Introduction

What are constitutional rights? We all know that we have constitutional rights. Most Americans could list some, probably proudly. But what does it mean to say that someone has a right? Are constitutional rights privileges to do or say whatever one wishes, regardless of the consequences? For example, if I have a right to burn the flag for purposes of political protests, can I do so at any time and any place, even if it would create a fire hazard? Do rights kick in only when the government acts for forbidden reasons or motives, such as to stifle political criticism or to subordinate some on the basis of race or religion? Are rights merely statements of ideals or aspiration that must yield to the common good whenever the common good is genuinely at risk? Or are they "absolutes" in some sense – and, if so, in what sense?

These are hard questions, not easy to answer. If hesitating, we might recall what St. Augustine said about the nature of time: "What . . . is time? If no one ask[s] of me, I know; if I wish to explain to him who asks, I know not."[1] We might imagine that we occupy a situation like that with respect to constitutional rights – one of knowing what constitutional rights are, even if we might stumble initially in explaining. Or, deploying the analogy in a different way, we might think that questions about the nature of constitutional rights have little practical significance. Even if most of us could not offer a good account of what time is (even or perhaps especially if we are acquainted with Einstein's famous claim that time is somehow relative to space, and vice versa), we get along well enough.

With constitutional rights, however, matters are different. Whatever time is, its nature lies beyond human control. By contrast, constitution-writers and courts have the power to change the rights that we have. They might give us new rights that we do not have now or take away some that we currently possess. More interestingly and challengingly, moreover, constitution-writers and courts can change the *nature* of constitutional rights. On this score, history leaves no doubt.

As I shall demonstrate in this book, the Supreme Court has altered the nature of constitutional rights within roughly the past three-quarters of a century.

[1] The Confessions of St. Augustine, Bishop of Hippo 301 (J. G. Pilkington ed. & trans., T. & T. Clark 1943).

Constitutional rights today are different not only in their subject matters, but also in their natures, from the constitutional rights that existed before 1937 and even before the 1960s. The signal development within the decade of the 1960s involved the invention of a judicial test, denominated as "strict judicial scrutiny," for defining, enforcing, and marking the limits on constitutional rights. When strict scrutiny applies, legislation will survive constitutional challenge only if it is "necessary" or "narrowly tailored" to promote a "compelling" governmental interest.[2] Today we cannot understand what constitutional rights are without understanding strict judicial scrutiny, even though, before the 1960s, there was no strict scrutiny to understand.

As every law student quickly learns, strict scrutiny forms one of two central pillars of the modern edifice of judicially protected constitutional rights. Since the collapse of the *Lochner* era at the end of the 1930s, the Supreme Court has relegated the protection of most ordinary "liberties" or "liberty interests" to the political process. Examples include the restraints on liberty that occur when legislatures impose highway speed limits, forbid trafficking in narcotic drugs, and require employers to pay their employees a minimum wage. Courts will uphold restrictions such as these pursuant to a "rational basis" test, which asks only whether a law is "rationally related to a legitimate government interest." The Supreme Court has described this test as "a paradigm of judicial restraint."[3]

Strict judicial scrutiny plays an equally paradigmatic role in defining and limiting constitutional rights, but one that puts the Supreme Court at center stage. The invocation of strict scrutiny signals that the Court takes the asserted right, and its role in protecting rights of that kind, extremely seriously. Under modern doctrine, the Court employs strict scrutiny to define and enforce many if not most of the constitutional rights that most Americans are likely to think most important. For instance, the strict scrutiny test applies to challenges under the Equal Protection Clause to statutes that discriminate on the basis of race or employ other "suspect" classifications.[4] It provides "the baseline rule"[5] under the First Amendment for assessing laws that regulate speech on the basis of content,[6] as well as for scrutinizing

[2] *See, e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1464 (2017); *Fisher* v. *Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016); *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015); *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011); *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010); *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Johnson* v. *California*, 543 U.S. 499, 505 (2005); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995); *Republican Party of Minn.* v. *White*, 536 U.S. 765, 775 (2002); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 395–96 (1992); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[3] *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

[4] *E.g.*, *Fisher*, 136 S. Ct. at 2208; *Parents Involved*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505; *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (requiring strict scrutiny of "classifications based on alienage").

