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## CORE AND PERIPHERY IN CONSTITUTIONAL LAW

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### ABSTRACT

*This paper embarks on an excursion through a number of the most vital constitutional rights cases, and other contexts as well, and seeks to show that the recurring judicial attempts to distinguish between core and peripheral areas within any given broad constitutional right are unnecessary and distracting. Intriguingly, the case for this conclusion varies significantly depending upon the nature of the general constitutional right in question. But the overall lesson is that courts should abandon their attempts to distinguish between core and peripheral areas of any given broad constitutional right. Courts should instead focus—directly or indirectly—on their best assessment of the purposes underlying, and the resulting scope and limits of, the broad constitutional right in question. Courts have, as well, a variety of alternative means of deciding any specific constitutional case that*

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*do not rely on inevitably vain attempts to distinguish between core and periphery.*

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## INTRODUCTION

Most important constitutional rights are said to have a central core area as well as a less central, or peripheral, area.<sup>1</sup> The distinctions that courts draw between core and peripheral areas of broad constitutional rights may affect the degree to which any specific practice is constitutionally protected.<sup>2</sup> In any event, judicial attempts to distinguish between the core and peripheral areas of constitutional rights seem to be deeply implanted in the law.<sup>3</sup>

As it turns out, though, seeking to distinguish core from periphery in constitutional right contexts runs into a variety of severe, and apparently intractable, problems. The nature of these problems, interestingly, varies with the constitutional provision in question. In the end, attempts to distinguish constitutional core and periphery, at best, merely duplicate the logically prior, and more fundamental, inquiries into the purposes, and thus, the scope and limits, of the broad constitutional right in question.

Thus, in some constitutional contexts, judicial distinctions between core and periphery display undue judicial discretion, lack of constraint on the courts, and sheer judicial arbitrariness.<sup>4</sup> In other areas, courts plainly cannot make up their minds about attempting to make this distinction, due to their concerns over their inability to do so with sufficient neutrality toward the affected parties.<sup>5</sup> In further areas, basic disputes over core and periphery are plainly unresolvable, as are disputes over the value of protecting what are deemed peripheral rights.<sup>6</sup> In yet other areas, the idea of core versus periphery has multiple distinct meanings, with the varied distinctions then being taken in unrelated directions.<sup>7</sup> Elsewhere, the potential value of the core-versus-periphery distinction is

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1. For merely one example of this common usage, see Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1497 (2020) (“Courts and scholars often use spatial metaphors like cores and peripheries when trying to draw lines between various levels of protection.”).

2. *See id.*

3. See the various illustrative contexts discussed *infra* Parts I-V.

4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

substantially diminished by a judicial tendency to assimilate almost all significant interests into the core.<sup>8</sup> Or else, the distinction between core and periphery is trivialized by according what might be deemed peripheral rights, perhaps quite justifiably, the same status and protection as core rights.<sup>9</sup>

Ultimately, even at their best, the judicial attempts to distinguish between core and periphery in the various constitutional right contexts needlessly echo the more fundamental debates that take place over the purposes, and thus over the scope and limits, of the constitutional protection of the general kind of right in question.<sup>10</sup> Attempts to distinguish between core and peripheral rights, in whatever constitutional context, are, at best, distracting and unnecessary. These phenomena, and the dubiousness of the enterprise of seeking to distinguish between core and periphery, are documented below. We begin with the Second Amendment case law.

#### I. CORE AND PERIPHERY IN THE SECOND AMENDMENT CASES

The leading Second Amendment precedent, *District of Columbia v. Heller*, relies upon a distinction between the core and the periphery of the broad constitutional right at stake.<sup>11</sup> The *Heller* majority thus refers to “self-defense” as “the *central component* of the right itself.”<sup>12</sup> Otherwise put, *Heller* rejects the view “that individual self-defense is merely a subsidiary interest” of the overall right to keep and bear arms.<sup>13</sup> The Court also refers to this activity as “the *core* lawful purpose”<sup>14</sup> of the Amendment.<sup>15</sup>

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8. See *infra* Part V.

9. See *infra* Part V.

10. See *infra* Parts II-V.

11. 554 U.S. 570 (2008).

12. *Id.* at 599 (emphasis in the original).

13. See *id.* We might note, though, a possible distinction between narrowly individual self-defense and, say, the defense of one’s family against intruders.

14. *Id.* at 630 (emphasis added). And logically, the existence of a core implies the existence of a “periphery.” See William D. Araiza, *Arming the Second Amendment—And Enforcing the Fourteenth*, 74 WASH. & LEE L. REV. 1801, 1841 (2017).

15. See *Heller*, 552 U.S. at 630. *But see* Rogers v. Grewal, 140 S. Ct. 1865, 1865, 1867 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari) (rejecting tiers of constitutional scrutiny by stating that “[t]he Second Amendment provides no hierarchy of ‘core’ and ‘peripheral’ rights”); Sam Zuidema, Note, *Raising Heller: Constitutional Scrutiny in a New Age of Second Amendment Rights*, 2018 U. ILL. L. REV. 813, 826 (2018).

The Court thus distinguishes, on some linear two-dimensional, or else on a three-dimensional spatial, metaphor, between core and periphery. The specific terminology used may vary as among core, essential, or central on the one hand, and something like noncore, nonessential, noncentral, subsidiary, secondary, incidental,<sup>16</sup> or peripheral on the other. But some sort of distinction between core and periphery is clearly intended.

The initial problem is that the core-versus-periphery distinction is used, in the Second Amendment cases and elsewhere, in two separate contexts. Within the protective scope of the broad Second Amendment, some specifiable rights will be recognized, on one ground or another, as core rights. Other rights, within the broad compass of the Second Amendment, will be somehow identified as peripheral rights. But these distinctions, however drawn, are clearly not the same as the distinctions between the core purposes, and the merely peripheral purposes, of recognizing and delimiting the Second Amendment in the first place. The purpose of an amendment, whether core or peripheral, may not match the logic of distinguishing the presumed core and peripheral specific rights recognized under that Amendment.

Thus, *Heller* refers to something like self-defense as the core or central element of the broader right protected by the Second Amendment.<sup>17</sup> And, as well, *Heller* also refers to self-defense as not merely a right, but as the “core lawful *purpose*” of the Amendment.<sup>18</sup> Remarkably, though, *Heller* then also identifies the desire to “prevent the elimination of the militia” as “the purpose” for which the Second Amendment was codified.<sup>19</sup> In both of these passages,

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16. One complication is that a government regulation may impair the core element of a right, but only incidentally, in the sense that the burdening of that core element is not intended by the regulating authority. This is not the same as incidentally burdening a right by restricting only the noncore, or the periphery, of the right in question. For background, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 394 n.82 (2009) and Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

17. *Heller*, 554 U.S. at 599.

18. *Id.* at 630 (emphasis added); see also *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (emphasizing that the central component of the broad right refers to the defense of one’s family and one’s home).

19. *Heller*, 554 U.S. at 599.

the Court appears to refer to the core right, or else to the core purpose, in the singular.<sup>20</sup>

But the Court also refers to the reasons for valuing the broad right, or the purposes of the Second Amendment, if not for its codification, in the plural.<sup>21</sup> Thus, the ‘purpose’ of the Amendment was said to involve not merely the preservation of the militia, but presumably more importantly, self-defense<sup>22</sup> and hunting.<sup>23</sup> *Heller* thus suggests that the purposes underlying a broad constitutional right, and as well the core rights protected by the amendment, may both be plural. Any reference to hunting, though, suggests that not all core rights need also be practically or politically important rights.

The Court in *Heller* does not attend specifically to the problem of how to distinguish core from peripheral Second Amendment rights. In particular, history and the presumed public mind at the time of enactment are generally foregrounded.<sup>24</sup> Greater attention to distinguishing core rights from peripheral rights was thought to be unnecessary, given the Court’s overall approach. Specifically, the Court declined to apply any version of a broad tiered levels of constitutional scrutiny analysis.<sup>25</sup> Had the Court chosen to impose one or more familiar levels of constitutional scrutiny in Second Amendment cases, the need to distinguish more and less central rights might have seemed more pressing.

Instead, the Court emphasized not so much the distinction between core and peripheral rights, as the historical or traditional

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20. *Id.* (referring to “the purpose” of the Second Amendment and not the purposes).

21. *See id.*

22. *See id.* In an alternative formulation that is simultaneously narrower and broader in certain respects, the Court also referred to the elevated status of “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635.

23. *See id.* at 599; *Kolbe v. Hogan*, 849 F.3d 114, 131 (4th Cir. 2017) (en banc); *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms For Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1448 (2009).

