The Judiciary's Inputs in Constitutional Rights Adjudication

*Mark D. Rosen**

INTRODUCTION

Analyzing a claim that governmental action violates a constitutional right requires up to two analytically distinct determinations. The first is whether the constitutional right reaches the governmental action—what Professor Schauer illuminatingly calls determining the right's *coverage*.[1] If coverage does not extend to the governmental action—as is true of prohibitions on fighting words, obscene material,[2] or two chief executive officers' discussions to fix prices[3]—then the constitutional claim automatically fails.

---

* University Distinguished Professor, IIT Chicago-Kent College of Law. I would like to thank the conference organizers as well as the Loyola University Chicago School of Law.

1. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) [hereinafter Schauer, *The Boundaries*] (distinguishing coverage and protection); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1621 (2015) (discussing the scope of coverage and protection of the First Amendment); *but see* Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law* 1–61 (Harvard Public Law Working Paper No. 16-26, Apr. 26, 2016), https://ssrn.com/abstract=2770774 (providing a critical analysis of the coverage/protection distinction).

2. *See* Miller v. California, 413 U.S. 15, 23–24 (1975) (holding that First Amendment protections do not extend to obscene material).

3. *See* Tushnet, *supra* note 1, at 1–2 (discussing this example).

But even if the right's coverage extends to the government's action, the action is not *per se* unconstitutional. For instance, though the Equal Protection Clause's coverage unquestionably extends to a public school's affirmative action program, not all affirmative action programs are unconstitutional.[4] Professor Schauer calls this second step determining the right's *degree-of-protection*, which is reflected in important part by which legal test a court uses to determine when restrictions of a constitutional right (hereinafter a *right-restriction*) is constitutionally permissible.[5] Strict scrutiny, probably the best known of the doctrinal tests, allows right-restrictions if the government aims to achieve a "compelling governmental interest" by "narrowly tailored" means.[6] Intermediate scrutiny permits right-restrictions to achieve an "important governmental objective" that are pursued in a "substantially related" manner.[7] The Supreme Court has ruled that campaign finance restrictions that limit speech are permissible only to achieve a "sufficiently important interest" in a "closely drawn" way.[8]

Many high-profile constitutional battles concern coverage questions, for example whether the Second Amendment's right to bear arms extends to the use of firearms for purposes of hunting and self-defense.[9] How coverage questions should be decided is a critical issue that rightly has been the subject of extensive scholarly discussion and public debate. But at least as important are the second step degree-of-protection determinations. It is that topic that this Essay explores, more specifically the judicial inputs that are constituent parts of a determination that a right-restriction is constitutionally permissible.

This Essay's inquiry is usefully approached by introducing terminology that does not precisely track legal doctrine. Rather than asking, "what counts as a compelling governmental interest?" or "what qualifies as an important governmental objective?," this Essay undertakes a more general inquiry that applies to all heightened scrutiny tests. But before introducing that general inquiry, some traditional doctrinal analysis is necessary.

---

4. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

5. Schauer, *The Boundaries*, *supra* note 1, at 1769.

6. *See, e.g.*, *Grutter*, 539 U.S. at 326 (applying strict scrutiny analysis to the use of race in college admissions).

7. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (analyzing gender classification statutes using this formulation, which is now referred to as intermediate scrutiny).

8. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1442 (2014) (invalidating as unconstitutional aggregate contribution limits to federal campaigns).

9. *See* District of Columbia v. Heller, 554 U.S. 570, 594 (2008) (holding that the Second Amendment guarantees an individual's right to possess a firearm unconnected with service in a militia and to use that arm for self defense and other traditionally lawful purposes).

Strict scrutiny, intermediate scrutiny, and the doctrine applicable to campaign finance regulations are all two-prong means-end scrutiny tests. The demand that there be a "compelling governmental interest," an "important governmental interest," or a "sufficiently important interest" requires courts to determine what end the regulation attempts to accomplish. "Narrowly tailored," "substantially related," and "closely drawn" are "means" requirements that are performed in relation to the conclusion reached in the "ends" prong. For example, strict scrutiny's "means" prong requires a court to ask whether governmental action is "narrowly tailored" in relation to achieving the end that qualifies as a "compelling governmental interest." A broader array of qualifying "ends" accordingly will sustain a broader set of "means."