[5] *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[6] *See, e.g.*, *National Inst. of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018); *Reed* v. *Town of Gilbert*, 135 S. Ct. at 2226–27; *Brown*, 564 U.S. at 799–800; *United States* v. *Playboy Entm't*

content-based exclusions of speakers from a public forum.[7] In the domain of due process, the Supreme Court says that statutes that restrict the exercise of "fundamental" rights trigger strict scrutiny.[8] The same rule applies in cases involving rights that are deemed fundamental under the Equal Protection Clause,[9] as in equal protection cases involving challenges to majority-minority voting districts the design of which was predominantly driven by race-based concerns.[10] Statutes that impose substantial burdens on freedom of association also receive analysis under the compelling governmental interest test,[11] as do laws that single out religiously motivated conduct for governmental regulation.[12]

Not all constitutional rights are enforced either by strict scrutiny on the one hand or rational basis review on the other. We shall come to some other tests soon enough. But strict scrutiny and its archetypal alternative of rational basis review have vast importance in organizing constitutional doctrine and, by doing so, in defining and constructing constitutional rights. This book therefore makes strict judicial scrutiny, and the nature of the rights that strict scrutiny protects, a central focus. The lessons that emerge from close examination of that framework will prove to be generalizable in most important respects and usefully distinguishable in others.

The history of strict scrutiny's emergence is little known. The relative lack of attention to its development, which I seek to correct, is surprising. Given the widespread role of strict judicial scrutiny in modern constitutional doctrine, one might expect that it must have deep roots either in the Constitution's text or in longstanding interpretive traditions. Neither is true. The words "strict scrutiny" appear nowhere in the Constitution. Nor does that term embody traditional understandings about the nature of constitutional rights or the judicial role in protecting them. Accordingly, to describe strict scrutiny as an invention is not an overstatement. It is difficult to identify the first case to apply or define strict judicial scrutiny.

Grp, Inc., 529 U.S. 803, 813–14 (2000), *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

7 *See, e.g.*, *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876, 1885 (2018); *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998); *United States* v. *Kokinda*, 497 U.S. 720, 726–27 (1990) (plurality opinion); *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981).

8 *See, e.g.*, *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997); *Reno* v. *Flores*, 507 U.S. 292, 301–02 (1993).

9 *See, e.g.*, *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–27 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969).

10 *See, e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1464 (2017); *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995); *Shaw* v. *Reno*, 509 U.S. 630, 643–44 (1993).

11 *See, e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648–49 (2000); *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982).

12 *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531–32 (1993). Prior to 1990, the Court also applied strict scrutiny to test the permissibility of substantial burdens on the free exercise of religion. But the Supreme Court effected a major retrenchment in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Under *Smith*, generally applicable laws that only incidentally burden the free exercise of religion no longer attract strict scrutiny. *See id.* at 882–89.

The modern formula evolved almost imperceptibly. Before the decade of the 1960s, strict judicial scrutiny as we know it today did not exist. By the end of the 1960s, it had achieved roughly the same reach that it possesses today. To understand the modern regime of constitutional rights, it is important to understand how and why strict scrutiny developed and spread.

The answers to those questions have profound continuing implications. The founders of the strict scrutiny regime were not constitutional or political theorists, at least self-consciously. Nevertheless, strict judicial scrutiny, willy-nilly, embodies a theory about the nature of constitutional rights. The crucial presuppositions emerge from the question: What do constitutional rights need to be like in order for the strict scrutiny test to be a coherent, well-adapted means for identifying and enforcing them? That question imagines a project of reverse-engineering. Taking strict scrutiny as a starting point, I work out what is or must be true about the nature of constitutional rights for them to be defined and applied in the way that the Supreme Court defines and applies them through the strict scrutiny formula.