24. *See, e.g., Heller*, 554 U.S. at 626-29; *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

25. *See Heller*, 554 U.S. at 628-29. For background on the levels of scrutiny, see generally Tara Leigh Grove, *Tiers of Scrutiny in a Judicial Hierarchy*, 14 GEO. J.L. & PUB. POL’Y 475 (2016); R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 207-08 (2016); and *Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1187, 1190 (9th Cir. 2019) (en banc) (opinion of Fisher, J.).

bounds and limits of the right to keep and bear arms.<sup>26</sup> Thus, the Court was largely unconcerned with degrees of stringency in protecting specific arms-related rights. The Court's focus was instead more crucially on whether a particular activity or circumstance fell, at all, within the scope and compass of the Second Amendment. Otherwise put, *Heller* is more about binary in-or-out determinations than about variable degrees or tiers of protection for particular rights within the scope of the Second Amendment.

Thus, historically, it has often been permissible for governments to prohibit the carrying of concealed weapons, based not on passing some level of constitutional scrutiny, but as simply not within the broad scope of the contemplated right.<sup>27</sup> The Court thus validated the historical prohibition on carrying "dangerous and unusual weapons."<sup>28</sup> Carrying such a weapon would indeed be the literal bearing or carrying an arm, but, if so determined by the courts, simply not at all within the scope and compass of the Second Amendment right. More broadly, the *Heller* Court declared:

[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>29</sup>

The Court's emphasis on the scope and limits of the broad constitutional right reflects the Court's concern for the purposes underlying the constitutional protection of the interests and practices at issue.<sup>30</sup> And, in the particular case of the Second Amendment, the judicial

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26. See *Heller*, 554 U.S. at 626-27; see also *Ezell v. City of Chicago*, 651 F.3d 684, 651.

27. See *Heller*, 554 U.S. at 627.

28. *Id.* at 627. For some complications, see *Kolbe*, 849 F.3d at 135-36.

29. *Heller*, 554 U.S. at 626-27; see also *Mai v. United States*, 952 F.3d 1106, 1113 (9th Cir. 2020) (quoting *Heller*). Mental capacity qualifications, however, are sometimes treated not as issues of the scope and limits of the Amendment, but of core versus peripheral rights. See *Tyler v. Hillsdale City Sheriff's Off.*, 837 F.3d 678, 691 (6th Cir. 2016).

30. See *Heller*, 554 U.S. at 577.

concern for purpose is especially heightened by the unusual express prefatory clause that introduces the operative clause.<sup>31</sup>

As we have seen,<sup>32</sup> there is certainly room for reasonable dispute as to the purposes underlying the Second Amendment. The range of this reasonable dispute can then translate into reasonable dispute as to the precise scope and limits of Second Amendment protection. In part, this range of dispute reflects differences in the degree to which courts look to history, tradition, and some sort of original public meaning or intent, as distinct from contemporary policy concerns.<sup>33</sup> So a focus on the partly contested basic purposes underlying the Second Amendment, translated into an understanding of the scope and limits of that Amendment, without further reflection,<sup>34</sup> will unavoidably leave some significant indeterminacy in the case outcomes.

Crucially, though, there has been an epidemic of judicial attempts to supplement, if not entirely bypass, any concern for the purposes of the Second Amendment, and for the scope and limits of the Amendment implied thereby. In particular, many courts have downplayed the significance of any such purpose inquiry. Instead, courts have hastened to emphasize their attempts to distinguish between core and peripheral Second Amendment rights.<sup>35</sup> In this, they have been encouraged by some of the language in *Heller*.<sup>36</sup>

As it turns out, however, this judicial concern for the core and periphery of the Second Amendment, at best, retraces the more fundamental logic of the basic purposes underlying the Amendment. At worst, and unfortunately more commonly, this concern for core and periphery multiplies judicial indeterminacies, and even judicial arbitrariness, in deciding the Second Amendment cases.

In this regard, courts do well when they take seriously the logically prior inquiry into whether a regulation genuinely burdens

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31. *See id.* at 576-77 (quoting the constitutional text of “[a] well regulated Militia being necessary to the security of a free State.”). The Court recognizes, though, that the proper scope of the Amendment may extend beyond the express terms of its preface. *See id.* at 578.

32. *See supra* notes 19-29 and accompanying text.

33. *See supra* notes 25-32 and accompanying text.

34. *See infra* notes 46-47 and accompanying text (discussing the realistic availability or unavailability of sufficient alternative means of fulfilling the Second Amendment’s purposes in any given context).

35. *See infra* note 49.

36. *See supra* notes 13-17 and accompanying text.

an activity that falls within the scope of the purposes underlying the Second Amendment.<sup>37</sup> Courts may thus sensibly ask whether “the restricted activity falls within the scope of the Second Amendment,”<sup>38</sup> or whether the regulation “imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>39</sup>

Some courts, however, then introduce a further unnecessary distraction. Courts have often declared that the regulation in question is unconstitutional if it “amount[s] to a destruction of the Second Amendment right.”<sup>40</sup> The problem here is partly one of ambiguity. No typical regulation, or even combination of regulations, genuinely destroys, in their entirety, any person’s Second Amendment rights. Even a regulation prohibiting all firearms in and outside the home allows for the use of all sorts of other weapons for the defense of self and family.<sup>41</sup>

More plausibly, this inquiry might focus on what a court deems the complete destruction, beyond mere regulation, of some more specific Second Amendment right. But there is, simply, no real difference between these two characterizations. Any significant burdening of a person’s Second Amendment rights can be fairly described as either a complete destruction or prohibition of some narrowly described right, or else as a mere regulation, short of complete destruction, of a somewhat more broadly described right. Thus, a complete prohibition of pistols in the home is either a complete destruction of a Second Amendment right phrased in just those terms, or else a regulation, however severe, of the somewhat broader right to have pistols and other firearms in the home. Either

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37. See, e.g., *White v. Illinois State Police*, 15 F.4th 801, 811 (7th Cir. 2021); *Ezell*, 651 F.3d at 701; *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

38. *White*, 15 F.4th at 811.

39. *Reese*, 627 F.3d at 800.

40. *Duncan v. Bonta*, 19 F.4th 1087, 1106 (9th Cir. 2021) (en banc) (quoting *Young v. Hawaii*, 992 F.3d 765, 784 (9th Cir. 2021) (en banc)). For background, see Zuidema, *supra* note 15, at 831-35.

41. Such a rule would leave open the use of spears, swords, tasers, and knives of all sorts. More creatively, Jimmy Stewart fends off Raymond Burr by the use of flash bulbs in the Alfred Hitchcock classic “Rear Window.” See *REAR WINDOW* (Paramount Pictures 1954). Even more creatively, Jackie Chan has demonstrated that virtually any solid object can be used as an instrument of self-defense. See, e.g., *Jackie Chan Famous Ladder Fight Scene* (First Strike), YOUTUBE (Sept. 18, 2010), [www.youtube.com/watch?v=DRrFzWPEOd4](http://www.youtube.com/watch?v=DRrFzWPEOd4).

description is interchangeable with the other.<sup>42</sup> The judicial hunt for a destruction, as distinct from a partial impairment, of a Second Amendment right is thus pointless.

The courts typically seek to distinguish between supposedly “core” and supposedly “peripheral” Second Amendment rights.<sup>43</sup> Core rights, and peripheral rights as well, presumably fall within the pre-established scope and limits of the Second Amendment, however that scope has been determined. The judicial attempt to distinguish core rights from peripheral rights then results in differing levels, or degrees, of constitutional scrutiny of the regulation at issue.<sup>44</sup>

Assuming that there is an identifiable core and periphery, one might imagine that burdens on core rights would receive something like either strict or exacting scrutiny,<sup>45</sup> and that burdens on merely peripheral rights would receive some form of intermediate scrutiny. And the courts have very occasionally taken that path.<sup>46</sup> Thus, the core versus peripheral status of the particular burdened right would establish the appropriate level of scrutiny.

But in practice, the courts have typically introduced further complications beyond somehow distinguishing between core and periphery. More ambitiously, courts assert their ability to place any burdened right at its proper place along an imagined gradient, or continuum, whether linear or spatial, ranging from the most central rights, through progressively fewer central rights, to the most peripheral Second Amendment rights.<sup>47</sup>

In addition to this remarkable vector-constructing ability, courts typically assert their ability to determine the degree of severity of

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42. For the closely analogous problem in the free speech area, involving ‘absolute’ prohibitions as supposedly contrasted with time, place, and manner restrictions, see R. George Wright, *Time, Place, and Manner Restrictions on Speech*, 40 N. ILL. L. REV. 265 (2020).

43. Among the more recent appellate cases, see, for example, *Duncan*, 19 F.4th at 1103; *White v. Illinois State Police*, 15 F.4th 801, 811 (7th Cir. 2021); *Young*, 992 F.3d at 784; *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *Worman v. Healey*, 922 F.3d 26, 36-38 (1st Cir. 2019); *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 703, 708 (7th Cir. 2011).

44. See cases cited *supra* note 43.

45. See sources cited *supra* note 25.

46. See, e.g., *Ex parte Lee*, 617 S.W.3d 154, 166 (Tex. App. 2020) (citing *Bezet v. United States*, 714 F. App’x 336, 340 (5th Cir. 2017)) (“If a core right is burdened, strict scrutiny applies; less severe regulations on more peripheral rights trigger intermediate scrutiny.”).

