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The Proper Role of Equality in Constitutional Adjudication: The Cathedral's Missing Buttress

ABSTRACT. The most difficult and divisive issue in American constitutional law is how to deal with fundamental rights that are not specifically protected in the Constitution. At times, courts have afforded such rights near-absolute protection against infringement. At other times, courts have declined to provide such rights any constitutional protection. Both approaches are misguided. Instead, as argued by Justices Antonin Scalia and Robert H. Jackson, and Professor John Hart Ely, laws infringing these rights should be invalidated if they burden only some in society while leaving the rights of the enacting majority unimpeded.

This Feature begins by describing the two sorts of protections the Constitution affords to enumerated fundamental rights. Some rights are given full "libertarian" protection, with any infringement subject to close scrutiny. But others, such as the right to property, receive only "egalitarian" protection. Private property may be taken for public use so long as all of society is burdened by the requirement that compensation be provided.

This Feature argues that the Constitution should be read to extend similar egalitarian protections to any number of unenumerated fundamental rights. Encumbrances on these rights run afoul of the Constitution's egalitarian guarantees if the burdens they impose are unequal. Protection of such rights is not available under the current reading of the Equal Protection Clause because violations of these rights are often not the result of discriminatory intent but rather the enacting majority's desire to achieve results it deems good without bearing their costs.

This Feature seeks to return the Constitution's egalitarian guarantees to the purpose contemplated by the Framers. It argues that a law violates these egalitarian protections if a law infringes unequally and substantially the fundamental rights of individuals not positively affiliated with the majority. It outlines factors in evaluating proper judicial remedies for impermissibly unequal laws. And it provides the doctrinal constitutional bases for such judicial action.

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in this as in all that I do, essential. She was always ready to help in correcting and rewriting, and in enabling me to find the time to write, this Feature.

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INTRODUCTION

The most difficult, divisive, and persistent issue in American constitutional law is the proper role of courts in the protection of rights that are viewed by many as fundamental but nonetheless are not specifically enumerated in the Constitution.[1] At times, courts have afforded such rights full constitutional protection, either directly or by putting them in the penumbra of protected rights. At other times, courts have decried such protections as undemocratic, declining to offer protection or retracting protection from the right in question. I write to discuss the proper role of courts in the protection of such rights.

In one of Justice Scalia's most interesting opinions—his concurrence in *Cruzan v. Director, Missouri Department of Health*—he wrote that due process (and like constitutional mandates) should not protect fundamental rights that are not expressly specified in the Constitution.[2] He then stated that fundamental but unenumerated rights are protected by "the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones

1. My belief that such rights exist is consistent with the way that Founding Era Americans viewed the process of specifying rights in a constitution: "Carrying forward longstanding constitutional habits, [Founding Era Americans] readily presupposed that constitutions were comprised of a seamless field of written and unwritten content." Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 120 (2019). "In some instances, text was understood to have enacted certain institutions or legal standards, but in others it was assumed that this text easily blended with other . . . fundamental authorit[ies] such as natural law, Magna Carta, 'right reason,' general law, the law of nations, or just the 'Laws of the Land.'" *Id.*; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 293-305 (1998) (noting that "with all of [Founding Era Americans'] emphasis on written documents," they did not entirely "concede[] that their charters and codifications by themselves were the source of their rights and liberties"); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) ("[T]he founding generation did not intend their new Constitution to be the sole source of paramount or higher law . . . .").

   In addition to Founding Era arguments, others have argued that the Fourteenth Amendment's ratification incorporated rights enumerated in state constitutions that remained unenumerated in the Federal Constitution. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 115-16 (2008) ("[F]or those wondering about incorporation or judicial protection against the states of unenumerated rights in federal constitutional law, the question is controlled not by the original meaning of the first ten Amendments in 1791 but instead by the meaning those texts and the Fourteenth Amendment had in 1868.").

2. *See* 497 U.S. 261, 292-300 (1990) (Scalia, J., concurring).

what they impose on you and me."[3] As to such rights, he said, whether a violation is permissible should turn on whether the violation in question applied to only some people in society or to all.[4]

Justice Scalia's dramatic claim echoes John Hart Ely's broader point in *Democracy and Distrust* that "the choosing of values is a prerogative appropriately left to the majority (so long as it doesn't by law or administration provide different rules for others than it does for itself)."[5] Likewise, Justice Jackson, writing in concurrence in *Railway Express Agency, Inc. v. New York*, contended that "[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation."[6] Scalia, Ely, and Jackson each believed that judges would have too much power if courts were permitted to protect unenumerated rights from infringement when the laws restricting those rights did not violate equal protection.[7]

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3. *Id.* at 300 ("Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of *most of our protection* . . . . [That] is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." (emphasis added)).

4. *See id.* at 301.

5. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 179 (1980). For what is meant by "the majority," see *infra* note 11 and accompanying text.

6. 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

7. Invocation of the Due Process Clause or other constitutional provisions providing for near-absolute protection of a right is undesirable, Justice Jackson argued, because judicial "[i]nvalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable." *Id.* at 112. He went on to say that

> [i]nvocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.

Id. It is significant that Jackson made this argument in a case that did not involve discrimination against racial, gender, or other minorities. Jackson, however, appeared willing to allow "reasonable differentiation" in how different members of society were treated. Whether such differentiation ought to be permissible—and if so, to what extent and on what grounds—I discuss throughout this piece, but especially in Part V, *infra*.

Notably, Justice Jackson's opinion expressly points to one of the principal virtues of an approach that focuses on egalitarian treatment: it allows for a second look at the constitutionality

On this view, our society is fundamentally libertarian as to only very few rights: it permits infringements of many fundamental rights when the whole polity requires such infringements for social-democratic, communitarian reasons.[8] Just a limited set of rights—most notably, speech and religion—are held to be fully inalienable and thus deserving of explicit constitutional protection.[9] But our society is also fundamentally egalitarian: infringements of most fundamental rights are acceptable only if all of society shares the burden of such infringements.

The Ely-Jackson-Scalia position thus suggests that our constitutional structure adopts two of the three principles of the French Revolution: liberté and égalité.[10] As to the third—fraternité, or "communitarianism," as I choose to refer to it—our constitutional structure permits the legislature to promote this principle, but only so long as its legislative acts (1) do not infringe a few fundamental rights, namely those rights provided explicit libertarian constitutional

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of a legislative action. That is, it permits courts to make a preliminary finding of unconstitutionality, while not ruling out that a statute could be rewritten to be made constitutional. Conversely, when a statute is held to violate an express constitutional guarantee, the asserted government interest in the object of the statute has been held insufficient to justify an infringement on a right. That ruling, then, prohibits the infringement of that right to further that interest without regard to whether society as a whole deems the burden on the right necessary to achieve some end. The approach advocated by John Hart Ely, Jackson, and Justice Scalia instead would allow the political branches to reenact the same burden on the same rights to further the same interest, so long as the acting majority, in Scalia's words, "accept[s] for themselves and their loved ones what they impose on you and me." *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring). For a general discussion of the advantages of giving legislatures a "second look," see *Quill v. Vacco*, 80 F.3d 716, 742 (2d Cir. 1996) (Calabresi, J., concurring in the result).

8. In using the term "libertarian," I do not mean to reference the term's modern political meaning. I mean to refer to the position that there are rights that are so fundamental that they may not be violated absent a truly compelling government interest. *See generally* Lawrence Solum, *Legal Theory Lexicon: Libertarian Theories of Law*, Legal Theory Blog (Jan. 2, 2022, 10:51 AM), https://lsolum.typepad.com/legaltheory/2022/01/legal-theory-lexicon-libertarian-theories-of-law.html [https://perma.cc/T7PA-T7X7] ("[T]he Lockean social contract would not authorize government to restrict fundamental liberties . . . .").

9. Of course, probably no rights are in fact entirely inalienable. In rare situations, even explicit constitutional guarantees may be abridged. *See, e.g.*, United States v. Rahimi, 602 U.S. 680, 690-91 (2024) ("Like most rights . . . the right secured by the Second Amendment is not unlimited." (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008))). But it remains true that our Constitution affords relatively few rights the sort of explicit protection provided in the First Amendment. And there are any number of other rights that, while not explicitly protected, have nonetheless been understood by the polity and the courts to be fundamental. Among those such rights are parental rights, the right to a degree of economic freedom, and the right to control one's body. *See infra* note 78.

10. After all, "[o]ur Constitution was framed during the seethings of the French Revolution." Draper v. United States, 358 U.S. 307, 317 n.5 (Douglas, J., dissenting) (quoting United States v. Innelli, 286 F. 731, 731 (E.D. Pa. 1923)).

protection; and (2) do not unequally burden other fundamental rights by infringing these rights only as to some—put otherwise, such legislative acts must not violate the Constitution's egalitarian requirements.

Thus, Ely, Justice Jackson, and Justice Scalia seem to have believed that the Constitution should empower judges to protect unenumerated fundamental rights when the majority enacts a policy that infringes such rights only as to some and does not burden the majority.[11] On the other hand, in their view, even fundamental rights can be limited so long as the violative policy infringes the rights of all, including the enacting majority. By "majority," I believe these three meant (and I shall use the term to mean throughout this piece) the enacting governmental actors—powerful parties, as their ability to enact policy demonstrates—in contrast to a "minority," that is those outside of power with whom the majority does not identify.

So far I am in strong agreement with Ely, Justice Jackson, and Justice Scalia. Majorities are better deciders than judges of what policies are worth their costs. Our Constitution has been read to give courts the power to protect very few specific rights.[12] As to most rights, even crucial ones, our Constitution trusts democracy more than a judicial priesthood. But as Scalia and Ely say, the

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11. For a further discussion of those with whom the majority does not identify, see *infra* Section II.B.3. In this vein, our nation has a long tradition of public resentment towards governmental actors who enact policies that affect the public without impacting the enactors themselves. *See, e.g.*, Ron DeSantis (@RonDeSantis), X (formerly TWITTER) (Dec. 18, 2024, 9:51 AM), https://x.com/RonDeSantis/status/1869395006437654941 [https://perma.cc/942Z-QXQ6] ("Proposed 28th amendment: 'Congress shall make no law respecting the citizens of the United States that does not also apply to members of Congress themselves.'").

12. As a result, jurists seeking to protect fundamental rights that are unspecified often seek to squeeze them into one of the enumerated rights. See, for example, *Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965), in which the Court found a right to privacy in the penumbras of the First, Fourth, Fifth, and Fourteenth Amendments, among others. And litigants frequently play the same game. Another example of this phenomenon is *City of Grants Pass v. Johnson*, 603 U.S. 520, 543-47 (2024), where the respondents argued that governmental action criminalizing the status of homelessness violated their Eighth Amendment rights to be free from cruel and unusual punishment. This argument stretched that Amendment, and the Court rejected it. *Id.* at 556. Rather than an argument that their treatment was cruel and unusual, which is rarely applied, *see* John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J.L. & SOC. POL'Y 307, 372 (2018), respondents' position sounds closer to an argument that homeless individuals were being subject to an unequal burden. Respondents, however, argued neither equal protection nor due process. *See* Brief for Respondents at 18-43, City of Grants Pass v. Johnson, 603 U.S. 520 (No. 23-175) (advancing an argument under the Eighth Amendment without arguing equal protection or due process); *see also* Brown v. MGM Grand Casino, No. 22-cv-12978, 2024 WL 4819575, at *2 (E.D. Mich. Nov. 18, 2024) (describing the plaintiff's contentions that getting vaccinated conflicted with his religious beliefs). Such penumbral arguments are, moreover, readily attacked. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

democratic majority can be trusted only when that majority is *itself* willing to bear the burden that limiting fundamental rights imposes. With no cost imposed on us or those close to us, nearly all of us would be willing to place even heavy burdens on an unseen minority in order to benefit ourselves. By contrast, a majority that is willing to burden itself is better positioned to identify the limits of rights than unaccountable judges are. This is the combination of liberty and equality that I, like Ely, Jackson, and Scalia, believe our Constitution establishes.

But to date, there has been no constitutional doctrine—grounded in the Equal Protection Clause or in any other constitutional provision—that protects unenumerated fundamental rights as Ely, Justice Jackson, and Justice Scalia say is needed. This absence is the source of many of our present constitutional conflicts. This Feature seeks to fill that void, to provide what I call the missing buttress, and explain the role of courts in doing so.[13] And it seeks to be democracy-enhancing by ensuring that every policy's costs are truly understood by the enacting majority.

Ely and Justice Scalia assert that unenumerated fundamental rights should be protected by the Equal Protection Clause.[14] In Part I, I will explain why that

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13. For those who may not know my article with A. Douglas Melamed, there I argued that entitlements to property and bodies are, in our law, protected and transferred in three ways; they may be transferred by agreement of the parties (contract law), by collective decisions (criminal and regulatory law), and through individual decisions, but with such decisions charged with a price/assessment determined by the state (tort law and eminent-domain law). For this argument, see generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

    In that article, I referred to Monet's many paintings of the Cathedral at Rouen. *Id.* at 1090 n.2. Monet's paintings demonstrated that to appreciate the cathedral fully, one needed to look at any number of depictions. *Id.* He did the same in a series of paintings of Haystacks. My reference was meant to suggest that the law-and-economics approach, taken by my article, was not the only way to depict law and that to understand law other approaches were needed. I did not mean to say that law was a cathedral. The point could have been made, though less elegantly, by using haystacks. That article has been cited innumerable times. And in many of those citations, the law is described as a cathedral. I now give up. Treating the law as a cathedral in this Feature, I argue that a crucial part of that cathedral, a part that is necessary to its strength, has not been adequately appreciated by scholars and judges. That part which I call the missing buttress, has, I believe, a function in both law-and-economics depictions of the cathedral and in more traditional rights-based ones.

14. It is not clear whether Justice Jackson, like Ely and Justice Scalia, looked to the Equal Protection Clause as the constitutional basis for such a holding. His language—that laws must be "equal in operation"—spoke to equality more generally. *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 113 (1949) (Jackson, J., concurring). However, to the best of my knowledge, Jackson did not develop his thought further.

Clause, as currently understood, cannot do the job that I agree must be done.[15] In Part II, I will argue that the Framers gave egalitarian, rather than libertarian, protection to one right that they thought needed explicit constitutional protection: the right to property. I will suggest that the protection given to property is a model for the protection of other fundamental rights that, unlike property, are not specifically enumerated in the Constitution.

Recognizing that most laws acceptably burden some people more than others, I will detail in Part III when the protection of the Constitution's egalitarian values requires judicial intervention and when no such intervention is needed. Specifically, I will argue that courts should intervene only if (1) a law infringes rights that, though not specified in the Constitution, are nonetheless fundamental; (2) such an infringing law substantially harms only a portion of the population; and (3) those harmed are not positively affiliated with the majority. I will then discuss how courts should respond if this inquiry concludes that a policy is impermissibly inegalitarian. Placing the same cost on the majority as on those whom the law harms is rarely possible (but may be available in some few cases, such as mandatory DNA collection or military service). Indeed, even compensating landowners financially is not the same as leaving them on their land. Where placing exactly the same burden on all is difficult or impossible, different types of burdens may be sufficiently similar in category and degree to ensure that the majority has not violated the Constitution's egalitarian commands. Such a finding ensures that the majority bears an appropriate burden and that the burdened do not feel unequally treated. In such cases, which I will discuss through

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15. The gravamen of our modern equal-protection jurisprudence is Justice Stone's famous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Footnote four limits the coverage of equal protection to "discrete and insular minorities," which the Court identified as perhaps "a special condition[] which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities [that] may call for a correspondingly more searching judicial inquiry." *Id.* Later, under the influence of Robert A. Dahl, the scope of whom the Clause protected was expanded. *See generally* ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 34-62, 124-32 (1967) (arguing that disorganized majority coalitions may, at times, be less powerful than highly organized minority coalitions). But footnote four remains the foundation of our Equal Protection Clause jurisprudence, and, as a result, the Clause continues to be read to protect defined categories of people from discrimination.

Bruce A. Ackerman has persuasively argued that *Carolene Products* was mistaken as to which categories of minority groups ought to be afforded the highest level of protection under the Fourteenth Amendment. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 737 (1985) ("It is the members of anonymous or diffuse groups who . . . will have the greatest cause to complain that pluralist bargaining exposes them to systematic—and undemocratic—disadvantage."); *see also id.* at 742 ("After a generation of renewed struggle for civil rights . . . it no longer follows that the discreteness or insularity of a group will continue to serve as a decisive disadvantage in . . . pluralist bargaining.").

various examples, the majority will have adequately made a "show of earnest" by imposing a burden on itself.

Judicial intervention, even where justified, should vary based on the circumstances. I will argue that courts will rarely be able to impose a specific show of earnest. Instead, they usually should play the crucial role of determining whether the show of earnest chosen by the legislature is sufficient. Additionally, courts will have to decide the often-difficult question of whether an egalitarian law must be struck down immediately or left in place with a requirement that the legislature impose an adequate show of earnest in short order.

In Part IV, I will discuss a number of examples of infringements of rights—abortion restrictions, rent control, DNA gathering, pretextual traffic stops, and integrational busing—that I believe might require judicial interventions to ensure that their burdens are not placed only on those who are not affiliated with or linked to the majority.[16] These examples may be appealing at times to the left and at times to the right. In other words, my approach is not an ideological or political one. Instead, it goes to the proper structure of democracy.[17] I will argue that though the issues involved are difficult to resolve, courts already frequently grapple with them.