So, the "ends" and "means" prongs are not analytically distinct. The "ends" prong plays dual doctrinal duties, insofar as the "means" prong's analysis *depends on* conclusions reached in the "ends" prong. The heavy work played by each doctrine's "ends" prong is the justification for this Essay's focus on the "ends" prong.[10] Because these heightened scrutiny tests share a common two-part structure, we can generate a single investigative question that applies to all of them. As regards each doctrine's "ends" prong, how is a court to determine what qualifies as a sufficiently important policy that justifies a governmental restriction of a constitutional right? In short, how is a court to answer the "Sufficiency Question"?[11]

I. THE INADEQUACY OF WORD-FOCUSED ANALYSIS

The Sufficiency Question is not answered by attentively considering the implications of each doctrine's particular verbal formulation. Though strict scrutiny's "compelling governmental interest" formulation suggests there must be a more significant interest than intermediate scrutiny's "important government objective," comparisons of this sort rarely help answer whether a particular policy satisfies the Sufficiency Question.[12]

10. This Essay's focus on the ends-prong should not be misunderstood as suggesting that the judicial role regarding the means-prong is inconsequential.

11. I first introduced this terminology a few years ago. *See* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015). This Essay builds on that Article's analysis.

12. Rarely, though not never. Such comparisons would be helpful in the event that governmental restriction ("R") was upheld in Case 1 against a constitutional rights claim that triggered strict scrutiny, and R thereafter was challenged in Case 2 as violating another constitutional right that triggered only intermediate scrutiny. The determination in Case 1 that R advanced a compelling governmental interest would lead to an *a fortiori* conclusion in Case 2 that intermediate scrutiny's ends prong also was satisfied. Even so, the Sufficiency Question remains

Nor do excavations of the semantic contents of the words "compelling," "important," or "sufficiently important" provide answers. For example, because affirmative action programs are subject to strict scrutiny, a public school's affirmative action program is constitutionally permissible only if it aims to advance a "compelling governmental interest."[13] A majority of the United States Supreme Court Justices has concluded that diversity in higher education qualifies as a "compelling governmental interest," but that increasing the number of persons who will work in underserved communities does not.[14] And four Justices think diversity in high schools is *not* a compelling governmental interest.[15] Regardless of how one thinks these questions should be answered, everyone can agree that determining whether any of these three goals satisfies strict scrutiny's "ends" prong does not turn on the semantic content of "compelling."

A common way of describing the judicial role in answering the Sufficiency Question is to say judges are *interpreting* the crucial doctrinal words of "compelling" and "important." But this is not an illuminating description of a judge's decision-making process because the text-based activity of "interpretation" does not meaningfully capture the thought process that comprises the determination that diversity in secondary schools is, or is not, sufficiently important to permit affirmative action. Likewise, consider the Justices' disagreement in *Citizens United v. Federal Election Commission* as to whether preventing quid pro quo corruption is the only permissible ground for restricting campaign finance contributions. Five Justices thought so, while four Justices thought rights-restrictions were justifiable to protect the integrity of the electoral process.[16] The Justices' divergent views are not meaningfully described as a dispute as to how the phrase "sufficient government interest" should be interpreted.

To be sure, the *Citizen United* holding can be labeled a determination that only preventing quid pro quo corruption qualifies as a "sufficient government interest." But that does not mean the activity of *interpreting* "sufficient government interest" led to that conclusion. And it is the methodological question of *how* courts conclude whether a given policy

---

in full force vis-à-vis the first court's determination.

13. And the public school's affirmative action program, per the means-prong, must do so in a narrowly tailored fashion.

14. *See* Grutter v. Bollinger, 539 U.S. 306, 324–30 (analyzing Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

15. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

16. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 334 (2010); *see* Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 444–52 (2012) (discussing Republican Legitimacy's superiority to corruption in understanding *Citizens United*).

satisfies the Sufficiency Question that is being probed here.

