

# THE SCOPE OF COMPELLING GOVERNMENT INTERESTS

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## INTRODUCTION

In constitutional cases, any relevant government interest may be said to vary in its breadth or scope. Government interests can be characterized narrowly or broadly. The narrowness or breadth of how courts choose to formulate a government interest may well affect that interest's overall weight or legal significance. For example, a public interest in safety and security, broadly conceived, may seem compelling. But the public interest in merely some modest upgrading of a safety and security regulation may seem less than compelling. A court might adopt either description. A court's choice to characterize the government interest at stake as either broad or narrow in scope is, however, often made on dubious grounds. This Essay highlights some of the most important of those dubious judicial choices as to the proper understanding of the scope of the government interest at stake, and then describes the nature and consequences of such choices.

Undue narrowing by courts of the scope of the relevant government interest at stake is most conspicuous in the contemporary freedom of religion cases.<sup>1</sup> Judicial narrowing of the scope of government interests in religious freedom cases is, however, put under exceptional pressure in the COVID-19 regulation and herd immunity cases.<sup>2</sup> And judicial narrowing of the relevant government interest is often rejected in other contexts, such as equal protection, and affirmative action in particular.<sup>3</sup> Additional appreciation of the scope of government

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1 See *infra* Part II.

2 See *id.*; *infra* notes 58–61 and accompanying text.

3 See *infra* Part III; see also *infra* notes 64–97 and accompanying text.

interest problems can be gleaned from the cases involving freedom of speech;<sup>4</sup> the congressional power to regulate interstate commerce;<sup>5</sup> and from the cases addressing procedural due process hearing rights.<sup>6</sup>

The judicial tendency to unduly limit the scope of any compelling government interest, in religious freedom cases and elsewhere, typically involves what we might call problems of aggregation, and a variety of fallacies of composition.<sup>7</sup> The rough idea here is that for a variety of reasons, the logic of any one single case, or of a few such cases, cannot be translated into some further succession of apparently similar cases.<sup>8</sup>

An important complication then arises. The cases implicitly suggest that strict scrutiny is, typically, not a genuinely two-part test, with separate inquiries into the weight of the government interest and the narrowness of tailoring of the regulation to that interest. As it turns out, the judicial inquiry into the existence of an inherently vague government interest is inseparable from and dependent upon the narrow tailoring inquiry, and vice versa.<sup>9</sup> In particular, the more demanding the narrow tailoring inquiry, the less well, and the less effectively, any broad version of the inherently vague government interest is likely to be promoted.<sup>10</sup>

## I. THE RELIGIOUS FREEDOM CASES

In the religious freedom cases applying strict scrutiny, the Supreme Court has often focused explicitly on the government's interest, short- or long-term, as manifested solely with respect to the particular claimant or claimants involved in the specific case.<sup>11</sup> Thus, the Court in the recent *Fulton* case<sup>12</sup> declared that:

4 See *infra* Part III; see also *infra* notes 98–129 and accompanying text.

5 See *infra* Part III; see also *infra* notes 131–34 and accompanying text.

6 See *infra* Part III; see also *infra* notes 135–39 and accompanying text.

7 See *infra* Part III.

8 See *id.*

9 See *id.*; *infra* notes 173–180 and accompanying text.

10 See *id.*

11 See, e.g., *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2432 (2021) (mem.) (Gorsuch, J., concurring); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881–82 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–98 (2021) (per curiam); *Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *Wisconsin v. Yoder*, 406 U.S. 205, 221–22 (1972). For a sampling of the relevant court of appeals cases, see, for example, *Smith v. Owens*, 13 F.4th 1319, 1328 (11th Cir. 2021); *Ramirez v. Collier*, 10 F.4th 561, 567 (5th Cir. 2021) (Dennis, J., dissenting), *rev'd*, 142 S. Ct. 1264 (2022); *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1347 (11th Cir. 2016); *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009).

12 141 S. Ct. 1868 (2021).

[r]ather than rely on “broadly formulated interests,” courts must “scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants . . . .” The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exemption to CSS.<sup>13</sup>

This narrow focus is required not only in any First Amendment free exercise case evoking strict scrutiny, but whenever there is a substantial burden on the claimant’s religious activities pursuant to the major federal statutes protecting religious freedom.<sup>14</sup>

In some instances, the Court has expanded the scope of the recognized government interest to encompass not just the particular claimant or claimants in the specific case, but the specific group with which the claimant identifies.<sup>15</sup> Thus in a classic case, the Court recognized the government interest bearing not merely upon the Old Order Amish religious claimant and his family, but on the Old Order Amish community more generally.<sup>16</sup> The government’s interest in requiring school attendance by possible claimants of other religious groups was not addressed.<sup>17</sup>

Specifically, the Court declared that:

[w]hatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional “mainstream.” Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.<sup>18</sup>

This judicial tribute to the civic virtues of the Old Order Amish was perhaps appreciated by its subjects. Plainly, though, if it is legitimate for the Court to hand out favorable civic report cards to particular religious groups, it inevitably follows that the Court is similarly entitled to hand out substantially less favorable report cards to other religious groups not meeting the Court’s standards. Would the interest of the government in requiring school attendance then be stronger in

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13 *Id.* at 1881 (quoting *Gonzales*, 546 U.S. at 431).

14 *See Holt*, 574 U.S. at 362–63 (The Religious Land Use and Institutionalized Persons Act (RLUIPA), like the Religious Freedom Restoration Act (RFRA), “contemplates a ‘more focused’ inquiry and ‘requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person”—the particular claimant whose sincere exercise of religion is being substantially burdened.” (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014))).

15 *See, e.g., Yoder*, 406 U.S. at 222.

16 *See id.*

17 *See id.*

18 *Id.*

such cases? At a very minimum, such a possibility should encourage the Court to pay greater attention to questions of the narrowness or breadth of any recognized government interests.

Narrow constructions of the relevant government interest occur across a variety of religious freedom contexts. These contexts include, merely for example, an unwillingness to adopt standard technologies for waste water disposal;<sup>19</sup> discrimination against gay potential foster parents;<sup>20</sup> in-home worship gatherings under a pandemic;<sup>21</sup> religious obligations of a prisoner to maintain a beard;<sup>22</sup> ceremonial use of controlled substances;<sup>23</sup> unwillingness to attend schools beyond some basic educational level;<sup>24</sup> physical contact with a spiritual advisor prior to execution;<sup>25</sup> and a religious requirement to kill four-legged animals.<sup>26</sup> Some of the contexts recur frequently, and others only rarely. The contexts also vary with respect to risks to the parties and to others, and with respect to the costs of accommodation. And most interestingly, the nature and effects of the relationships among the instances of any given specific kind of religious context may vary as well.<sup>27</sup>

In general, the religious claimant will tend to fare better, under a strict scrutiny test, to the extent that the courts restrict the scope of any cognizable government interest in regulating the religious activity. To the extent that any broader formulation of a government regulatory interest is disallowed, the religious claimant is more likely to prevail. And this is no doubt the predominant effect of a narrowly individualized, case-specific approach to government interests and narrow tailoring.

It should be noticed, though, that some religious claimants might actually benefit from a rule that is less sensitive to the claimant's own circumstances, and that focuses instead on what is more typically true in the run of categorically similar cases. The government interest, for example, in requiring a prisoner to have at most only a minimal beard is modest in the most typical individual case.<sup>28</sup> But in the specific case

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19 See *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2431 (2021) (mem.) (Gorsuch, J., concurring).