Finally, and most importantly, in Part V, I will discuss the constitutional and doctrinal bases for my argument and the limited judicial power it entails. In this respect, I will address two bases. The first is a broadened reading of the Equal Protection Clause. The second relies on the egalitarian principles found in any number of constitutional provisions and throughout our Bill of Rights. I will conclude by explaining again why this approach is more desirable and effective than the status quo, both in restraining how courts treat fundamental unenumerated rights and in allowing them to protect such rights when they are deserving of protection.

I. UNENUMERATED RIGHTS AND THE INADEQUACY OF EQUAL-PROTECTION JURISPRUDENCE

We must first define the problem. Some examples may be helpful. A majority may wish to control the scourge that they believe drugs cause,[18] stop the spread

16. For a discussion of the meaning and impact of "affiliated with or linked to the majority," see *infra* Section II.B.3.

17. There are many other examples that could be used. I selected these because they have been the subject of recent discussion and illustrate the difficulties involved in finding appropriate shows of earnest.

18. For a discussion of one such policy, see generally *Stop-and-Frisk During the Bloomberg Administration 2002-2013*, N.Y.C.L. UNION (Aug. 2014), https://www.nyclu.org/uploads/2019/02/stopandfrisk_briefer_2002-2013_final.pdf [https://perma.cc/C74P-J56M].

of a dangerous disease,[19] integrate schools in a community in which racially separate housing dominates,[20] protect what it believes is unborn life,[21] give adequate housing to those who cannot afford market rental prices,[22] or have public spaces free of homeless encampments.[23] In each case, the aim of the majority is to achieve a communitarian goal it deems desirable. And yet, in each case the majority seeks to achieve that goal by infringing on the rights of a minority, rights that those in that minority group believe (correctly or not) to be fundamental. The majority may not wish to hurt the minority. But it does not *care* that rights, which are perhaps fundamental, are violated, because its own rights, and the rights of those it identifies with, are left essentially untouched.[24]

Would the majority pursue its "good" object if its own rights were also being infringed? It may *say* that it would. But that is often a meaningless statement when no such infringement occurs. Because the majority's own rights are unaffected, the way in which it evaluates the harms of proposed infringements is fundamentally different than if its own rights were on the line.

It is this "*care*-lessness" that I believe underlies some of the most problematic and divisive issues in our constitutional law today. Courts are driven to the protection of these unenumerated fundamental rights and so will occasionally (but only occasionally) intervene even though the Constitution does not explicitly

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19. *See, e.g.*, Roman Cath. Diocese v. Cuomo, 592 U.S. 14, 16 (2020) (per curiam) (examining emergency COVID-19 restrictions limiting gatherings to ten persons in areas of highest concern and twenty-five persons in areas of lesser concern).

20. *See generally* Cara Sandberg, *The Story of* Parents Involved in Community Schools, BERKELEY L. SCH. (2011), https://www.law.berkeley.edu/files/The_Story_of_Parents_Involved_Sandberg.pdf [https://perma.cc/3VU2-QGGK] (recounting the details of the litigation surrounding Seattle's plan for mandatory desegregation of its public schools); Douglas Judge, *Housing, Race and Schooling in Seattle: Context for the Supreme Court Decision*, 2 J. EDUC. CONTROVERSY, art. no. 9 (2007) (same).

21. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201(1), 171.204(a) (West 2025).

22. *See* Liam Dillon, *California Will Limit Rent Increases Under Bill Signed by Gov. Gavin Newsom*, L.A. TIMES (Oct. 8, 2019, 3:00 PM PT), https://www.latimes.com/california/story/2019-10-08/california-rent-cap-tenant-protections-signed [https://perma.cc/AB8U-85RR].

23. Daniel Trotta, *Emboldened by Supreme Court, California Turns to Police in Homeless Crisis*, REUTERS (Sept. 5, 2024, 12:49 PM EDT), https://www.reuters.com/world/us/emboldened-by-supreme-court-california-turns-police-homeless-crisis-2024-09-05 [https://perma.cc/DK3D-P367] (noting that, in the two months following the Supreme Court's ruling in City of Grants Pass v. Johnson, 603 U.S. 520 (2024), "12 California cities or counties have passed camping bans while another nine are considering them or have already given initial approval").

24. Callous carelessness is not the only explanation for such majority actions. When the majority—and those close to the majority—are unaffected by the costs of such an action, even a majority that might care about the harms that its policies impose may well be oblivious to the true cost of its choices.

protect them.[25] Majorities and minorities (in the legislature and in the country as a whole) become most upset about these judicial decisions, both when courts prohibit and when courts decline to prohibit what the majority has decided to do.[26]

In *Cruzan*, Justice Scalia assigned to the Equal Protection Clause the responsibility of protecting unspecified fundamental rights from majoritarian abuse.[27] But that Clause, as currently interpreted, cannot do the job. The Equal Protection Clause[28] was historically created, and is still needed, to fight discrimination. Because the Clause aims to combat discrimination, it concerns fundamental rights only insofar as those rights may be the subject of a discriminatory policy.

Significantly, *Brown v. Board of Education*'s foundational statement that separate but equal is "inherently unequal" applied directly to education—perhaps a fundamental right—but was quickly read to cover access to public facilities generally, and in time, to the right to access water fountains, which is not a fundamental right.[29] *Brown* thus stands for the proposition that all have a fundamental right to be free from discrimination. *Brown* and its progeny applied that to discrimination in receiving an education, and in access to public facilities. But *Brown* and its progeny did not concern themselves with whether there is a

25. There are some rights that are so clearly intended to be protected in the Constitution that even though they are not specifically mentioned, they have long been granted protection. The best example of this is voting rights. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 555 (1964). For purposes of this Feature, I will use the terms "explicitly" and "specifically" indifferently to distinguish such rights from those that are neither directly mentioned nor taken for granted as being protected by the language of the Constitution. There may be others which are deemed so much a part of the protection of an explicit right—for example, the right to travel is understood to be essential to the idea of interstate commerce, *see* United States v. Guest, 383 U.S. 745, 757 (1966)—that no one questions their existence. In this Feature, I am concerned with rights that are deemed essential by many, but that are not universally considered to be protected by the Constitution itself.

26. I will discuss in due course the public backlash to the Supreme Court's revocation of abortion rights and to the Court's allowance of the eminent-domain action in *Kelo* to proceed. The same dynamic can also be seen in the reaction to the so-called *Lochner* era. *See infra* note 78.

27. *See* 497 U.S. 261, 292-300 (1990) (Scalia, J., concurring).

28. The text of the Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. And the Fourteenth Amendment further affords Congress the "power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

29. *See* 347 U.S. 483, 495 (1954); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964); Katzenbach v. McClung, 379 U.S. 294, 295 (1964).

standalone fundamental right to education, or to access public facilities more generally, regardless of discrimination.[30]

Consistent with *Brown*'s focus on discrimination, the cases subsequent to *Brown*, while continuing to oppose any overt racial classification, turned their attention to the intent of the relevant governmental actors. And in *Washington v. Davis*, the Court expressly held that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[31] The Court reaffirmed that principle in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, explaining that the Equal Protection Clause protects only against actions for which "discriminatory purpose was a motivating factor."[32] As a result, the Equal Protection Clause today provides no protection when a majority, motivated not by an intent to discriminate but rather a well-intentioned desire to achieve some good, enacts a policy that differentially burdens even those in groups that qualify as the sort of discrete and insular minority on which the Clause initially focused.[33]

Washington v. Davis rests on the recognition that all governmental actions burden some in society more than others.[34] But *Washington v. Davis* has been taken also to suggest that the fact that a law or other action injures even the *fundamental* rights of some more than others is not sufficient to give rise to a claim under the Equal Protection Clause without discriminatory intent. In my view, furthermore, it implicitly seems to assert that such disproportionate injury does not implicate any other constitutional provision. It is precisely these extensions of *Washington v. Davis* that this Feature takes issue with: I believe that, properly read, the Constitution does and must protect fundamental rights from inegalitarian laws.

Nevertheless, the Equal Protection Clause today applies typically only as to people who, because of their particular historical treatment, are placed in suspect or semisuspect classifications,[35] and only when such people are treated unequally

30. The Supreme Court has held that the Equal Protection Clause does not create new substantive rights beyond that of equal protection itself. Justice Powell's oft-cited writing is emblematic: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

31. 426 U.S. 229, 240 (1976).

32. 429 U.S. 252, 266 (1977).

33. *See supra* note 15 and accompanying text.

34. *See* Phila. Police & Fire Ass'n for Handicapped Child., Inc. v. City of Philadelphia, 874 F.2d 156, 162 (3d Cir. 1989) (collecting cases).

35. *See Rodriguez*, 411 U.S. at 28 (explaining that a suspect class is one that is so "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated

by laws which intend to discriminate against them because of who they are.[36] This is true whether intent to discriminate is read narrowly as Justice Scalia reads it, broadly as Ely does, or even more broadly than Ely would.[37]

Let me emphasize: I agree that these functions of equal protection are crucially important to all societies.[38] And they are absolutely essential to our polity with its history of slavery, gender discrimination, ethnic prejudice, and homophobia. How and when traditionally maltreated groups can be safeguarded from prejudice is not easy to define. Achieving that goal has been the job—and a mighty one—of the Equal Protection Clause.[39]

But the Equal Protection Clause, as currently interpreted, does *not* protect unspecified fundamental rights that are being limited for nondiscriminatory

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to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

36. The Supreme Court's seeming reliance on immutability has been much criticized. *See, e.g.*, Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 504 (1998) (arguing that an emphasis on immutability "presume[s] that legislation is less problematic if it burdens groups that can assimilate into mainstream society by either converting or passing"); Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 33 (2015) (advancing the notion that "immutability often rests on untenable, harsh, intrusive, and stigmatizing judgments about the traits for which individuals should receive blame").

37. *See* ELY, *supra* note 5, at 136-45. Scholars have read Ely not to include gay rights as among those minority groups that the Constitution ought to protect, and certainly, some of his early writings can be read that way. *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1289 (2005); ELY, *supra* note 5, at 255 n.92 (arguing that laws based on a "sincerely held moral objection" to sodomy, rather than on discriminatory intent to harm, are beyond judicial review). But Ely, in fact, changed his mind, though he did not do so in published writings. *See* Letter from author to John Hart Ely (Sept. 3, 1980) (on file with author); Letter from John Hart Ely to author (Sept. 23, 1980) (on file with author).

38. *See* Arthur Chaskalson, Brown v. Board of Education*: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503, 506 (2004); Holning Lau & Hillary Li, *American Equal Protection and Global Convergence*, 86 FORDHAM L. REV. 1251, 1253 (2017); Susan H. Williams, *Introduction: Comparative Constitutional Law, Gender Equality, and Constitutional Design*, *in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 1, 4-5 (Susan H. Williams ed., 2009); Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 BROOK. J. INT'L L. 1, 18-23 (2010).

39. If we examine the cases dealing with the Equal Protection Clause in this way, we readily see its focus and power, but also its limits. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274-75, 279-81 (1979) (holding that a policy preferencing veterans in hiring for government jobs does not, despite significantly impacting the ability of women to compete for such positions, give rise to a cognizable equal-protection claim because it was not enacted with discriminatory intent).

reasons.[40] It does not touch the crucial situations in which fundamental rights of a minority are limited simply because the majority wishes to accomplish some good or avoid some bad. It does not protect a minority from fundamental-rights violations when the majority does not seek to do harm but nonetheless imposes an awful burden on the minority without sharing that burden.[41]

Of course, the Equal Protection Clause could be reinterpreted to protect against such impositions. I will discuss the advantages and disadvantages—linguistic, historical, and practical—of such an interpretation at the end of this Feature when I detail the doctrinal bases for what I believe needs to be done.[42] But the Clause as it is currently read cannot do the job.

II. THE NEED FOR A SHOW OF EARNEST

The reason that majority decisions that primarily affect a minority are so problematic should be obvious to anyone who has suffered through a course in basic economics. When the majority achieves a good or counters a bad in a way that burdens a minority but does not burden itself, there is no reason to assume that the polity as a whole actually wants that good given its real costs. We all want any number of things, trivial or great, if they come free. And we all want to avoid even minimal harm if that avoidance is costless to us. Conversely, we

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40. Ricci v. DeStefano, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting) ("The Equal Protection Clause, this Court has held, prohibits only intentional discrimination . . . ."). For example, in the context of a challenge to Texas's unequal school funding, the Court held "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory." *Rodriguez*, 411 U.S. at 54-55. "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard." *Id.* at 55 (citing McGinnis v. Royster, 410 U.S. 263, 270 (1973)).

41. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, for example, the Court rejected a challenge to a single-family zoning ordinance that the Seventh Circuit had found to have the "ultimate effect" of being racially discriminatory despite being enacted for nondiscriminatory purposes such as protecting property values. 429 U.S. 252, 254-55, 258-59 (1977). And in *Rodriguez*, all that the Court looked to for Texas's school-funding system to pass equal-protection scrutiny was "whether the challenged state action rationally furthers a legitimate state purpose or interest." *Rodriguez*, 411 U.S. at 55. As Justice Stewart explained in his concurring opinion, this low bar was because "the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes." *Id.* at 60 (Stewart, J., concurring). Actions without such classifications receive a presumption of validity: "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)).

42. *See infra* Section V.B.

would think twice about achieving such goals if we had to bear our share of the cost of that achievement—in other words, if we had to make a "show of earnest."[43] When achieving a goal entails a cost as severe as the infringement of fundamental rights, we will think long and hard before we continue to pursue that goal if we bear an appropriate share of the infringement costs.[44] Requiring a show of earnest, moreover, has another important function. When the show of earnest takes the form of compensation to those whose right is infringed, the harm to them is often reduced. And even if compensation is not given, a proper show of earnest can make the minority burden-bearers feel that they are not being maltreated unjustly for the benefit of others. That is, it can serve society's egalitarian values directly.

A. Property as an Egalitarian Example

The Framers were well aware of these facts. In the eighteenth century, they were most concerned with protecting rights related to speech, religion, and

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43. *See infra* Section III.C. The term "show of earnest" in the sense that I am using it is, I believe, new to this Feature. But the general concept that actions by which a party assigns a burden to another while avoiding a similar burden itself ought to be subject to scrutiny is long known in economic theory and is implicit yet ubiquitous in much of society's moral reasoning.

As will be seen from the discussion in this Section and the following, the show of earnest that I believe is needed has two functions. The first—perhaps rooted in classical economics—is to make sure that the costs entailed by a rights-infringing measure are properly considered before the measure is enacted. The second is to keep those whose rights are infringed from feeling that they have been treated unjustly. As we shall see, the two functions are not equally well served by different possible shows of earnest, and their relationship to each other is, to put it mildly, complex. The first function is the one which, given my law-and-economics background, I may seem to emphasize. But, in fact, both are there. And their relationship in individual examples of rights infringements deserves more analysis than I can give it in this Feature.

44. Car choices are an example. In purchasing a car, our own safety is often at odds with the safety of others. One recent study found that "for every life that the heaviest SUVs and trucks save, more than a dozen" pedestrians, cyclists, or other motorists are lost because the added mass of these cars deals added damage in an accident. *See Americans' Love Affair with Big Cars Is Killing Them*, ECONOMIST (Aug. 31, 2024), https://www.economist.com/interactive/united-states/2024/08/31/americans-love-affair-with-big-cars-is-killing-them [https://perma.cc/W7FQ-VSQD]. Unless large-car insurance prices adequately reflect these costs, we will consistently—and understandably—choose to prioritize our own safety.

I do not mean to suggest that humans act only in self-interested ways: altruism can be a motivating force. For a discussion of the interplay between altruism and self-interest, see GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 90-116 (2016). But even true altruists are unlikely to be sufficiently aware of the costs that their choices impose on others unless these costs are reflected in what they themselves bear because it is difficult for one properly to understand costs without bearing those costs themselves.

property.[45] As to the first two, the Constitution gave specific and powerful libertarian protections[46] (albeit in a federalist way).[47] The new central government was barred from infringing upon them, even if all were willing to have them be infringed. As to property, however, the Framers took another approach. Like speech and religion, the right to property was specifically protected. But it received a *limited* protection. When there was a sufficient public need, the government was allowed to infringe that fundamental right. The state could, in such circumstances, take what was my property, even though I cherished it and would not voluntarily give it up.[48]

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45. *See, e.g.*, 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) ("Property must be secured, or liberty cannot exist."); *id.* at 8-9 ("Property is surely a right of mankind as really as liberty. . . . The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., rev. ed. 1966) (1911) (describing the statement of Alexander Hamilton, as recorded by Rufus King, that "[o]ne great [object] of [Government] is personal protection and the security of Property"); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 533 (providing the statement of Gouverneur Morris, as chronicled by James Madison, that "[l]ife and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of society"); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 251-56 (2017) (discussing the substantial import placed on freedom of expression by the Framers and their natural-rights understanding of the expressive freedoms).

46. I will later argue that these rights were also given *egalitarian* protection. *See infra* Part V.

47. The protections afforded by the Federal Constitution to speech and religious expression did not at first apply to actions taken by the states, for whom the First Amendment left the pre-Union status quo unchanged. *See* Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) ("Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.").