II. SMOKE-OUT AND TRADE-OFF

So if interpreting the words "compelling" and "important" is not the activity by which courts answer the Sufficiency Question, what is? Though the Supreme Court has decided scores of cases in which it has been called upon to decide whether a particular policy satisfied the Sufficiency Question, the Court has provided precious little guidance as to *how* it comes to its determination.

Perhaps the best known explanation can be found in *City of Richmond v. J.A. Croson*, *Co.*, where Justice O'Connor explained that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[17] But Justice O'Connor's description is inadequate as a methodological explanation of how courts answer the Sufficiency Question, for how does the importance of a policy assure that race is not being used illegitimately? *Croson* not only neglects to answer this question, but there is no apparent answer to it because there is no necessary connection between the importance of a governmental goal and the illegitimate use of race. This is the case because the two are not mutually exclusive. Pursuing a magnificently important objective does not guarantee that the government has not *also* used race in an illegitimate fashion. Accordingly, *Croson*'s smoke-out rationale does not provide any guidance as to what qualifies as a "goal important enough" to permit racial classifications.[18] And this conclusion is generalizable beyond strict scrutiny: the smoke-out rationale does not help answer the Sufficiency Question.[19]

A more promising approach to understanding how courts answer the Sufficiency Question is found in Justice O'Connor's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[20] *Casey* famously retained the holding in *Roe v. Wade* that women have a constitutionally protected liberty interest to terminate their pregnancies,[21] but substituted the *sui generis* undue burden standard for *Roe*'s strict

17. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

18. Another implication is that where race is used illegitimately, the government policy should be deemed unconstitutional, regardless of how important the policy may be.

19. This is not to suggest that constitutional doctrine never functions to smoke-out illegitimacy, but only that illegitimacy cannot be ascertained by analyzing how important a governmental objective is. For this reason, the smoke-out rationale does not assist in answering the Sufficiency Question.

20. 505 U.S. 833, 843 (1992).

21. *Id.* at 878.

scrutiny test.[22] Even under a strict scrutiny test, Justice O'Connor rightly observed that a woman's constitutional right was not absolute, but could be restricted to advance the State's "important and legitimate interest in protecting the potentiality of human life."[23] Nonetheless, the plurality in *Casey* thought that in practice, *Roe*'s strict scrutiny test "undervalue[d] the State's interest in potential life . . . ."[24] *Casey*'s plurality thought the undue burden standard was the "appropriate means of reconciling the State's interest . . . in protecting fetal life . . . with the woman's constitutionally protected liberty."[25]

Though *Casey*'s plurality aimed to justify its shift from one legal test to another, its explanation illuminates how legal tests actually operate, and in so doing aids this Essay's methodological inquiry. Rather than treating legal tests as being aimed at resolving the binary question of whether the government was or was not pursuing an illegitimate end, *Casey* understands that legal tests can serve as tools for dealing with the conflicts that arise when society holds multiple legitimate commitments. To illustrate, there is a strong societal commitment (let's call it "C^1") to a woman's liberty to choose whether to carry the fetus to term or abort; indeed, C^1 is so important it rises to the level of a *constitutional* interest. But there are other legitimate societal commitments as well, such as protecting the potentiality of human life (let's call that "C^2"). What happens when these two commitments come into conflict?[26]

Roe's strict scrutiny test permitted restrictions on C^1 for the purpose of advancing C^2.[27] It is worth unpacking what this means: even strict scrutiny permits trade-offs of a constitutional interest for the purpose of achieving a sub-constitutional interest. The problem with strict scrutiny in the abortion context, in the view of *Casey*'s plurality, was it did not allow *enough* trade-offs of the constitutional interest for purposes of advancing the sub-constitutional interest of C^2.

To the extent that intermediate scrutiny's "ends" prong is more easily

22. *Id.* at 953.

23. *Id.* at 871 (citing Roe v. Wade, 410 U.S. 113, 162 (1973)).