20 See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

21 See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam).

22 See *Holt v. Hobbs*, 574 U.S. 352, 362 (2015).

23 See *Gonzales v. O Centro Espirita Beneficente Uniao*, 546 U.S. 418, 423, 430 (2006).

24 See *Wisconsin v. Yoder*, 406 U.S. 205, 223–25 (1972).

25 See *Ramirez v. Collier*, 10 F.4th 561, 563 (5th Cir. 2021) (Higginbotham, J., concurring in part), *rev'd*, 142 S. Ct. 1264 (2022).

26 See *Merced v. Kasson*, 577 F.3d 578, 591 (5th Cir. 2009).

27 See *infra* Part III.

28 See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 362–67 (2015).

of “a convicted murderer . . . who has had dozens of disciplinary infractions while incarcerated,”<sup>29</sup> a focus on the particular circumstances of the case may enhance the weight attached by the court to prison security, and even to public safety.<sup>30</sup>

Inevitably, though, there will be pressure on the part of the government litigants for the courts to consider costs and circumstances that are less confined to the immediate case context. Thus, in a prison dietary accommodation case, the government argued,<sup>31</sup> in vain,<sup>32</sup> that compliance costs would be high,<sup>33</sup> that the prison budget was in deficit,<sup>34</sup> that staff vacancies were high,<sup>35</sup> and that the prison “might have to eliminate 246 positions to pay for the meals.”<sup>36</sup>

As well, the distinction between government interests in some specific case and a broader, and no doubt genuine, government interest is sometimes difficult to maintain at a psychological and a rhetorical level. One case, for example, involved religiously motivated trespass upon, and damage to property on, a naval base, for the sake of protesting the nuclear weapons program.<sup>37</sup> Understandably, the court referred to the government’s at least allegedly “compelling interests in the safety and security of the naval base, naval base personnel, and naval base assets.”<sup>38</sup> Now, it is certainly possible to think of a compelling government interest in the safety and security of the military base over merely some isolated, specific period of a few hours. But more naturally, if not inevitably, we think of safety and security, in a practical sense, as sustained conditions, persisting across time, across incidents, and across evolving circumstances.<sup>39</sup>

It should not surprise us then when the courts choose, in some instances, to take into account a more broadly formulated allegedly compelling government interest that is plainly not exhausted by any particular set of case circumstances.<sup>40</sup> Consider, for example, the

29 *Smith v. Owens*, 13 F.4th 1319, 1328 (11th Cir. 2021).

30 *See id.*

31 *See United States v. Sec’y, Fla. Dep’t of Corr.*, 828 F.3d 1341, 1347 (2016).

32 *See id.*

33 *See id.*

34 *See id.*

35 *See id.*

36 *Id.*

37 *See United States v. Grady*, 18 F.4th 1275, 1280, 1285–86 (2021).

38 *Id.* at 1285.

39 *See*, THOMAS HOBBS, *LEVIATHAN* 86–90 (Richard Tuck ed., rev. student ed. 1996) (1651) (discussing personal safety and security in the general state of nature).

40 *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 508 (1986); *United States v. Lee*, 455 U.S. 252, 258 (1982); *Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009); *Daniels v. City of Arlington*, 246 F.3d 500, 505 (5th Cir. 2001).

breadth of the government interest endorsed in the religious military headgear case of *Goldman v. Weinberger*.<sup>41</sup>

In *Goldman*, the Court accepted a broad understanding of the military interest:

The considered professional judgment of the Air Force is that traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank.<sup>42</sup>

One could question whether this government interest is genuinely compelling, well-advised, or even legitimate. But it seems clear that the interest at stake does not refer to any single individual case, or to any small number of such cases. No more or less isolated case by itself is likely to have a detectable, let alone a significant, effect on military cohesion, morale, discipline, or any other dimension of military operations. Any such effect appears only after some degree of aggregation of relevantly similar cases has taken place.<sup>43</sup>

We do not, by very loose analogy, penalize sidewalk litterers solely by reference to the minimal environmental effects of their own littering. The relevant interest in a generally appealing environment is hardly impaired by any typical individual instance of littering.<sup>44</sup> In such cases, we instead ask, at least implicitly, what the result would be if everyone, or at least some unspecifiable<sup>45</sup> number of people, acted in a similar way.<sup>46</sup>

The Court recognized a similarly broad-based government interest in denying a religiously based request by plaintiff Edwin Lee for an exemption from the Social Security tax and benefit system.<sup>47</sup> The Court concluded that “[t]he design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system.”<sup>48</sup> Plainly, neither the individual Old Order Amish plaintiff, nor any limited group of persons similarly situated, could threaten the solvency of the Social Security system by their own

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41 See *Goldman*, 475 U.S. at 508–09.

42 *Id.* at 508.

43 See *infra* Part III.

44 See *id.*

45 See *id.*

46 See *id.*

47 *United States v. Lee*, 455 U.S. 252, 257–61 (1982).

48 *Id.* at 258.

nonparticipation. The fiscal health of the system could be threatened only by some more substantial number of nonparticipants.

In declining to validate the plaintiff's claim for exemption,<sup>49</sup> the Court sought to distinguish the school attendance exemption granted in the Old Order Amish case of *Wisconsin v. Yoder*.<sup>50</sup> The Court in *Lee* declared that “[u]nlike the situation presented in *Wisconsin v. Yoder*, it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.”<sup>51</sup>

Whatever one thinks of the merits of this claim, the attention to a wide variety of beliefs is hardly focused on the individual plaintiff, or even on the Old Order Amish as a single group. And this understandable judicial focus on the broad scope of a presumed government interest has been manifested elsewhere as well.<sup>52</sup>

Often, though, the courts are led to reject broad construals of the relevant government interest by their perceptions of bureaucratic inflexibility and by their unjustified concerns for slippery slopes.<sup>53</sup> In these cases, the government's broadly formulated interest is deemed to “echo[ ] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.”<sup>54</sup> The government is thought to not be asking “what if everyone did that?” but claiming that everyone will in fact do that.<sup>55</sup>

Curiously, though, the Court then implicitly legitimized the government's concern for broad, holistic consequences by acknowledging that “there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under [the Religious Freedom Restoration Act (RFRA)].”<sup>56</sup> And even more clearly, the Court may permissibly reject the theory that they “must

49 See *id.* at 259–61.

50 See *supra* notes 15–18 and accompanying text.

51 *Lee*, 455 U.S. at 259–60 (citation omitted).

52 See, e.g., *Webb v. City of Philadelphia*, 562 F.3d 256, 259–61 (3d Cir. 2009) (defining government interest as police department's essential values of “impartiality, religious neutrality, uniformity, and the subordination of personal preference,” in a Title VII religious discrimination case); *Daniels v. City of Arlington*, 246 F.3d 500, 506 (5th Cir. 2001) (finding similarly that “[a] police department cannot be forced to let individual officers add religious symbols to their official uniforms”).

53 See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–36 (2006); *Holt v. Hobbs*, 574 U.S. 352, 368 (2015); *Ackerman v. Washington*, 16 F.4th 170, 187–88 (6th Cir. 2021); *Williams v. Annucci*, 895 F.3d 180, 192 (2d Cir. 2018).

54 *Gonzales*, 546 U.S. at 436; see also *Faver v. Clarke*, 24 F.4th 954, 961 (4th Cir. 2022) (noting the distinction between incremental harms and direct harms to government interests).

55 See *Gonzales*, 546 U.S. at 436.

56 *Id.*

turn a blind eye to the effect of cascading accommodations.”<sup>57</sup> But ignoring “cascading” effects of various sorts is precisely what is implied by narrowing the scope of judicial concern to the consequences of accommodating any single individual claimant, or any small group of such cases.