Similarly, the Fifth Amendment and its Takings Clause, like the First Amendment, did not apply to the states prior to the adoption of the Fourteenth Amendment. *See* Maryland v. Shatzer, 559 U.S. 98, 103 (2010) (noting that although the Fifth Amendment did not apply to the states at the time of the Founding, it now "applies to the States by virtue of the Fourteenth Amendment"). Nonetheless, property was considered so fundamental a right that many state constitutions contained explicit provisions for its protection. "In language derived from Magna Carta, the Revolutionary constitutions of a number of states, including Maryland, Massachusetts, North Carolina, and South Carolina, declared that no person could be 'deprived of his life, liberty, or property but by the law of the land.'" James W. Ely Jr., *'The Sacredness of Private Property:' State Constitutional Law and the Protection of Economic Rights Before the Civil War*, 9 N.Y.U. J.L. & LIBERTY 620, 624 (2015). Further, "[t]he need to provide compensation when private property was taken by the government was a settled common law principle." *Id.*

48. *See, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159-64 (1896) (upholding a law that gave municipal corporations the power to condemn land in order to establish irrigation districts).

But the Framers knew well that we all would want a park, a road, a canal, if the property taken was not ours—if the infringement, the taking of property, burdened only someone else. As Justice Ginsburg explained, "The Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[49] The solution was and remains a crucial one. Property can be taken for a public purpose, but only if society provides compensation to ensure that the burden for the taking is shared!

Property, important as it was, was thus given an egalitarian, rather than a fully libertarian, protection.[50] As we shall see in due course, the Takings Clause of the Constitution gives rise to all the uncertainties and problems that I believe adhere also to my egalitarian approach—and perhaps more. What constitutes a taking is highly problematic. And the person whose land or property is taken is not truly made whole by a payment in cash.[51] But when the polity takes for a public purpose and pays an appropriately assessed price, it shares in the burden and gives a show of earnest.[52] It is required to demonstrate (often as much as it

49. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); *see also* Sheetz v. County of El Dorado, 601 U.S. 267, 273-74 (2024) (quoting *Armstrong* and discussing the relationship between the Takings Clause and land-use planning).

50. Rather than being afforded the full libertarian protection entailed in "shall make no law," as the First Amendment says, or "shall not be violated [without probable cause]," as in the Fourth Amendment, property rights were given a more limited protection: private property can be taken for public use, so long as "just compensation" is provided. U.S. CONST. amend. V. This provision incorporates egalitarian principles: private property can be taken for public use but only so long as the burden is borne across all of society in the form of compensation. *See* Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (observing that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking").

51. That money is not a like-for-like substitute for real property is obvious, and many property owners fight tooth and nail against proposed eminent-domain actions even though they would be compensated with money for such a taking. *See, e.g.*, Susette Kelo, *The Government Stole My Home*, 31 CATO POL'Y REP., no. 2, 2009, at 5, 5 .

52. The adequacy of a burden on the majority when it differs from a burden on the minority will depend, in part, on whether it was in fact feasible to place the same burden on both parties. That is, if the same burden could have been placed, and the majority merely enacted a different burden on itself, a policy will be suspect. An example of such a policy was Civil War draft statutes. *See infra* notes 108-115 and accompanying text.

can) that the goal sought—the park, the road, the canal—is *in fact* worth having, despite its costs.[53]

Ely, Justice Jackson, and Justice Scalia sought this very assurance about unspecified fundamental rights: that a majority could not burden a minority at no cost to itself. The Equal Protection Clause does not currently provide the kind of protection that the Takings Clause seeks to. In prohibiting uncompensated takings, the Framers did not say, "Do not discriminate against a particular landowner; do not take the property of suspect classes." They were not seeking to avoid discrimination. (Indeed, a constitutional focus on discrimination would come only much later, after and because of the Civil War.) The Framers wanted to ensure something different, something fundamentally democratic: that actions could be taken only if the majority *truly* wanted a good, or the avoidance of a bad, and was willing to demonstrate its desire by bearing an appropriate share of the costs of achieving the goal.[54]

It is for the protection of this *democratic* goal that my missing buttress is needed. To the extent that I see the need for courts to act as guarantors, to make sure that the polity really wants the goal it allegedly wants, my proposed doctrine allocates power to courts to further, to enhance, democracy. The missing buttress is not intended to further countermajoritarian purposes, like avoiding discrimination. Rather, it seeks to make the majority face up to the burden and decide what it really believes is worth doing. In this sense, the buttress is closely linked to Ely's view of the role of courts: to be protectors of democracy and of true majoritarianism.[55]

Of course, every law, every rule, burdens some people more than others. If only changes benefiting everyone could be enacted, lawmaking would be impossible. Pareto superiority—the idea that there are transactions that benefit some

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53. *See* Calabresi & Melamed, *supra* note 13, at 1096-97 (observing that when a cost is placed on a party, that party will determine whether the cost is worth the benefits and proceed accordingly).

54. I am, of course, referring here to the idea of "revealed" or "demonstrated" preference economic theory. These theories posit that the best way to understand whether we view the price as worth paying in a given situation is to observe what course of action is picked. Or, put otherwise, faced with two options—paying a price in exchange for a good, or sticking with the status quo—the best way to reveal whether we think the benefits of the good are worth its costs is to see whether we choose to bear the costs or stick with the status quo. *See, e.g.*, Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 ECONOMICA 243, 243 (1948); Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics*, *in* ON FREEDOM AND FREE ENTERPRISE: ESSAYS IN HONOR OF LUDWIG VON MISES 224, 225 (Mary Sennholz ed., Ludwig von Mises Inst. 2008) (1956) ("Human action is the use of means to arrive at preferred ends. . . . Action implies choice among alternatives. . . . From his action, we can deduce that he has acted so as to satisfy his most highly valued desires or preferences.").

55. ELY, *supra* note 5, at 181.

people without harming anyone in even the slightest way—is an absurd goal.[56] It is not, with due respect to Richard A. Epstein, what our Constitution or even just the Takings Clause is about.[57] Nor is it feasible to have courts intervene and require structures that would guarantee, through some sort of utilitarian analysis, that the gainers gain more than the losers lose. As to most laws, we are willing to let a majority vote be a sufficient indication of that worthiness, which economists call Kaldor-Hicks superiority.[58] That is the meaning of *Washington v. Davis*,[59] an opinion that, as we shall see, we cannot live without, but with which we also cannot fully live. So long as ordinary laws do not burden losers for discriminatory reasons, we generally find that a vote by an electoral majority is assurance enough that the costs the law imposes are worth bearing. That is, when discriminatory intent is not shown, we generally require merely that an action demonstrate a rational basis, or, put otherwise, satisfy the lowest level of scrutiny. We inquire only into whether disparities produced by a policy "are the product of a system that is so irrational as to be invidiously discriminatory."[60]

On one level, of course, this is absolutely essential: intent to discriminate on the basis of race, gender, or another protected characteristic is in fact different in kind and category from policies that do no more than disparately burden the less powerful. As a result, and as a result of the powerful demands of our history, such discrimination has been treated differently. But in incorporating egalitarian commands, our Constitution also requires scrutiny of other forms of unequal treatment, even if that treatment is borne not out of discrimination but out of either benevolent ignorance or a desire to establish a societal good at no personal cost.

B. When Is Judicial Intervention Required?

When should laws and rules require more than a simple majority vote? When should assurances of universal burdening, akin to those of the Takings Clause, be imposed? When, in other words, is the absence of this discriminatory intent not enough? And when must courts intervene to ensure that laws reflect

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56. *See* Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1216 (1991).

57. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that the Takings Clause should apply broadly to all regulatory action).

58. *See* Calabresi, *supra* note 56, at 1221-27.

59. 426 U.S. 229 (1976).

60. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

true majoritarian desirability consistent with fundamental egalitarian values? Several factors should govern here:

1. How fundamental is the right that is being infringed?
2. How great, how undue, is the burden on those whose rights are being infringed?
3. How sensitive to those whose rights are being infringed is the majority likely to be, that is, how closely does the majority identify positively with the loss-bearers? Or how much, instead, do the loss-bearers belong to groups that have been traditionally maltreated or marginalized?

None of these factors are easy to define precisely or to establish, and yet all of them are factors with which our courts have traditionally dealt. They are, moreover, no more difficult when employed in this mode of analysis than when they have been employed in past cases.

1. The Right Infringed Must Be Fundamental

Courts should intervene only when the law or governmental action in question infringes a right that, even if not specifically protected in the Constitution, can properly be deemed fundamental. Only as to these ought we say that *Washington v. Davis* cannot rule. That reveals the first problem of this approach: what rights qualify as fundamental? If you look at the rights that Justice Scalia listed in *Cruzan* as unspecified but fundamental liberty interests, you might well wonder.[61]

There will certainly be disagreement over which rights qualify as fundamental. It is not for me to say which do and which do not. Still, I believe that in any given polity there are rights that do qualify as sufficiently crucial. We can discern them in the writings of philosophers, theologians, and historians, and in the great works of literature. More importantly, judges often seem to know what they are. In fact, judges deal with assertions of such rights all the time. These are the rights that courts have occasionally read into the Constitution as deserving absolute protection.[62] These rights are also the ones that other courts have

61. Justice Scalia's list included the right to drive, the right to homeschool children (or, at least, not to require them to attend ten hours of school every day), and the right not to be taxed at a rate of one hundred percent for every dollar after subsistence level. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

62. Examples include the right of parents to direct the education and upbringing of their children, *see* Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-

recognized as crucial but (sometimes, regrettably) outside the protection of unelected judges.[63] For these rights, courts have sought to ensure that current legislatures have deemed infringements to be truly justified[64] through requirements

35 (1925); to marry, *see* Loving v. Virginia, 388 U.S. 1, 7 (1967); to procreate, *see* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536, 541 (1942); and to be free from certain bodily invasions, *see* Rochin v. California, 342 U.S. 165, 172-73 (1952). When courts have recognized these rights, they have usually located them within the Due Process Clause, which is exactly what Scalia criticized in *Cruzan*. *Cruzan*, 497 U.S. at 293-94, 300 (Scalia, J., concurring).

63. *See, e.g.*, *Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.").

64. *See generally* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) (detailing the role of courts in our constitutional system in the context of judicial review). Nondelegation — as Alexander Bickel described it, *id.* at 19-20, and as articulated in the cases — is very different from the position currently pushed by several Justices of the Supreme Court, *see* Gundy v. United States, 588 U.S. 128, 148-49 (2019) (Alito, J., concurring in the judgment) (expressing a willingness to endorse the position that Congress may not delegate certain powers to the executive branch without saying so explicitly); *id.* at 149 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting) (same). Bickel's view, instead, was that Congress could not delegate to administrative agencies decisions in questions close to the line of constitutionality because some democratically accountable official had to take responsibility for the resolution of such questions. Bickel, *supra*, at 19-20.

of clarity,[65] nondelegation,[66] and nondesuetude,[67] and through second-look doctrines.[68]

As to some of these rights, fundamentality will be discerned by seeing how long they have been recognized historically—or, as some might describe it, by looking to our "historical tradition" and practice.[69] But in a society in which slavery, segregation, and sexual discrimination have deep roots, historical recognition cannot be a requirement, though perhaps it is sufficient to establish fundamentality. Recognition of such rights in the constitutions and practices of individual states[70] or of cognate nations is another indication.[71] The indicia are

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65. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 470 (1984) (stating that, with respect to surplus-land acts, congressional intent to diminish the land allotted to a tribal nation as a reservation "will not be lightly inferred," and that "Congress [must] clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found." (second and third alterations in original) (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977))).

66. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 139-40 (1959) (Black, J., dissenting) (stating that in cases "reach[ing] to the very fringes of congressional power . . . . more is required of legislatures than a vague delegation to be filled in later by mute acquiescence"); Greene v. McElroy, 360 U.S. 474, 507 (1959) ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.").

67. *See, e.g.*, Quill v. Vacco, 80 F.3d 716, 735 (2d Cir. 1996) (Calabresi, J., concurring in the result) ("The enforcement of the laws themselves has fallen into virtual desuetude . . . . And this fact by itself inevitably raises doubts about the current support for these laws."); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 442 (1979) (rejecting the "home port doctrine" practice of ship taxation because the theory of taxation on which it was based "has fallen into desuetude").

68. *See, e.g.*, *Quill*, 80 F.3d at 739-40 (Calabresi, J., concurring in the result) (discussing "constitutional remand, or second look" (citing Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972))); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (describing his preference that the Court use the Equal Protection Clause to ensure equal application of the laws).

69. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

70. Each of the fifty states, for example, has a clause in its constitution recognizing a right to education. *See* R. Craig Wood, Educational Finance Law: Constitutional Challenges to State Aid Plans—An Analysis of Strategies 103-08 (3d ed. 2007).

71. "By 2016, no less than 82 percent of constitutions included the right to education." Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 64 J.L. & Econ. 713, 713-14 (2017). *See generally* Antonin Scalia & Stephen Breyer, Remarks at the U.S. Association of Constitutional Law Discussion at American University on Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, Free Republic (Feb. 27, 2005, 8:44 PM), https://www.freerepublic.com/focus/f-news/1352357/posts [https://perma.cc/W8AC-VC9Z]) (discussing the relevance—or lack thereof—of foreign law for constitutional interpretation).

many; they are scholarly, literary, and judicial.[72] And while I believe defining them ex ante is impossible, courts frequently act as if they know what they are.[73] In this respect, it is interesting that whichever way courts rule as to protecting them, there *are* rights that both judicial majorities and dissents often describe as fundamental. As to these rights, my proposed approach represents a middle ground between unconditional protection and nonrecognition. My framework for weighing rights, burdens, and fundamentality offers a better view of the role of courts and of the proper limits on judicial behavior than does the current approach.[74]

Today, courts tend to take an all-or-nothing approach to such rights.[75] Law and governmental practices are at times struck down as unconstitutional even though the right involved is not specifically protected in the charter.[76] At other times, laws and governmental actions are permitted to continue unchecked, even though, as a result, the fundamental rights of many, but not all, in the polity are

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72. *See, e.g.*, MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 8 (1997) ("[T]he novel constructs a paradigm of a style of ethical reasoning . . . in which we get potentially universalizable concrete prescriptions by bringing a general idea of human flourishing to bear on a concrete situation."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (evaluating "[t]he history and culture of Western civilization" and concluding that these "reflect a strong tradition of parental concern for the nurture and upbringing of their children" before finding that, as a result, "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

73. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461 (1985) ("The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."); Maher v. Roe, 432 U.S. 464, 472 n.7 (1977) ("[T]he right of procreation without state interference has long been recognized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.'" (second alteration in original) (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942))); *Yoder*, 406 U.S. at 232 ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (finding that Texas's unequal funding of its public schools violates the right to education found in the Texas Constitution).

74. The existence of such rights, and their indefinite number, is directly asserted in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that *among* these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

75. *See generally* Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) (describing the modern Supreme Court as treating rights as nearly absolute).

76. *See Yoder*, 406 U.S. at 234-36 (concluding that parental rights prevent a state from requiring Amish parents to compel their children to attend high school after the age of sixteen); Shapiro v. Thompson, 394 U.S. 618, 621-22 (1969) (striking down the prohibition of welfare benefits to residents of less than one year as violative of the right to travel).

profoundly violated.[77] Courts have both constitutionalized unspecified fundamental rights and failed to extend protection to those rights. This behavior has been alternately attacked as dangerous (reactionary or radical) and praised as righteous depending on who lost.[78]

In other words, the problem of deciding what unspecified rights are fundamental is not a problem of *my* approach. That problem has dominated some of our most contentious constitutional debates for generations. Further, for reasons I will soon explain, I believe that my approach provides the best path for resolving these difficult debates.

For governmental actions affecting such "fundamental rights," however defined, courts must look beyond *Washington v. Davis*. To ensure that the challenged governmental actions are truly wanted in the polity despite their rights-destroying costs, we must go beyond traditional procedural and second-look safeguards and require something akin to the protections afforded by the Takings Clause.

2. *The Infringement Must Be Severe and Constitute an Undue Burden*

The fundamentality of an infringed right is not enough to justify judicial intervention in every case. There are two additional factors that come into play and whose interaction ought to guide courts in deciding whether and how to intervene. The first is the severity of the burden on the nonmajority.

We see this quite directly in one aspect of the Takings Clause line of cases. The right to own property is fundamental, both in our jurisprudence and in the

77. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301-02 (2022) (upholding Mississippi's Gestational Age Act, which prohibits abortion after fifteen weeks, and explicitly overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

78. *See* Gloria Oladipo, *'One of Our Darkest Days': Outrage After Supreme Court Overturns* Roe v. Wade, GUARDIAN (June 24, 2022, 1:07 PM), https://www.theguardian.com/us-news/2022/jun/24/roe-v-wade-decision-reaction-republicans-democrats [https://perma.cc/7M8B-3LRQ] (describing criticism by leaders of the Democratic Party, and praise by leaders of the Republican Party, of the Court's holding that there is not a federal constitutional right to obtain an abortion); Ryan T. Anderson, Tony Evans & Robert P. George, *One Year After* Obergefell, NAT'L REV. (June 25, 2016, 8:00 AM), https://www.nationalreview.com/2016/06/obergefell-v-hodges-one-year-anniversary [https://perma.cc/J43G-JVUE] (criticizing the Court's decision that the right to marry extends to same-sex couples, on the basis that it "deprived the American people of the opportunity to resolve the matter as the Constitution contemplates – by debate, persuasion, and compromise").

thinking of the Framers.[79] But before compensation is required, the burden must be truly significant.[80] For some infringements—direct condemnations by eminent domain or other physical invasions—the infringement itself is assumed to be severe enough to require compensation without further examination.[81] In these situations, the majority must always show that it is willing to pay to achieve its goals. As to other infringements—those resulting from regulatory actions—a show of earnest or compensation is mandated only if the infringement has a severe effect.[82]

The line drawn in these cases is anything but clear, and courts have struggled with it over the years.[83] The insight, however, is clear and applies more generally.