47. See cases cited *supra* note 43.

burdening of the right in question.<sup>48</sup> The degree or weight of burdening of the particular right at stake is thus placed on yet a further continuum ranging from destructive or nearly destructive severity, through substantial burdening, through merely modest, minimal, or insignificant burdening.<sup>49</sup>

Thus the courts typically hold that the intensity of typically heightened<sup>50</sup> scrutiny in typical Second Amendment cases will depend on both the degree of proximity of the right to the presumed core of the Amendment, and the degree to which the identified right is burdened.<sup>51</sup> The courts differ, though, on if the burden on core, or core-proximate, rights must be severe, merely substantial, or else somehow disproportionate, before strict scrutiny is deemed appropriate.<sup>52</sup>

There is certainly some logic in attempting to develop this remarkably ambitious adjudicative apparatus. It is unlikely that most particular rights falling within the broad scope of the Second Amendment cluster either very close to the presumed core of that Amendment's protections, or else instead at some remote distance from that presumed core. Courts have thus naturally assumed that some cases will fall between these extremes, and have then credited themselves with the ability to place the cases at some proper point

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48. See cases cited *supra* note 43.

49. See cases cited *supra* note 43.

50. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008); *Duncan v. Bonta*, 19 F.4th 1087, 1103 (9th Cir. 2021); *White v. Ill. State Police*, 15 F.4th 801, 811 (7th Cir. 2021); *Ezell v. City of Chicago*, 651 F.3d 684, 701. In the words of Judge Frank Easterbrook, “[a]ll legislation requires a rational basis; if the Second Amendment imposed only a rational basis requirement it wouldn’t do anything.” *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (emphasis in original).

51. See *supra* note 49 and accompanying text.

52. Compare *Duncan*, 19 F.4th at 1103 (finding that a merely “substantial” burden on a core right suffices for application of strict scrutiny), *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020), and *Heller v. District of Columbia*, 670 F.3d 1244, 1252-53 (D.C. Cir. 2011) (“[O]nly regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment.” (quoting *Nordyke v. King*, 655 F.3d 776, 786 (9th Cir. 2011))), with *Young v. Hawaii*, 992 F.3d 765, 784 (9th Cir. 2021) (finding that a “severe” burden is required for strict scrutiny to be invoked), and *Ezell*, 651 F.3d at 708. It is rare for strict scrutiny to be applied in enumerated constitutional right cases only when the regulatory burden on a presumed core right is deemed severe. For outlier language in the Second Amendment context that would be typical elsewhere, see *Ass’n of N.J. Rifle & Pistol Clubs v. Attorney General*, 910 F.3d 106, 117 (3d Cir. 2018) (“If the core Second Amendment right is burdened, then strict scrutiny applies; otherwise, intermediate scrutiny applies.”).

on a presumed core-periphery continuum.<sup>53</sup> Having made such placement judgments, courts then presume to determine the degree of weightiness of the burden on the right in question.<sup>54</sup> The next additional complication, then, might be to develop a formula that multiplies the degree of centrality of the right by the judicially perceived degree of severity of any burden on the specific right in question.

On some such basis, courts consign the somewhat fewer disturbing cases to some version of intermediate scrutiny review.<sup>55</sup> Second Amendment intermediate scrutiny has been said to require the government interest to be “significant, substantial, or important.”<sup>56</sup> Regulations of even supposedly core Second Amendment rights may evoke only intermediate scrutiny if the burden on that core right is deemed to be “modest.”<sup>57</sup>

The degree of required tailoring is similarly indeterminate. It is often said that there must be a “substantial” relationship between the regulatory goal and the scope of the conduct affected.<sup>58</sup> But the substantial relationship requirement is then often diluted, oddly, to the merely minimum scrutiny requirement of reasonableness, or a “reasonable fit.”<sup>59</sup>

Overall, the core-versus-periphery distinction the Second Amendment context confers a remarkable degree of subjective discretion, and a correspondingly limited degree of constraint, on the courts. Judgments as to core and periphery, near core and near periphery, and certainly placements along that continuum, are largely unconstrained. Comparisons of modern weapons and their popularity with historic weapons are similarly open to judicial discretion. And the “weight” or “severity” of any regulatory burden will typically

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53. *See supra* note 45.

54. *See supra* note 45.

55. *See, e.g., Duncan*, 19 F.4th at 1109; *Worman v. Healey*, 922 F.3d 26, 38 (1st Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017).

56. *Duncan*, 19 F.4th at 1108 (quoting *Mai*, 952 F.3d at 1115).

57. *Worman*, 922 F.3d at 38.

58. *See id.*

59. *See, e.g., Duncan*, 19 F.4th at 1108; *Worman*, 922 F.3d at 38. Compare with the minimum scrutiny rational relationship test as classically articulated in *City of New Orleans v. Duke*, 427 U.S. 2513, 2518 (1976). *See also* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 453, 459-60 (1980).

depend on how the court chooses to characterize the burden in question.<sup>60</sup>

What, then, would be the genuine cost, in terms either of defensible constitutional values or the public safety and security, if the Second Amendment core-versus-periphery distinction, and all its complications, were simply set aside? In truth, much of the necessary adjudicative work can be done, and is more appropriately done, at *Heller*'s initial stage reflecting the presumed purposes, scope, limits, and categorical exclusions of the Amendment as a whole.<sup>61</sup> Many claims can be denied as outside the scope and compass of the Amendment, however determined.<sup>62</sup> Doubtless there will be marginal and therefore difficult cases on any such purpose-driven approach. Further tests, other than core versus periphery, may then be invoked. But the cost of getting a case wrong at the outer boundaries of the Amendment is typically constitutionally minimal.

It is likely that the judicial inquiry into core versus peripheral rights may reflect some considerations already addressed in the prior inquiry into the purposive scope and limits of the Amendment.<sup>63</sup> But in such cases, any judicial concern for core versus peripheral rights, at best, unnecessarily duplicates those prior, more properly focused, purpose and scope inquiries.

Any remaining substantial injustices can be mitigated by asking, as in some First Amendment cases,<sup>64</sup> whether the regulation in question does, or does not, leave the regulated party with adequate alternative means of fulfilling any relevant purpose of the Second Amendment, including personal safety. In fact, some Second Amendment cases have sensibly pursued this line of inquiry.<sup>65</sup> As

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60. For general background, see Laurence H. Tribe & Michael C. Dorf, *Level of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

61. See *supra* notes 26-29 and accompanying text.

62. See *supra* note 29 and accompanying text.

63. See *id.*

64. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (referring to “reasonable alternative avenues” for exercising the right in question). More broadly, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

65. See, e.g., *N.Y. Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 259 (2015) (“No ‘substantial burden’ exists—and hence heightened scrutiny is not triggered—if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.”); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (inquiring “whether law-abiding

long as appropriate alternative means of, say, personal defense remain realistically available to the claimant, no inquiry into core and periphery, and no form of heightened constitutional scrutiny of the regulation in question need be imposed.<sup>66</sup> And if all else fails, there remain balancing tests not relying on any core-versus-periphery distinction.

## II. CORE AND PERIPHERY IN THE FREE EXERCISE AND RELATED CASES

Consider next the distinction between core and periphery in Free Exercise of Religion cases, and under the major religious liberty statutes. The courts and commentators tend to distrust this distinction, while at the same being unable to consistently resist its appeal. Both the distrust of and the attraction toward the core-versus-periphery distinction in the religious context are entirely understandable. But as in other constitutional contexts, the core-versus-periphery distinction turns out to at best perform no indispensable function in the religious freedom cases.

From the standpoint of a metaphorical territorial defense, it is natural to distinguish between something akin to an indispensable citadel and a less essential hinterland. Thus, some have historically envisioned a “natural right of religious freedom ... with a core untouchable by positive law, and a periphery that could be policed and regulated by the legislature in furtherance of the common good.”<sup>67</sup> Distinctions between core and peripheral beliefs or practices may be clearly drawn by the religious entities themselves,<sup>68</sup> and in some cases can be reasonably discerned by the courts.<sup>69</sup>

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citizens retain adequate means of self-defense”).

66. See *supra* note 65.

67. Marc O. DeGirolami, *The Sickness Unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 750, 761 (2019).

68. See, e.g., *Roman Catholic Archbishop v. Bowser*, 531 F. Supp. 3d 22, 26 (D.D.C. 2021); CATECHISM OF THE CATHOLIC CHURCH ¶ 1324, at 334, 369-69 (2019) (“The Eucharist is the ‘source and summit’ of the Christian life.... For in the blessed Eucharist is contained the whole spiritual good of the Church, namely Christ himself, our Pasch.”). Whether Christ and the practice of the Eucharist are at the core or at the periphery of Catholic belief and activity is not a question beyond the competence of judges to answer.