The reality of broadly conceived government interests in religious liberty cases has been foregrounded by some of the recent vaccination cases raising the possibility of “herd immunity.”<sup>58</sup> The idea of herd immunity is, by its nature, not reducible to the circumstances or effects of a decision by any individual person, or any limited group of persons.<sup>59</sup> In some cases, achieving herd immunity with respect to a disease could conceivably be a compelling governmental interest.<sup>60</sup> And herd immunity would be of no interest as a concept if herd immunity required everyone to follow some rule or practice, with zero or few exceptions.<sup>61</sup>

All of these considerations go to what we might call the public policy value, and the limits thereof, of focusing on the government interests at stake only in the single case at bar, apart from any other cases and contexts. As a matter of legislative history or statutory intent, this narrow focus may be justifiable.<sup>62</sup> And there is a certain logical symmetry in such a narrow focus. Two eminent scholars have argued that “[b]ecause a free-exercise claimant seeks only an exemption at the margin, the court must measure the government’s interest at the margin.”<sup>63</sup>

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57 *Ackerman*, 16 F.4th at 188.

58 *See, e.g., Dr. A. v. Hochul*, 142 S. Ct. 552, 556-57 (2021) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief); *see also We the Patriots USA, Inc. v. Hochul*, 17 F.4th 368, 386-87 (2d Cir. 2021) (per curiam); *Does 1-6 v. Mills*, 16 F.4th 20, 32-33 (1st Cir. 2021); *Dahl v. Bd. of Trustees of WMU*, 15 F.4th 728, 735 (6th Cir. 2021) (per curiam); *Cassell v. Snyders*, 990 F.3d 539, 549 (7th Cir. 2021).

59 For background sources, see *infra* Part III.

60 *See Dr. A.*, 142 S. Ct. at 556 (Gorsuch, J., dissenting from denial of application for injunctive relief).

61 *See, e.g., Does 1-6*, 16 F.4th at 33 (referring to Maine’s relatively high estimated necessity of ninety percent vaccination rates in order to establish herd immunity with respect to the COVID-19 delta variant).

62 For a relatively brief argument to this effect, see *Tucker v. Collier*, 906 F.3d 295, 301-02 (5th Cir. 2018).

63 Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 2020-2021 CATO SUP. CT. REV. 33, 51 (2021). Professors Laycock and Berg clearly recognize, though, the possibility that some requests for religious exemptions, as in some tax cases, may track the strong secular interests of claimants, and thus incentivize a flood of further claimants seeking the same highly attractive exemptions. *See id.* at 52-53. These authors seek to avoid exemption policies that distort choices by either encouraging or discouraging religious profession. *See id.* For an interesting incentive effect analysis in the procedural due process context, see *McKart v. United States*, 395 U.S. 185, 201-02 (1969).



To understand the policy considerations that bear upon the scope of any government interest, though, it is useful to contrast the religious freedom caselaw with the law in other constitutional contexts. The Court's substantially different approach taken in the affirmative action equal protection cases is addressed immediately below.

## II. GOVERNMENT INTEREST AGGREGATION IN OTHER CONSTITUTIONAL CONTEXTS

In the affirmative action cases, it is well established that “[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”<sup>64</sup> This formulation was applied in declaring unconstitutional the quantitatively oriented undergraduate admissions policy at issue in *Gratz v. Bollinger*.<sup>65</sup> *Gratz* declared that “[t]o withstand our strict scrutiny analysis, respondents must demonstrate that the University’s use of race in its current admissions program employs ‘narrowly tailored measures that further compelling governmental interests.’”<sup>66</sup>

In an important sense, the focus of judicial attention in *Gratz* was indeed on the individualized circumstances of each particular applicant for admission. Thus, the Court referred to “the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”<sup>67</sup>

The Court’s most crucial concern, though, was presumably not for any alleged injustice to any particular individual applicant, but for the nature and general consequences of the university’s broad and uniform policy,<sup>68</sup> under which all underrepresented minority group applicants received a fixed number of twenty points credit toward admission.<sup>69</sup> It was in this respect that the university, in the course of its admissions policies and processes, was judicially required to focus on individual applicants, as individuals.<sup>70</sup>

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In *McKart*, Justice Marshall sensibly concluded that acquitting the defendant in the case would not inspire any number of other persons to bypass the possibility of being declared ineligible for the military draft through their administrative appeals. *See id.*

64 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

65 539 U.S. 244, 270–72 (2003).

66 *Id.* at 270 (quoting *Adarand*, 515 U.S. at 227).

67 *Id.* at 271.

68 *See id.* at 271–74.

69 *See id.* at 271.

70 *See id.*

This judicially imposed requirement, however, does not tell us anything about how the Court conceives of and applies strict scrutiny in the affirmative action context. In particular, requiring individualized consideration of each applicant tells us nothing about the narrowness, or breadth, of any public interest in pursuing any affirmative action policy. A university might engage in individualized consideration of applicants for the sake of either a very narrow and particularized, or a broadly conceived and necessarily collective, interest.

The possibility of a broad and collective compelling governmental interest in these affirmative action cases emerges more clearly in *Gratz's* law school companion case of *Grutter v. Bollinger*.<sup>71</sup> The majority in *Grutter* indicated that “strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”<sup>72</sup>

This language could conceivably be read as referring to reasons for denying admission to, specifically, one or more named plaintiffs as individuals. But the much more sensible reading focuses instead on testing the sincerity and importance of the reasons for the broader, overall affirmative action program. The goals and interests underlying the program clearly refer to aggregates, or to overall effects.

In particular, the law school sought “the educational benefits that flow from a diverse student body.”<sup>73</sup> Relatedly, the law school intended to promote cross-racial understanding and undermine racial stereotyping;<sup>74</sup> promote lively class discussion;<sup>75</sup> prepare students for an increasingly diverse workplace;<sup>76</sup> and more fundamentally, to sustain “our political and cultural heritage”<sup>77</sup> and “the fabric of society.”<sup>78</sup>

As a matter of logic and practice, these goals are not significantly advanced, or impaired, by incremental admission decisions at the margin. Admitting, or denying admission to, any single or any few applicants does not meaningfully affect diversity at the Law School, racial understanding or stereotyping, the liveliness of classroom discussions,

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71 539 U.S. 306 (2003).

72 *Id.* at 327; *see id.* at 333.

73 *Id.* at 328 (quoting Brief of Respondents at i, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)). The Court restates and constitutionally validates this formulation. *Id.*; *see also* *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157, 186 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.).

74 *See Grutter*, 539 U.S. at 330.

75 *See id.*

76 *See id.*

77 *Id.* at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

78 *Id.*

preparation for a diverse society, or societal stability and change.<sup>79</sup> These goals, whether deemed compelling or not, are meaningful only as more broadly characterizing the overall law school experience. Any individual admission denial may have only modestly greater effect on the law school's declared policy goals than any individual behavior may have on local air pollution.<sup>80</sup>

Recognizing the breadth of the law school's interests, however, inevitably generates problems with respect to any narrow tailoring inquiry. The law school's interest cannot possibly be in minimal diversity, in whatever respect, merely in the abstract. Even an admitted class of genetic clones would be diverse in some respects, to some degree. What the law school seeks, logically and practically, is "sufficient diversity."<sup>81</sup> If taken seriously, a genuine narrow tailoring inquiry would somehow have to distinguish, with whatever degree of precision is deemed necessary, between insufficient diversity, a vague spectrum of appropriate kinds and degrees of diversity, and supposedly "excess" diversity in the sense of an assertedly unjustified burdening of the rights of objecting parties.<sup>82</sup>

The Court's approach thus requires a showing that the affirmative action elements of the admissions process "not unduly harm members of any racial group."<sup>83</sup> Otherwise put, "[t]o be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"<sup>84</sup> For our purposes, we may set aside all critique of the Court's identification and labeling of "favored"<sup>85</sup> and "burdened"<sup>86</sup> groups.