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79. *See* Solum, *supra* note 8 ("[T]he Lockean social contract would not authorize government . . . to take property from one citizen and transfer it to another."); EDMUND S. MORGAN, THE CHALLENGE OF THE AMERICAN REVOLUTION 54-55 (1976) ("Anyone who studies the revolution must notice at once the attachment of all articulate Americans to property. Liberty and property was their cry, not liberty and democracy."). Further, the Due Process Clause of the Fourteenth Amendment incorporates property among the three rights it features most: "[N]or shall any state deprive any person of life, liberty, or *property*, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added).

80. Those "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain" may constitute takings. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005). And, in determining whether a regulatory action is a taking, doctrine "focuses directly upon the *severity* of the burden that [the] government imposes upon private property rights." *Id.* (emphasis added). To constitute a regulatory taking, then, a regulation must "unreasonably impair the value or use of their property." PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

81. *See* PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 487-88 (2021) (stating that eminent domain "can be exercised either through the initiation of legal proceedings or simply by taking possession up front, *with compensation to follow*") (emphasis added); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that regulatory takings may constitute per se takings in some cases, including those in which a governmental regulation entails a permanent physical invasion of private property).

82. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *Lingle*, 544 U.S. at 537 ("Since *Mahon* . . . the Court [has] recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such regulatory takings may be compensable under the Fifth Amendment.").

83. *See generally* ROBERT MELTZ, CONG. RSCH. SERV., 7-5700, 97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (2015) (compiling the Supreme Court's Takings Clause cases, many of which involve drawing a line between takings and nontakings). Until *Mahon*, for example, the Court had held that the Takings Clause protected against only physical takings, and not regulatory actions. *Id.* at 1. The distinction between physical and regulatory takings may not be wise, and this Feature is not the place to try to make sense of that distinction, let alone the whole mass of Takings Clause law. My point is that however muddled the cases may be, the concept of severity has been recognized as a crucial element in determining whether a show of earnest is needed.

Even if the right infringed is fundamental, in many instances, our constitutional tradition allows us to assume that the infringement is worth its costs without a majoritarian show of earnest. That is, unless the burden on those whose rights infringed is *undue*, we can assume that the cost of the infringement is less than the benefit the majority sought to achieve.

In most such cases, the burden falls on the minority to bring a suit and show that the infringement is in fact undue. But there undoubtedly are other cases where the infringed right is deemed so fundamental that we place the burden on the majority to show that the burden is *not* undue.[84] The stronger—the more fundamental—we think the right is, the less of a showing a plaintiff must make to establish that the burden is undue. Religion, which among the specifically protected rights has been treated as truly fundamental, is a good example of an area where courts have increasingly held that any burden is undue, even though we have historically allowed minor infringements.[85]

Determining what *is* undue, of course, is difficult. So is defining what infringements are sufficiently fundamental that even a small burden qualifies as undue. But courts have long dealt with both questions adequately, if not well. As we have seen, similar questions come up rather messily in the Takings Clause line of cases when courts must determine whether a show of earnest in the form of compensation is required.[86] More significantly, perhaps, the requirement of an undue burden is seen even in those limited areas in which the fundamentality of the right and its protection are constitutionally and specifically mandated. Even speech and religion are protected from majoritarian infringements only where the challenged governmental action imposes burdens that are undue.[87]

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84. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part and dissenting in part) ("[O]nce a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives.").

85. *Compare* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment))), *with* Fulton v. City of Philadelphia, 593 U.S. 522, 542 (2021) (representing the Court's recent shift to a close examination of governmental policies burdening religious exercise), *and* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022) (same).

86. *See supra* Section II.A.

87. The Constitution allows "incidental burden[s] on speech . . . no greater than is essential . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689 (1985).

In other words, courts are accustomed to defining and assessing what constitutes an undue burden. This inquiry, though messy, is a traditional part of judicial decision-making. Accordingly, such determinations, can limit and affect when judicial intervention is proper to protect nonspecified fundamental rights without leading courts into areas outside their competence.

3. The Burdened Minority Must Not Be Favorably Linked to the Majority

An additional factor that should inform a court's decision on whether to intervene is the relationship between the burdened minority and the enacting majority. Specifically, courts should consider whether the minority whose right has been infringed has traditionally been maltreated in our polity. This factor has not always been given proper weight in the context of specified constitutional rights, and it is not an obvious factor in the Takings Clause context, although—as we shall see later—it may play a role even there.[88]

The object of the challenged governmental action may not be to discriminate. It may be to accomplish a communitarian good or avoid a bad. Sometimes the governmental action, however, "happens" to infringe the rights of those who "happen" to be in suspect or semisuspect categories. When that is the case, the majority is likely to be more than usually "*care*-less" about the infringement. Because a majority tends to ignore burdens it does not bear, it will, therefore, most likely ignore burdens placed only on those with whom the majority has little exposure or a weak affiliation. If the burden is borne by people who are not sufficiently positively linked to the majority, the majority will almost always view the good as obviously worth achieving.[89]

In such a case, the Equal Protection Clause, as it is interpreted today, would afford no protection because the majority did not intend to discriminate. But the principle that makes the Equal Protection Clause essential—protection of the marginalized—should also inform and guide courts in deciding whether intervention is justified in cases involving fundamental rights infringed for

88. This factor, however, has traditionally been a relevant criterion in determining whether a classification should be considered suspect or quasi-suspect. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986).

89. *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that "the availability of [F]ourteenth [A]mendment protection in racial cases" would depend on "unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites").

nondiscriminatory reasons. It should guide courts in deciding whether judicial action is needed to ensure that the polity truly wants what the majority has ordained.[90]

Significantly, this factor can also cut in the opposite direction. When the burdened minority is not a historically maltreated group but is instead *closely and positively linked* to the dominant majority, that relationship counsels against judicial intervention. When those whose rights are infringed are similar to and favorably connected with the dominant majority, the majority that ordained the infringement may well be aware of the costs. In a sense, the majority bears the costs itself, albeit only vicariously or through burdens on its close connections. As a result, the assumption that the governmental action is truly desired is likely to be valid, and judicial intervention is likely to be neither necessary nor desirable.

* * *

To reiterate, I believe that judicial intervention to protect those whom such laws injure should occur only if (1) the law infringes a right that is fundamental, (2) the law places an undue burden on those whose rights are being infringed, and (3) those whose rights are being infringed are not people with whom the majority identifies favorably but are instead in groups that have been traditionally maltreated or marginalized.[91]

III. DETERMINING WHAT IS AN ADEQUATE BURDEN ON THE MAJORITY

Finding that judicial intervention is justified, hard as it is, is just the beginning of the task. The next question is what that intervention should entail. What should a court do once it concludes that an unenumerated fundamental right is being infringed in a way that raises doubt as to whether the infringement would be sought if all its costs were considered?

90. *See* Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 135-36 (1991).

91. At the moment, I am inclined to think that if all three conditions are met, intervention is proper. But I am not averse to arguments that there ought to be other conditions required.

A. What Is an Adequate Show of Earnest?

The Takings Clause has been read to require market-price compensation rather than value in use.[92] In that context, such financial compensation has been deemed both necessary and sufficient to show that the taking—the park, the road, the canal—is truly wanted. In fact, however, even in this context the proper amount of compensation has at different times and in different polities been questioned.[93] For my purposes, I will nonetheless take the appropriate judicial action in the takings context to be defined as market-price compensation and to be *relatively* easy to calculate.

In many other contexts in which judicial action is justified, it is far more difficult to say that the infringement is truly wanted. The object of judicial intervention must be to impose on the majority a burden sufficiently equivalent to that borne by those whose fundamental rights are infringed, so that the majority can truly decide whether the infringement is worth its costs. But often the burden can and should be allocated in a way that also keeps the losers from feeling that they have been unjustly maltreated. The point is usually to require a decision that will enable the majority to say either, "Yes, we need this infringement to achieve our goals," or "No, our goals are not worth their costs." But, if possible, the point is also to promote equality generally.

In some—perhaps relatively few—cases, this can be done by requiring exactly the *same* burden, precisely the same *infringement*, to be borne by all. Everyone could be made to give their DNA to the state for storage in a database,[94] not

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92. *See* United States v. Miller, 317 U.S. 369, 374-75 (1943). Market-price compensation "is what a willing buyer would pay in cash to a willing seller," *id.* at 374, while value in use is the present value of the assets generated by the property based on its current use, *IAS 36 Impairment of Assets*, PFK 2 (July 2017), https://www.pkf.com/media/8d891e7f2ad0952/ias-36-impairment-of-assets.pdf [https://perma.cc/V9R4-95GM]. For example, suppose I own land that, due to its location and characteristics, could be used as valuable warehousing space, but I instead choose to treat the land as a nature refuge and raise cattle. Were my land to be taken by eminent domain to bring jobs to the area, value-in-use compensation would pay me only what I received from raising cattle, while market-price compensation would provide me with what the property would have fetched on the open market.

93. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (advocating a closer examination of the sincerity of a government's asserted public use in eminent-domain proceedings); *see also* Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 LAW & CONTEMP. PROBS., no. 2, 2014, at 1, 11 (discussing *Kelo*).

94. California has apparently begun to move in this direction, maintaining a database of the DNA profiles of nearly every baby born in the state and using that database for law-enforcement purposes. *See California Stores DNA from Every Baby: Renewed DNA Privacy Concerns Following SFPD Rape-Kit Allegations*, CBS SACRAMENTO (Feb. 16, 2022, 9:22 AM PST), https://www

just those who are involved in misdemeanors,[95] those arrested for whatever reason,[96] those close to a crime or arrest,[97] or those noncitizens who are detained.[98] Everybody could be made to go through time-consuming and degrading examinations before boarding planes, not just those whom we intuit are more likely to be terrorists or to be carriers of environmentally dangerous produce.[99] Vaccinations could be required of all and not limited by more or less plausible exemptions.

But often, such full equality of treatment is impossible or itself unduly costly.[100] What can courts do then? In such situations, courts must require that the majority bear a burden that, by its similarity or size to that borne by the minority, gives adequate assurance. This may or may not take the form of money or other compensation. Significantly, compensation may lessen the burden on those whose rights are infringed as well as ensure that the majority truly wants the good it is furthering. But here two problems come immediately to mind.

.cbsnews.com/sacramento/news/california-biobank-dna-privacy-concerns [https://perma.cc/4QAR-BQ9C] (discussing how DNA samples from California's database "are being used by law enforcement" and that "[i]nvestigators have confirmed newborn [DNA samples] are being used to solve cold cases").

95. "Prosecutors offer some defendants charged with petty misdemeanors a dismissal or plea offer in exchange for DNA collection and storage in the prosecutorial database." Emma Kenny-Pessia, *Ditching "DNA on Demand": A Harms-Centered Approach to Safeguarding Privacy Interests Against DNA Collection and Use by Law Enforcement*, 101 WASH. U. L. REV. 627, 629 (2023).

96. 34 U.S.C. § 40702(a)(1)(A) (2018) ("The Attorney General may . . . collect DNA samples from individuals who are arrested, facing charges, or convicted . . . ."); 18 U.S.C. § 3563(a)(9) (2018) (requiring submission to DNA collection for federal offenses as a *mandatory* condition of supervised release).

97. "DNA dragnets may consist of police knocking on doors of residences or businesses within the vicinity of a crime, stopping individuals on the street, or asking individuals to consent to DNA collection during a traffic stop." Kenny-Pessia, *supra* note 95, at 637.

98. 34 U.S.C. § 40702(a)(1)(A) (2018) ("The Attorney General may . . . collect DNA samples from . . . non-United States persons who are detained under the authority of the United States.").

99. *See* Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. TIMES (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html [https://perma.cc/J3RA-HWPV].

100. For example, there are any number of medical conditions that we conclude do not merit universal testing, so we instead only test individuals based on their family history. *See, e.g.*, *Screening and Prevention for People with a Family History of Colorectal Cancer*, DANA-FARBER CANCER INST., https://www.dana-farber.org/health-library/screening-prevention-for-people-with-a-family-history-of-colorectal-cancer [https://perma.cc/8STV-PNMZ] ("Colonoscopy screening should begin at 40 years or 10 years earlier than the earliest case of colon cancer in the family.").

B. The Problem of "Separate but Equal"

The first is that in our society—in contrast, say, to Europe—the choice of a burden that is not *identical* to that borne by the minority is, for historical reasons, suspect.[101] In many polities, equity does not demand, or may even sometimes be viewed as inconsistent with, equality.[102] And that is to some extent true in our country as well, as differential treatment of some disabled persons demonstrates.[103] In the United States, however, any burden that is not the same

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101. The European Union Charter of Fundamental Rights addresses equality in a detailed manner. That Charter has seven titles. Title III is dedicated entirely to equality and contains separate provisions for "[e]quality before the law," requiring that "[e]veryone is equal before the law," and "[n]on-discrimination," which prohibits "[a]ny discrimination based on any ground," but the Charter does not define "equal" to require sameness. Charter of Fundamental Rights of the European Union arts. 20 & 21, 2012 O.J. (C 326) 391, 399-400. For decades, European courts have implemented these provisions in response to challenges to policies regarding the schooling of children of ethnic minorities. In one such case, the European Court of Human Rights addressed a Croatian policy placing many Roma children in separate classes to receive a special education claimed to focus on remedying language differences. Oršuš & Others v. Croatia, App. No. 15766/03, ¶¶ 10-51 (Eur. Ct. H.R. Mar. 16, 2010), https://hudoc.echr.coe.int/eng?i=001-97689 [https://perma.cc/B2NU-7KHA]. The Court held that policy violative of the equality provisions of the Charter: "The facts of the case indicate that the arrangements made for the schooling of Roma children were not accompanied by sufficient safeguards to ensure that . . . the State would take sufficient account of the special needs of these children as members of a disadvantaged group." *Id.* ¶ 182. The Court so held despite the fact that, as the dissent noted, Roma children in separate classes "receive the same standard final certificate which in no way indicates that they attended some special, separate classes." *Id* at ¶ 11 (joint partially dissenting opinion). By that time, it was well established that segregation violated the Charter's equality provisions, D.H. & Others v. Czech Republic, App. No. 57325/00, ¶¶ 207-10 (Eur. Ct. H.R. Nov. 13, 2007), https://hudoc.echr.coe.int/eng?i=001-83256 [https://perma.cc/X7P7-9LYC], but the Court of Human Rights did not rely only on the conclusion that the policy represented de facto segregation. Instead, the Court additionally concluded that the facts of the case indicated that the Croatian government did not take sufficient account of the "special needs" of "members of a disadvantaged group" and, thus, that the challenged policy was insufficient to ensure that the education the Roma children received ensured equality. *Id.* ¶¶ 207-08.

102. *See, e.g.*, Ivy Morgan, *Equal Is Not Good Enough: An Analysis of School Funding Equity Across the U.S. and Within Each State*, EDUC. TR. 2 (Dec. 2022), https://edtrust.org/wp-content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf [https://perma.cc/93WS-JU7D] ("If state leaders truly want to achieve school funding equity, they will quickly realize that equal funding across school districts is not good enough.").

103. The Americans with Disabilities Act does not require that employers treat disabled individuals equally but instead requires that they provide "reasonable accommodations." 42 U.S.C. § 12112(b)(5) (2018).

immediately brings the fear that what is being done, though nominally "separate but equal," is in fact nowhere near equal.[104]

Throughout our history, the state has intentionally discriminated against minority groups by giving them something that was inadequate and that was demeaning precisely because it was different from what was given to the majority.[105] That history makes anything other than *identical* treatment suspect, and it may seem to make equity demand equality even when the object is to impose a show of earnest. This perception creates severe problems when equality is impossible—when, as is often the case, we cannot treat the majority identically to those whose rights are infringed.[106] It pushes us to seek sameness of treatment even when true equity, a true show of earnest, would demand *different* treatment because the majority and the minority are not similarly situated.

The problem of determining the proper burden arises even under the Takings Clause. Financial compensation is *not* the same as the loss of property: property is not money, and so the compensation is different from that which has been taken. But money often is pretty close, and it is the best we can do. So, aware of its shortcomings, we use it nonetheless.[107] And as we shall see in due course

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104. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."). *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (describing how the government reinforced residential segregation).

105. *See* Am. Experience, *Jim Crow Laws*, PBS, https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws [https://perma.cc/8E4Z-MR49] (quoting civil-rights activist Diane Nash, who said that "[t]he very fact that there were separate facilities was to say to black people and white people that blacks were so subhuman and so inferior that we could not even use the public facilities that white people used").

106. An obvious example is abortion: because only women bear the burden of carrying a fetus, restrictions on abortion impact women and men differently.

107. Doubts as to the sufficiency of fair-market-value compensation are, nevertheless, longstanding. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property."). As a result, some have proposed applying a multiplier when a taking is from certain categories of property. *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 735-37 (1973). And Justice Kennedy inquired about just such a premium. *See* Transcript of Oral Argument at 23, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108). In the wake of *Kelo*, such statutes proliferated, and various state eminent-domain statutes now require compensation to include a multiplier of a property's fair market value, especially when the property taken was used for residential purposes. *See, e.g.*, MO. REV. STAT. §§ 523.001(2), 523.039 (2024) (authorizing, for "condemnations that result in a homestead taking," payments amounting to 125% of the fair market value of the

when I discuss some specific examples, some very different—and unequal—burdens may be available and may still be enough to do the job. But our history will require particular care when the burden borne is not the *same*. And we should not be surprised if there are powerful, and historically linked, objections of "inequality," of "unfairness," of "unjust, not truly wanted violations of rights" when courts accept as adequate shows of earnest by the majority that differ from what is borne by those originally burdened.