24. *Id.* at 875.

25. *Id.* at 876.

26. For an argument against the proposition that there cannot be conflicts between these commitments, see Rosen, *supra* note 11, at 1543–60.

27. *See Casey*, 505 U.S. at 869–71 (emphasizing the importance of adhering to the *Roe* holding and drawing the line of compelling interests at viability, noting that a woman's right to terminate her pregnancy before viability is central to *Roe*); *Roe*, 410 U.S. at 163 (holding that the State's important and legitimate interest in the health of a pregnant woman is at the end of the first trimester, based on established medical fact which finds mortality in abortion to be less than mortality in normal childbirth up to the end of the first trimester).

satisfied than strict scrutiny's, intermediate scrutiny allows the constitutional commitment with which it is associated[28] to be traded-off for the sake of achieving a broader set of competing commitments. For that reason, there might be great significance as to which legal test the Supreme Court associates with a given constitutional right.[29] The expression "the Sufficiency Question" is not intended to erase such differences between the different legal tests' "ends" prongs, but rather is used to clarify that all "ends" tests share characteristics that raise the same methodological challenge. To be precise, the tests permit constitutional commitments to be traded-off against competing commitments of a constitutional, and sometimes even sub-constitutional, dimension. Therefore, all "ends" prongs implicate the same question of how courts are to determine which competing commitments are sufficiently important to allow a trade-off with a constitutional commitment.

It is worthwhile to delve into the relationship between the paradigms of smoke-out and trading-off. To begin, smoking-out illegitimacy is very different from trading-off competing legitimate commitments. Smoke-out is a binary inquiry that aims to uncover an illegitimacy. If illegitimacy is found, the governmental action is unconstitutional. By contrast, deciding when, and to what degree, there might be trade-offs between two commitments when they come into conflict is a non-binary, qualitative determination that turns on the relative importance of the competing interests. So it would be a mistake to treat trading-off as a subset of smoking-out.[30] These descriptions are conceptually distinct, and smoking-out does not fairly capture the thought process involved in trading-off between multiple legitimate commitments.

It might be objected that this Essay's claim that trade-off is non-binary misdescribes how heightened scrutiny tests actually operate. For example, because a high school's affirmative action program is subject to strict scrutiny, the doctrinal question before the Supreme Court in *Parents Involved in Community Schools* ("*PICS*") *v. Seattle School District No. 1*

28. Or, to be more precise, with the context in which the right is operating. For example, regulations of speech frequently, though not always, are subject to strict scrutiny. *Compare* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015) (applying strict scrutiny to a regulation challenged under the free speech clause), *with* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (applying less than strict scrutiny to commercial speech challenged under the free speech clause).

29. I say "might be" because the Court's application of the legal tests has not been uniform. Insofar as the Court sometimes applies strict scrutiny in a highly forgiving manner, the distinction between the different levels of scrutiny becomes uncertain, and the importance of which specific test applies becomes less certain.

30. To reiterate, I do not claim that doctrine never functions in a smoke-out capacity, but that smoke-out does not exhaust the roles doctrine plays. *See supra* note 19 and accompanying text.

was whether diversity in secondary schools is a compelling governmental interest.[31] This is a binary question, continues the objection, insofar as its answer is either yes or no.

But this objection conflates conclusions—the binary "yes'" or "no" answer—with the reasoning process that generates the conclusions. It is the latter that is of interest to this Essay. Accordingly, the relevant question for present purposes is whether four Justices' conclusion that diversity in secondary schools is not a compelling governmental interest[32] resulted from a binary analysis that aimed to identify a flat-out illegitimacy, or from a non-binary qualitative assessment that took account of the relative significance of competing societal commitments.