Unavoidably, though, any inquiry into whether any burden is undue, or "unduly"<sup>87</sup> large in magnitude, as in the narrow tailoring requirement, must involve controversial value judgments and largely intuitive interest balancing by the Court. The metaphor of tailoring, and of narrow tailoring in particular, falsely suggests a process of essentially empirical measurement, as a tailor might measure the tailoring of a suit. Value judgments are instead crucial, and inevitable, in the form

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79 See *supra* notes 74–78 and accompanying text.

80 See *infra* Part III.

81 *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013).

82 See *Grutter*, 539 U.S. at 341.

83 *Id.*

84 *Id.* (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

85 *Id.*

86 *Id.*

87 *Id.*

of some partly inarticulable process of weighing and balancing the interests at stake.

The narrow tailoring inquiry, if taken seriously, thus requires a more or less arbitrary judicial inquiry into the boundary areas separating insufficient diversity from the school's perspective; a range of sufficient but constitutionally legitimate diversity; and an area of constitutionally "excessive" diversity, in the sense of diversity that is thought to somehow unduly burden the constitutional rights of one or more objecting applicants.

Realistically, largely intuitive value judgments must supply the substance that is not provided through any largely empirical or observational process that is suggested by the metaphor of measure and tailoring. And even then, further intuitive value judgments are required. It is said, for example, that a presumably "nonracial"<sup>88</sup> approach to sufficient diversity is to be adopted if such an approach could further the school's interest in diversity "about as well and at tolerable administrative expense."<sup>89</sup> Of course, the idea of working "about as well" is hopelessly vague and contestable.

The problems typically requiring more or less controversial intuitive balancing here are inescapable. Assume first that "racial" and "nonracial" approaches to diversity can be distinguished in some uncontroversial manner. The courts are to then ask what the presumed "best" nonracial approach "could" do.<sup>90</sup> The problem is that the assumed fact that some approach "could" work tells us little about actual probabilities. That a process "could" work does not distinguish, say, a twenty percent chance of working from an eighty percent chance of working. But the difference between probably not working and probably working is of practical significance.

The metaphor of narrow tailoring then requires a further judgment whenever a nonracial approach is deemed to work less well toward the goal of some sufficient diversity than some race-conscious approach, but when the difference in effectiveness of the two approaches is judged to be so limited as to require a non-race-conscious approach.<sup>91</sup> The idea of narrow tailoring cannot possibly tell us how to balance, or trade off, some vague degree of loss of effectiveness in achieving some sufficient degree of diversity against whatever

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88 *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

89 *Fisher v. Univ. of Tex.*, 597 U.S. 365, 377 (2016) (quoting *Fisher*, 570 U.S. at 312).

90 *See Fisher*, 570 U.S. at 312.

91 *See id.*

additional burden is imposed on persons that are presumed not to sufficiently benefit overall by a race-conscious process.

Suppose that a court could somehow determine that some approach to affirmative action would result in roughly ninety percent of some “critical mass”<sup>92</sup> of contributors to diversity. The idea of a “critical mass” of diverse admittees, like the idea of a tipping point,<sup>93</sup> suggests some important discontinuous, not-merely-incremental change at that point. Reaching a figure that is ninety percent of the critical mass, however, may well not provide anything like ninety percent of the overall value obtained by actually reaching a critical mass. And it seems unlikely in the extreme that the proverbial eighty-twenty rule applies,<sup>94</sup> such that enrolling twenty percent of the admittees thought sufficient for a critical mass will result in eighty percent of the diversity benefits that would stem from actually achieving the presumed critical mass.

Finally, this plainly evaluative, hopelessly vague, and readily contestable supposedly nonracial approach to some vague degree of diversity is likely to come at some greater cost to the university than some viable race-conscious alternative approach. Once again, the narrow tailoring test, taken seriously, does not approach anything like a meaningful tailoring or measurement. According to the Court’s narrow tailoring test at this point, the additional administrative expense associated with the supposedly race neutral approach must be “tolerable.”<sup>95</sup> It is difficult to imagine a vaguer standard.

The problem here is the thoroughly valuational, and thoroughly contestable, balancing of interests, inherent in most judgments of the vague “tolerability” to a school, of any increased expense that does not simply swamp the system’s resources. In many educational program contexts, increased expenses may be deemed intolerable, where much greater increased expenses for other programs may be tolerable, and indeed thought to be money well spent. For a federal court to supervise and constrain such judgments on constitutional grounds is, again, largely a matter of contestable, intuitive<sup>96</sup> interest balancing, as distinct

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92 *Gutter v. Bollinger*, 539 U.S. 306, 316–19 (2003) (quoting Joint Appendix at 120–21, *Gutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

93 Drawing upon the work of Thomas Schelling, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002).

94 See, e.g., Carla Tardi, *The 80-20 Rule (aka Pareto Principle): What It Is, How It Works*, INVESTOPEDIA (July 7, 2022), <https://www.investopedia.com/terms/1/80-20-rule.asp> [<https://perma.cc/A786-XYB7>].

95 See *supra* note 89.

96 For a broader investigation, see R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381 (2006).

from the merely pretended empiricism of narrow tailoring, or the application of any legal rule.<sup>97</sup>

Let us then shift the subject-matter focus. The free speech cases, whether applying strict scrutiny or not, often adopt a narrow, individual defendant- or plaintiff-focused approach to assessing the scope of the government interest at stake.<sup>98</sup> But there are also instances<sup>99</sup> in which a free speech case adopts a much broader, aggregative, perhaps nonlinear, discontinuous, or tipping-point-sensitive approach to the government interest at stake.<sup>100</sup> This radical difference in approach can cut across the specific free speech case type or context at issue.<sup>101</sup> Finally, both a narrow and a broader approach to the proper scope of the government interest at stake may be adopted even in the specific same free speech case.<sup>102</sup>

Thus the primary, if not exclusive, government interest in the so-called “true threat” speech cases is, at least in some formal sense, on the well-being of the particular individuals targeted by the threatening speech in question.<sup>103</sup> When the target of the threat is the President, however, it is difficult to separate the harm to the individual person targeted and the nonaggregative harm to the broader national interest.<sup>104</sup> But when the threatened party is even a somewhat less prominent national public figure, the governmental interest may be formulated in more particularized terms. In the latter such true threat cases, the courts may well focus on the victim, and on the presence or absence of “a serious expression of an intent to commit an act of unlawful violence *to a particular individual.*”<sup>105</sup>

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97 For a sense of the mutual reinforcements, compatibilities, and conflicts among university priorities, including goals related to affirmative action and diversity, see R. George Wright, *Campus Speech and the Functions of the University*, 43 J. COLL. & U.L. 1 (2017).

98 See *infra* note 113 and accompanying text.

99 See *infra* note 123 and accompanying text.

100 See *infra* Part III.

101 See *infra* notes 103–29 and accompanying text.

102 See *infra* notes 108–12 and accompanying text.

103 See, e.g., *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (concerning a rhetorical threat against President Lyndon Johnson); *United States v. Dutcher*, 851 F.3d 757 (7th Cir. 2017) (concerning a culpable threat against President Obama).