This problem manifests itself directly in the uncertain relationship between compensation and adequate shows of earnest. The Civil War draft statutes afford a good example. Those drafted could enter into private contracts through which others would serve in their place, or they could exempt themselves by paying a commutation fee of up to $300.[108] It might seem that these alternative options imposed a burden to support the war that paralleled the burden of draftees who did not exempt themselves, and thereby met the requirements of a show of earnest. The Civil War draft, however, resulted in dreadful draft riots.[109] What the wealthy needed to pay, either to find a substitute or as a commutation fee, was trivial to them,[110] while the vast majority of the population could not afford substitutes or commutations.[111] That part of the population—the part burdened by

property); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 257 (2007). *Kelo* itself discusses the Mill Acts (which authorized manufacturers to flood upstream lands to create dams) and notes that many of these Acts provided for such bonus compensation. *Kelo*, 545 U.S. at 479 n.8; *see* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 10 (1885) (quoting one such Act, which provided that compensation be set at 150% of the appraised value).

108. Enrollment Act of 1863, ch. 75, § 13, 12 Stat. 731, 733. The $300 fee could have represented a policy judgment by the Union government that the $300 was more valuable than the single soldier (original or substitute). But it also could have represented a judgment that the policy would eliminate protests from the powerful upper class by making draft avoidance easier.

109. The backlash ultimately resulted in the "largest civil insurrection in American history" other than the Civil War itself: the New York City draft riots of 1863. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 32-33 (updated ed. 2014). During those riots, immigrants (mainly from Ireland) at risk of being drafted to fight in the Civil War attacked African American families in New York, resulting in a death toll of around 120. *See id.*; IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR 288 n.8 (1990).

110. For example, Andrew Carnegie, upon receiving his draft notice, paid an Irish immigrant $850 to serve in his place. Jonathan Yardley, *How an Ambitious Scottish Immigrant Rose from Hardscrabble Roots to the Pinnacle of Industry*, WASH. POST (Oct. 14, 2006), https://www.washingtonpost.com/archive/entertainment/books/2006/10/15/how-an-ambitious-scottish-immigrant-rose-from-hardscrabble-roots-to-the-pinnacle-of-industry-span-classbankheadhow-an-ambitious-scottish-immigrant-rose-from-hardscrabble-roots-to-the-pinnacle-of-industryspan/1a8a7d38-fc73-4277-ab51-d30e06bda959 [https://perma.cc/N9WB-3J6J].

111. In fact, of course, the draft would have failed if too many could afford to pay commutation fees.

actually serving in the war—believed that the majority impinged on their fundamental bodily-autonomy rights but did not impose a similar burden on itself.[112] They concluded that the burden was unequal and unjust.[113]

The cause was great, and substitutes did—at least in a sense—go voluntarily. And yet what was done did not, in fact, give the assurance that I believe is needed in such situations: the policy burdened the rights of some unequally, and the purported show of earnest—a relatively insignificant financial burden—was insufficient.[114] It was, in fact, not a show of earnest. Instead, it was an example of a majority trying to demonstrate that it was committed to the cause, while actually bearing only a trivial burden.

C. The Role of Courts and Legislatures in Determining an Adequate Burden

When I come to specific contemporary examples, I will consider in more detail what may suffice—what, even if it is not fully satisfactory, meets the requirement that Ely, Justice Jackson, and Justice Scalia seemed to be seeking. The point is that defining a proper burden, one that ensures that the polity really wishes to bear the infringement, is always hard. And, more importantly, courts generally should not be responsible for initially choosing that burden. The legislative and

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112. A. James Fuller, *The Draft and the Draft Riots of 1863*, Bill of Rts. Inst. 2, https://bri-pdf-generator.s3.amazonaws.com/pdfs/the_draft_and_the_draft_riots_of_1863.pdf [https://perma.cc/TL3W-T8Y9] ("The option to hire a substitute or pay a fee not to serve angered many Americans, who complained about the conflict's being a 'rich man's war and [a] poor man's fight.'" (alteration in original)).

113. Of course, racism was also an important motivating factor spurring opposition to the Civil War. *See* Paul D. Escott, The Worst Passions of Human Nature: White Supremacy in the Civil War North 31 (2020). But notably, only the draft policies prompted this level of backlash. Mark E. Neely, Jr., Lincoln and the Democrats: The Politics of Opposition in the Civil War 27-33, 155-60 (2017) (discussing conscription as a wedge issue used by Lincoln's political opponents). It is an interesting fact that those who believe their rights are unjustly infringed by laws that did not equally affect those who enacted the laws regularly direct their fury primarily on those whom these laws seek to benefit, rather than on those who enacted the laws and structured the laws to leave themselves unburdened. The draft riots were devastating to African Americans but left Carnegie's class unharmed. *See* Foner, *supra* note 109, at 33. I believe we see this also, and dramatically, in the immigration context. For a discussion of this "populist" phenomenon, see generally Guido Calabresi, The Annual Lecture in Memory of Martin Buber, First President of the Academy: About Equality—A Fable Understanding the Recent American Election (Dec. 20, 2016), https://www.academy.ac.il/Index/Entry.aspx?nodeId=936&entryId=20254 [https://perma.cc/CS9L-VRNP].

114. When I discussed the Civil War draft with Norman Silber, the author of my oral history, he told me of a letter that his wife found in her family's papers. It was from the government to a Civil War era ancestor of hers, and it commended the ancestor for the courageous death suffered by his substitute.

executive branches must be the ones to decide what show of earnest can feasibly be imposed. In doing this, the political branches must combine compensation to the losers with direct burdens on the polity as a whole. They should choose *equal* treatment where that is feasible and choose substitutes when "sameness" is not possible or costs too much.[115]

The job of courts is likely not to decide what precisely is required. Instead, the judicial role is to perform the extremely difficult task of deciding whether what the other branches have done is adequate to meet the constitutional egalitarian requirement I have been describing. Because the majority has shown itself to be willing to share the burden, judges would decide only whether the burden that the majority has taken on is sufficient to ensure that a fundamental right that is not given full libertarian protection has been permissibly infringed.

To summarize: Here, as in so many areas of the law, courts are not the ultimate makers of law.[116] However, courts are well suited to require that those who *do* make and enforce the law do so consistently with our Constitution. Courts can require that the burdens of infringements on fundamental rights be borne by all, and that when equal burdening is not feasible, the substitutes chosen are truly adequate to the task. In doing this, courts must seek to avoid the historical curse of "separate but equal."

D. Burdening the Majority Even When Infringements Are Clearly Justified

So far, I have presumed that judicial intervention is intended to assure that the majority is also burdened by the costs of its policies, and that judicial review is intended to ensure that the goals sought benefit the winners more than they harm the losers. To return to the Takings Clause, I have presumed that the Clause is intended simply to ensure that the park, the road, or the canal is really wanted, to make certain that having them is worth their costs, properly understood. But, in fact, the Takings Clause requires that compensation be given even when we are certain—without imposing the costs of fair compensation—that the park or road is worth its costs.[117] Compensation for a taking is not required

115. In the case of the draft, of course, the burden could well have been imposed equally, simply by not including the substitution and commutation provisions. But such equality entails large costs by drafting those whose "home service" is particularly valuable. For a full discussion of the different treatment of selective service in American wars and the cost of each approach, see GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 158-67 (1978).

116. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163 (1982).

117. The Takings Clause has been read to allow an exception to the compensation requirement in cases of emergency destruction of property. *See* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 392-93 (2015). But the Clause itself applies regardless of how manifestly

merely to make sure that the majority appreciates the full costs, because that compensation is required even when we already know that the infringement is worth its costs. Why is this so? And what are the implications for the broader issues I have been dealing with? Why, in other words, should compensation be imposed even when the infringement of some people's rights is manifestly justified?

In an early article, Louis Kaplow argued that compensation in takings cases is improperly required where it is manifest that the relevant park, road, or canal is socially desirable. Whether compensation was appropriate, Kaplow contended, depended on the wealth, status, and loss-spreading capacity of the person whose land was taken, as against that of those who would bear the cost of compensating.[118] But, despite its analytical brilliance, Kaplow's insight has had no practical consequences. Why?

Law is always concerned with at least two things: a public goal—the accomplishment of general communitarian public purposes, such as ensuring that a taking to build a road, canal, or park is really desired; and a private goal—the recognition of and respect for the private expectations and the sense of "right" of individual members of the polity.

This duality can be seen dramatically in the law of torts. There, the righting of what are viewed as private wrongs must always live with and cohere with the public need to establish rules to determine correctly how many accident and safety costs are desired (and who ought to bear these costs).[119] This duality also explains why, young Kaplow's views notwithstanding, compensation is "always" required in takings and why the approach I am now urging imposes "egalitarian" requirements even when the infringement of a fundamental right is manifestly justified.

I believe that compensation functions in many takings cases to ensure that the taking is worth its costs. And, even though full compensation may not be possible, money compensation that is based on the price of the property taken is

desirable a taking may be—even emergency destruction of property is still a taking. *See generally id.* (discussing the "necessity exception" to the compensation requirement as incongruent with the rest of takings jurisprudence).

118. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602-07 (1986).

119. *See* Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449, 464 (2013) (explaining that the injustice present in the seminal case of Scott v. Shepherd, (1773) 96 Eng. Rep. 525 (KB), motivated judges to find a way of allowing recovery when the law did not, at first glance, appear to support recovery); Calabresi & Melamed, *supra* note 13, at 1105-15 (theorizing the role of tort law in determining which accidents are worthwhile and how the costs of those accidents should be distributed); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 257 (2020) ("[W]e think recognizing wrongs is what courts do.").

generally deemed adequate to show this.[120] But once a general rule that takings require compensation—that the property does not belong to the state, that it is privately owned—is established, all property owners come to believe that they have a *right* to be compensated if their property is taken. And the private expectation that my property is mine and cannot be taken without compensation itself becomes a fundamental right in our polity. Imagine state officials saying to a property owner, "Sorry, in your case, we are certain that a park is worth its costs and therefore we won't compensate you." This would simply cost too much morally. The right to compensation has, properly, taken on a life of its own and must be served even if, were all or most cases like the one just hypothesized, no such right would have come to be created.

Some distinctions are obvious enough that they can be made. My land is protected from trespassers, from those who would come on it without my permission, even when they cause me no actual damage and have reasons for trespassing.[121] That right, however, does not apply when those who come on my land are fire or police personnel passing through to get to where they are needed in an emergency.[122] The distinction is sufficiently obvious that the right (I own my property) and its permitted infringement (fire personnel can enter my property without permission) are easily understood, morally. Any number of similar distinctions could be made and readily explained. But most of the time, once the individual right to property is established, it costs too much morally to ask whether an infringement is justified without compensation.

So it is with the perhaps more difficult relations that I have been focusing on. Often, we are by no means certain whether an infringement of the fundamental rights of a relatively small group is justified. Traditionally, we have either barred such an infringement or, as I argue should be done, required a show of earnest, a bearing of a like burden by the majority. When the show of earnest is required, and especially when the burden imposed takes the form of compensation, we should expect that all burdened minorities will demand compensation, sometimes fiercely. And we should expect that they will do so (and that their demand will be met) even when the initial infringement of rights was manifestly justified.

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120. *See* Jeffrey Evans Stake & Michael Alexeev, *Perceptions of "Just Compensation,"* 44 EVOLUTION & HUM. BEHAV. 229, 233-34 (2023).

121. *See, e.g.*, CONN. GEN. STAT. § 53a-110a(a) (2025) ("A person is guilty of simple trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in or on any premises without intent to harm any property.").

122. "When the performance of his duty requires an officer to enter upon private property, his conduct, otherwise a trespass, is justifiable." United States v. Knight, 451 F.2d 275, 278 (5th Cir. 1971) (citing Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Foster v. United States, 296 F.2d 65 (5th Cir. 1961); United States v. Sterling, 369 F.2d 799 (3d Cir. 1966)).

This demand for "like treatment" will occur even when the show of earnest that is given does not take the form of compensation. Once the dominant majority is required to take on a burden—perhaps in the name of equality, but actually to assure us of an action's desirability—the "egalitarian" statement that such a requirement entails will take on a life of its own. And it will give rise to equivalent egalitarian majority-burdening, even when the decision to burden the minority—that is, the infringement of their fundamental rights—was manifestly justified.

This private-law demand is so powerful and deeply rooted that it has force also, and remarkably so, in those situations in which the initial minority-right infringement is not only clearly desirable but is in fact constitutionally mandated.[123] Actions that the Constitution requires to protect some maltreated minorities may infringe on the rights of other minorities. And those minorities whose rights are infringed in the name of protecting the rights of others will demand either compensation or equal burdening of the majority, and they will often do so successfully. We shall see this especially when the majority enforces a constitutionally required antidiscrimination, antimajoritarian right, the enhancement of which then infringes a right borne mainly by a different minority.

This may be quite costly, but is it undesirable? My own feeling is that when fundamental rights of minorities have been infringed, the pressure for egalitarian burdening of the majority is appropriate and should be served, even if the initial infringement was constitutionally required. In fact, pronouncing that a show of earnest is necessary in cases in which we are sure that the infringement is worth the cost—because such pronouncement serves egalitarianism as a good in itself—has advantages that may, in themselves, justify such judicial interventions. But in such cases, the argument that the cost is so great that an initial burdening of the majority is not worth requiring is anything but trivial.[124]

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123. *See infra* Section IV.D (discussing busing).

124. There are those who criticize equality as an aim on the grounds that egalitarianism reduces welfare for all by requiring no one to be better off than the worst among us. *See, e.g.*, Derek Parfit, *Equality and Priority*, *in* IDEALS OF EQUALITY 1, 19-20 (Andrew Mason ed., 1998). Merits aside, equality remains a fundamental tenet of our constitutional system. Moreover, and more substantively, I believe that the form of analysis I advance is largely unrelated to that debate. My principal aim is to ensure that those empowered to make decisions have the information and incentives necessary to impose costs only where the benefits truly outweigh the harms.

IV. EXAMPLES OF INFRINGEMENTS THAT MAY REQUIRE JUDICIAL INTERVENTION

I next turn to some examples where the need for, and the problems with, the approach that I have outlined can be readily seen. My examples are not meant to be all-encompassing. Nor are they cases in which burdening the majority as a condition for allowing infringement on a minority right is necessarily desirable. These cases are, rather, those where the burdened minority regularly and forcefully decries the infringement as "unjust" and "not truly democratic." They are also cases in which courts, at times, have responded by blocking the infringement, and at other times have allowed it to go unchecked. And they are cases where the basic egalitarian problem to which Justice Scalia referred has rarely led to a full and reasoned judicial analysis. They are cases where courts have either allowed or barred the infringement fully, rather than barring it conditionally and allowing it *only* if the majority responds by burdening itself.

These examples help demonstrate the difficulty of defining what is an adequate show of earnest. They may also indicate the different possible functions of the shows of earnest. That is, they may suggest how different shows of earnest serve to demonstrate the majority's true commitment to the cause it claims to be espousing and serve to ease the minority's feeling that it has been unjustly burdened.

A. Abortion

The first and most currently contested example is abortion.[125] Can the government impose a very significant burden on a pregnant woman's control and ownership of her own body in the interest of protecting fetuses/unborn life? Many have argued that requiring a woman to continue a pregnancy against her

125. I am far from the only scholar to consider the equality concerns present in the context of abortion. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308-24 (1991) (developing an egalitarian defense of abortion rights); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 335-46 (1992) [hereinafter Siegel, *Reasoning from the Body*] (exploring the role of gender in the development of antiabortion laws). And, of course, Justice Ruth Bader Ginsburg famously espoused a similar view, as did I. *See generally* Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013) (discussing Justice Ginsburg's view on equality and abortion); GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985) (providing my perspective on equality and abortion). But none have, I believe, given an adequate doctrinal basis for their wise intuition. And that is what this Feature seeks, inter alia, to do.

wishes constitutes a type of forced labor,[126] infringes her control of her own body, and violates her fundamental right to bodily autonomy.[127] That the right infringed is a fundamental one, even if not expressly listed in the Constitution, seems manifest to me. That the burden imposed is frequently undue (as *Casey* observed) is also obvious.[128] Yet the Equal Protection Clause does not, as currently read, serve to guarantee similar majority-burdening. And even though those whose rights are infringed are overwhelmingly women—a category that is accepted to be suspect[129]—the Equal Protection Clause has not been seriously argued in these cases.[130] While some of those who oppose abortion probably do seek to discriminate against women, most antiabortion actions are rooted in the desire to protect the unborn.[131]

And yet the lack of egalitarianism is also manifest. When pro-choice advocates claim that "[i]f men could get pregnant, abortion would be a sacrament,"[132] they are asserting the premise of this piece. Would abortion be limited, and to what degree, if the burden imposed by that limitation were universal? In the face of these facts, courts have alternated (and still do, if one looks to individual

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126. *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 509-11 (1990).

127. Still others have noted the tension between bodily-autonomy claims of the unborn and of pregnant women. *See* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986); *see also infra* notes 136-139 and accompanying text (noting the incompatibility of antiabortion arguments with other values and practices of our society).

128. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876-79 (1992).

129. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982).

130. *See generally* Reva Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2023) (advocating for abortion rights on an equal-protection basis). This may partly result from *Roe*'s holding which itself relied on other grounds. *See* Siegel, *Reasoning from the Body*, *supra* note 125, at 351.