The necessary analysis is partly conceptual. It should interest those who care about the relationship between constitutional law, on the one hand, and various philosophical theories about the nature of rights, on the other. But there are important practical payoffs too. When the assumptions that underlie strict scrutiny are laid bare, lawyers, judges, concerned citizens, and even Justices of the Supreme Court should have an enriched understanding of how courts could do better. Some of the sharpest implications involve the judicial role in devising remedies for constitutional violations and in determining who should have standing to sue. Rights and remedies are conceptually interconnected, I argue, and courts should exploit the connections to realize the values that underlie rights while limiting the sometimes inevitable social costs of rights enforcement.

My prescriptive conclusions, however, are less important than the lines of analysis that this book opens up. Most of us think it the glory of our Constitution that it guarantees our rights. Especially if so, and if the nature of constitutional rights can change, we have urgent reason to know what constitutional rights are today and what they might be or become instead. Roughly two centuries ago, the philosopher Jeremy Bentham derided appeals to natural rights as "nonsense upon stilts."[13] Rights, he thought, were no more real than ghosts, even if many people believed in both. We could easily imagine Bentham's barb as applying to constitutional rights. Nor should concerned citizens dismiss out of hand the Realists' manifesto that rights, at bottom, are whatever judges say they are. Beginning with the conceptual assumptions about the nature of rights that the prism of strict scrutiny reveals, this book depicts sense, not nonsense, at the foundations of our constitutional practice. But it depicts sense of a kind that will force many of those aligned

[13] Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, in 2 THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., 1843).

with the right, left, and center in modern constitutional debates to rethink their positions.

In contemporary debates, originalists equate rights with guarantees that the Framers embodied in the Constitution. But how does that view cohere, or does it fail to cohere, with the identification of constitutional rights through a strict judicial scrutiny test that judges invented only about a half-century ago? The legal philosopher Ronald Dworkin, who long carried the left-liberal banner in many constitutional debates, described rights as "trumps."[14] But doesn't the strict scrutiny formula assume that constitutional rights can be overridden by "compelling governmental interests"?

As these questions suggest, using the strict judicial scrutiny test as a prism through which to examine constitutional rights promises to generate insights not only about rights, but also about the judicial role in defining and enforcing rights. It will take patience to work out conclusions. But it is not too early to see that the strict scrutiny test requires distinctions among different kinds of rights, some of which may bear different relationships than others to original constitutional meanings, some of which may identify "trumps" in ways that others do not, and some of which might or might not be "living" or evolving.

By way of a down-payment, here is a first cut at some relevant distinctions. *Texas* v. *Johnson*[15] – a case to which I shall refer repeatedly – provides a useful paradigm. Gregory Lee Johnson was prosecuted for burning a flag under a statute that made it a crime to "desecrate" a "venerated object." The Supreme Court reversed his conviction on free speech grounds. Applying strict judicial scrutiny, the majority determined that Johnson had what I shall call an *ultimate right* not to be punished under the challenged statute, which the Court found not to be narrowly tailored to a compelling governmental interest. By an ultimate right, I mean one that the Court upholds or would uphold at the end of its inquiries, after applying all relevant law to the facts.[16] An ultimate constitutional right is a categorical constraint on the legitimate power of the government and its officials under identified circumstances.[17]

Significantly, however, much of the dispute in *Texas* v. *Johnson*, in which the Justices divided five to four, was not about compelling governmental interests and narrow tailoring. It was about whether strict judicial scrutiny should apply at all.

[14] *See, e.g.*, Ronald Dworkin, TAKING RIGHTS SERIOUSLY, at xi (1977) ("Individual rights are political trumps held by individuals.").

[15] 491 U.S. 397 (1989).

[16] It would be possible to draw further, potentially important distinctions within the category of ultimate rights. In perhaps the most influential categorical scheme in the jurisprudential literature, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), distinguishes among claim rights to have others act in a particular manner, privileges, powers, and immunities. He also influentially contrasts those varieties of rights with their jural opposites (no-rights, duties, disabilities, and liabilities). I take no position on continuing controversies about the value of Hohfeld's analytical subdivisions. My interest in this book lies in distinguishing ultimate rights from other categories of rights with which the former can be usefully contrasted.

[17] *See* T. M. Scanlon, THE DIFFICULTY OF TOLERANCE 151–52 (2003).