104 See *Watts*, 394 U.S. at 707 (alluding to a broader public interest).

105 *United States v. Weiss*, No. 20-10283, 2021 WL 6116629, at \*2 (9th Cir. Dec. 27, 2021) (emphasis added) (quoting *United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011)) (concerning a threat against Senator Mitch McConnell); see also *United States v. Fleury*, 20 F.4th 1353, 1364–65 (11th Cir. 2021) (concerning speech classified as addressing “purely private matters,” as opposed to speech on a matter of public interest and concern, with the judicial focus then on the threat to kidnap and kill specifically targeted victims).

Beyond the true threat cases, as in instances of public-school student bullying speech, the courts may focus, at least partially, on the well-being of the directly affected parties. Thus, in one recent school speech case, the court focused narrowly on the speech's fostering "an environment that emboldened the bullies and encouraged others in the invasion of Roe's rights."<sup>106</sup> In that case, the court noted that the disciplined students "were well aware of the effects of [their] conduct on Roe."<sup>107</sup>

The courts are in this respect following the Supreme Court's concern, classically expressed in *Tinker v. Des Moines Independent Community School District*,<sup>108</sup> for the individual rights of particular persons affected by student speech.<sup>109</sup> Of course, *Tinker* is equally concerned with disruption, disturbance, disorder, and indiscipline in the school environment.<sup>110</sup> And it may be difficult, in some cases, to entirely separate individual rights violations from nonaggregative effects on overall school morale.<sup>111</sup> But the judicial concern both for individual rights violations and for educational disruption often focuses, narrowly, on the particular school in question, at a particular place and time.<sup>112</sup>

While the matter is not free from doubt, the cases involving official discipline based on the speech of public employees tend to focus on the interests of the government employer, by itself, as an individual entity, in its own efficiency, orderliness, discipline, and morale.<sup>113</sup> The public employee speech cases, like many other speech categories, do not focus on any distinction between compelling and noncompelling government interests.<sup>114</sup> But the cases implicitly evoke questions as to the narrowness or breadth with which any relevant government interest is to be envisioned.

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106 *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 508 (1st Cir. 2021).

107 *Id.* (emphasis added).

108 393 U.S. 503 (1969).

109 *See id.* at 513; *see also, e.g., M.S. v. Manheim Twp. Sch. Dist.*, 263 A.3d 295, 314 (Pa. 2021).

110 *See Tinker*, 393 U.S. at 513; *see also Hopkinton*, 19 F.4th at 505 ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" (quoting *Morse v. Frederick*, 551 U.S. 393, 403 (2007))).

111 For a discussion linking the victimization of, and effects on, one targeted school teacher with the broader school environment and disruption flowing therefrom, *see, for example, Manheim Twp.*, 263 A.3d at 310–11.

112 *See supra* notes 108–111 and accompanying text.

113 *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Connick v. Myers*, 461 U.S. 138, 150 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

114 As in, for example, the public school student speech cases, discussed *supra* notes 108–12 and accompanying text.

The classical formulation in this public employee speech context has it that “[t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>115</sup>

The Court in *Pickering v. Board of Education* arguably seems to have confined the scope of any relevant government interest to the particular school and school system immediately concerned.<sup>116</sup> The interest balancing is thus limited to the context,<sup>117</sup> and to “the manner, time, and place of the employee’s expression.”<sup>118</sup> The government interest at stake is thus assumed to be “particularized,”<sup>119</sup> rather than reflective of any broader concern for cumulating or other aggregative processes.

In contrast, the historic subversive advocacy cases, unlike the more contemporary *Brandenburg v. Ohio* case,<sup>120</sup> often seem to contemplate a public interest that encompasses a broader range of circumstances and additional speakers. On occasion, the historic subversive advocacy cases do appear to focus on the effects of the particular speech in question. Thus the Court in *Debs v. United States*<sup>121</sup> asked whether “the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service . . . .”<sup>122</sup>

But the early subversive advocacy cases often refer as well to a broadly conceived government interest reflecting the possibility of nonlinear, discontinuous, or disproportionate consequences unpredictably flowing from the possibility of other speakers, motivated in part by prior speech that appears harmless in itself.<sup>123</sup> The Court in *Frohwerk* went some distance in this direction by referring to “the circulation of the paper . . . in quarters where a little breath would be enough to kindle a flame . . . .”<sup>124</sup> More generally, the Court in *Gitlow* refers to the possibility that “[a] single revolutionary spark may kindle

115 *Pickering*, 391 U.S. at 568.

116 *See id.* at 572–73; *see also Garcetti*, 547 U.S. at 417 (discussing *Pickering*).

117 *See Rankin*, 483 U.S. at 388.

118 *Id.*

119 *Connick v. Myers*, 461 U.S. 138, 150 (1983).

120 395 U.S. 444, 447 (1969) (per curiam) (permitting the criminalization of subversive advocacy only where the speech in question is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). The relevant government interest under *Brandenburg* is thus case-specific, or narrowly contextualized.

121 249 U.S. 211 (1919).

122 *Id.* at 216.

123 *See, e.g., Frohwerk v. United States*, 249 U.S. 204, 209 (1919); *Gitlow v. New York*, 268 U.S. 652, 670 (1925); *Dennis v. United States*, 341 U.S. 494, 511 (1951).

124 *Frohwerk*, 249 U.S. at 209.



a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.”<sup>125</sup> More sweepingly yet, and more clearly, the Court in *Dennis* referred to “the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with [some other] countries.”<sup>126</sup> In any event, the metaphor of “smouldering”<sup>127</sup> and then suddenly bursting into flame anticipates in particular the idea of a “tipping point.”<sup>128</sup> There seems to be an awareness not only of unforeseen consequences of the defendant’s own speech, but of the distinctive consequences of speech by other parties.

Overall, then, the free speech cases sometimes recognize a broad governmental interest that is not exhausted by the narrowly conceived circumstances of the case in question.<sup>129</sup> But this is far from a general practice across the range of free speech cases. Taking account of a broader, cumulating, perhaps discontinuous government interest is in contrast more conspicuous in the key cases involving procedural due process,<sup>130</sup> and certainly even more so in the cases addressing the scope of the congressional power to regulate interstate commerce, as in the classic case of *Wickard v. Filburn*<sup>131</sup> and successor cases.<sup>132</sup>

*Wickard* in particular recognizes that individual transactions, or individual failures to transact, do not ordinarily have significant effects on the relevant market, even though competitive markets may be the aggregate result of such individual decisions.<sup>133</sup> Thus the Court in *Wickard* opines “[t]hat appellee’s [Filburn’s] own contribution to the

125 *Gitlow*, 268 U.S. at 669; *see also id.* at 667 (discussing speech “tending to corrupt public morals”).

126 *Dennis*, 341 U.S. at 511.

127 *Gitlow*, 268 U.S. at 669.

128 *See infra* Part III.

129 *See supra* notes 103–27 and accompanying text; *see also* *Williams-Yulee v. Fla. Bar*, 577 U.S. 433, 445 (2015) (recognizing the “vital state interest” in “public confidence in the fairness and integrity of the nation’s elected judges” (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009))); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) (“[T]he [g]overnment’s interest in combating terrorism is an urgent objective of the highest order”); *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992) (referring to the interest in free elections “conducted with integrity and reliability”).

130 *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 680–81 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Bd. of Regents State Colls. v. Roth*, 408 U.S. 564, 587, 591 (1972) (Marshall, J., dissenting).

131 317 U.S. 111, 127–28 (1942).

132 *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 300–01 (1964); *United States v. Lopez*, 514 U.S. 549, 556 (1995); *Gonzales v. Raich*, 545 U.S. 1, 18 (2005); *United States v. Taylor*, 754 F.3d 217, 223 (4th Cir. 2014).