69. See *supra* note 68. For one possible approach to this distinction, see Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 63-64 (2006). See also Marc J. Bloustein, *The “Core”-“Periphery” Dichotomy in First Amendment Free Exercise Clause*

More generically, it has been argued that “[f]orming in groups to serve others is central to religion and therefore to the free exercise of religion; it lies at the core, not the periphery.”<sup>70</sup> In the religious freedom context, identifiable core religious practices will normally also be practically important practices from the standpoint of the religious claimant.<sup>71</sup>

Typically, though, it is said that in the religious freedom context, governments should not attempt to distinguish core and peripheral religious practices.<sup>72</sup> This conclusion reflects the belief that “civil magistrates are not competent to decide which practices are at the ‘core’ of a given religion and which are peripheral.”<sup>73</sup>

Thus, in the Free Exercise context, the Court has declared that “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.”<sup>74</sup> By way of comparison, “[i]t is no more appropriate for judges to determine the ‘centrality’ of religious beliefs ... than it would be for them to determine the ‘importance’ of ideas ... in the free speech field.”<sup>75</sup>

There are similar sentiments abound in the federal statutory religious context as well. In a notable opinion, then-Circuit Judge Neil Gorsuch emphasized the intent of Congress in the Religious Land Use and Rights of Institutionalized Persons Act (RLUIPA) to

*Doctrine*: Goldman v. Weinberger, Bowen v. Roy, and O’Lone v. Estate of Shabazz, 72 CORNELL L. REV. 827, 827 (1987).

70. Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 299 (2013).

71. By contrast, self-defense and hunting for sport may both be thought of as core elements or purposes of the Second Amendment, but the former may be often thought of as significantly more important, in a practical sense, than the latter. For the assumption that core religious practices will be the more important such practices, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 56 (1998).

72. See *id.*; Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 19 (2016); Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 910 (2001).

73. Esbeck, *supra* note 71, at 910.

74. Emp’t Div., Dep’t of Hum. Res. v. Smith, 494 U.S. 872, 887 (1990) (quoting Hernandez v. Comm’r, 490 U.S. 680, 699 (1989)).

75. *Id.* at 886-87. We here set aside the possibility that centrality or “core” status may not always track “importance” in the relevant sense. For references to Smith on this point, see, for example, Williams v. Hansen, 5 F.4th 1129, 1136 (10th Cir. 2021); Watts v. Florida International University, 95 F.3d 1289, 1295 (11th Cir. 2007); Kay v. Bemis, 500 F.3d 1214, 1220 (10th Cir. 2007).

protect religious practices, “whether or not compelled by, or central to a system of religious belief.”<sup>76</sup>

Judge Gorsuch cited not only a lack of judicial expertise<sup>77</sup> but the risk of bias in favor of religious compelled practices.<sup>78</sup> The thought is that different religions may have different ratios of their respective core practices to their periphery practices. Perhaps one religion might, in the extreme, be perceived as all core. Judge Gorsuch might have seen such a judicial perception as producing an unfair bias in favor of the “all-core” religion.<sup>79</sup> One might equally argue, though, that different judicial treatment may indeed be appropriate for all core as distinct from “minimal core” religions, or that these opposing intuitions as to fairness cancel one another out.

And indeed, courts have emphasized that under RLUIPA, religious exercise may be protected regardless of whether that exercise is central to any religious belief system.<sup>80</sup> The statute itself specifies that noncentral or noncore religious practices may indeed be protected.<sup>81</sup> Some of the courts, though, have extended the import of this statutory language.<sup>82</sup> The RLUIPA section involved is agnostic as to the possibility of, or the fairness of judicial inquiry into, the core or peripheral status of a religious practice.<sup>83</sup>

But some courts, oddly, read the “whether or not central” language to, of its own force, prohibit any judicial inquiry into centrality of religious belief.<sup>84</sup> Thus the Ninth Circuit, for example, has announced that “[b]y the plain language of RLUIPA, we are forbidden from evaluating the centrality of a religious practice or

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76. *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (quoting RLUIPA, 42 U.S.C. § 2000cc-5(7)(A)).

77. *See id.*

78. *See id.*

79. *See id.*

80. *See, e.g., Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022); *Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015); *Thai Meditation Ass’n v. City of Mobile*, 980 F.3d 821, 829 (11th Cir. 2020); *Fox v. Washington*, 949 F.3d 270, 276-77 (6th Cir. 2020); *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019); *Fuqua v. Ryan*, 890 F.3d 838, 848-49 (9th Cir. 2018).

81. *See supra* note 80.

82. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005); *Johnson v. Baker*, 23 F.4th 1209, 1214-15 (9th Cir. 2022); *Jones v. Slade*, 23 F.4th 1124, 1143 (9th Cir. 2022); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008).

83. *See Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000*, 42 U.S.C. § 2000cc-5(7)(A).

84. *See supra* note 82.

belief.”<sup>85</sup> Thus debarred, the courts are left only with an occasionally dubious inquiry into the mere sincerity of the professed religious belief.<sup>86</sup>

There can, however, be a certain logic to inquiring into the centrality or peripherality of a religious belief.<sup>87</sup> What understandably motivates such inquiries is the sense that religious freedom claims require a showing that the regulatory burden on religion is substantial, or at the very least, not *de minimis*.<sup>88</sup>

From there, it is sometimes assumed that a genuinely substantial burden on religion must significantly inhibit or constrain conduct or expression that manifests *some central tenet* of a person’s individual religious beliefs; must meaningfully curtail a person’s ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person’s religion.<sup>89</sup>

Determining whether a burden on religious practices should count as substantial may be both essential<sup>90</sup> and unusually complex.<sup>91</sup> Some may equate insubstantial burdens with *de minimis*, or trivial, burdens.<sup>92</sup> What counts as substantial varies according to

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85. *Johnson*, 23 F.4th at 1214-15.

86. *See Cutter*, 544 U.S. at 725 n.13; *Johnson*, 23 F.4th at 1215.

87. *See, e.g.*, *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053 (8th Cir. 2020); *United States v. Ali*, 682 F.3d 705, 709-10 (8th Cir. 2012) (referring to a belief’s fundamentality as perhaps being distinct from its centrality); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008); *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004) (referring as well to fundamentality).

88. *See supra* note 87.

89. *Patel*, 515 F.3d at 813 (quoting *Murphy*, 372 F.3d at 988) (emphasis added). For background and analysis, see D. Bowie Duncan, *Inviting an Impermissible Inquiry? RFRA’s Substantial Burden Requirement and “Centrality,”* 2021 PEPP. L. REV. 1 (2022) (distinguishing religious costs, and the substantiality thereof, from secular costs and the substantiality thereof).

90. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 233 (2014) (“[T]he law does not take account of trifles.”); Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. PA. L. REV. 429 (1927). Whether the *de minimis* principle, in a form more demanding than that of having judicial standing to sue in the first place, should be required in the context of constitutional rights is disputed. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (discussing liberty interest due process); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (*per curiam*).

91. Substantiality seems to have elements of both description and of evaluation. For background, see BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 140-42, 150-52 (1985) (discussing “thick” concepts).

92. *See supra* note 90.

the legal context.<sup>93</sup> And burdens in the religious freedom area may be substantial while at the same time being abstract, ineffable, and in some measure beyond articulate verbal description.

Even where a religious claimant must show a substantial injury, it will typically be possible, as in other constitutional contexts, to bypass any attempted judicial inquiry into core versus peripheral religious practices. Core-versus-periphery inquiries aside, a legally required violation of what the religious claimant takes to be a binding religious commandment will typically be a substantial burden. A legal requirement that would increase one's perceived chances of eternal perdition will normally be a substantial burden, again without inquiring into core and periphery. A legal prohibition of performing on Sundays some activity the claimant believes can be performed on any day of the week will typically not be a substantial burden.<sup>94</sup>

As well, where the question of the substantiality of the burden is close, it is unlikely that inquiring into the core or periphery status of a belief will be of distinctive help, beyond further reflection upon the claimant's sincerity and the circumstances as the claimant sees them.<sup>95</sup> No inquiry can prevent close or difficult cases. And any error in finding or not finding a substantial religious burden is harmless in any case involving a sufficient government interest that is pursued in a sufficiently tailored fashion.<sup>96</sup> Even if the courts could validly and reliably distinguish core from peripheral religious beliefs, there would then still be the problem of nonsubstantial burdens on core beliefs.<sup>97</sup> And finally, no core-versus-periphery test

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93. See R. George Wright, *Substantial Burdens in the Law*, 46 SW. L. REV. 1 (2016).

