

STANDARDS OF REVIEW UNDER THE EQUAL PROTECTION  
CLAUSE AND RELATED CONSTITUTIONAL DOCTRINES  
PROTECTING INDIVIDUAL RIGHTS: THE "BASE PLUS SIX"  
MODEL AND MODERN SUPREME COURT PRACTICE

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INTRODUCTION

The topic of this year's Symposium, "Equal Protection After the Rational Basis Era: Is It Time To Reassess the Current Standards of Review?," is most apt. While the number and content of the standards of review has been a source of much commentary over the past fifty years,<sup>1</sup> recent Supreme Court cases suggest that the Justices are at a crucial point in their elaboration of the doctrine regarding standards of review. The "right" or the "wrong" road could be taken in the next few years. Mapping out these two roads is the subject of this Article.

In a 1992 article, I discussed six standards of review used by the Supreme Court to analyze the constitutionality of legislation.<sup>2</sup> A second article, in 1995, discussed how the Supreme Court's intervening cases were consistent with, or in a few cases were not consistent with, the analysis suggested in 1992.<sup>3</sup> Although traditional black-letter law continues to discuss three basic standards of review—minimum rationality review, intermediate or mid-level review, and strict scru-

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<sup>1</sup> See, e.g., Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984); Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475 (1997); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343-65 (1949). See also Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968) (discussing standards of review in First Amendment and Due Process Clause cases); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

<sup>2</sup> R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493 (1992).

<sup>3</sup> R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1 (1995).

tiny<sup>4</sup>—actual Supreme Court cases continue to reflect the six standards of review discussed in my previous articles.<sup>5</sup> Indeed, recent cases suggest a variation of strict scrutiny, “loose” strict scrutiny, which, as discussed below, fits neatly into the scheme previously presented.<sup>6</sup> Explicit adoption of this seventh standard of review would create a “base” level of minimum rationality review, “plus six” levels of heightened scrutiny: two heightened levels of rational review; two kinds of intermediate scrutiny; and two kinds of strict scrutiny.<sup>7</sup> Adopting this “base plus six” model would bring proper closure to a structured, but flexible approach towards levels of scrutiny of governmental action.

A major threat to this approach is represented by a few cases over the past few years—particularly *Madsen v. Women’s Health Center, Inc.*,<sup>8</sup> *United States v. Virginia*,<sup>9</sup> and *Timmons v. Twin Cities Area New Party*<sup>10</sup>—that have used language which, if adopted as controlling, would create eighth, ninth, and tenth levels of scrutiny. This proliferation would decidedly not promote predictable or principled application of the law.

The intent of this Article is to discuss the various levels of scrutiny and to provide a rethinking of the recent troublesome cases. Part I of this Article discusses the current standards of review in terms of the “base plus six” approach. Part II discusses the problems posed by the possibility of increased proliferation of levels suggested in some of the recent cases. Part III provides a solution for these problems. Since all of the recent troublesome cases are capable of reconceptualization as part of the “base plus six” model suggested in this Article, the Court should simply stick to that model instead of muddying the waters with loose unfocused language. The “base plus six” model provides sufficient flexibility in terms of giving the Supreme Court choices for the appropriate level of scrutiny, while providing needed predictability and guidance to lower courts in their application of whatever level of scrutiny is applied. Part IV provides a brief conclusion.

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<sup>4</sup> See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997) (“Under strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government purpose.”); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 638-46 (6th ed. 2000).

<sup>5</sup> See *infra* text accompanying notes 11-40.

<sup>6</sup> This seventh standard of review appears in *Bush v. Vera*, 517 U.S. 952, 977 (1996), and is based upon *United States v. Paradise*, 480 U.S. 149, 184 (1987). See *infra* text accompanying notes 41-46.

<sup>7</sup> A summary of these levels appears in an Appendix, *infra*.

<sup>8</sup> 512 U.S. 753 (1994), discussed *infra* notes 47-50.

<sup>9</sup> 518 U.S. 515 (1996), discussed *infra* notes 51-55.

<sup>10</sup> 520 U.S. 351 (1997), discussed *infra* notes 57-64.