133 *See, e.g.*, Adam Hayes, *Price-Taker*, INVESTOPEDIA (Dec. 28, 2020), [www.investopedia.com/terms/pricetaker.asp](https://www.investopedia.com/terms/pricetaker.asp) [https://perma.cc/5PAT-K9H4].

demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others, is far from trivial.”<sup>134</sup>

The interstate price of wheat was thus recognized as not reducible to the sum of admittedly negligible, or individually trivial, production and purchase decisions.

This judicial understanding of the nature and scope of the relevant government interest is also adopted, if a bit less explicitly, in important procedural due process cases. In particular, the crucial procedural due process case of *Mathews v. Eldridge* looks beyond the costs the government might have to bear in the case of any individual due process claimant. *Eldridge* refers to “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”<sup>135</sup>

While this language could, technically, be construed to refer only to some individual case in isolation, the courts understandably read the scope of the relevant government interest more broadly.<sup>136</sup> The Justices may well disagree over the weight of the aggregated costs in a given context.<sup>137</sup> But they may also be attentive to discontinuous, qualitatively distinct, perhaps unintended effects on government interests of particular procedural due process rules.<sup>138</sup> In the case of *Ingraham v. Wright*, for example, the Court considered the possibility that an expansion of due process hearing rights in public school student corporal punishment cases could eventually lead to the general abandonment of such corporal punishment, solely in light of the newly imposed procedural costs.<sup>139</sup>

### III. THE AGGREGATION OF CASES AND THE FALLACIES OF COMPOSITION

Thus, as we have seen, in some contexts, especially but hardly exclusively those involving religious freedom,<sup>140</sup> the courts tend to consider government interests only insofar as the interests, short or long

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134 *Wickard*, 317 U.S. at 127–28.

135 *Eldridge*, 424 U.S. at 335.

136 *See id.* at 347 (clearly referring to cumulating or aggregative burdens on the government).

137 *See, e.g., Roth*, 408 U.S. at 591 (Marshall, J., dissenting) (arguing for the manageability of an overall administrative burden of briefly explaining adverse employment decisions by government agencies).

138 *See Ingraham v. Wright*, 430 U.S. 651, 680–81 (1977).

139 *Id.*

140 *See supra* Part II.

term, are manifested in or arise from the particular circumstances of the specific case at hand,<sup>141</sup> and not as more broadly conceived across other cases. Let us now consider this phenomenon a bit more deeply.

We might think of this tendency as raising a version of the familiar “level of generality” problem.<sup>142</sup> Here, certainly, the focus would be not on how generally to formulate the relevant liberty or right, but how generally to formulate the relevant government interest or interests. But the need to make value choices as to alternative formulations would clearly remain.<sup>143</sup>

Simply put, the short- or long-term government interest in not accommodating, say, a particular religiously motivated claimant may be quite minimal. But for a variety of reasons, reflecting a number of causal pathways, that government interest may be quantitatively, and indeed qualitatively, quite different when the possibility of other, similar situated religious claimants is taken into account.

One might refer to these complications as, in neutral terms, problems of aggregation.<sup>144</sup> Less neutrally, though, these complications as to the scope of the government interest take one form or another of what is called “the fallacy of composition.”<sup>145</sup> The fallacy of composition can take many forms. But the overall problem can be formulated in these terms:

In the fallacy of composition, a conclusion about a whole, group, or collectivity is reached on the basis of premises about parts of that whole, or the individual members of that group or collectivity. The reasoning goes straightforwardly from the smaller unit to the whole composed of smaller units—from smaller scale to larger scale—or as is often said, from the micro level to the macro level, without the establishment of any appropriate link between the levels.<sup>146</sup>

141 *Id.*

142 *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

143 *See id.* (“[t]he selection of a level of generality necessarily involves value choices”).

144 As clearly recognized in the wheat price aggregation case of *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942). The terminology is adopted in JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 303 (2007) (describing Adam Smith and Karl Marx as both emphasizing “how *externalities* of behavior may aggregate to produce outcomes neither intended nor foreseen by the agent”); IWAO HIROSE, MORAL AGGREGATION (2014).

145 *See, e.g.*, Maurice A. Finocchiaro, *The Fallacy of Composition: Guiding Concepts, Historical Cases, and Research Problems*, 13 J. APPLIED LOGIC 24 (2015); James E. Gough & Mano Daniel, *The Fallacy of Composition*, OSSA CONF. ARCHIVE, Spring 2009; Trudy Govier, *Collective Responsibility and the Fallacies of Composition and Division*, OSSA CONF. ARCHIVE, Spring 2001; William L. Rowe, *The Fallacy of Composition*, 71 MIND 87 (1962).

146 Govier, *supra* note 145, at 3 (emphasis omitted).

On this approach, the whole, or aggregate, may be not merely 'greater' than the sum of its parts, but qualitatively quite different, as famously argued for by the Gestalt psychologists.<sup>147</sup>

Like all fallacies, however, the fallacies of composition mark out risks, or stand as warnings, rather than implying claims of mistaken outcomes in all cases. In some instances, courts may indeed quite reasonably infer some overall property of a category of cases from a property of each of the cases making up the entirety of such cases.<sup>148</sup> It has thus been observed that if one knows that every single cup of punch from the bowl is sour in the same way, or from the same cause, it is fair to conclude that the bowl of punch, overall, or taken as whole, is also sour.<sup>149</sup>

But on many occasions, a fallacy of composition takes hold. If, for example, every grain of sand making up a beach is light in weight, it does not follow that the beach composed entirely of those sand grains must also be light in weight.<sup>150</sup> More interestingly, consider the individually rational but collectively self-defeating behavior seen at football games: "Have you ever seen people jump up at football game to gain a better view? They usually find that, once everybody is standing up,<sup>151</sup> their view has not improved at all."<sup>152</sup> We thus begin to see that whatever the explanatory mechanism, the real overall interests of the government, in religious cases and elsewhere, is not simply the additive sum, or anything remotely like the additive sum, of its interests in the individual cases.

Perhaps the most familiar way in which we raise problems of aggregation and fallacies of composition is to ask of claimant: "What if everyone did that?"<sup>153</sup> The idea is to require the claimant to show that

147 See, for example, the brief account of Gestalt, or holistic, theory by Kendra Cherry, *What Is Gestalt Psychology?*, VERYWELL MIND (Sept. 28, 2022), <https://www.verywellmind.com/what-is-gestalt-psychology-2795808/> [<https://perma.cc/BQU5-CC3W>]. Relatedly, see Henry Jackman, *Meaning Holism*, STAN. ENCYCLOPEDIA PHIL. (2020), <https://plato.stanford.edu/entries/meaning-holism/> [<https://perma.cc/WQ7E-3N72>].

148 See Rowe, *supra* note 145, at 89.

149 See Gough & Daniel, *supra* note 145, at 6 (citing T.E. DAMER, *ATTACKING FAULTY REASONING: A PRACTICAL GUIDE TO FALLACY-FREE ARGUMENTS* 113 (5th ed. 2004)).

150 See Finocchiaro, *supra* note 145, at 27 (on the weights of the numerous parts of a machine).

151 Or, is defensively forced to stand up, impairing the view of spectators behind one, lest one have no view at all.

152 Finocchiaro, *supra* note 145, at 28 (quoting P.A. SAMUELSON & W.D. NORDHAUS *ECONOMICS* (13th ed. 1989)).

153 For a range of critical perspectives on such questions, largely inspired by Kantian universalization, see, for example, BRAD HOOKER, *IDEAL CODE, REAL WORLD* 5 (2000); I DEREK PARFIT, *ON WHAT MATTERS* 311–12 (2011); MARCUS GEORGE SINGER, *GENERALIZATION IN ETHICS* 91–92 (1971); Kent Bach, *When to Ask, "What If Everyone Did That?,"* 37 *PHIL.*

their own circumstances justify an exemption from a widely applicable rule.<sup>154</sup> The challenge to imagine universalizing one's claim discourages free-riding behavior where the harm, short or long-term, to the public interest of any single exploitive act is minimal.<sup>155</sup>

The force of the "what if everyone did that" argument lies in the possibility of cumulative effects of many individual acts.<sup>156</sup> Clearly, though, we cannot always conclude that a claimant should not be legally accommodated because disaster would result if everyone made a similar claim, or engaged in a similar action.<sup>157</sup> In some cases, the disaster of universalizing one's action is morally irrelevant.