94. For a more elaborate discussion, see, for example, *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014).

95. See *id.*

96. See *id.* at 56-57.

97. For example, consider that many religious groups encourage, but do not doctrinally require, church attendance on Good Friday. A belief that one should nonetheless attend might well count as a noncore belief. But a legal prohibition against attending church on that day might sensibly be thought to be a substantial burden on someone's religious practices. See ThoughtCo, *Is Good Friday a Holy Day of Obligation?*, LEARN RELIGIONS (June 25, 2019), [www.learnreligions.com/good-Friday-holy-day-obligation](https://www.learnreligions.com/good-Friday-holy-day-obligation) [<https://perma.cc/WH45-XSP6>]. On the other hand, a modest temporary burden on an assumedly core religious practice, including reception of the Eucharist, might not be deemed substantial. For instance, the apparently uncontroversial masking and cleaning requirements involved in *Roman Catholic Archbishop v. Bowser*, 531 F. Supp. 3d 22, 39 (D.D.C. 2021).

can be religiously neutral. Religions themselves may or may not distinguish between core and peripheral beliefs. For some religions, all articulated beliefs may be core beliefs,<sup>98</sup> or more interestingly, some religions may take their beliefs to amount to a network of not merely interwoven, but mutually constitutive, beliefs.

### III. CORE AND PERIPHERY IN THE FREE SPEECH CASES

It is widely believed that the constitutional right to freedom of speech has a core and a periphery. This belief is held by the courts<sup>99</sup> themselves and by the commentators.<sup>100</sup> Thus it is said that “[o]ne of the major features of the landscape of modern First Amendment law is the existence of categories of speech deemed ‘less central’ or peripheral to the values of free speech that are left unprotected or less protected.”<sup>101</sup> Even if we think of speech as in a sense already distinctly protected,<sup>102</sup> the law still “distinguishes between the core zone of protected speech—where safeguards are at their height—

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98. See *Yellowbear*, 741 F.3d at 54.

99. See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (holding that nude dancing “falls only within the outer ambit of the First Amendment’s protection”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (plurality opinion) (regarding “indecent” and “patently offensive references to excretory and sexual organs and activities: [though] some of these references may be protected, they surely lie at the periphery of First Amendment concern”).

100. See, e.g., Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 48 (2012); Clay Calvert, *Iancu v. Brunetti’s Impact on First Amendment Law: Viewpoint Discrimination, Modes of Expression, Proportionality and Profanity*, 43 COLUM. J.L. & ARTS 37, 69 (2019); Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL RTS. J. 657, 695 (2009); Richard Delgado & David Yun, “*The Speech We Hate: First Amendment Totalism, The ACLU, and the Principle of Dialogic Politics*,” 27 ARIZ. ST. L.J. 1281, 1293-94 (1995); Cynthia L. Estlund, *Speech On Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 40 (1990); Mary Fan, *Adversarial Justice’s Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 810 (2014); Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 1049 (2010); James A. Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U.L. REV. 493, 501 (2007). Some speech will include, inseparably or not, both core and peripheral or mixed elements. See, e.g., Carl Willner, Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 962 (1984).

101. Estlund, *supra* note 100, at 40. The assumption is again that the constitutional value of the kind of speech increases as one approaches the core.

102. See Fan, *supra* note 100, at 810.

and the periphery.”<sup>103</sup> And it is then natural to say that “speech that lies at the periphery of constitutional concern may be regulated on a lesser showing of harm than speech that lies at the core.”<sup>104</sup>

Seeking to distinguish core and periphery in free speech contexts, as in other constitutional right contexts,<sup>105</sup> results in substantial conflict and controversy.<sup>106</sup> The obvious first move is to isolate speech that can be classified as relevantly political, and to assign core status to that speech.<sup>107</sup> It is a further step, certainly, to then expand the concern for the political to encompass all public issues,<sup>108</sup> and all “matters of public concern.”<sup>109</sup> Does a concern for “self-government” exhaust the scope of the political?<sup>110</sup> Where should the spending of money on political candidates be placed on any core-versus-periphery axis?<sup>111</sup> Where does private for-profit and other corporate speech on political matters fall on such an axis?<sup>112</sup> Does Nazi Party political speech lie at the core?<sup>113</sup> How about evident hate

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103. *Id.* At least in the free speech context, if not the Second Amendment context, what is thought to be core and what is thought to be peripheral may change over time. See Mark D. Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1961-62 (2000) (citing Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1277 (1992)).

104. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807 (1993); see also Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 22-23 (1992).

105. See, e.g., Lawrence M. Friedman, *Human Rights, Freedom of Expression, and the Rise of the Silver Screen*, 43 HOFSTRA L. REV. 1, 6 (2014).

106. See *supra* note 104.

107. See, e.g., Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment*, 1998 WIS. L. REV. 905, 925 (1998) (citing William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1638-48 (1996)) (contrasting “political” with “indecent” speech as supposedly distinct categories); Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1, 23 (2000) (referring to the work of Professor Alexander Meiklejohn); Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 549 (2018).

108. See Estlund, *supra* note 100, at 46.

109. *Id.*

110. See Cynthia L. Estlund, *What Do Workers Want?: Employee Interests, Public Interests, and Freedom of Expression*, 140 U. PA. L. REV. 921, 960 (1992) (distinguishing purportedly non-self-governmental concerns over public employee working conditions).

111. See, e.g., Lillian R. BeVier, *Mandatory Disclosure, “Sham Issue Advocacy,” and Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. REV. 285, 290 (2000).

112. See, e.g., Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1397 (2017).

113. See, e.g., Leonard M. Niehoff, *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition*, 52 U. MICH. J.L. REFORM 859, 895-96 (2019) (discussing the views of Professor Alan Dershowitz). But see Kenneth L. Karst, *Equality as a Central Principle in*

speech more generally?<sup>114</sup> Or dissenting political speech in particular, whatever its nature or political valence?<sup>115</sup>

The crucial question, though, then becomes one of what, if anything, beyond the arguably political, belongs at the core of freedom of speech. Not all picketing, certainly, is political speech.<sup>116</sup> Does the filing of any complaint in court amount to core speech?<sup>117</sup> What about an argument that does not amount to, or even seek to amount to, a “reasoned” argument?<sup>118</sup> In an era of remarkably distorted news and other social communications media, should we still conclude that “th[e] unfettered flow of information is central to freedom of speech?”<sup>119</sup>

Should commercial speech, say, occupy a place at or near the free speech core?<sup>120</sup> Commercial speech is often consigned to the periphery,<sup>121</sup> perhaps along with pornography.<sup>122</sup> But beyond the evolving case law itself,<sup>123</sup> it has been argued that “the conclusion that commercial speech lies outside the ‘core’ of first amendment

*the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

114. See, e.g., Delgado & Yun, *supra* note 100, at 1286 (“[H]ate speech today lies not at the periphery, but at the center, and ... political speech lies at the periphery of First Amendment ideology.”); see also *id.* at 1297.

115. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 13 (1986); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 96-100 (1990).

116. See, e.g., *Terry v. Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996) (“Protest, picketing, and other like activities lie at the core of free speech guaranteed by the First Amendment.”).

117. See, e.g., *Mercer v. Schirro*, 337 F. Supp. 3d 109, 129 (D. Conn. 2018) (“[A]n individual’s right to file a legal action is at the core of free speech under the First Amendment.”).

118. See *Police Officers’ Guild v. Washington*, 369 F. Supp. 543, 551 (D.D.C. 1973) (referring in particular to a “reasoned argument” as “an activity which lies at the heart of free speech and association”).

119. *Berkshire Cablevision v. Burke*, 571 F. Supp. 976, 987 (D.R.I. 1983), *vacated as moot*, 773 F.2d 383 (1st Cir. 1985).

120. See, for example, the irresolution running throughout the opinion in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). See also the elevation of the status of commercial speech in *Berkshire Cablevision*, 571 F. Supp. at 987.

121. See, e.g., Daniel Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 562 (1991); Fan, *supra* note 100, at 810-11 (finding the First Amendment as imposes lesser constraints on the regulation of “commercial speech or the speech of government employees”); see also STEVEN H. SHIFFRIN, *WHAT’S WRONG WITH THE FIRST AMENDMENT?* 79-93 (2016).

122. See Farber, *supra* note 121, at 562.

123. See *id.*; see also *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

protection appears unwarranted.”<sup>124</sup> Here, as elsewhere, perceptions of core and of periphery may shift over time.<sup>125</sup>

Even if we can assign core and peripheral status to the various kinds of speech, we then face problems of how to relate the judicial tests for core and for peripheral speech. Suppose we want to most effectively protect what we deem to be core speech. This would be on the assumption that the core, most central, or the clearest paradigm instances of speech will also be the most constitutionally valuable speech. But the desire to safeguard core speech cannot tell us how much constitutional protection to extend to peripheral speech.

The optimal protection of core speech rights is instead partly a matter of real-world consequences. And the relevant consequences may be difficult to discern, let alone predict. We might think of the core and periphery of speech as analogous to a vital citadel and a less valuable hinterland, and then reflect upon the defense, to one degree or another, of both.<sup>126</sup> Our first impulse might well be to imagine that we can best secure core speech by expanding, and strengthening, constitutional protection for peripheral speech.<sup>127</sup> The more that free speech battles are focused on peripheral cases, or the hinterlands of speech, the safer the core or citadel, at least on that view.

But then, it may seem at least equally plausible that excessive protection for merely peripheral speech may ultimately tend to dilute, compromise, or call into question stringent protection for presumed core speech.<sup>128</sup> This might be especially plausible if the

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124. David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 430 (1990).