On the one hand, it seems difficult to describe the plurality's conclusion in *PICS* as emerging from binary analysis, insofar as diversity in the closely related context of higher education is not only legitimate, but qualifies as a "compelling governmental interest." It would be odd if a relatively subtle contextual shift—from university to high school—transformed a compelling governmental interest into a flatly illegitimate one. It is more plausible that the contextual shift altered the valence of each permissible commitment, thereby altering the normatively-appropriate reconciliation. Consider as well *Citizen United*'s conclusion that preserving the legitimacy of the electoral system does not satisfy heightened scrutiny's "ends" requirement.[33] It is difficult to claim that the goal of preserving the legitimacy of our electoral system constitutes an illegitimate governmental purpose. It is more natural to say that *Citizens United*'s majority did not think any goal, apart from preventing quid pro quo corruption,[34] was sufficiently important to justify a restriction on political speech. These characterizations of *PICS* and *Citizens United* fit the paradigm of trading-off's qualitative analysis, not smoke-out's binary approach.

On the other hand, perhaps binary smoke-out really does describe the reasoning process of the *PICS* plurality. On this view, these Justices believed that affirmative action indeed is *per se* illegitimate—end of story.[35] The *PICS* plurality treated diversity in higher education as a

31. Parents Involved in Cmty. Schools ("PICS") v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 722 (2007) (plurality opinion).

32. *See id.* at 747.

33. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010).

34. *See id.* (noting that campaign contribution limits, unlike limits on independent expenditures, are an accepted means to prevent quid pro quo corruption) (referencing and overruling *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136–38, 138 n.40).

35. *See PICS*, 551 U.S. at 765 (plurality opinion).

compelling governmental interest only because of stare decisis—that is, only because an earlier Supreme Court decision had so held.[36] On this view, the *PICS* plurality deployed a binary smoke-out methodology to narrow the scope of precedent it was unable—or unwilling—to fully overturn.

But while binary smoke-out may describe the thought process of some of the Justices comprising the *PICS* plurality, smoke-out does not seem to generalize to all, or even most, applications of heightened scrutiny. For example, did the *Citizens United* majority *really* think that campaign finance regulations to prevent quid pro quo corruption also should be unconstitutional? And even if some or all did,[37] do these Justices *really* think all speech restrictions are unconstitutional? If the answer to either of these questions is "no"—as seems likely—then even the Justices constituting the *PICS* plurality find some government policies are sufficiently important to allow right-restrictions. And this would mean that binary smoke-out is not generalizable even for the Justices who joined the *PICS* plurality.[38] Rather, something like *Casey*'s non-binary trading-off paradigm describes some sub-domain of heightened scrutiny's "ends"-prong analysis. And though I will not be able to prove it here, trading-off likely is a substantial, if not the dominant, sub-domain.

Finally, it is worth noting that the trade-off paradigm sheds critical light on an aspect of Professor Schauer's framework. Though Professor Schauer's two-step approach is analytically correct,[39] the locution *degree-of-protection* might be misleading in two related respects. First,

36. That earlier decision was *Grutter v. Bollinger*, 539 U.S. 306 (2003). *See PICS*, 551 U.S. at 722 (noting this).

37. Smoke-out might accurately describe the late Justice Scalia's approach to racial classifications, and perhaps Justice Thomas's as well. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524 (1989) (Scalia, J., dissenting) ("In my view there is only one circumstance in which the States may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.").

38. It might be objected that the individual Justice's intent does not matter. After all, following *Citizens United*, one governmental end is sufficient to allow campaign finance restrictions, regardless of whether one or several Justices might think it should be otherwise. This objection is illuminating, though ultimately it does not fully deliver as an objection. It is illuminating insofar as it makes clear that there are two possible ways we might try to make sense of answers to the Sufficiency Question. This Essay's approach is to seek an *explanation* of how a decision maker goes about answering it. The objection makes clear that we also might seek to provide a *rational reconstruction* of the answers that constitute the case law's black letter law—that is to say, the most plausible rationalization of the pattern that emerges from the case law, which is not tethered to the subjective intent of those who provided the answers. While that is true—and is why the objection is illuminating—the objection ultimately fails because there is no reason to believe that rational reconstruction is the only useful inquiry. Rather, explanation and rational reconstruction are different inquiries, and explanation is both interesting and important.