Thus for religious reasons, a limited number of persons choose not to have children. If everyone made a similar choice, for religious or nonreligious reasons, the species would quickly become extinct. But this consequence does not establish the immorality of celibacy.<sup>158</sup> If literally no one worked on some common Sabbath day,<sup>159</sup> the result would be disaster. But this hardly establishes the immorality, or the legal wrong, of one's observing a Sabbath.

More dramatically, imagine an individual who decides to engage in five minutes of silent prayer at noon. If this conduct were in fact universalized, or more or less nearly universalized, the results would inevitably be disastrous. Surgical operating room communication would be disrupted. Emergency phone calls would not be made or answered. Emergency vehicles would not be dispatched. But this would not provide any reasonable grounds for declining to accommodate the silent prayer practices of one or some vague limited number of similar claimants.

Recognizing this logic, the "what if everyone did that" question has been amended. It has thus been suggested that "[w]e act wrongly unless we are doing something we could rationally will everyone to do,

& PHENOMENOLOGICAL RES. 464 (1977); Gerald Dworkin, *Non-Neutral Principles*, 71 J. PHIL. 491, 491 (1972). From a behavioral science perspective, see Anne Trafton, "What If Everyone Did That?"—*How We Make Moral Decisions*, SCITECHDAILY (Oct. 4, 2020), <https://scitechdaily.com/what-if-everyone-did-that-how-we-make-moral-decisions/> [<https://perma.cc/2HM2-SLML>].

154 See Dworkin, *supra* note 153, at 491.

155 See Trafton, *supra* note 153, at 1; Singer, *supra* note 153, at 91–92.

156 See Bach, *supra* note 153, at 464. Some harms are essentially cumulative by their very nature. See, e.g., Tom Neltner, *FDA and Industry Continue to Ignore Cumulative Effects of Chemicals in the Diet*, ENV'T DEF. FUND (Sept. 24, 2021), <https://blogs.edf.org/health/2021/09/24/fda-and-industry/> [<https://perma.cc/3RJP-A6DS>].

157 See Bach, *supra* note 153, at 468.

158 See Parfit, *supra* note 153, at 311–12.

159 See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1973) (Seventh Day Adventist unemployment compensation case).

*in similar circumstances, if they can.*"<sup>160</sup> Or, alternatively, that we should instead ask "What would the consequences be if everyone *felt free* to do that?"<sup>161</sup>

However we choose to modify the "what if everyone did that" question, there will remain a variety of problems in assessing relevant government interests that responsible courts must take into account. There are notorious problems of collective action and, in particular, "free rider" problems.<sup>162</sup> The consequences of the acts, whether repeated or not, of any particular free rider may be minimal, if noticeable at all.<sup>163</sup> But if too many people act in their individually preferred way, the overall consequences may dramatically undermine an important public or governmental interest.

Thus, if one or a few people dispose of their trash in the most personally convenient way, the effects on the public interest will likely be minimal. There will be no genuinely compelling government interest in those few acts in themselves, in isolation. But there can be severe problems of aggregation, and in particular, of cumulativeness. If too many persons engage in parallel conduct, the public health may well be jeopardized, and the quality of the environment substantially impaired.<sup>164</sup>

And there may be problems of cumulativeness with regard to various sorts of religious accommodations and exemptions as well. The costs of increasing numbers of cases may sometimes be linear, or even diminishing.<sup>165</sup> But such costs may also be nonlinear,<sup>166</sup> or otherwise not merely incremental, continuous, and readily predictable.<sup>167</sup> Once the number of a particular religious accommodation reaches some

160 Parfit, *supra* note 153, at 311 (emphasis added).

161 Hooker, *supra* note 153, at 5 (emphasis added); see also TIM MULGAN, THE DEMANDS OF CONSEQUENTIALISM 57 n.3 (2001) (quoting Hooker, *supra* note 153, at 51).

162 See, classically, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) ("Freedom in a commons brings ruin to all.") (noting how individually rational acts, for that individual actor, may collectively lead to clearly harmful overall outcomes for all such individual actors) [hereinafter Hardin, *Tragedy of the Commons*]. For a broad and expert brief summary, see Russell Hardin, *The Free Rider Problem*, STAN. ENCYCLOPEDIA PHIL. (2020), <https://plato.stanford.edu/entries/free-rider/> [<https://perma.cc/WAT3-3XF6>] [hereinafter Hardin, *Free Rider Problem*]. More broadly, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

163 See Hardin, *Free Rider Problem*, *supra* note 162.

164 See Hardin, *Tragedy of the Commons*, *supra* note 162, at 1244.

165 For related case contexts, see *supra* Part II.

166 See, e.g., Germa Coenders & Monica Gonzalez, *Nonlinear Effect*, ENCYCLOPEDIA OF QUALITY OF LIFE & WELL-BEING RSCH. (2014). Non-linear effects refer in particular to a "lack of direct proportionality between cause and effect" and to a "discontinuity in the process of change." *Id.* at 4370.

167 See *id.*

perhaps unpredictable level, the public costs of accommodation may become similarly unpredictable, and even exponentially greater.

One alternatively formulated way of looking at this possibility is through the concept of emergence.<sup>168</sup> In general, emergent properties are “macro-level properties that are in some sense both dependent on and autonomous from their underlying micro-level properties.”<sup>169</sup> In our cases, the relevant government interest may reflect the purely arithmetic cumulation of any increasing number of religious accommodations, and in even that limited sense may take on increasing weight and significance, until the interest becomes genuinely compelling. But it is also possible that once a certain number of religious accommodations occur, and are sufficiently publicized, a qualitatively new and more substantial government interest may emerge. This might occur, perhaps through the demand’s going “viral,” or the government’s bumping up against some crucial limitation on its resources.

Beyond the incrementally increasing weight of increasing numbers of demands for accommodation, the government’s interest may alternatively reflect what we might call a “critical mass,” or a “tipping point,”<sup>170</sup> at which the government interest changes in its qualitative character, and becomes not merely marginally greater, but substantially different, and perhaps compelling. One might think of a video that receives minimally increasing numbers of views over some period of time, but then, for whatever perhaps minimal reason, goes viral. Or, in our contexts, as word of some more or less attractive religious accommodation spreads, the more or less sincere demand for such an accommodation increases dramatically, with perhaps nonlinear costs, of unpredictable sorts, to the government’s interests.

In less dramatic cases, there will typically be no distinctive single point at which the government’s interests in the accumulating cases “tip” from being less than compelling to being somehow judged to be genuinely compelling. There is in such cases simply no “tipping

168 See, e.g., Robert Michael Francescotti, 67 ERKENNTNIS 47 (2007); Gough & Daniel, *supra* note 145, at 6 (“an emergent property that pertains to the whole is not decomposable to its individual parts” or to its instances); Jaegwon Kim, *Making Sense of Emergence*, 95 PHIL. STUD. 3, 3 (1999); Timothy O’Connor, *Emergent Properties*, STAN. ENCYCLOPEDIA PHIL. (2020), <https://plato.stanford.edu/entries/properties-emergent> [<https://perma.cc/3NFY-GG8Z>]; Timothy O’Connor, *Emergent Properties*, 31 AM. PHIL. Q. 91, 91 (1994); Elanor Taylor, *An Explication of Emergence*, 172 PHIL. STUD. 653, 654 (2014).