125. See Rosenbaum & Tokaji, *supra* note 103, at 1961-62.

126. For useful background, see Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. REV. 1, 38 (2004); John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 487 (2014); Kyle Langverdt, *The Doctrinal Toll of “Information As Speech,”* 47 LOY. U. CHI. L.J. 761, 815 (2016); Nat Stern, *Implications of Libel Doctrine For Non-defamatory Falsehoods*, 10 FIRST AMEND. L. REV., 465, 476 (2012); Willner, *supra* note 100, at 961.

127. For background, see Steven M. Wise, *Rattling The Cage Defended*, 43 B.C. L. REV. 623, 676-77 (2002); Balkin, *supra* note 126, at 38; Langverdt, *supra* note 126, at 815 (“[S]ome degree of overbreadth in the rules governing peripheral subject matter is nevertheless, in my view, a tolerable price to pay for a stronger free speech doctrine at the core.”); Stern, *supra* note 126, at 476 (“[D]efamation’s model of safeguarding the core of speech by shielding some of its periphery suggests immunity for another type of factual falsehood.”).

128. See, e.g., Inazu, *supra* note 126, at 487 (citing Philip Hamburger, *More Is Less*, 90 VA.

Court devotes substantial attention<sup>129</sup> to free speech claims that could reasonably be viewed as involving substantial social costs. There is, on this latter view, a risk of developing an ordinary cost benefit mentality with respect to speech cases more generally.

In this regard, consider how some of the Court's recent speech cases might appear to many reasonable observers. The Court has, for example, struck down restrictions on the dissemination of videos devoted to the torture of animals.<sup>130</sup> The Court has struck down restrictions on access by minors to violent video games that are judicially found to lack serious political, artistic, literary, or scientific value for minors.<sup>131</sup> The Court has struck down prohibitions on intentionally dishonest claims to have been awarded the Congressional Medal of Honor and other decorations.<sup>132</sup> And the Court has most recently barred public school discipline of dubious personally focused speech without obvious public interest relevance.<sup>133</sup>

In the last case, the Court recognized the arguable constitutional triviality of the speech at issue.<sup>134</sup> The Court concluded, though, that "sometimes it is necessary to protect the superfluous in order to preserve the necessary."<sup>135</sup> The unanswered question, though, is whether protecting what may be perceived as trivial, or in other cases as even socially damaging behavior, tends over time to strengthen, or else to erode, strong protection for core, but controversial, speech.

As elsewhere, then, the attempt to distinguish core from peripheral speech, at best, reiterates preexisting and more foundational controversies. Worse, the largely unresolved conflicts over distinguishing core from periphery have generated distracting controversies and complications of their own.

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L. REV. 835, 885 (2004); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 478 (1985); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654-55 (1980); see also Willner, *supra* note 100, at 961.

129. See Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 980 (2004) ("[T]he trend of much current Supreme Court case law concerning speech involves issues more on the periphery of free speech than in the center.").

130. See *United States v. Stevens*, 559 U.S. 460 (2010).

131. See *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011).

132. See *United States v. Alvarez*, 567 U.S. 709 (2012).

133. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

134. See *id.* at 2048.

135. *Id.*

Rather than focusing, largely fruitlessly, on disputes over core and peripheral speech, the courts could simplify matters by attending to questions as to what counts as speech for constitutional purposes in the first place. The Supreme Court has identified a number of categories of more or less literal speech that are deemed outside the scope of speech for constitutional purposes.<sup>136</sup> These determinations as to the scope of speech for First Amendment purposes are thus prior to any later judgments as to core or peripheral status.

Thus, the Court has held, rightly or wrongly, that at least some instances of literal speech are not merely peripheral, or else of constitutionally low value, but entirely outside the scope of the First Amendment. These categories are thought to include direct incitement to illegality; obscenity; some forms of defamation; speech that is integral to crime; fighting words; child pornography; fraud; true threats; and perjury.<sup>137</sup> Whether justified or not, these exclusions from the scope and compass of speech for constitutional purposes do useful work without undertaking the further dubious task of somehow placing speech instances, or speech categories, at one point or another on some axis or axes of core and peripheral speech.

With or without any such spectrum of supposed core and peripheral speech, there will of course be the need to somehow trade off the value of protecting speech against the various sorts of harms that speech can impose. But no sliding scale of core and peripheral speech can tell us more or less how to adjudicate such inevitable value conflicts without controversy.

Instead, the ultimate guide to adjudicating such conflicts should be whatever we take to be our best sense of our basic reasons, purposes, and goals in singling out speech for constitutional protection in the first place. At this more fundamental level, there is admittedly no detailed consensus. But there is a useful clustering of sentiment. There is certainly no point in struggling with any real disagreement as to the scope of speech at this fundamental level, and then largely repeating such disputes in the form of debates over core and peripheral speech.

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136. For a useful, if not complete, listing, see *Alvarez*, 567 U.S. at 717, 720.

137. *See id.*

In concrete terms, there is at least a very rough consensus with respect to the basic purposes of constitutionally protecting speech. Emphases and formulations vary, certainly, but there is obvious logic in encouraging tolerance;<sup>138</sup> in checking governmental abuses;<sup>139</sup> in furthering democratic self-government more broadly;<sup>140</sup> in the promotion of self-realization or self-fulfillment;<sup>141</sup> and in the optimal social pursuit of truth.<sup>142</sup> In general, the courts are better advised to do their excluding and balancing with an eye, directly or indirectly, toward these fundamental purposes. This approach thus allows for a bypass of attempts to craft and utilize axes of core and peripheral speech. Such axes at best reiterate, perhaps in distorted fashion, disputes as to the basic reasons for protecting speech in the first place, and how to use those basic reasons in resolving unavoidable value conflicts. And the courts can again, as elsewhere, ask whether regulated speakers still retain constitutionally satisfactory ways to communicate their messages.

#### IV. CORE AND PERIPHERY IN THE EQUAL PROTECTION CASES

The ideas of core and periphery also pervade the equal protection case law. Unfortunately, this distinction in the equal protection context is not used in any single, unequivocal sense. Instead, “core,” and “periphery” are in the equal protection context, deployed ambiguously, with unnecessary dispute and confusions being the predictable result.

In the equal protection cases, “core” is often used in the context of abstract concepts of equal and unequal treatment. Thus, it is said that at its core, “[t]he Equal Protection Clause ... keeps governmental decisionmakers from treating differently persons who are in

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138. See, e.g., Lee C. Bollinger, “*The Tolerant Society*”: A Response to Critics, 90 COLUM. L. REV. 979(1990).

139. See, e.g., Vincent Blasi, The Checking Value in First Amendment Jurisprudence, 2 AM. B. FOUND. RES. J. 521 (1977).

140. See, e.g., Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U.L. REV. 1097 (2016); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

141. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin Redish, *The Value of Freedom of Speech*, 130 U. PA. L. REV. 591 (1982).

142. See, e.g., JOHN STUART MILL, ON LIBERTY ch. 2 (Gertrude Himmelfarb ed. 1974) (1859); Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses*, 22 YALE J.L. & HUMANS. 35 (2010).

all relevant respects alike.”<sup>143</sup> In this sense, the core of the Equal Protection Clause simply reiterates the most fundamental and abstract principle of Aristotelian justice.<sup>144</sup>

In condensing this abstract formula, the Court has referred to “[o]ur traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications.”<sup>145</sup> But this would mean, oddly, that the gravest equal protection cases in which the government has any nonarbitrary reason for its policy, actually lie outside the equal protection core.

And then there are further problems. Could the intentional, as opposed to unintentional, character of an arbitrary classification make any difference as to core status?<sup>146</sup> The Court has arguably suggested so in declaring that “[t]he purpose of the equal protection clause ... is to secure every person within the State’s jurisdiction against *intentional* and arbitrary discrimination.”<sup>147</sup> And does the underlying importance or triviality of the arbitrary classification have nothing to do with whether that classification is at or near the core of the Equal Protection Clause?<sup>148</sup> Can a trifling matter really lie at a constitutional core?<sup>149</sup> Either way, our history suggests that the core of equal protection is, at the very least, not exhausted by such abstract, disembodied considerations. Along another, more

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143. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis deleted); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 54 (10th Cir. 2013); *see also* *Sound Aircraft Servs., Inc. v. Town of East Hampton*, 192 F.3d 329, 335 (2d Cir. 1999) (“At its core, equal protection prohibits the government from treating similarly situated persons differently.”).

144. *See generally* ARISTOTLE, *The Nicomachean Ethics Book V*, HARV. UNIV. PRESS (1934), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0054%3Abook%3D6> [<https://perma.cc/LG25-5AUJ>]. How much substantive content, or guidance, can be drawn from this core principle alone has been the subject of dispute. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

145. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008); *see also* *Planned Parenthood Ass’n v. Herbert*, 828 F.3d 1245, 1254 (10th Cir. 2016); *Conyers v. Rossides*, 558 F.3d 137, 152 (2d Cir. 2009).