39. That is, Professor Schauer's two-step approach is correct, at least as a descriptive matter. It is an interesting question as to whether there should be a first-step coverage determination.

it seems to mischaracterize the decision-making process. Electing to allow some trade-offs between a constitutional commitment and other societal commitments is not so much a determination of what *degree-of-protection* to give the right, as much as a decision as to how multiple societal commitments are to be reconciled when they come into conflict. Second, the locution *degree-of-protection* might frame the process of answering the Sufficiency Question in a manner that gives excessive consideration to the constitutional commitment. When asked how much protection is to be given to a single good, one might be inclined to assume more is always better. The trade-off paradigm, by contrast, more readily retains awareness that multiple commitments must be accommodated. In law, as in life, seldom is there a free lunch. More of one commitment frequently comes at the expense of others.

III. OUR (SLIGHTLY) REFORMULATED AND (SUBSTANTIALLY) REINVIGORATED QUERY

So let us return to a more-refined formulation of the question with which this Essay began: How do judges determine what qualifies as a sufficiently important governmental interest such that a trade-off can be made with a constitutionally protected interest? Or, in this Essay's short-hand, how do judges answer the Sufficiency Question?

Beyond what has already been canvassed here regarding *Croson* and *Casey*, the Supreme Court has not provided sustained attention to the methodological question of how judges answer the Sufficiency Question. Nor have scholars yet jumped in to fill the explanatory void.[40] Though not all explanatory voids are troublesome, this one is. Three considerations make it important to have an answer as to how courts answer the Sufficiency Question. The first is the Sufficiency Question's ubiquity under contemporary doctrine by virtue of the fact that, as discussed in relation to *Roe* and *Casey*, the countervailing commitment that is sufficiently important to permit trading-off a commitment of constitutional dimension need not itself rise to the level of a constitutional interest.[41] If it were otherwise—if a constitutional interest only could be traded-off against a competing constitutional interest with which it came into conflict—then the Sufficiency Question would arise far less frequently. Second, there are compelling normative reasons for contemporary doctrine's allowance of trade-offs of constitutional

40. An intervention by me a few years ago is all there is. *See* Rosen, *supra* note 11, at 1596–1603.

41. *See supra* Part II (noting the Court's sparse guidance as regards answering the Sufficiency Question).

interests for sub-constitutional ends. Our normative sensibilities are too complex to be adequately captured by a simple rule that would authorize constitutional rights to categorically trump all competing sub-constitutional.[42] Third, our normative sensibilities also are too complex to be adequately captured by a simple rule that would give trumping authority to one constitutional right as against all other competing constitutional interests.[43]

In short, the Sufficiency Question not only is, but should be, ubiquitous. It therefore is advisable to develop an account of how the Sufficiency Question is properly answered.

IV. DEFERENCE AND GO-IT-ALONE

Though the Court has not provided a sustained explanation of how it goes about answering the Sufficiency Question, two distinct approaches can be discerned in the case law. The first, exemplified by the majority in *Grutter v. Bollinger*, is for judges to substantially defer to the judgments of non-judicial institutions.[44] The *Grutter* Court deferred heavily to the non-judicial institution—a public law school[45]—that had acted so as to restrict the constitutional right, and to the non-governmental entities—including retired officers and civilian leaders of the military and "major American businesses" like General Motors and 3M—that had submitted amici briefs testifying to the importance of diversity.[46] The second approach, found in the *Citizens United* majority opinion, might be dubbed as "go-it-alone" because the Court paid no heed to the views of other institutions. The fact that multiple Congresses spanning more than a century thought that protecting the democratic process was important enough to require campaign finance regulation did not figure at all when

42. *See* Rosen, *supra* note 11, at 1554–60 (providing extensive explanation of this point).

43. *Id.* at 1555–60. For an extensive argument that constitutional rights can come into conflict, see Mark D. Rosen, *Two Ways of Conceptualizing the Relationship Between Equality and Religious Freedom*, 4 J.L., RELIGION & ST. 117 (2016).

44. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (holding that the University of Michigan's law school admission program did not violate Equal Protection).