The dissenting Justices said no. In the vocabulary that I shall use throughout this book, their dispute with the majority involved the existence of a *triggering right*. In other words, the central question for the dissenters was whether the act of burning a flag under the law at issue properly elicited strict judicial scrutiny as a mechanism for protecting the freedom of speech. They concluded that it did not. As that disagreement among the Justices reveals, before a court determines whether a party has an ultimate right, it needs to make several analytically prior determinations (even if it does not pause to think about them in these terms).

Just to kick matters off, the Justices needed to decide whether a ban on flag-burning presented a First Amendment issue of any kind. Why wasn't burning a flag a form of conduct, not speech, and thus wholly outside the concern of the First Amendment? To answer that question, the Justices needed to have in mind what I shall term an *abstract* free speech right, reflecting the values, goals, or purposes of "the freedom of speech" that the Framers embodied in the Constitution and that the Constitution guarantees today. Being defined only by vaguely specified values, purposes, or historical understandings, an abstract right in this sense may be inchoate, as in *Texas* v. *Johnson*, and thus leave the Justices with a genuine question about whether to recognize a triggering right to any more sharply edged test of constitutional validity. We need the idea of an abstract right – to go along with the concepts of triggering and ultimate rights – to explain what the Justices were debating when they divided about whether to apply strict scrutiny in *Texas* v. *Johnson*: Was an abstract right to freedom of speech sufficiently infringed to call for exacting judicial review under the First Amendment?

There is just one more complication, in light of which it will sometimes be helpful to identify yet another category of constitutional rights. Because strict judicial scrutiny is not the only test of constitutional validity that the Supreme Court sometimes employs, a fully specified triggering right is defined by both (1) a threshold level or kind of infringement on an abstract right and (2) the particular test of constitutional validity that infringements of that kind make applicable. In *Texas* v. *Johnson*, a majority of the Justices concluded that strict scrutiny applied. But they also considered the possibility that a different test might be called for. A fully specified triggering right thus subsumes a *scrutiny right*, or a right to have a particular test employed. As this book will show, distinguishing among abstract, triggering, scrutiny, and ultimate rights, and among the judicial functions in making judgments within these varied categories, will clarify numerous constitutional debates. It will also illuminate the plausibility of various theoretical positions within those debates.

Even and perhaps especially when we distinguish among varieties of rights, examining constitutional debates through the prism of strict judicial scrutiny reveals a practical and conceptual puzzle that defines another large part of the book's agenda. This puzzle involves the relationship between rights and interests. Within the strict scrutiny formula, triggering rights – such as the free speech right to burn

a flag that the Supreme Court identified in *Texas* v. *Johnson* – must be weighed against governmental interests, such as that in preserving the flag as a symbol of national unity, that courts must adjudge either compelling or not compelling. The juxtaposition of individual rights with governmental interests presents a question about the commensurability of rights and interests. To borrow a phrase from Justice Antonin Scalia, why isn't asking whether a governmental interest outweighs a right like asking whether a rock is heavier than a line is long?[18]

In response, I argue that rights themselves reflect, and are constructed out of, "interests." Along a myriad of often unrecognized dimensions, constitutional law requires the identification, specification, weighing, balancing, and accommodation of sometimes competing individual and governmental interests. The Supreme Court identifies, balances, and accommodates interests when it defines triggering rights by constructing them out of abstract rights. The triggering right to burn a flag for expressive purposes is a judicial construct in this sense. The Court performs a similar exercise when it devises tests such as strict judicial scrutiny and when, in applying the strict scrutiny formula, it balances triggering rights against governmental interests to determine the shape and scope of our ultimate rights, including our rights to freedom of speech and freedom from race discrimination.