146. *See* *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923)); *see also* *Mathers v. Wright*, 636 F.3d 396, 402 (8th Cir. 2011); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1186 (7th Cir. 1986).

147. *Olech*, 528 U.S. at 564 (emphasis added).

148. *See* *Oregon v. Mitchell*, 400 U.S. 112, 126-27 (1970) (finding that the Civil War Amendments were “unquestionably designed to condemn and forbid every distinction, however trifling, on account of race”). If so, then some trifling matters can presumably lie at the core of equal protection jurisprudence.

149. *See id.*

substantively defined axis, we might naturally think instead of race, in particular, as at the core of the Equal Protection Clause.

Thus, it is often said that the “core guarantee of equal protection [requires] ensuring citizens that their State will not discriminate on account of race.”<sup>150</sup> But this substantive focus immediately provokes its own questions. Is it really that the equal protection rights of citizens, but not those of aliens and other noncitizens, are at the core of equal protection?<sup>151</sup> Or are alienage and national origin discrimination close to, if not at, the core of equal protection?<sup>152</sup> Or should the core of the Equal Protection Clause be understood to encompass some number of other invidious classifications?<sup>153</sup>

But there are important unresolved complications even within the realm of race. The Court sometimes refers to explicit distinctions on the basis of race, as distinct from other forms of racial classification.<sup>154</sup> Does this matter for purposes of distinguishing an equal protection core? And is racial discrimination against dominant groups, including Caucasians, as close to the core of equal protection as discrimination against African Americans?<sup>155</sup>

There is, after all, widely recognized sentiment to the contrary. The Slaughter-House Cases in particular did not view the Equal Protection Clause’s core as itself race-neutral.<sup>156</sup> Instead, the Court stated that the “one pervading purpose”<sup>157</sup> of the Civil War Amendments was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made

150. See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019); *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986); *Green v. Travis*, 414 F.3d 288, 298 (2d Cir. 2005); *Reynolds v. Benefield*, 931 F.2d 506, 510-11 (8th Cir. 1991).

151. See *supra* note 150.

152. See *Sugarman v. Dougall*, 413 U.S. 634, 655 (1973) (Rehnquist, J., dissenting) (“The state statute that classifies aliens on the basis of country of origin is much more likely to classify on the basis of race, and thus conflict with the core purpose of the Equal Protection Clause.”).

153. See, e.g., *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997) (“[T]he defendants violated the core principle of the Equal Protection Clause by choosing to exercise the power of the state against Stemler solely for the reason that they disapproved of her perceived sexual orientation.”).

154. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 905 (1995); *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

155. Consider the application of a similar strict scrutiny test in all cases of intentional race discrimination in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-28 (1995).

156. See *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 71-72 (1872).

157. *Id.* at 71.

freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>158</sup> Denial of equal protection on other bases might also be legally actionable, but not within the designated core.<sup>159</sup>

And then there is the separate sense that the core of an equal protection violation consists in relative, or comparative, differences in treatment.<sup>160</sup> But in some practically important equal protection contexts, the Court has dismissed concern for relative disparities—for literal inequalities—in favor of a concern merely for the presence or absence of some supposedly absolute minimum quantum of state provision.<sup>161</sup> There is no obvious judicial resolution of these opposing approaches.

Finally, there are cases that seem to treat the core of equal protection as equivalent to what we might think of as the most elemental equal protection violation cases. Along these lines, Judge Posner argues that “the core violation of the equal protection clause is indeed the selective withdrawal of police protection from a disfavored group.”<sup>162</sup> From a different angle, it has been argued that “the suppression of private violence [was] the core concern of the Equal Protection Clause.”<sup>163</sup>

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158. *Id.*

159. *See id.* at 71-72; *see also* *Crum v. Alabama*, 198 F.3d 1305, 1323 (11th Cir. 1999) (“There can be little doubt that the core motivation animating the Fourteenth Amendment’s Equal Protection Clause was a concern for protecting the rights of racial minorities subject to historical discrimination.” (citing Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955))).

160. *See, e.g.,* *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Motz, J., concurring) (“A state ‘may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.’ This is the core of an Equal Protection Clause challenge.” (citing *Reynolds v. Sims*, 377 U.S. 533, 568 (1964))).

161. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973) (public school education context); *see also* *A.C. v. McKee*, 23 F.4th 37, 42-43 (1st Cir. 2022) (reiterating the holding and analysis conducted in *Rodriguez*, 411 U.S. at 30, 33, 35-37).

162. *Schroder v. Hamilton Sch. Dist.*, 282 F.3d 946, 957 (7th Cir. 2002) (Posner, J., concurring); *McCauley v. City of Chicago*, 671 F.3d 611, 620-21 (7th Cir. 2011) (Hamilton, J., dissenting in part) (echoing Judge Posner’s opinion in *Schroder*); *see also* *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) (“[S]elective withdrawal of police protection ... is the prototypical denial of equal protection.”).

163. *Estate of Romain v. City of Grosse Point Farms*, 935 F.3d 485, 495 (6th Cir. 2019) (alteration in original) (quoting Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 254 (2009)).

As elsewhere, attempts to distinguish core and periphery in the equal protection context, at best, merely reinscribe the questions we must more appropriately ask in determining the scope and meaning of the Clause itself. The difference between core and periphery in most other constitutional right contexts and in the context of equal protection is the remarkable number and variety of fundamentally different perspectives on display in the latter context. Particularly in the equal protection context, core and periphery are, as we have seen, remarkably equivocal. And then, along each of the diverging core-periphery axes identified above, what counts as core is deeply contested. Of course, we may well disagree about the initial scope and basic purposes of the equal protection guarantee. But in this respect, any further attempts to distinguish core and periphery merely add redundancy and further confusion.

#### V. CORE AND PERIPHERY IN PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Attempts to distinguish between core and merely peripheral due process rights, again, at best, merely reinscribe the reasons for singling out, circumscribing, and protecting due process rights in the first place. We can sensibly say that “[n]atural liberty and traditional property were the traditional core of procedural-due-process-protected interests,” with their deprivation then implicating the value of procedural fairness.<sup>164</sup> Liberty might be said to be at the core of substantive as well as procedural due process.<sup>165</sup> More specifically, perhaps, one might also identify litigant autonomy as a core value or as a “core element” of procedural due process.<sup>166</sup> And then, one might also think some conception of dignity is at the core of due process rights.<sup>167</sup>

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164. Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 859 (2016).

165. M. Isabel Medina, *Demore v. Kim—A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697, 731-32 (2004).

166. Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1611 (2007).

167. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 41 (1985); Andrew Leon Hanna, Note, *A Constitutional Right to Appointed Counsel for the Children of America’s Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 274 (2019) (“[Human dignity is] a core value underlying the right to procedural due process.”). Dignity thus seems to underlie

Beyond these considerations, one might then say that procedural due process shares with equal protection<sup>168</sup> the core aim of the “protection of the individual against arbitrary action of government.”<sup>169</sup> Colloquially, we might say that “[a]t the historical core of procedural due process is the idea that parties have a right to ‘a day in court.’”<sup>170</sup> At a minimum, this core requires “notice and an opportunity to be heard” at a meaningful time.<sup>171</sup> The point of recognizing this as the core of due process is that appropriate procedural safeguards may prevent infringement of constitutional rights.<sup>172</sup>

The core of procedural due process is then said more concretely to include “the accuracy of the factfinding process and the impartiality of the decisionmaker.”<sup>173</sup> To these core elements, we could add a written statement of the decision and the availability of appellate review.<sup>174</sup> As well, core procedural due process in particular is said to require that the written decision contain “a fully-articulated rationale.”<sup>175</sup> The core of procedural due process is thought as well to encompass appointed counsel for indigent criminal defendants.<sup>176</sup> And the due process core may also be said to bar generalized

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or justify due process protection in the first place, apart from distinguishing core and peripheral due process rights. For a critique of the Court’s failure to articulate the basic values underlying civil adjudicative due process as distinct from core versus peripheral due process rights, see Richard B. Sapphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 (1978).

168. See *supra* notes 145-47 and accompanying text.

169. Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785, 833 (2004).

170. Mark Moller, *Class Action Defendants’ New Lochnerism*, 2012 UTAH L. REV. 319, 332 (2012) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008)).

171. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).

172. See, e.g., Joshua Flynn-Brown, *Analyzing the Constitutional Implications of the Department of Veterans Affairs’ Process to Determine Incompetency: Is the Federal Government Violating the Second Amendment and Due Process?*, 41 HASTINGS CONST. L.Q. 521, 548 (2014).

173. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 236 (2004).

174. See, e.g., Thaddeus Mason Pope, *Procedural Due Process and Intramural Hospital Dispute Resolution Mechanisms*, 10 ST. LOUIS U.J. HEALTH L. & POL’Y 93, 140 (2016).

175. Nan Hunter, *Managed Process, Due Care: Structures of Accountability in Health Care*, 6 YALE J. HEALTH POL’Y L. & ETHICS 93, 104 (2006).