## I. THE CURRENT STANDARDS OF REVIEW AS REFLECTING THE "BASE PLUS SIX" MODEL OF REVIEW

### A. *Explicit Standards of Review*

Whenever the Supreme Court reviews legislation, whether under the Equal Protection Clause, the Due Process Clause, or the First Amendment, the Court considers whether the legislation represents a good enough fit to pass constitutional review.<sup>11</sup> This inquiry typically has three components.

The first inquiry is what governmental interests support a statute's constitutionality. Depending on the standard of review, the governmental interests must be legitimate or permissible; important, substantial, or significant; or compelling or overriding.<sup>12</sup> Of course, the governmental interest to support a statute may be impermissible or illegitimate, and thus not support the statute under any standard of review.<sup>13</sup>

The second inquiry concerns the relationship between the statute's means and how it advances those governmental ends. Depending on the standard of review, the statute must have a rational relationship, a substantial relationship, or a direct relationship to its ends.<sup>14</sup>

<sup>11</sup> See generally R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279 (1994) (exploring different aspects of legislative "fit" analysis to provide a more structured approach to questions of equal protection, due process, and free speech).

<sup>12</sup> *Id.* at 1286-88. To reflect the most common terminology used by the Court, the terms legitimate governmental interest, important or substantial governmental interest, and compelling governmental interests are used in the remainder of this Article. See *id.* at 1286-87 nn.32-33.

<sup>13</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (finding "animus" against a politically unpopular group, in this case animus based upon sexual orientation, an illegitimate governmental interest); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (holding prejudice against the mentally impaired is illegitimate); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (finding prejudice against interracial marriage illegitimate). As Professor Edwin Baker, of the University of Pennsylvania, noted in his Introductory Address at this Symposium, this issue of the "illegitimacy" of some governmental ends is a "normative" issue, while the remaining inquiries, which focus on the relationship between the statute's means and its ends, are "instrumental" questions. Professor Edwin Baker, Introductory Address at the University of Pennsylvania Journal of Constitutional Law Symposium: Equal Protection After the Rational Basis Era (Feb. 2-3, 2001) (videotape on file with the *University of Pennsylvania Journal of Constitutional Law*). This normative issue is best conceived as a question of law for "de novo" review by courts on appeal, while the instrumental means/ends questions are best viewed as fact questions subject to the "clearly erroneous" standard of deference on appeal. See *infra* notes 159-60 and accompanying text.

<sup>14</sup> See Kelso, *supra* note 11, at 1288-97. As discussed therein, this relationship inquiry actually "has two parts: (1) the extent to which the statute fails to regulate all individuals who are part of some problem (the underinclusiveness inquiry); and (2) the way in which the statute serves to achieve its benefits on those whom the statute does regulate (the service inquiry)." *Id.* at 1281. Though under a "pristine" analysis, the Court probably should consider only the under-

The third inquiry focuses on the burdens imposed by the statute's means. Depending on the standard of review, the statute's burden must not be irrational, substantially more burdensome than necessary, or it must be the least restrictive burden that would be effective in advancing the governmental interests.<sup>15</sup>

The three main standards of review track the responses to these three questions. Thus, under minimum rationality review, the legislation only has to be rationally related to legitimate government interests, and not impose irrational burdens on individuals.<sup>16</sup> Under intermediate review, the legislation must be substantially related to advancing important or substantial governmental interests, and not be substantially more burdensome than necessary to advance these interests.<sup>17</sup> Under strict scrutiny, the statute must directly advance compelling governmental interests and be the least restrictive effective means of doing so.<sup>18</sup>

The Court determines which standard of review to adopt in each case by considering a myriad of factors that counsel the Court either

inclusiveness inquiry under equal protection analysis, and reserve the service inquiry for due process analysis, the Court has not typically disciplined its analysis in this way. See *id.* at 1293-94. For discussion of why a pristine analysis would lead to this result, see *infra* note 15.