131. *America's Abortion Quandary*, PEW RSCH. CTR. 64 (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/social-and-moral-considerations-on-abortion [https://perma.cc/YFP8-5KN2] (discussing how, in response to an open-ended question asking about one's thoughts about abortion, "[a]bout one-in-five of the people who responded to the question expressed disapproval of abortion—the most common reason being a belief that a fetus is a person or that abortion is murder").

132. Emma Brockes, *Gloria Steinem: 'If Men Could Get Pregnant, Abortion Would Be a Sacrament*,' GUARDIAN (Oct. 17, 2015, 7:00 AM EDT), https://www.theguardian.com/books/2015/oct/17/gloria-steinem-activist-interview-memoir-my-life-on-the-road [https://perma.cc/L6UY-565X].

states[133]) between finding that the right to abortion is constitutionally protected and allowing virtually unlimited infringement of that right.

Consider, instead, how we would look at abortion under my proposed approach. First, we would ask whether the right to control one's body is a fundamental right even if it is not expressly specified and protected in the Constitution. Second, we would evaluate the severity of the burden imposed by the governmental action on that group—whether the burden is "undue," in *Casey*'s terms.[134] Third, we would consider whether the group whose right is infringed is a traditionally disfavored, maltreated group. Then, since the same treatment of the bodies of men is not possible (as men do not become pregnant),[135] we would ask whether any number of shows of earnest are available and could be required. Such shows of earnest would not be "equal" to the infringement, but at least some of them would go a significant way toward showing that the majority truly believed that the restriction on this minority's right was worth its costs.

Such a show of earnest would still not put the *same* burden on all: pregnancy is different from any burden we could devise. And the shows of earnest I discuss would not lessen the burden that an unwanted pregnancy places on a woman. Nonetheless, they *might* lessen the feeling that abortion prohibitions unjustly place lifesaving burdens only on women.

This latter conclusion might be the case if the polity generally and regularly imposed limits on the control of our bodies "for the common good." Abortion might look different if there were a truly effective duty to help and rescue those in need, even at the risk of one's safety.[136] The same might be true of a society that prohibited the killing of others even when that killing occurred to protect one's own life, body, or property.[137] It would be plausible in a society that *required*

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133. *See, e.g.*, Women of Minn. v. Gomez, 542 N.W.2d 17, 19 (Minn. 1995); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 832 (Cal. 1997); Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 969 (Alaska 1997); Armstrong v. State, 989 P.2d 364, 387 (Mont. 1999); Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 622 (N.J. 2000); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 466 (Kan. 2019); Gainesville Woman Care, LLC v. State, 210 So.3d 1243, 1245-47 (Fla. 2017).

134. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876-79 (1992)

135. When I say "men" and "women" here, I am using the terms to refer to sex, rather than gender. Of course, there are people who break this binary. I speak in these terms nonetheless because most laws regulating abortion utilize this language.

136. *See* RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965) (noting that generally, tort law imposes no duty to rescue another unless a special relationship exists between the parties).

137. *See* People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) ("It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack.").

individuals to submit themselves to medical experiments to develop treatments that might save the lives of innocent others. It would be so, most dramatically, were all of us *required* to donate our kidneys, bone marrow, and other body parts to those who could only survive if they received a transplant.[138] A society that imposed all or most of these requirements—if it existed—might claim to require pregnant women to forgo abortions, because in those societies, the majority was clearly willing to burden itself significantly, to yield its own bodies in order to protect the lives of others. Indeed, in such a society it might even be argued that the unborn would have a constitutional right to protection. But that is not our society.[139]

In our society, courts seem to alternate between ignoring the infringement on a woman's bodily rights and making those rights fundamental libertarian ones. My approach might lead a court to say the right to abort can be limited only in those jurisdictions that required men (or, indeed, everyone) to give major body parts for transplants to those who needed them, and which punished criminally those who killed others even when the killer acted to protect their life or their property against perceived threats. Such requirements would not be the same as a prohibition or restriction on abortion, but they would go some distance toward showing that the polity thought life—including unborn life—was worth protection when infringement on bodily autonomy was borne by all.

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138. I suppose that some might limit this to a requirement that organs be donated to save the life of a close relative.

139. Some, but not all, of the examples just given involve inaction that results in death. Abortion, it is said, is different, as it entails "death-causing" action. Justice Oliver Wendell Holmes told us long ago that the distinction between active and passive killings is nonsensical. O.W. Holmes, Jr., The Common Law 277-83 (Boston, Little, Brown & Co. 1881). Choices are choices, whether we choose passively to fail to provide an antidote certain to preserve life or whether we choose to administer the poison affirmatively in the first place. Nonetheless, some of the examples I gave, like killing one who ventures onto my property, are certainly affirmative. What is morally relevant is the degree of certainty of the outcome that we are aware of when we act or fail to act.

There are, of course, those in our society who believe that a woman's right to control her body is absolute and should be given full libertarian protection akin to that afforded to speech and religion. Conversely, there are those who believe that fetuses/the unborn should be given full libertarian protection. Both find their desired right in the penumbra of specified libertarian-protected rights. For each of these, my use of abortion as an example is obviously misguided. I nevertheless use it as an example, whatever my own view might be, because I believe a very large part of our polity does not take either position.

B. Rent Control

My second example, rent control, comes from a very different context. Courts are regularly involved in this area too.[140] Here, landlords comprise the burdened minority, and their claim is that even though rent control is not a classic taking of physical property, regulatory rent restrictions are sufficiently severe that they qualify as either regulatory takings or, in some other sense, unconstitutional infringements of landlords' fundamental rights.[141] The landlords' argument, in the words of Chief Justice Rehnquist, is that "with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens."[142] One way of conceiving the right they assert is as a right to engage freely in the market. Reminiscent of the *Lochner* era, this claim is based on a right not found in the Constitution's text but that some say is nonetheless fundamental.[143]

Although any number of regulatory restrictions are typical attributes of our economy, rent control is claimed to be different.[144] The burden of the controls imposed is alleged to be huge (or, in my terms, "undue"). Analogous restrictions on profit making are *not*, it is said, part of our economic system. Storekeepers can generally charge what the market will bear even for goods that are essential.

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140. Recently, for example, advocates have urged courts to find that rent-control laws constitute takings. *See* Sam Spiegelman, *Rent Controls and the Erosion of Takings-Clause Protections: A Sordid History with Recent Cause for Optimism*, 51 FORDHAM URB. L.J. 357, 359-60 (2023); 74 Pinehurst LLC v. New York, Nos. 22-1130 & 22-1170, 2024 WL 674658, at *1 (Feb. 20, 2024) (Thomas, J., statement respecting the denials of certiorari) ("The constitutionality of [rent-control] regimes like New York City's is an important and pressing question.").

141. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 11 (1988) (holding that rent control does not, as a price-regulating mechanism, violate the Due Process Clause because it is not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt" (quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 769-70 (1968))); Fisher v. City of Berkeley, 693 P.2d 261, 295 (Cal. 1984) (holding that rent-control ordinances could violate the due-process rights of property owners to receive "fair return on their investments"); Hutton Park Gardens v. Town Council, 350 A.2d 1, 13 (N.J. 1975).

142. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 354 (2002) (Rehnquist, C.J., dissenting).

143. *See* Lochner v. New York, 198 U.S. 45, 53-54, 64 (1905) (holding that labor regulations violated the right to contract).

144. *See, e.g.*, Petition for Writ of Certiorari at i, *Pinehurst*, No. 22-1130 (U.S. Feb. 20, 2024) (presenting the question whether allegations that New York's rent-control law "conscripts private property for use as public housing stock, and thereby substantially reduces its value, state a regulatory takings claim.").

Only landlords' profits, it is argued, are limited for the public good.[145] The restrictions are not, of course, imposed in order to discriminate. Landlords are not a suspect class. And the object of rent control, typically, is to help the poor or the middle classes get adequate housing, not to hurt the landlords.[146] Yet only *landlords* bear this restriction. And one might well question whether such restrictions on rights would be imposed (apart from special crisis situations) if these restrictions applied to all of us and not just "them."

Of course, the majority may feel passionately about the purported aim of rent control. But would the majority feel the same way if it bore the burden? We could well have the impact we desire if we placed a tax on ourselves and thereby bore the burden equally. Or we could place a similar burden on all profit making, in all industries.

State rent control may not really be the kind of infringement I am writing about. Regulated industries are a part of our economy, and no one is forced to enter an industry that is regulated—other forms of profit making are available. Moreover, people often enter this regulated industry speculating that the regulations will ease, allowing them to make windfall profits.[147] And some might add that landlords are not a class of people who are disfavored by society, and so there is no reason to believe "we" *care* less about them. But this is far from clear when we recall how often the landowner, the "rentier," is scorned in literature as opposed to the merely wealthy entrepreneur.[148] It is interesting how frequently a claim of special infringement has been plausibly made in this area.[149] Thus, I

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145. *Id.* at 28 (arguing that the decision below erred in focusing "on whether the law was enacted to promote 'public health, safety, and general welfare,' while treating as immaterial that the law seeks to achieve these goals by *uniquely and exclusively burdening owners of rental property*" (emphasis added) (citing 74 Pinehurst LLC v. New York, 59 F.4th 557, 568 (2d Cir. 2023))).

146. *See* Bowles v. Willingham, 321 U.S. 503, 513 n.9 (1944) ("[T]he purposes of this Act are . . . to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living . . . ." (quoting Emergency Price Control Act of 1942, ch. 26, § 1(a), 56 Stat. 23, 24)).

147. Because rent-control properties have often been sold, and sold again, with the limitations of rent control priced in, those purchasers who happen to be holding the property at the cessation or weakening of a rent-control policy would see a windfall. *See 74 Pinehurst LLC*, 59 F.4th at 567.

148. 3 Karl Marx, Capital: A Critique of Political Economy 759-61 (Ben Fowkes trans., Lawrence & Wishart 1998) (1894). *See generally* George Orwell, The Road to Wigan Pier (1937) (critiquing the greed of the landlording class).

149. For a few recent examples, see Rob Schmitz, *Berlin Voted for the City to Seize Apartments Owned by Developers to Lower Rent Costs*, NPR (Dec. 3, 2021, 4:52 PM ET), https://www.npr.org/2021/12/03/1061333538/berlin-voted-for-the-city-to-seize-apartments-owned-by-developers-to-lower-rent [https://perma.cc/X9HG-YCVC]; and Kim Van Sparrentak & Ernest Urtasun, *Who (Really) Owns Your City?: How Corporate Landlords Are Using Homes to Make Money*,

suggest that an analysis of the sort this Feature proposes might be helpful. In some instances, it is possible that judicial "conditional" intervention might be preferable to the all-or-nothing actions that currently predominate.

What would an adequate show of earnest be in this area? That is hard to say. Let me suggest three. First, rent control could be treated as a taking requiring compensation. This would lessen the burden on the landlords and demonstrate a willingness on behalf of the majority to share the burden. But the amount of compensation would be quite hard to determine. Second, rent control could be permitted only if a jurisdiction had in place programs supporting middle-class housing generally. This approach would likely reduce the severity of rent control, simultaneously lessening the burden and demonstrating the majority's willingness to bear part of that burden. Finally, profit makers could be restricted in all industries.[150] This would not lessen the burden on the landlords, but it would treat them equally to other businesspeople and make clear the majority's commitment to the cause, whether or not that cause is desirable.

C. Fourth Amendment Infringements

My next examples involve possible Fourth Amendment violations linked to police practices and to DNA collection. Although they may not be as politically salient as the prior examples, they are perhaps more practically important. Because Fourth Amendment issues rarely give rise to broad political concern, they are less likely than the previous examples to find true democratic solutions without the judicial intervention suggested here.[151] In some of these examples, sameness of treatment is feasible. In some, it is much more difficult.

The most obvious of these examples is DNA testing and data collection. In some cases, such as the investigation of specific crimes like rape and homicide, the motivation for collecting (and perhaps retaining) DNA is categorically different from the more general governmental desire to have a broad collection of DNA data that can be used for any number of (plausibly) good purposes.[152] This

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GREENS/EFA EUR. PARLIAMENT (Feb. 27, 2022), https://www.greens-efa.eu/opinions/who-really-owns-your-city [https://perma.cc/SR63-BUYK].

150. Thirty-nine states have now passed "antigouging" statutes, but only in unusual circumstances, such as emergencies and natural disasters. *See Price Gouging State Statutes*, NCSL (Jan. 21, 2025), https://www.ncsl.org/financial-services/price-gouging-state-statutes [https://perma.cc/8E48-TANU].

151. These issues may be of great concern to law professors and judges, but that does not mean that they are broadly politically resonant.

152. The widespread practice of targeted DNA collection pursuant to law enforcement's efforts to investigate serious individual crimes is not implicated by this analysis because such individual

latter goal could be pursued by collecting DNA from anyone, or, as described earlier, by collecting a DNA sample from each infant born in a state, as California does.[153] But obtaining and retaining DNA is not, at the moment, done universally. Rather, the government takes DNA only from those arrested for minor crimes or detained as a result of trivial interactions with the state, such as traffic stops.[154]

I think the current approach is deeply wrong. Having everyone's DNA in a database may well have highly beneficial consequences. But the question is: does the polity deem those benefits sufficient to justify the invasion of privacy that such collections and retentions entail? And if so, what limits on the use of that DNA database would the polity impose? These judgments will not be made in a truly democratic way if only those detained for minor interactions with the police have their DNA collected by the government, while the rest of us do not. It is, therefore, a typical example of the "*care*-lessness" that my approach seeks to counter. Here too, the majority likely does not wish to discriminate. It may want broad collection of DNA, and for good reasons. But the majority makes this judgment knowing that its own privacy, its own fundamental rights, are not invaded.

The factors I listed earlier underscore the relevance of the example. Those whose DNA is collected are overwhelmingly members of maltreated groups.[155] The right infringed is clearly fundamental even if, due to the use of the word "reasonable" in the Fourth Amendment, it is not an "absolute" right at the level of First Amendment ones. And the burden on those made to bear it is, one could say, sufficiently severe as to be undue.[156]

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instances of collection do not entail the widespread policy of minority-group burdening with which my approach concerns itself. This is especially so if the DNA is not retained once the judicial proceedings involving the specific crime are completed.

153. *See supra* note 94.

154. *See supra* notes 94-98 and accompanying text.

155. The groups from which DNA is collected en masse — for example, federal prisoners — are usually maltreated classes, with limited ability to advocate for themselves in our political system. *See supra* notes 95, 96, 98.

156. "DNA stores and reveals massive amounts of personal, private data about that individual . . . . [DNA provides information] about the person's health, propensity for particular disease, race and gender characteristics, and perhaps even propensity for certain conduct." United States v. Kincade, 379 F.3d 813, 842 n.3 (9th Cir. 2004). This is true at least absent severe limits on the usage of collected DNA — which might affect how grievous we believe the infringement to be. Notably, sometimes the absence of such limits persuades us that the infringement, which is greater than it would be if limited, is not worth its significant costs. This dynamic is clear in the discussion surrounding GEDmatch and other private DNA databases. GEDmatch allows private users who upload their own DNA to opt in to sharing their DNA data with law

In such circumstances, the appropriateness of a democracy-enhancing role for courts seems apparent. Once cases in categories that clearly warrant different treatment (like specific instances involving the investigation of serious individual crimes) are removed, the question becomes whether the polity deems the benefits of DNA collection to be greater than its harms. And courts, applying the approach I propose, could ensure that such a judgment is made "*care*-fully" and not "*care*-lessly" by holding that DNA collection, while constitutional if asked of all of us, would violate the Fourth Amendment if imposed only on a maltreated minority. The Equal Protection Clause, as currently understood, would not be implicated, but the fundamental egalitarian principle I am suggesting would require this outcome. Such a holding seems to me clearly preferable to courts either (1) prohibiting universal DNA collection altogether or (2) allowing such general collection from only a minority. The appropriate show of earnest—equal treatment to all—would in this case demonstrate the majority's commitment to the cause. But it would not lessen the burden unless the majority decided to limit the permissible uses of the collected DNA. Of course, imposing the burden on all may make such limits more likely.

What is notable about the DNA example is that sameness is so readily available that perhaps courts could require it directly themselves, rather than leaving the choice of an appropriate show of earnest to other governmental institutions. DNA collection is a rare context in which full judicial intervention may be possible.

My next Fourth Amendment example is very like the DNA one, but it is more difficult because the dubious selectiveness of those whose rights are infringed is less obvious. It involves the bulk of subterfuge traffic stops and subsequent searches.

The police seeking to catch drug dealers or users regularly stop cars for minor traffic violations.[157] They do it because they believe that there is a chance that those in the car are criminals. The stops are often for trivial reasons, such as the failure to signal a turn more than one hundred yards before a crossing, or

enforcement to assist in solving violent offenses. *See* Nila Bala, *Opinion: The Risks of Sharing Your DNA with Online Companies Aren't a Future Concern. They're Here Now*, L.A. Times (Oct. 21, 2024, 3:06 AM PT) https://www.latimes.com/opinion/story/2024-10-21/testing-dna-websites-genes-23andme-gedmatch [https://perma.cc/QRF8-MX5T].