176. This is true under the Sixth Amendment, at the very least. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963). But see the limitations noted in *Nicole K. ex rel. Linda R. v Stigdon*, 990 F.3d 534, 538 (7th Cir. 2021) (noting several civil, quasi-criminal, and petty criminal exceptions).

unfairness in the administration of government benefits, as well as penalties.<sup>177</sup>

More generally, “the core of procedural due process is some combination of fairness and reasonableness that requires a balancing between the interests of the state and the individual.”<sup>178</sup> And with this, and all of the more specific core requirements specified immediately above, it is difficult to disagree.

The problem for our purposes is, unlike in the equal protection context,<sup>179</sup> not one of the multiplicity of meanings of core and periphery. Each of the above specifications of one or more core elements of procedural due process seems a reasonable and mere friendly amendment, by way of a fully compatible addition, to all of the rest. Each of the above considerations can easily be deemed core, as distinct from peripheral, elements of procedural due process.

But this means that to an exceptional degree, beyond that of other constitutional right contexts, most of what the courts might dispute about is already safely within the core of procedural due process, as opposed to being consigned to the merely core-adjacent, or to the periphery. The core-versus-periphery distinction thus does relatively little interesting adjudicative work in the procedural due process context.

Certainly, there are contested issues of procedural due process. The provision of legal counsel as a matter of right could certainly be expanded to various civil contexts.<sup>180</sup> The scope and limits of procedural due process rights on public university campuses bears reexamination.<sup>181</sup> But the ratio of what is considered core to what is considered periphery in the most significant due process contexts is relatively high.

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177. See *Lassiter v. Dep’t Soc. Servs.*, 452 U.S. 18, 24 (1981); *Goldberg v. Kelly*, 397 U.S. 254, 262-66 (1970); Risa E. Kaufman, *Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System*, 3 HASTINGS RACE & POVERTY L.J. 1, 16 (2015).

178. See *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976); Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 167 (2017); see also *id.* at 168 (“These essential components of due process analysis—fairness, reasonableness, and balancing—remain the core features of procedural due process.”); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975).

179. See *supra* Part IV.

180. See, e.g., *Nicole K.*, 990 F.3d at 538.

181. For background, see R. George Wright, *Due Process On Campus: Where Do Procedural Rights Come From, and What Do They Require?*, 22 NEV. L.J. 281 (2021).

To change the metaphor, the procedural due process classification amounts to mostly banana, and relatively little peel. Or at least, more so than is true of other constitutional rights, including freedom of speech.<sup>182</sup> This means that less will typically be at stake in any core-versus-periphery disputes over procedural due process rights, and that core-versus-periphery disputes will thus tend to be both relatively rare and relatively insignificant. And certainly, there are no grounds for supposing that trying to distinguish core from peripheral due process rights affords significant advantages over the logically prior inquiry into the underlying purposes of scope and limits of a constitutional right to procedural due process in the first place. At worst, and as in our other constitutional contexts, courts again have the option of employing balancing tests that are independent of any reliance on notions of core versus periphery.

In a sense, matters are dramatically different when we turn from procedural due process to substantive due process. Consider the crucial substantive due process case of *Griswold v. Connecticut*.<sup>183</sup> First, one might see *Griswold* as marking a major transition within the realm of substantive due process. In *Griswold*, privacy supplants, at the core, earlier and now peripheralized concerns for economic or contractual substantive due process.<sup>184</sup>

But for our purposes, *Griswold* in a sense undermines the significance of the distinction between constitutional core and constitutional periphery. In particular, *Griswold* diminishes the importance of the explicit textual embodiment, or the literal mention, of a constitutional right. One could certainly say that textual rights are generally core rights, whereas rights not textually referred to are usually peripheral in character. But *Griswold* stands for the idea that rights that are outside, or spatially between,

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182. Consider, for example, the relatively rigorous free speech tests applied in striking down arguably sensible restrictions on pure commercial speech, animal crush videos, deliberate lying about having won a military medal, the sale to minors of violent video games without serious cultural value, and socially modest grievances with respect to public school decisions addressing cheerleaders. See *supra* notes 120, 130-35. Whether any or all of these speech restrictions addressed core, as distinct from peripheral, speech interests are at least readily contestable.

183. See 381 U.S. 479, 485 (1965).

184. For markers of the centering, and then the peripheralizing, of economic or contractual substantive due process, see generally *Lochner v. New York*, 198 U.S. 45 (1905) and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

express rights can be just as constitutionally significant and as stringently protected as enumerated rights.<sup>185</sup>

That is, *Griswold* establishes that a right, in this case to marital privacy, can take on the constitutional status of a core constitutional right, if not an even greater status,<sup>186</sup> if it can be seen as appropriately positioned with respect to enumerated rights. This is the import of *Griswold*'s famed references to "penumbras," or half-lights, cast by radiating "emanations" from enumerated constitutional rights.<sup>187</sup>

Thus Justice Douglas famously writes in *Griswold* that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>188</sup> *Griswold* involved a privacy right, where that right was given substance by the joint, apparently overlapping, and thus sufficiently illuminating emanations of "several fundamental constitutional guarantees."<sup>189</sup> The "right of marital privacy" at issue was thought to lie "within the protected penumbra of specific guarantees of the Bill of Rights."<sup>190</sup>

To the extent that penumbral, and in that sense peripheral, rights are protected at least as stringently as enumerated or core rights, *Griswold* dramatically reduces the significance of any attempt to distinguish between core and periphery. The broad penumbral privacy right recognized in *Griswold* would then be said to have its own core and its own periphery.<sup>191</sup> The question of which

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185. In fact, it would be reasonable to say that the most important function of the Third Amendment right not to have troops quartered in one's home in peacetime has been its limited role in establishing the legitimacy of unenumerated substantive due privacy process rights.

186. See *Griswold*, 381 U.S. at 484-85.

187. See *id.* at 484.

188. *Id.* *Griswold* makes no argument that these peripherally located rights could, in their turn, help give life and substance to the enumerated rights, although that does seem a conceivable argument for other contexts.

189. See *id.* at 485.

190. *Id.* at 487. In particular, from presumably somehow overlapping emanations of the more or less adjacent First, Third, Fourth, Fifth, and Ninth Amendments. See *id.* at 484. Whether one chooses to call this right a substantive due process right, or merely a constitutional right that is penumbrally created, is mostly a matter of terminology.

191. See, e.g., *Harris v. McRae*, 448 U.S. 297, 316 (1980) ("[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*." (citing *Roe v. Wade*, 410 U.S. 113 (1973))).

rights fall within the *Griswold* privacy core, and which within the *Griswold* privacy periphery, is of course notoriously contested.<sup>192</sup> And there is again no reason why the important unresolved issues are better addressed by vainly trying to distinguish between core and peripheral privacy rights than by taking a step back to survey the broader constitutional landscape, and the basic constitutional purposes and interests at stake.<sup>193</sup>

### CONCLUSION

This excursion through a number of the most vital constitutional rights cases, and other contexts as well, has sought to show that the recurring judicial attempts to distinguish between core and peripheral areas within a given broad constitutional right are unnecessary and distracting. Intriguingly, the case for this conclusion varies significantly depending upon the nature of the general constitutional right in question. But the overall lesson is that courts should abandon their attempts to distinguish between core and peripheral areas of a given broad constitutional right. Courts should instead focus, directly or indirectly, on their best assessment of the purposes underlying, and the resulting scope and limits of, the broad

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192. See *id.* Whether the rights recognized in *Roe* are thought by the Court to be core or peripheral, the Court in *Harris* declared that “it simply does not follow that a woman’s freedom of choice carries with it a constitutional right to the financial resources to avail herself of the full range of protected choices.” *Id.* For critique, see, for example, Janet L. Dolgin & Katherine R. Dieterich, *The “Other” Within: Health Care Reform, Class, and the Politics of Reproduction*, 35 SEATTLE U.L. REV. 377, 393 (2012); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 179 (2003). See also the opinions in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

193. Our general conclusions apply as well to rights outside the federal constitutional context. Consider, for example, the theory of property rights in general. See, e.g., Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 920 (2010) (“[I]nformation and progressive theorists alike describe property through the trope of core and periphery. But they ‘fill’ the core quite differently. In the eyes of the information theorists, exclusion constitutes property’s core, while for the progressive theorists, human relationships constitute the core.”); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 634, 636, 641 (1988) (“[T]o sophisticated thinkers, the absence of a general theory to separate the core from the periphery undermines the meaningfulness of the distinction.”). Nor have European legislators and theorists fared any better. See, e.g., Takis Tridimas & Giulia Gentile, *The Essence of Rights: An Unreliable Boundary?*, 20 GERMAN L.J. 794, 797, 804 (2019) (“It appears that courts have shied away from establishing any concrete criteria for distinguishing between the essence and the periphery of fundamental rights.”).

constitutional right in question. Courts have, as well, a variety of alternative means of deciding any specific constitutional case that do not rely on any attempt to distinguish between core and periphery.