<sup>15</sup> See Kelso, *supra* note 11, at 1298-1305. As discussed therein, the burden inquiry "also has two parts: (1) the extent to which the statute imposes burdens on individuals who are not intended to be regulated (the overinclusiveness inquiry); and (2) the amount of the burden on individuals who are properly regulated by the statute (the oppressiveness or restrictiveness inquiry)." *Id.* at 1281. Again, though under a "pristine" analysis the Court probably should consider only the overinclusiveness inquiry under equal protection analysis, and reserve the restrictiveness inquiry for due process analysis, the Court has not disciplined its analysis in this way either. See *id.* at 1293 n.52. As noted there:

In theory, a statute which is neither underinclusive nor overinclusive, but which only minimally serves the government's interest, or greatly burdens individuals, does not deny a citizen equal protection of the laws, because the law is applied equally to all similarly situated parties. It may, however, deny the citizen substantive due process if the burden on the individual is sufficiently great compared to the minimal benefit that is achieved.

*Id.*

<sup>16</sup> CHEMERINSKY, *supra* note 4, at 529 ("Under rational basis review a law will be upheld if it is rationally related to a legitimate government purpose . . . . The means chosen only need be a rational way to accomplish the end."); Kelso, *supra* note 11, at 1283 ("Regarding the question of legislative fit and the various versions of rational review, minimum rationality review only requires a minimally rational relationship . . . advancing a legitimate interest, and no less restrictive alternative analysis.")

<sup>17</sup> CHEMERINSKY, *supra* note 4, at 529 ("Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose . . . . The means used need not be necessary, but must have a 'substantial relationship' to the end being sought."); Kelso, *supra* note 11, at 1300 ("[R]eflecting intermediate scrutiny's typical 'substantial' level of rigor, the statute only need be 'narrowly drawn'—that is not 'substantially more burdensome' than necessary . . . .")

<sup>18</sup> CHEMERINSKY, *supra* note 4, at 529 ("Under strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government interest. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."); Kelso, *supra* note 11, at 1283 n.19 ("At strict scrutiny, the Court applies the compelling governmental interest, direct relationship, and least restrictive alternative legislative fit test.")

to defer to legislative judgment, in which case rational review is employed,<sup>19</sup> or counsel the Court to be suspicious of the legislative action, in which case some form of heightened scrutiny is applied.<sup>20</sup> Over time, the Court has clarified the standard of review to be applied in most cases under the Equal Protection Clause and related constitutional doctrines, so that lower courts today are supplied with reasonably clear and predictable guidance on what standard of review to apply in most cases.<sup>21</sup>

<sup>19</sup> Some of these factors include: (1) whether arguments of test, structure, and history suggest that the classification is one the Framers and ratifiers would not have thought deserve heightened scrutiny, *see* *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); (2) whether judges are competent to make the substantive decisions required at heightened scrutiny, which typically involve second-guessing legislative judgment, *see* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) ("Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation."); and (3) whether a Pandora's box would be opened up where heightened scrutiny in this case would lead to demands for heightened scrutiny in other similarly situated cases. *Id.* at 445-46 ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups . . . . One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.").

<sup>20</sup> Some of these factors include: (1) whether a fundamental right is involved, *see* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race . . . . We advert to [these matters] merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential . . ."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . ."); (2) whether a deficiency exists in the "political processes which can ordinarily be expected to bring about repeal of undesirable legislation," *id.*, including cases where the legislature may be operating in a self-interested capacity, *see infra* note 34; (3) whether the statute is "directed at particular religious, or national, or racial minorities," or reflects "prejudice against discrete and insular minorities," *Carolene Products*, 304 U.S. at 152 n.4 (citations omitted); (4) whether the classification burdens an immutable characteristic, *see* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . ."); (5) whether the classification is a product of stereotypical generalizations, particularly if part of an historical pattern of discrimination, *id.* at 684-85 ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination . . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes . . ."); and (6) whether the classification burdens an individual for something not the product of that individual's choice, *see* *Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("[I]mposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." (alteration in original) (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))).

<sup>21</sup> *See, e.g.*, CHEMERINSKY, *supra* note 4, at 525-636; NOWAK & ROTUNDA, *supra* note 4, at 638-1023. For a discussion of how general principles can become more definite over time through the common law process of judicial decision, see Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38-49 (1981). For a discussion of how the Framers' and ratifiers' views regarding constitutional interpretation were grounded in the grand traditions of the Anglo-American common law system, see R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL.

### B. *Implicit Standards of Review*

While these three standards are clearly identified in modern Supreme Court doctrine, three other standards have been used in recent cases, and a fourth additional standard has recently emerged. These standards reflect variations on the three inquiries of governmental interests, relationship to benefits, and burdens.