157. *See generally* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev. 425 (1997) (describing the discriminatory effects of pretextual traffic stops); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637 (2021) (same).

ornaments in the car that are somehow forbidden.[158] Those in the car are then subjected to demeaning and arguably rights-infringing examinations, such as being pressed spread-eagle against their car.[159] These examinations may be, in turn, "justified" in the (proper) interest of police safety. The Supreme Court has upheld such stops, even when they are subterfuges and manifestly not done for traffic safety reasons, but instead are done for other (perhaps worthy) goals. Not surprisingly, the Court has said such stops are permissible, so long as they do not violate the Equal Protection Clause.[160] But these stops are virtually never held to violate the Equal Protection Clause because the police in such cases need only avoid selectively enforcing laws on the basis of discriminatory (e.g., racial) considerations.[161] They are stopping the driver—whom they have no other legitimate basis to examine—in the hopes of catching drug dealers. And so, the great Clause, as it is read today, does not come into play.

Such stops and the demeaning searches that follow them affect only a small proportion of the population, with whom the majority likely does not identify.[162] Would the majority endure or permit such police behavior if it bore the burden?

Catching unlawful drug dealers is certainly desirable. And yet in nearly ninety percent of such stops in New York City, no drugs or other serious

158. *See, e.g.*, Seleeke Flingai, Mona Sahaf, Nicole Battle & Savannah Castaneda, *An Analysis of Racial Disparities in Police Traffic Stops in Suffolk County, Massachusetts, from 2010 to 2019*, VERA INST. 3, 8 (June 2022), https://vera-institute.files.svdcdn.com/production/downloads/publications/analysis-of-racial-disparities-police-traffic-stops-suffolk-county-ma.pdf [https://perma.cc/V4LS-Q3MV] (finding that nontraffic safety stops, targeting "infractions such as tinted windows, expired registration, improperly placed license plates, or objects hanging from a rearview mirror," made up thirty-one percent of all traffic stops in Suffolk County, Massachusetts).

159. United States v. Weaver, 9 F.4th 129, 136 (2d Cir. 2021) (en banc).

160. Whren v. United States, 517 U.S. 806, 813 (1996) (finding that pretextual stops by police officers are permissible so long as these stops are not selectively enforced in a way that violates the Equal Protection Clause, "agree[ing] with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race"). The *Whren* Court, in effect, mirrored what Justice Scalia said in his *Cruzan* concurrence: "Our salvation is the Equal Protection Clause." Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

161. Aliza Hochman Bloom, *Inferable Discrimination: A Landmark Decision Addresses Selective Law Enforcement*, AM. CONST. SOC'Y: EXPERT F. (Apr. 4, 2024), https://www.acslaw.org/expertforum/inferable-discrimination-a-landmark-decision-addresses-selective-law-enforcement [https://perma.cc/6JUD-HPZM].

162. ERIKA HARRELL & ELIZABETH DAVIS, BUREAU OF JUST. STAT., NCJ 255730, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 4 (Feb. 3, 2023), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf [https://perma.cc/P2F4-BWHP] (finding that in 2018, only twenty-four percent of the public age sixteen or older had contact with police).

violations are found.[163] Would a majority think such stops, and their all-too-frequent violent sequelae, are worth having if they or those close to them bore the burden? Perhaps, though I have my doubts. In any event, that is the question that the missing buttress would empower the courts to ask. And under this approach, courts could hold such stops and searches violative of the Fourth Amendment *unless* the government showed that they were used and applied almost universally—that is, unless they occurred sufficiently broadly to ensure majoritarian "*care*-ful" approval.[164]

In the alternative, a show of earnest here might take the form of *always* giving significant compensatory damages to those stopped and searched when no illegal drugs or like serious criminality were found. Such compensation, if sufficiently large, would both burden the majority and lessen the burden on those whose rights were infringed.[165]

D. Busing

My last example is a harder one because finding an appropriate show of earnest is, in this case, extremely difficult, and because the infringement has usually been imposed by courts, rather than directly by a legislative majority. Busing is the response that some courts deemed constitutionally required when legislatures failed to establish desegregated schools. Courts utilized their power to require this remedy because of legislative failure—that is, the inaction of the

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163. *Stop-and-Frisk Data*, NYCLU (Mar. 14, 2019), https://www.nyclu.org/en/stop-and-frisk-data [https://perma.cc/52NB-48YF] ("Between 2003-2013, nearly 90 percent of stops did not lead to a summons or arrest.").

164. All of this can be seen in my dissenting opinion in *Weaver*, 9 F.4th at 172-83 (Calabresi, J., dissenting), and the other opinions in that case, *see id.* at 133-54 (majority opinion); *id.* at 154-62 (Lohier, J., concurring in the result); *id.* at 162-72 (Pooler, J., dissenting); *id.* at 183-86 (Chin., J., dissenting).

165. This is, of course, the opposite of what occurs today, given the doctrine of qualified immunity. *See* Rogers v. City of Amsterdam, 303 F.3d 155, 158 (2d Cir. 2002) ("The doctrine of qualified immunity shields police officers acting in their official capacity from suits for damages . . . unless their actions violate clearly-established rights of which an objectively reasonable official would have known." (quoting Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999))). Instead, it is much closer to the doctrine as it existed at the Founding: officers were empowered, through so-called "writs of assistance," to search any location for smuggled goods, without need for probable cause or reasonable suspicion. Akhil Reed Amar, The Words That Made Us: America's Constitutional Conversation, 1760-1840, at 12, 21 (2021). But if the search came up empty-handed, these officers could be sued in trespass, "and a civil judge and jury might well mulct the unsuccessful searcher with serious damages." *Id.* at 21; *see also* United States v. Hagood, 78 F.4th 570, 585-86 (2d Cir. 2023) (Calabresi, J., dissenting) (citing Bruce v. Rawlins (1770) 95 Eng. Rep. 934, 934-35 (KB), which held, via jury, that an officer who acted pursuant to a writ of assistance but whose search of a home did not reveal any illegal goods owed damages to the homeowner).

governing majority necessitated court action.[166] In such situations, "majorities" have sought to impose the busing of children from one neighborhood to another to achieve properly integrated schools.[167] And those whose children have been bused have objected vehemently, sometimes violently, to what they believe to be an infringement of their fundamental right to local schooling.[168] They also have asserted—more than plausibly—that such integration-minded programs would not be established if the dominant majority, those who lived in suburbs, also had their children distantly bused.[169] The example (and the often-violent reactions) may cause some to recall my earlier discussion of the Civil War draft rioters.[170]

The factors here are perhaps less clear than in some cases. Is the right to local schooling a fundamental one? Not obviously so, but perhaps. Is the burden a substantial one? I would think so. Are those who bear the burden—those who were happy in their schools and are forced to commute much further to attend a school they consider less desirable—a suspect class, or at least disfavored? Not in a traditional historical sense, and yet the frequent maltreatment of such lower-middle-class, relatively poor, often ethnic minorities, is not hard to discern. In Boston, for example, the governing majority's failure to desegregate its schools may well have represented the politically powerful suburban majority's refusal to accept a burden that it instead shifted to immigrant white neighborhoods.[171]

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166. In that sense, they were acting in place of the "majority" (as we have defined it, "those in power"). For that reason, I will refer to busing as resulting from action of the "majority," even though I am referring to an action ordered by courts.

167. *See, e.g.*, Morgan v. Hennigan, 379 F. Supp. 410, 482-84 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974). Busing in Massachusetts resulted both from a series of court decisions and the Commonwealth's passage of An Act Providing for the Elimination of Racial Imbalance in the Public Schools, ch. 641, 1965 Mass. Acts 414.

168. Bruce Gellerman, *'It Was Like a War Zone': Busing in Boston*, WBUR (Sept. 5, 2014), https://www.wbur.org/news/2014/09/05/boston-busing-anniversary [https://perma.cc/5SCR-A7GF].

169. *See* Vincent Cannato, *The Controversy over Busing*, BILL OF RTS. INST. 3, https://bri-pdf-generator.s3.amazonaws.com/pdfs/the_controversy_over_busing.pdf [https://perma.cc/4K6H-FN7W] ("Opponents of busing tended to be mostly working-class white Bostonians who felt they were being made to bear the brunt of integration while more affluent residents and suburbanites were immune from its impact.").

170. *See supra* note 112 and accompanying text.

171. *See supra* note 169; *see also In 1970s Boston, Black and White Students Were Bused for the First Time: "The Busing Battleground" on AMERICAN EXPERIENCE – Sept. 11 at 9 pm*, WOUB PUBLIC MEDIA (Sept. 5, 2023), https://woub.org/2023/09/05/1970s-boston-when-black-and-white-students-were-bused-for-the-first-time-in-the-busing-battleground-on-american-experience-sept-11-at-9-pm [https://perma.cc/SW8J-XWE6] ("Many white parents took to the streets in protest. They often came from lower-income neighborhoods and were furious that some of their children would no longer attend nearby schools; they complained that the wealthy white suburbs that supported integration would not be affected by the plan.").

I, for one, would readily recognize "busing" as another example where my approach should apply.

But is school integration such an obvious good (perhaps even a constitutionally required good) that its benefits are manifestly superior to the losses of the losers? Some might well say so. And yet, even if they were right, my approach should still require a show of earnest by those whose rights were not infringed.[172]

What, however, would such a show of earnest be? Sameness of treatment might well not be possible, though the backlash in Boston indicates that the parents of white students in Boston thought suburban students could have borne a similar burden, busing from the suburbs to the city. If the majority enacted such a policy, it would be a clear statement of democratic commitment. But the cost of more distant busing might make that approach not feasible and perhaps not equal. And its requirement might interfere with local government structural divisions and distinctions to an inappropriate extent. Thus, while theoretically possible, *equal* treatment here might not be possible in practice.

What then might be sufficient so that a court could conclude that the majority was willing to share the burden of school integration? Several things come to mind, all involving money. The first is simply taxation on the suburbs to finance pecuniary benefits and direct money compensation to those whose children would be bused.[173] Would the whole issue look different if every child who was bused away from their neighborhood received $1000 per year to be placed in a fund for their higher education or to fund their future business? If such payment was accompanied by the creation of highly advantaged special schools in inner-city areas (for art, science, and so on), again financed primarily by suburban taxes, a court might well find that the "majority" had shown its willingness to bear the costs of integration.

Here, however, and whenever "compensation" is used, the danger of separate-but-equal treatment is particularly great. Unless the amount of compensatory damages is truly large, those who pay it will not be adequately burdened, and those who receive it will believe that they are still being unequally treated.

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172. *See supra* note 169. Many busing policies were a direct result of *Brown v. Board of Education*, 347 U.S. 483 (1954), and sought to remedy maltreatment of a minority. But that a majority may seek to resolve maltreatment of one minority by burdening another minority is, of course, common, and should still be subject to scrutiny under my approach.

173. This was the solution sought by the petitioners in *Rodriguez*, who sought not busing, but redistribution of school funding. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

The Civil War draft, and its attendant riots, remains the classic example of this difficulty.[174]

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It should be clear from these examples why courts generally cannot be responsible for establishing or requiring a particular "show of earnest." Nonetheless, courts must be able to invalidate a policy absent a show of earnest and require a majority to show what it is willing to do. Courts can then judge the sufficiency of such legislative action. In some cases, courts could even say that a goal—like integration—is constitutionally required but still require the majority to provide a constitutional way of achieving it by imposing a sufficiently broad, all-encompassing burden, with the court determining whether that universal burden is enough or more is needed.

Many other examples might be given, such as affirmative action as it once was and environmental requirements that affect the lower-middle class.[175] Just mentioning them suggests the breadth and difficulties of the issue I am raising.

V. DEFINING THE EGALITARIAN APPROACH AND ITS DOCTRINAL BASES

In concluding, let me state: the precise constitutional doctrine that this approach requires; its possible bases in our Constitution; the issues that need to be examined further, either in judicial or academic writing; and why the doctrine I am proffering is preferable to what is being done now, both in terms of results and in terms of control of judicial behavior.

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174. *See supra* notes 109-111 (discussing the draft riots); *see also supra* notes 93, 107 (discussing *Kelo*).

175. An example I was tempted to use was sexual orientation, because Justice Kennedy asserted that protection for these groups could be found in the Due Process Clause and discussed the egalitarian foundations of that Clause. *See* Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other."); *see also id.* at 670 ("Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."). Ultimately, I opted not to use this example because even though sexual orientation has not been formally recognized as the basis for suspect or quasi-suspect classification under the Equal Protection Clause, there are strong arguments that it should qualify. Moreover, many laws affecting these groups had a discriminatory purpose and hence could properly be invalidated under the Equal Protection Clause in its limited traditional meaning. *See* Lawrence v. Texas, 539 U.S. 558, 579, 581 (2003) (O'Connor, J., concurring in the judgment) (concluding that Texas's antisodomy law is unconstitutional under the Equal Protection Clause because it "makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction").

A. The Egalitarian Approach and the Judicial Role

Where a governmental action is challenged as constitutionally invalid because it infringes a fundamental right, I believe that courts are empowered under our Constitution to act to protect that fundamental right. If the right is one of those relative few, like religion and speech, that are given full libertarian status—rights deemed inalienable even when the polity might wish to limit them—a court's job is to protect that right, even though doing so is countermajoritarian.

Where, instead, the asserted right is not one of those few given full libertarian protections, the court has a duty to ascertain whether the polity, made adequately aware of the costs and benefits involved, truly wishes to infringe that right. In such cases, courts are not acting in a countermajoritarian way; they are acting to protect the democratic nature of our government. By ensuring that infringements are consistent with egalitarian values, courts are protecting *majoritarian* values from infringement. They have done so in right-to-vote cases and ballot-access cases.[176] Likewise, they should do so when a litigant sufficiently alleges that a fundamental right that is not given full libertarian protection in the Constitution has been infringed in an inegalitarian way.

When a challenge to a fundamental but unenumerated right is made, courts applying the framework I described should act in the following way. First, they should ascertain whether the right is sufficiently fundamental that its infringement can be justified only if a present majority truly deems its infringement necessary. Second, they should determine whether the challenged infringement places an undue burden on those who complain of it. Third, they should examine whether the infringement burdens those with whom the majority does not positively identify. If any of these conditions are not met—if the right is not fundamental, if the burden imposed by the governmental action is not undue, or if the burden is placed on parties who are sufficiently linked to the whole majority—the courts should assume that the governmental action is democratically supported and should abstain from intervening. *Washington v. Davis* properly governs.[177]

If, however, the burden imposed by the violation of such a fundamental right is undue and falls primarily on those not linked positively to the majority, the courts should ascertain whether the majority believes that the infringement of that fundamental right is desirable. Courts traditionally have done this in a variety of indirect ways, by imposing requirements against vagueness, against undue delegation and against desuetude, and, rarely, by requiring that the

176. *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964); Baker v. Carr, 369 U.S. 186, 237 (1962); Anderson v. Celebrezze, 460 U.S. 780, 786 (1983).

177. 426 U.S. 229 (1976).

legislatures give the issue a second look.[178] I believe courts must also do this directly by requiring evidence that the polity truly deems the infringement worth its costs and that the polity is willing to show that by bearing an appropriate share of those costs. Courts must ensure that infringements that are permitted in view of our limited libertarian constitutional requirements nonetheless do not violate constitutional egalitarian values.

Sometimes, where an equal burdening on all is feasible and "sameness" is easily available, courts can impose that requirement directly. They can say this action violates the relevant constitutional clause (e.g., the Due Process Clause, the Fourth Amendment, or, as we shall see shortly, a revised reading of the Equal Protection Clause) and is barred because it does not apply broadly enough. Most often, such full equality of treatment will not be readily available, and courts, though still empowered to ensure adequate democratic support and egalitarian burdening, will have to be more restrained. They could strike down, or threaten to strike down in short order, the governmental action, but only conditionally. They could say that an action violates the Constitution—that is, the relevant amendment or the Equal Protection Clause—unless the government shows through appropriate actions that the polity as a whole has demonstrated its willingness to bear burdens analogous to those it imposes on those whose rights have been infringed. Without such a showing, the governmental action would be struck down conditionally. That is, the state action would be invalidated unless and until the polity showed its earnest desire to achieve the goal by, as equally as possible, bearing the costs that achieving the goal entails. The courts ultimately would decide what legislatively imposed generalized cost-bearing suffices to show true majoritarian support, but only after the state chose the egalitarian burdens it wished to impose.

When a fundamental right has been violated, the proper step may be an immediate, conditional striking down of the governmental action. But there will also be cases in which the goal to be achieved or the harm to be avoided by the governmental action is both great and urgent. In such circumstances, courts should "reverse" the conditionality. They should say that the governmental action can continue, but only for some defined time during which the relevant legislatures demonstrate, by concrete burden allocation, that the majority desires the infringement. What would justify such a delayed invalidation requires more study. My instinct is that an analysis similar to that employed by courts in

178. *See supra* notes 64-68 and accompanying text.

deciding when a statute should be stayed pending a decision as to its constitutional validity would be appropriate.[179]

B. Doctrinal and Constitutional Bases for the Egalitarian Approach

But what is or should be *doctrinally* the source of the judicial power that I am advocating? There are, I believe, three possible answers.

The first was stated to me in conversation by a distinguished longtime professor at George Washington Law School, well known for his conservative credentials, and now a judge on the Court of Appeals for the Armed Forces. He agreed that my approach was both necessary and desirable. He then asserted that we should enact a constitutional amendment to give it a proper basis.[180] That would satisfy any doctrinal doubts. But I believe it is not necessary and would leave us in the current situation with its continuing constitutional problems for far too long.

The second possibility is that this power *in fact* derives from the Equal Protection Clause. Linguistically the Clause is certainly broad enough to grant the courts the power I assert. And it is no accident that some who have seen the problem, like Justice Scalia, have asserted that the great Clause was the answer.