The Supreme Court also takes competing interests into account when crafting and limiting remedies for constitutional rights. With respect to that issue, this book's central thesis cuts against the claims of those who view depict the Court solely as a "forum of principle"[19] and constitutional rights as "trumps" – as Professor Dworkin did – in a sense that overruns all pragmatic and policy-based considerations in all cases. As even many constitutional scholars forget much of the time, rights and remedies do not exist in a one-to-one correlation. In one well-known example, the prevailing plaintiffs in *Brown* v. *Board of Education*[20] got no immediate remedy, only a promise of school desegregation "with all deliberate speed."[21] Some had graduated from segregated schools before desegregation occurred. Similarly, people whose rights were violated in the past and who seek damages relief often discover that the violation of their rights will go unremedied. The doctrine of sovereign immunity will preclude suits for damages against the government. And if an aggrieved party sues the governmental official who violated her rights – say, by subjecting her to an unconstitutional search and seizure – she will often run afoul of a less known but hugely important doctrine of "official immunity." Interest-balancing explains the often complex relationship between constitutional rights and constitutional remedies. It also explains the mystifying rules that determine

[18] *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).
[19] *See* Ronald Dworkin, A Matter of Principle 69–71 (1985).
[20] 347 U.S. 483 (1954).
[21] *See Brown* v. *Bd. of Educ.* (*Brown II*), 349 U.S. 294, 301 (1955).

when courts will deem statutes unconstitutional "on their faces" versus only "as applied" – among other examples that the book will explore.

But what, the reader will demand to know, is an *interest*? And where do interests come from? This book offers answers to these and many other crucial questions about the nature of constitutional rights within American constitutional practice. Among the issues to be addressed are these:

The Role of the Constitution's Text and History in Creating Constitutional Rights. The status of strict judicial scrutiny as a judicial creation both raises important questions and teaches important lessons about the limited role of text and history as determinants of constitutional rights. The Constitution's text and original history matter in multiple ways to the Supreme Court's application of the strict scrutiny test. But careful analysis of strict scrutiny cases illustrates the large, creative role the Court plays, not only in weighing the rights that trigger strict scrutiny against purportedly compelling governmental interests, but also in identifying triggering rights in the first instance.

Constitutional Originalism. Constitutional "originalists" maintain that the Constitution's meaning was fixed at the time of its ratification and that contemporary constitutional interpretation should reflect the original meaning of constitutional language.[22] Nevertheless, leading originalist judges and Justices have embraced, rather than renounced, the strict judicial scrutiny test, even though that test is a twentieth-century judicial invention wholly unforeseen by the Founding generation. Originalists' embrace of strict scrutiny does not necessarily reveal them as hypocrites or falsify the main claims on which nearly all originalists unite. Nonetheless, the endorsement of strict judicial scrutiny as a measure of constitutional validity imposes limits on the kind of originalism that anyone could plausibly defend as "our law,"[23] or a theory that captures the animating assumptions of most current constitutional doctrine, rather than a proposal for radical reform.

Rights as Trumps. By calling for rights sometimes to yield to compelling governmental interests, strict scrutiny problematizes Professor Dworkin's famous characterization of rights as "trumps" that prevail categorically over all competing considerations of prudence, convenience, and expediency. To try to rescue Dworkin's claim, we can immediately distinguish the ultimate rights that emerge from the strict scrutiny test from those that trigger strict scrutiny in the first place. Having drawn that distinction, we can insist that the former are trumps even if the latter are not. But in order for the claim that the former are "trumps" to be more than

[22] *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459–62 (2013) (identifying the "Fixation Thesis" and "Constraint Principle" as the "core of contemporary originalism"); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

[23] *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

tautological, we will need to extract some non-obvious insights about what interests are and how rights relate to interests.

The Nature of "Interests." As used in constitutional law, the term "interests" functions as a placeholder for goods, benefits, and opportunities that reasonable and rational people would want for themselves and their prosperity. John Rawls's famous ideas of an "original position" and a "veil of ignorance" provide a useful analogy: Parties behind the veil would seek to promote or realize interests.[24] So, presumably, would the authors and ratifiers of a constitution. Interests matter in constitutional adjudication because the courts, to adjudicate cases under the Free Speech or Equal Protection Clause, for example, must imagine those provisions as protections for interests that the Supreme Court must identify. Looking at the Free Speech Clause in *Texas* v. *Johnson*, the Court imputed an interest in protecting "expressive conduct" such as flag-burning, even though it is not "speech" in the literal sense. Conversely, the Court assumes that there is no protected First Amendment interest in falsely crying fire in a crowded theater, even though such a cry would literally constitute speech.[25] Under the Equal Protection Clause, the Court identifies a protected interest in freedom from discrimination on the basis of gender, despite the absence of evidence that the Fourteenth Amendment was originally understood this way. Yet the Court has not (so far) identified a significantly protected constitutional interest in freedom from discrimination based on IQ or educational attainment.