#### 1. *Heightened Rational Review Standards*

Two of these additional standards of review reflect variations of minimum rationality review. As noted above, to be constitutional under minimum rationality review, the legislation must: (1) advance legitimate governmental interests; (2) be rationally related to advancing those interests, and (3) not impose irrational burdens on individuals.<sup>22</sup> Under minimum rationality review, the Court defers to legislative judgment concerning both the statutory means and ends.<sup>23</sup> Thus, the Court will strike down the governmental action as unconstitutional only if the challenger can nevertheless prove, given this deference, that there is no conceivable legitimate interest to support the statute,<sup>24</sup> or that the statute's means to advance the governmental ends are clearly irrational.<sup>25</sup>

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U. L. REV. 121, 164 (1994) ("This approach, which rejects non-interpretive review, favors such principles as reasoned elaboration of the law, fidelity to precedent, deciding cases on narrower grounds where possible, and deciding most cases only after full briefing and argument."); Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DEN. U. L. REV. 961 (1999). Kemp notes:

In *Constitutional Fate*, Philip Bobbitt elaborates a theory of the Constitution which suggests that the legitimacy of certain conventional types of arguments is antecedent to, rather than founded upon, a theory of the Constitution . . . . Bobbitt's answer is that the initial forms of constitutional argument have their origin in decisions made by the Framers, decisions which in effect made the state a subject matter for the common law . . . . These common law forms—conventions—are the source of the forms of constitutional argument.

*Id.* at 971. See also R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny* 5-17 (forthcoming 2001) (manuscript on file with the *University of Pennsylvania Journal of Constitutional Law*) (discussing the Court's application of the "common law" approach in *Planned Parenthood v. Casey*, 505 U.S. 833, 844-69 (1992), to "reasoned elaboration" of the law and the weight to be given to "precedent" in constitutional cases); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) (discussing a common law method of constitutional interpretation, and addressing whether *Roe v. Wade* was rightly decided).

<sup>22</sup> See *supra* text accompanying note 16.

<sup>23</sup> See CHEMERINSKY, *supra* note 4, at 533-35, 541-43 (discussing the Court's deference to legislative judgment under minimum rationality review, and noting that "the Supreme Court is extremely deferential under the rational basis test and usually will find that laws are reasonable"); Kelso, *supra* note 2, at 499 (recognizing that deferring "to the legislature's judgment concerning whether a rational relation exists to a legitimate governmental end" is a "salient feature" of minimum rationality).

<sup>24</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (declaring animus towards individuals

In some cases, however, what has been called "second-order" rational review appears to exist.<sup>26</sup> Under this version, the Court does not defer to legislative judgment concerning means and ends, but rather engages in a real inquiry into whether given the benefits of the statute, the statute reflects a rational accommodation of interests.<sup>27</sup> As discussed in previous articles, this standard seems to exist not only in some cases under the Equal Protection Clause,<sup>28</sup> but also in some

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based solely upon their sexual orientation an illegitimate governmental interest); *Cleburne Living Ctr., Inc.*, 473 U.S. at 448 ("Private biases [against the mentally retarded] may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))).

<sup>26</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 324 (1993) ("A statutory classification fails rational basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" (quoting *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978))). Compare *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) (holding that county tax assessor's practice of valuing real property at fifty percent of its most recent sale price, no matter when that most recent sale occurred, was irrational) with *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (holding that California Proposition 13, which limits real property taxes to one percent of assessed valuation as of 1975-76 and permits reassessment only when sold, was rationally related to the conceivable legitimate purposes of allowing people to know their tax burden at time of purchase, avoiding taxes on appreciation due to inflation, and encouraging stable neighborhoods by creating an economic disincentive to move).