One might say that whatever the Equal Protection Clause does and must do with respect to discrimination, suspect classifications, and nonfundamental rights, it is also an appropriate basis for the job I am describing. The Clause has an undoubted minoritarian function, as asserted in Justice Stone's famous footnote.[181] But it could also have an equally crucial majoritarian role to avoid "*care*less" violations of fundamental rights.[182]

Equal protection means more than just antidiscrimination. It is more than appropriate to refocus our attention on the Equal Protection Clause's proper meaning. To do so, we must step outside the remark and function that Stone—

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179. *See* Nken v. Holder, 556 U.S. 418, 426 (2009); *see also* United States v. Texas, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring in denial of applications to vacate stay) (explaining that the "point" of an administrative stay "is to minimize harm while an appellate court deliberates"); Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 Notre Dame L. Rev. 1941, 1951 (2022) ("The most significant components of the standard for granting a stay are the likelihood of success on the merits and the prospect of irreparable harm.").

180. Credit for this claim goes to Dean and Judge Greg Maggs.

181. *See* discussion *supra* note 15.

182. In this sense, my proposal is substantially democracy-enhancing, whether grounded in the Equal Protection Clause or in other constitutional provisions.

writing in an era highly skeptical of judicial review[183]—relegated to a footnote. There is no fundamental reason to limit the great Clause to the role that Stone assigned to it. Stone wrote after a long period of extreme judicial actions giving absolute libertarian protection to rights that a conservative court deemed fundamental. He wrote when judicial protection of such unenumerated rights was being attacked as judicial activism. He was facing attempts by the then-newly-dominant left to limit almost totally the constitutional role of courts.[184] In that context, he asserted a minimal, and most obviously necessary, role for courts. That he did so was of great importance in view of our history of discrimination, but there is no reason to take it as determinatively defining the full meaning or function of "equal protection of laws."

This basis is, incidentally, quite different from attempts to expand the Clause's meaning to cover less obviously disadvantaged groups or to read disparate effect as adequate evidence of discrimination.[185] Such attempts, whether desirable or not, are simply extensions of Justice Stone's minoritarian, antidiscrimination view of equal protection. These efforts remain wedded to the notion that equal protection means avoidance of discrimination, and they seek only to enlarge equal protection's effectiveness in this role. They thus remain attached to the limited scope that Stone gave to equal protection. I believe, however, that any such limitation is arbitrary. Equal protection means—and should mean—that courts must act to ensure that fundamental rights can be infringed only

183. Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1150-51 (1987) (concluding that the Court's repeated striking down of policies enacted by the elected branches strongly affected public opinion).

184. *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 47-53 (1993); *id.* at 119 ("The fact that we begin with a footnote is itself important. As matters stood in 1938, the Court had more pressing things to do with its text . . . . One year after the 'switch in time,' the *Carolene* Court was still struggling to accommodate the primary thrust of the New Deal itself. . . . Only by elaborating and reinforcing the new constitutional principles . . . could the Court reassure the still-suspicious President, Congress, and electorate that the Justices had fully accepted the [New Deal]."); *see also* FDR'S FIRESIDE CHATS 83-95 (Russell D. Buhite & David W. Levy eds., 1992) (describing President Roosevelt's March 9, 1937, fireside chat on packing the courts).

185. *See* Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 29 (2013); Siegel et al., *supra* note 130, at 69-70; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749-50 (2011); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985) (holding that intellectual disability is not a suspect classification); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312-14 (1976) (holding that age is not a suspect classification); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-29 (1973) (holding that wealth alone is not a suspect classification). For one of the most sophisticated discussions of the relationship between discrimination and disparate impact, see generally Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003).

when the whole polity bears the burden and that courts have a duty to apply the Equal Protection Clause to achieve that imperative.

Still, there are reasons against basing this doctrine in the Equal Protection Clause. The first is the worry that, to the extent the Clause is used for majoritarian purposes, its minoritarian antidiscrimination role would be undermined. Not logically, but perhaps psychologically, anything that focuses the great Clause away from discrimination and traditionally oppressed groups may weaken its effectiveness in countering discrimination.

More technically, the specific context in which the Clause was enacted, the timing of its enactment, and the fact that linguistically the Clause applies only to the states and not to the federal government all cut against using it as a basis for what I propose.[186] I do not doubt that if one looked hard enough, one could find statements at the time of its enactment that could lend historical support to a broader reading and function. Yet the fact that the Clause was enacted in the wake of Emancipation speaks volumes. The problem I have focused on was present and needed attention from the Founding, which suggests that another earlier constitutional basis may be more appropriate. Another reason for not relying on the Equal Protection Clause is that, as written, it does not apply to the federal government, yet the problem of unequal infringement of fundamental rights is as much a federal problem as it is a state one.

This fact, however, interestingly indicates why the third doctrinal basis I will suggest already has a grounding in Supreme Court holdings. The third possible doctrinal basis is that most specific constitutional commands have, and must reflect, egalitarian requirements. I believe that the Due Process Clause, the Fourth Amendment, and the rest of the Bill of Rights were meant historically to be both libertarian and egalitarian. And this egalitarian basis empowers the courts to do what I assert needs to be done to provide what I have called the "missing buttress."

Our Constitution embodies egalitarian as well as libertarian elements throughout its text. The slogan of the French revolution—a contemporary of the drafting of our Constitution—was liberté, égalité, and fraternité. Recent constitutions in cognate countries recognize fraternitarian duties.[187] Fraternité, or the

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186. *See* GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 108-27 (2013); FONER, *supra* note 109, at 114-17.

187. 1958 CONST. art. 2 (Fr.), *translated in Constitution of 4 October 1958*, CONSTITUTIONAL COUNCIL, https://www.conseil-constitutionnel.fr/sites/default/files/2024-08/en_constitution_20240813_1.pdf [https://perma.cc/5EB3-2NAL]; India Const. pmbl., *translated in The Constitution of India*, LEGIS. DEP'T (May 1, 2024), https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/2024071689031207 8.pdf [https://

duty to achieve communitarian values—whether of the right or the left—is not explicitly in our Constitution. Accordingly, we have left communitarian policies to be furthered by legislative, majoritarian actions rather than by constitutional command. But when communitarian policies infringe on fundamental rights, courts must test these actions to gauge whether they comply with the libertarian and egalitarian mandates that our Constitution *does* impose.[188]

Undoubtedly, our Constitution is profoundly egalitarian as well as libertarian. The language of the Declaration of Independence, providing a background to our Constitution, should be enough to tell us so: "[A]ll men are created equal" and "are endowed by their Creator with certain unalienable Rights."[189] Additionally, as I recognized earlier, the First Amendment is obviously both libertarian and egalitarian.[190] The requirement that all religions be treated equally—that none be favored—is as powerful and clear as the libertarian requirement protecting the practice of individual religions.[191] The application of the First Amendment to speech reflects a similar combination of libertarian and egalitarian rights.[192] Moreover, one cannot understand other constitutional mandates—like the prohibition on unusual punishments, the bar on bills of attainder, the requirement of juries of one's peers, and even the prohibitions on ex post facto legislation, in their original English Bill of Rights derivations—except as encompassing egalitarian values. Further still, more general terms like "due process" themselves incorporate both egalitarian and libertarian requirements. For example, due process is libertarian in prohibiting deprivation of certain interests without a level of fair process, and it is egalitarian in that minority groups must all have access to a process that protects their core interests.

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perma.cc/RXW7-YV29]; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] pmbl. (Braz.), *translated in Constitution of the Federal Republic of Brazil*, CHAMBER OF DEPUTIES (3d ed. 2010), https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf [https://perma.cc/5T7U-6DAR].

188. *See, e.g.*, Cotting v. Kan. City Stock Yards Co., 183 U.S. 79, 112 (1901) (holding that a Kansas stock-yard statute violated the Equal Protection Clause because it applied only to one company); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 558 (1902) (striking down an Illinois antimonopoly statute because it exempted livestock and agricultural products in the hands of producers at the time of enactment); S. Ry. Co. v. Greene, 216 U.S. 400, 418 (1910) (holding unconstitutional an Alabama law imposing a tax on foreign corporations but not domestic corporations); Zobel v. Williams, 457 U.S. 55, 65 (1982) (finding an Alaska statute determining dividend payments to residents on the basis of length of residency to be unconstitutional); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969) (striking down a law requiring successful welfare claimants in Washington, D.C., to have resided in the city for at least one year).

189. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

190. *See supra* Section II.A.

191. U.S. CONST. amend. I.

192. *See* Rosenberger v. Rector, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

Moreover, the Supreme Court has expressly recognized that due process is infused with egalitarian values. When the Court, in *Bolling v. Sharpe*, applied the Equal Protection Clause to the federal government despite its clear linguistic limitation to the states, it held that some part of equality was inherent in due process.[193] Of course, in *Bolling*, the Court was faced with a discriminatory policy, and so the case in its narrow holding stated that discrimination was so violative of equality that the Due Process Clause of the Fifth Amendment forbade it.[194] But that necessarily meant that equality in some form was part of and protected by due process. If equality is part of due process (and, as it has been applied, is part of other constitutional rights like the Fourth Amendment as well[195]), egalité generally, and not merely antidiscrimination, can be deemed to be so fundamental as to be required by the specific clauses of the Constitution. Significantly, in *Obergefell*, Justice Kennedy explained this connection between due process and equal protection:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way . . . . Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other . . . [and] the two Clauses may converge in the identification and definition of the right.[196]

If that argument and that reading of *Bolling* are appealing, then the doctrinal basis for my approach is also clear. The egalitarian foundations of our Constitution reflected in the Due Process Clause and other specific constitutional requirements become a proper basis for the judicial power I am asserting. What Ely, Justice Jackson, and Justice Scalia wrote was needed can be accomplished by reading the Equal Protection Clause more broadly than Justice Stone did. But it can also be achieved by using specific constitutional clauses to give the courts the power to require the majority to make an egalitarian show of earnest when unenumerated fundamental rights are infringed.

If one agrees that the Constitution has egalitarian values, how does one deal with the concern, shared by Ely and Justices Scalia and Jackson, that this will give courts too much power? They feared that if a court struck down legislation that infringed on rights not specifically protected in the Constitution as violative of due process, courts would have the last word on the validity of (often-crucial

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193. 347 U.S. 497, 499 (1954).

194. *Id.* at 498-500.

195. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (finding that a federal policy of searches or seizures may be impermissible under the Equal Protection Clause as classically defined).

196. Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

communitarian) legislative policy enactments.[197] But that is not the case when due process or other constitutional requirements are deemed violated on egalitarian, rather than libertarian, grounds. When laws are deemed invalid because they do not apply sufficiently equally, the legislature can achieve what those laws sought to do by reenacting them with an adequate show of earnest. Whether under the Equal Protection Clause or under the Due Process Clause, the requirement of equality always affords the legislatures a second look.

Applying my approach, therefore, would not justify Ely, Justice Jackson, and Justice Scalia's worst fears. Under this doctrine, courts are not imposing their own values on the polity. An equal-treatment requirement, applied when unspecified rights are infringed, does not tell the polity that the values inherent in such rights must govern. It makes the polity face the full costs of infringing those values, and thereby makes the polity understand what infringing those values entails. The polity, not the courts, gets the last word on how important it deems those values to be in the face of contrary communitarian policies.

C. Questions Requiring Further Study

To implement my approach adequately, courts must resolve a series of questions. These are not significantly different from what courts currently do. But most of them would benefit from further judicial and academic development:

1. What makes an unenumerated right fundamental?
2. What constitutes undue harm when the state infringes such a right?
3. What makes the enactors of rights-infringing laws sufficiently closely and positively linked to those who bear the burden of an infringement? In other words, what makes the enactors vicarious burden-bearers, so that majoritarian support for the laws can be assumed?
4. When should such rights-infringing laws be conditionally but immediately invalidated, and when, instead, should they be left in place temporarily, with the requirement that the legislature enact a proper show of earnest, a proper majority-burdening, in short order?
5. What, in the circumstances of any given rights-infringing law, constitutes an adequate show of earnest, and what instead is properly seen as a false show of majoritarian support?
6. Is the proffered doctrine best grounded in a broadened version of the Equal Protection Clause or directly in the egalitarian requirements of

197. *See supra* notes 2–7 and accompanying text. Others have shared their concern. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting) (arguing that "the Court should be extremely reluctant to . . . strike down legislation adopted by a State or city to promote its welfare" on the basis of the Due Process Clause).

the specific clauses of the Constitution? Should it be grounded in both?

CONCLUSION

Let me conclude by restating what I believe to be the missing buttress—the needed constitutional doctrine—and the advantages of that doctrine over the current state of things.

A law that infringes fundamental rights not specifically protected in the Constitution is valid so long as it infringes the rights of most everyone in society. It is valid if, in Justice Scalia's words, "the majority accept[s] for themselves and their loved ones what they impose on you and me."[198] If, however, such a law places undue burdens on a minority that is not positively linked to the enacting majority, that law is conditionally invalid, even in the absence of discriminatory motives. It is invalid because there is no sufficient indication that such a law, which violates fundamental rights, would be enacted were its full costs properly understood and widely borne.

In such circumstances, courts have the constitutional duty—arising both from the Equal Protection Clause and from egalitarian commands that are inherent in the specific clauses of the Constitution and Bill of Rights—to require the enactors to demonstrate that the law and its cause are truly desired. Courts should do this by requiring the legislatures to enact a show of earnest, a burden on the majority that is sufficiently similar to that borne by those whose rights the law infringes. In requiring this, courts would not assert their own view of what values must govern a polity. They would only, but crucially, assure the polity that rights-infringing laws have true majoritarian support and thereby reduce the likelihood that those whose rights the laws infringe feel unjustly and unequally burdened.

Today, instead, courts either unconditionally strike down laws infringing fundamental rights that are not specifically protected in the Constitution, or they allow such laws to stand undisturbed. The first constitutes a dangerous assertion of judicial power to determine what values not expressly enshrined in its constitution a polity must have. The second allows rights-infringing laws to be enforced against a minority when the enacting majority does not bear, or perhaps does not even know, their costs. It leaves untouched rights-infringing laws that injure a minority and that have not been shown to be majoritarian or worth their harms. Both of these approaches have been applied in the past and have led to deep and angry divisions.

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198. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

Each of these all-or-nothing positions goes too far. The availability of an egalitarian approach that does not require discriminatory intent would make courts much less likely to adopt either extreme judicial position. Courts would likely impose absolute constitutional invalidation only in cases where specifically protected libertarian rights were infringed. They would not be tempted, as they are today, to give libertarian protection to rights simply because these rights enjoyed special judicial affection.

That is, of course, the charge that is regularly made when a "right" that is not specifically protected in the Constitution is given fully libertarian protection by courts. And the courts that gave such rights protection in *Lochner* and *Roe* have been so criticized.[199] But the removal of constitutional protection, in the face of longstanding precedents and reliance on those precedents has, in fact, been equally subject to the charge that this removal occurred primarily because of deeply held viewpoints of more recently appointed Justices.[200] Accordingly, some have argued, this stripping of protections also represents judicial overreach.[201] This is so, moreover, even if nominally the removal of constitutional protection returned the power to make decisions to legislatures. Obvious examples include the criticism of *Dobbs*'s overruling of *Roe*, and of the New Deal Court's rejection of longstanding Lochnerian positions, as due to the Court's desire to impose its own values.

On the other hand, the "*care*-less" abnegation of fundamental rights by a majority unharmed by infringements would be controlled. The approach and the doctrine I proffer, thus, both limits and enhances the power of courts.[202] This

199. *See supra* note 78. *See generally* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373 (2003) (canvassing, though disputing, several widespread critiques of *Lochner* and characterizing the decision as "ferociously attacked.").

200. *See* Sanford V. Levinson, *The Overreaching Court: The United States Supreme Court*, VERFASSUNGSBLOG (Sept. 29, 2022), https://verfassungsblog.de/the-overreaching-court [https://perma.cc/R482-CQ8S].

201. *See, e.g.*, *id.*

202. There will be those who believe that this approach will be too permissive of rights violations. Conversely, because courts do not have the last word, courts may be more willing to act and to require legislatures to reconsider laws that they have passed. And some have argued that giving courts such more limited power, in practice, affords courts too much power. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964); Charles Krauthammer, *Deciding on Life or Death*, WASH. POST (Apr. 11, 1996, 8:00 PM EDT), https://www.washingtonpost.com/archive/opinions/1996/04/12/deciding-on-life-or-death/f9a19275-772d-4fe2-8a76-a036f07fe87a [https://perma.cc/7AV7-ZTN7]. This dynamic can be seen in the jurisprudence of the Supreme Court of Canada, where violations of rights under its charter are almost always subject to legislative reconsideration because the Canadian Charter of Rights and Freedoms's Notwithstanding Clause gives its legislature the right in most circumstances

approach properly keeps courts from imposing their values, ultimately, on a polity. But it also gives courts the power to ensure that all truly important laws governing us are desired by a majority that is aware of their costs and is willing to bear them. In this way, it furthers the role courts play in protecting and enhancing democratic governance.

to overturn that court's constitutional rulings. Canadian Charter of Rights and Freedoms § 33(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). The argument is that the Canadian high court is willing to hold laws invalid with some frequency precisely because it does not have the last word. *See generally* Robert Leckey & Eric Mendelsohn, *The Notwithstanding Clause: Legislatures, Courts, and the Electorate*, 72 U. TORONTO L.J. 42 (2022) (arguing that the Clause facilitates a democratic dialogue between courts and legislatures such that courts can explain the concerns with certain legislation to ensure that legislatures believe the legislation is nonetheless worth pursuing).