169 Taylor, *supra* note 168, at 654.

170 See, classically, THOMAS C. SCHELLING, MICRO-MOTIVES AND MACROBEHAVIOR 99–102 (2006); see also Daniel B. Klein, Tyler Cowen & Timur Kuran, *Salute to Schelling: Keeping It Human*, 2 ECON. J. WATCH 159 (2005). For a popular reference, see MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 12 (2000) (“[t]he Tipping Point is the moment of critical mass, the threshold, the boiling point”).

point.” But there may still be a qualitative change, worthy of recognition. We might think, by loose analogy, of someone with a reasonably full head of hair, and thus only a minimal interest in any hair-restorative techniques. That person might then lose hairs incrementally over time such that, near the end of that hair-losing process, we think of the person as “bald,” and perhaps having a compelling interest in hair restoration. But there is clearly no single point in the gradual hair-losing process at which the hair-restorational interest “tips” to being compelling. At no point does having  $n-1$  hairs rather than  $n$  hairs mark any significant difference.<sup>171</sup> But this does not, to return to the legal context, excuse the court from somehow determining that the government’s interest extends beyond any individual case and is compelling.

We have already considered such cases in the context of religiously motivated requests for one form of exemption or another from any of a variety of government regulations intended to confront the COVID-19 pandemic.<sup>172</sup> In particular, the idea of “herd immunity” and its value is inherently vague.<sup>173</sup> As inherently and inescapably vague, the broad compelling government interest in reaching herd immunity is, however, simply not susceptible of any more or less precise “narrow tailoring” analysis. Typically, if the broad government interest cannot be formulated with anything like precision, that vagueness will then be reflected in any judicial assessment of whether the regulation at issue is “narrowly” tailored to that vaguely defined broad government interest.

More broadly, this implies that in many instances, the two prongs of strict scrutiny simply cannot be separated. In all such cases, the compelling government interest and the required scope of tailoring will feed back upon and significantly affect one another. If, for example, the required degree of tailoring is made either more or less narrow, rigorous, and demanding, there will typically be a corresponding impact upon the degree to which the compelling, but unavoidably vague, broad government interest will actually be promoted or impeded.

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171 Thus, what is referred to as the Sorites problem, according to which there is no single identifiable point at which a few grains of sand, incrementally increased, become a “heap” of sand. See Dominic Hyde & Diana Raffman, *Sorites Paradox*, STAN. ENCYCLOPEDIA PHIL. (2018), <https://plato.stanford.edu/entries/sorites-paradox> [<https://perma.cc/LWE3-9KGF>]; see also Jason Stanley, *Context, Interest Relativity and the Sorites*, 63 ANALYSIS 269, 269 (2003).

172 See *supra* Part II.

173 See generally Roy Sorenson, *Vagueness*, STAN. ENCYCLOPEDIA PHIL. (2018), <https://plato.stanford.edu/entries/vagueness/> [<https://perma.cc/ZK9V-JLWH>].



Consider, for example, the determination that “[s]temming the spread of COVID-19” qualifies as ‘a compelling interest.’<sup>174</sup> The problem is that ‘stemming the spread’ of a pandemic disease, if not simply a metaphor, is at best vague and ill-defined in crucial respects. We may assume that eradicating, or nearly eradicating, some specified disease or variant thereof could be a compelling government interest, whether realistically possible or not. Reducing the spread of a disease by fifty percent, however measured, could be a compelling government interest as well. Perhaps stemming the spread by twenty-five percent, depending upon the severity of the illness, might count as well. Perhaps making a good faith effort, through public policies, to stem the spread, whatever that means, might also count as compelling important.

Any or all of these understandings might count as compelling government interests, on one scale or another. But the interest in stemming the spread of a disease is thus inescapably vague. And this vagueness ensures that there cannot possibly be any single, determinate, best approach to the question of narrow tailoring or the lack thereof. Some versions of narrow tailoring will allow for greater degrees of progress in slowing, or reducing, the advance of the disease than other versions.

Thus it is often deeply mistaken to say, as is common, that “[n]arrow tailoring requires the government to demonstrate<sup>175</sup> that a policy is the ‘least restrictive means’ of achieving its objective.”<sup>176</sup> The government interest or objective is often neither clear and determinate, nor a simple binary in which the aim is either achieved or not achieved.<sup>177</sup> Even a strategy in winning a war is also, to some degree, attentive to the costs in human lives. Indeed, even “winning a war” is vague.

And in cases in which there are religiously based requests for exemptions from required vaccinations, masking, or social distancing, questions of narrow tailoring must depend on the degree of promotion of the government interest for which we strive, or are willing to settle. What counts as “almost?” Any judicial finding that any rule is

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174 *Kane v. DeBlasio*, 19 F.4th 152, 169 (2d Cir. 2021) (per curiam) (quoting *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020)).

175 Note, merely incidentally, that it is hardly clear what is or is not required for the government to “demonstrate” any complex fact in the first place.

176 *Kane*, 19 F.4th at 169 (quoting *Thomas v. Rev. Bd. of Ind.*, 450 U.S. 707, 718 (1981)).

177 *But cf. id.* (referring merely to “the government’s interest in preventing the spread of COVID-19”). Consider as well the understandable judicial confusion as to the scope of the government interest in regulating tobacco advertising, as noted in Gregoire Webber, *Proportionality and Limitations on Freedom of Speech*, in *THE OXFORD HANDBOOK OF FREEDOM OF SPEECH* 173–92 (Adrienne Stone & Frederick Schauer eds., 2021).

not the “least restrictive means”<sup>178</sup> of somehow promoting some vague interest must inevitably leave some number of religious objectors outside the scope of the requirement, and perhaps thereby incentivize some unpredictable number of additional requests.<sup>179</sup> And it is certainly possible that jurisdictions that choose to impose less religiously burdensome rules may simply be willing to tolerate an indeterminately somewhat less effective pursuit of the compelling government interest in conflict therewith.<sup>180</sup> Such tradeoffs are thus more a matter of politics, justice, and morality than of applying two discrete and distinct stages of a strict scrutiny analysis.

### CONCLUSION

In many cases, the judicial characterization of the scope of the government interests at stake acknowledges those interests only insofar as they are affected, short- or long-term, by the individual case at bar. Typically, this judicial focus is unduly narrow. The underlying explanation for this systematic bias is crucially a matter of a judicial failure to properly account for problems of aggregation, and of the courts’ susceptibility to one form or another of what is known as the fallacy of composition. Failure to address this fallacy also undermines the two-step judicial inquiry into the presence or absence of a compelling government interest and then, supposedly separately and independently, into the presence or absence of sufficiently narrow tailoring of the regulation at issue.

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178 See *Kane*, 19 F.4th at 169 (quoting *Thomas*, 450 U.S. at 718).

179 For an awareness of such possibilities, see *Dr. A. v. Hochul*, 142 S. Ct. 552, 556–57 (2021) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief).

180 This is a possible response to the Court’s approach to narrow tailoring in *Holt v. Hobbs*, 574 U.S. 352, 368 (2015). For additional problems with the Court’s narrow tailoring analysis in religiously based exemption request cases, see R. George Wright, *Free Exercise and the Public Interest After Tandon v. Newsom*, 2021 U. ILL. L. REV. ONLINE 189 (2021).