in question.<sup>138</sup> As well, on our suggested approach, any meaningful violation of a party's fundamental constitutional rights<sup>139</sup> should result not in the application of any form of tiered judicial scrutiny, but, more predictably, in a judgment and redress for that injured party.<sup>140</sup>

More generally, the reforms suggested above simultaneously promote more effective legislation, the reduction of legislative waste, fuller respect for basic constitutional rights, and various uncontroversial elements of the rule of law,<sup>141</sup> including simplicity, predictability, and a reduced scope for judicial subjectivity and undue discretion, along with an appropriate respect for the separation of powers.

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governmental error are to be strongly encouraged, of course, but they are usually belated and exceedingly rare.”)

<sup>135</sup> See, e.g., cases cited *supra* notes 14–15

<sup>136</sup> See, e.g., authorities cited *supra* note 121 and accompanying text.

<sup>137</sup> See cases cited *supra* notes 14–15.

<sup>138</sup> See *supra* Part II. For concerns as to the proper timing of judicial review, see *supra* note 96.

<sup>139</sup> We assume that tiered scrutiny analysis, including exacting scrutiny and strict scrutiny, will tend to be more practically manipulable by any given court than will the prior question of whether a fundamental constitutional right claim is present to begin with. For a sense of historical trends in the latter context, see cases cited *supra* note 75.

<sup>140</sup> See *supra* notes 72–81 and accompanying text.

<sup>141</sup> Among the most widely cited elements of the rule of law are: (1) the ability of governed parties to reasonably know, in advance, of the considerations likely to effectively determine judicial outcomes; (2) the minimization or reduction of what amounts to retroactive legal determinations; (3) avoidance of frequent or unpredictable substantial changes in what the law is held to require or permit; (4) reasonable clarity, consistency, and stability in the law, particularly in its application through administrative decrees and judicial decisions; and (5) appropriate limits on executive discretion. Many of these basic rule of law themes are shared among the authors cited *supra* note 4. For a concise and representative example, see Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 67–83 (2009). See also BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 1–8 (2007); R. George Wright, *The Magna Carta and the Contemporary Rule of Law Problem*, 54 LOUISVILLE L. REV. 243, 243–44 (2016); Wright, *supra* note 127, at 1125–27.