Crucially, the Constitution's strategy for protecting interests is two-pronged. On the one hand, it confers judicially enforceable rights (that courts must identify on the basis of an interest-based analysis). On the other hand, it vests powers in the government to protect citizen interests that do not give rise to judicially enforceable constitutional rights. For example, we all have interests in personal security that justify the attribution of a "governmental interest," sometimes compelling in character, in national security.[26] We have interests in empowerment and health that underlie claims of governmental interests in enacting laws related to education and medical care. How to compare and accommodate diverse kinds of interests that sometimes compete with one another is perhaps the most fundamental challenge of practical reasoning. Constitutional law must struggle with that challenge without the aid of any algorithm. It should be no surprise that constitutional law incorporates, without having produced an elegant solution to, the most fundamental challenge of moral and political thought.

[24] *See* John Rawls, A Theory of Justice, at xii (rev. ed. 1999); John Rawls, Political Liberalism 19, 304–24 (1993).
[25] *See Schenck* v. *United States*, 249 U.S. 47, 52 (1919).
[26] *See, e.g., Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 38–40 (2010) (upholding a prohibition against speech used to train terrorist organizations in light of "real dangers" to national security).

Categorical Alternatives to Interest-Balancing in the Identification of Constitutional Rights. For a variety of reasons, characterization of the judicial function in constitutional cases as involving interest-balancing occasions anxiety, not only about the contingent character of constitutional rights, but also about the capacity of courts to weigh competing interests. Critics often call for a more categorical approach, such as one in which the courts confine themselves to invalidating legislation that reflects constitutionally forbidden intentions or purposes.[27] In examining the role of constitutionally forbidden intentions in constitutional law, I argue that courts cannot escape from the obligation of interest-balancing. Forbidden legislative intentions should matter as a trigger for interest-balancing pursuant to the strict judicial scrutiny formula. Nevertheless, the ultimately determinative consideration should be whether challenged legislation is narrowly tailored to a compelling governmental interest.

Rights as Constraints Rather than Privileges. On one familiar view, to have a right is to have a privilege (which might be broader or narrower) to do or say what one wants, regardless of social costs or harm to others. If the right to burn the flag as an act of political protest were a privilege in this sense, I could burn a flag whenever or wherever I wanted, regardless of the hazards I created or the government's reasons for wanting to stop me. But the strict scrutiny test is not framed to identify or protect privileges. Rather, in paradigmatic applications, it asks whether particular, challenged laws or statutes are narrowly tailored to compelling governmental interests. This focus of analysis reveals the rights that strict scrutiny protects not as privileges, but as constraints. As identified through the strict scrutiny test, constitutional rights constrain the government from enacting particular statutes or engaging in other actions without sufficiently good reasons for doing so. *Texas* v. *Johnson* exemplifies the distinction. The First Amendment constrained Texas from punishing flag-burning under a statute that barred the desecration of venerated objects. But the right to freedom of speech would not have constrained Texas from enforcing a law that forbade all lighting of fires on public property, justified by interests in protecting public safety, against someone who ignited a flag.

Rights and Remedies. The strict judicial scrutiny formula defines constitutional rights, but the practical significance of constitutional rights frequently depends on the remedies that are available to enforce them. Constitutional scholars sometimes portray the identification of constitutional rights as one exercise and the provision of remedies as another. Trumpeting the slogan "for every right, a remedy,"[28] they have

[27] *See, e.g.*, Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); *see also* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[28] In the American constitutional tradition, the phrase evokes *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice John Marshall stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . The government of the United States has been emphatically termed a government of laws, and not of

often expressed outrage whenever the Supreme Court betrays the promise that (they think) rights convey by denying an individually effective remedy, such as compensation in the form of money damages, to someone whose constitutional rights have been violated.