45. *See id.* ("The Law School's educational judgment that . . . diversity is essential to its education mission is one to which we defer" in deciding that "in the context of higher education, [there is] a compelling state interest in student body diversity."); *see also* PICS v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 845 (2007) (Breyer, J., dissenting) ("If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as how best to include people of all races in one America.").

46. *See Grutter*, 539 U.S. at 330–31 (citing to 3M's and General Motor Corp.'s briefs as amici curiae, which both took the stance that skills necessary in the current worldwide marketplace can only be developed through exposure to diverse cultures, people, and ideas).

the majority went about answering the Sufficiency Question.[47]

At first glance, the first approach's deference to other institutions might seem surprising, and wrong. After all, if rights are judicially enforced restrictions on democratic majorities to protect minorities, why should the Court take account of the majority's views, as expressed in non-judicial institutions, as to what satisfies the Sufficiency Question?

But this objection to the first approach rests on an incomplete appreciation of how rights operate. Disregarding the views of non-judicial institutions would be sensible if rights operated solely as checks on majoritarianism. But rights play other roles. For instance, they also serve as signifiers of particularly important societal commitments that guide the manner in which those commitments (*viz.* rights) are to be reconciled with competing societal commitments. This second role played by rights is well-captured in *Casey*'s trade-off paradigm. Because rights also operate in this second capacity, the majoritarian-check narrative is incomplete.

Insofar as rights operate consistently with the trade-off paradigm, four interlocking reasons give rise to the conclusion that judges should presumptively take account of other societal institutions' views as to what satisfies the Sufficiency Question. First, generating the non-binary, qualitative answers to the Sufficiency Question does not call upon the special professional competencies that belong to judges and lawyers. Second, and conversely, non-judicial institutions may have superior access to, or the ability to appreciate, information and considerations that bear on answering the Sufficiency Question.[48] Third, because the Sufficiency Question serves as a situs for fleshing out how society reconciles its multiple competing commitments, answering the Sufficiency Question is a deeply subjective process that simultaneously reflects and constructs the country's political identity. Fourth, and finally, insofar as answering the Sufficiency Question is both identity-reflecting and identity-constructing, the principle of democratic self-governance demands the participation of institutions beyond the judiciary. These four considerations explain why *Grutter*'s attentiveness to non-judicial institutions' views concerning diversity's significance

47. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357–62 (2010); *see also* Rosen, *supra* note 11, at 1605–11 (critiquing the *Citizens United* majority opinion on this ground).

48. For example, as regards campaign finance, "members of the elected branches are better situated than courts to understand the dynamics, and pathologies, of money in politics." Rosen, *supra* note 11, at 1609; *see generally* David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 61 L. & CONTEMP. PROBS. 63 (2000) (considering respects in which the President may have superior access to information that is important to rendering certain constitutional decisions).

was not misplaced.

V. IMPORTANT REMAINING QUESTIONS

But how much deference do judges owe other institutions' views as to what does and does not satisfy the Sufficiency Question? Though I cannot fully answer this important and difficult question here, several preliminary observations are possible. Judges should (1) *presumptively* (2) *take account of* other societal institutions' views. The presumption might be rebutted if there is reason to suspect the institution's decision making. *Take account of* is deliberately open-ended insofar as it does not specify the degree of deference. And there is no reason to think courts should defer equally to all institutions. To the contrary, institutional differentiation seems sensible: a large public university's input could conceivably be treated differently than that of a school board. Likewise, non-governmental organizations' input might merit different deference than that of governmental institutions.

The above comments raise many important issues that I have not answered here. Determining if an institution's decision-making is suspect requires a baseline for measuring trustworthiness.[49] Are there methodologies and considerations that appropriately inform how non-judicial institutions should go about answering the Sufficiency Question? Does the answer vary across institutions? Finally, insofar as deference does not mean blind obedience, what remains of the judicial role in answering the Sufficiency Question?

These are all important questions. But their elucidation must await another day.

49. Relatedly, deciding how much deference is owed may require a measure of deference-worthiness.