I take a contrary view. If constitutional rights properly reflect a comparison of competing interests, the Supreme Court should also take competing interests into account in crafting and awarding constitutional remedies. Even defenders of sovereign and especially official immunity doctrines frequently portray them as necessary evils, devised to protect public treasuries and to spare individual officials from personal liability simply for doing their jobs. In doing so, they assume that constitutional rights are constants and that remedies for rights violations are variables. But if rights are themselves defined through a process of interest-balancing, then rights are variables as much as remedies are. If there had to be a damages remedy for every violation of constitutional rights, the governmental interests that counsel against the recognition of rights in the first place would become more weighty, and the scope of judicially recognized ultimate rights might shrink. To take a historical example, if the social costs of the Supreme Court's decision to uphold a right to desegregated schooling in *Brown* v. *Board of Education*[29] had included the necessity of providing a damages remedy to every person who had suffered wrongful discrimination in the past, then the Supreme Court might have felt disabled from deciding *Brown* as it did.[30] The Justices, most of whom thought the case a very difficult one anyway, might have ruled that although maintaining segregated schools was morally troublesome, the Constitution did not forbid it, and waited for state legislatures or for Congress to abolish segregation. As that prospect should suggest, sometimes we are better off with relatively broader rights but restricted remedies than we would be with relatively narrower rights and more robust remedies.

Judicial Legitimacy and the Judicial Role. Insofar as courts applying strict scrutiny must make value-based and instrumental calculations about how best to promote competing interests, the question inevitably arises: How does the judicial role in doing so differ from the function of legislatures, which also should seek to balance and accommodate competing interests? And since the role that the courts play in administering strict scrutiny is one that they have defined for themselves, a deeper question is whether that role can be justified. This question is partly one of constitutional law, but it also implicates democratic theory. We should address it in those terms. A careful analysis of the conceptual foundations of strict scrutiny doctrine shows the need to rethink the justification for searching judicial review to protect inherently contestable, interest-based constitutional rights.

men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right," *id.* at 163.

[29] 347 U.S. 483 (1954).

[30] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–101 (1999).

This book offers a fresh, nonstandard justification for judicial review. I argue that the best justification for aggressive judicial review is not that courts are inherently better than legislatures at defining constitutional rights and appraising competing governmental interests. It is, rather, that some of the interests that underlie constitutional rights are so important that they deserve a double safeguard: The government ought not be able to act in ways that either the legislature or a reviewing court believes incompatible with a commitment to ensuring and enforcing a robust scheme of rights against the government.

The book comprises seven chapters. Chapter 1 traces the historical emergence of strict judicial scrutiny during the 1960s and identifies the felt needs that the Supreme Court devised strict scrutiny to meet. Chapter 2 provides a close analytical examination of strict scrutiny's constituent elements, including those of fundamental rights, narrow tailoring, and compelling governmental interests. Chapter 3 explains how individual rights and governmental interests can be weighed against each other by arguing that fundamental rights themselves reflect interests. Chapter 3 also discusses in detail the kinds of contestable judgments that the Supreme Court must make to apply a strict scrutiny formula that was at its inception, and remains, incompletely theorized. Chapter 4 broadens the focus of inquiry beyond strict scrutiny to consider other tests that the Supreme Court has developed to define and enforce constitutional rights. As viewed through this broader lens, constitutional rights emerge as more diverse in their natures than an exclusive focus on strict judicial scrutiny would reveal. Nevertheless, Chapter 4's analysis generalizes the conclusions of Chapter 3 in two key respects: As examined through the windows furnished by judicial tests other than strict scrutiny, rights reflect interests that are subject to balancing, and they function as constraints on particular kinds of governmental action, not as encompassing privileges to say or do particular things regardless of legal or practical context. Chapter 5 examines the role of forbidden legislative intent in modern constitutional law and considers possible categorical alternatives to strict judicial scrutiny that purport to avoid interest-balancing. Chapter 6 delineates often unappreciated practical and conceptual interconnections between rights and remedies, including limitations that sometimes leave victims of rights violations with no judicial remedy whatsoever. Chapter 7 offers a justification for interest-balancing judicial review that does not depend either on original constitutional understandings or on the premise that courts possess greater moral and practical wisdom than do legislators.