During his commentary to Panel II of the Symposium, Clint Bolick, of the Institute for Justice, Washington, D.C., cited four cases he had litigated where the challenger was able to prevail under minimum rationality review: *Brown v. Barry*, 710 F. Supp. 352 (D.C. Cir. 1989) (employing the rational basis test in finding a regulation forbidding shoeshine stands in public places unconstitutional); *Craigsmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) (finding certain provisions of the Tennessee Funeral Directors and Embalmers Act violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment because the provisions were not rationally related); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (holding that California state cosmetology licensing requirements were a violation of the Equal Protection and Due Process Clauses under a rational basis test because the objectives were not rationally related to the objectives); and *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (striking down Houston's regulation of jitneys, small motor vehicles used to carry passengers for a fare, using a rational basis test). See Clint Bolick, Commentary at the University of Pennsylvania Journal of Constitutional Law Symposium: Equal Protection After the Rational Basis Era (Feb. 2-3, 2001) (videotape on file with the *University of Pennsylvania Journal of Constitutional Law*).

<sup>26</sup> See, e.g., CHEMERINSKY, *supra* note 4, at 536 ("Many argue that the Court in these cases applied a different, more rigorous version of the rational basis test."); Kelso, *supra* note 3, at 3 n.13 and sources cited therein (discussing "second-order" or "not toothless" rational review).

<sup>27</sup> See, e.g., CHEMERINSKY, *supra* note 4, at 531, 536, stating:

The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more 'bite' than the customarily very deferential rational basis review . . . . The claim is that there is not a singular rational basis test but one that varies between complete deference and substantial rigor.

See also Kelso, *supra* note 3, at 3-4 ("[T]he Court does not give special deference to the legislature's judgment, but rather balances for itself the relevant costs and benefits of the governmental program to ensure that the balance is sufficiently rational and does not reflect an excessive burden on the individual.").

<sup>28</sup> See Kelso, *supra* note 2, at 521-23, 522 n.152 (citing, inter alia, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). See also CHEMERINSKY, *supra* note 4, at 535-36 (citing, inter alia, *Metropolitan*

cases involving substantive due process analysis,<sup>29</sup> Dormant Commerce Clause analysis,<sup>30</sup> Contract Clause analysis,<sup>31</sup> and procedural due process analysis.<sup>32</sup> That each of these areas of constitutional analysis should have a similar doctrinal structure should not be surprising. In every case where the Court has to consider whether a statute unconstitutionally infringes on an individual right, the Court must consider whether the statute's means, in terms of both benefits and burdens, justify the government's ends.<sup>33</sup> Given these considerations, the Court is naturally drawn to phrasing the doctrine as a three-part test, focusing on governmental ends, the statute's relationship to achieving benefits, and the statute's burden on individuals.<sup>34</sup>

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Life Ins. Co. v. Ward, 470 U.S. 869 (1985)).

<sup>29</sup> See Kelso, *supra* note 2, at 527-28 (citing, inter alia, United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973)). Many of these equal protection and substantive due process cases are discussed more fully in Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999).

<sup>30</sup> See Kelso, *supra* note 2, at 503-04, 519-20 (discussing, inter alia, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), where the Court stated:

Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if a State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

*Id.* at 881 n.128. See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (holding regulations banning retail sale of milk in plastic non-returnable, non-refillable containers was not an unreasonable burden on interstate commerce); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (finding a requirement that cantaloupes grown in Arizona must be packaged in Arizona burdens interstate commerce and is therefore unconstitutional).

<sup>31</sup> See Kelso, *supra* note 2, at 501-02, 520-21 (discussing, inter alia, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 & n.13 (1983) ("sharply" distinguishing regular deferential Contract Clause analysis where the legislature imposes "a generally applicable rule of conduct" from those cases involving "the special concerns associated with a State's impairment of its own contractual obligations"); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 n.14 (1983) (finding deference to the legislature inappropriate when the state is a contracting party); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977) (finding deference to the legislature inappropriate because of the state's interest in the contract)).

<sup>32</sup> See Kelso, *supra* note 2, at 525-27 (discussing, inter alia, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (employing a tripartite balancing test to find that a due process right to a trial existed before termination of Social Security disability benefits)). On Dormant Commerce Clause, Contract Clause, and procedural due process examples, see Kelso, *supra* note 2, at 585 app. a, tbl.1.

<sup>33</sup> The only exception to this principle would be for "absolute" rights where no balancing of governmental interests versus individual interests need be done. Most constitutional rights are not of this kind. *But see* U.S. CONST. art. I, § 9, cl. 3 (prohibiting Bills of Attainder); U.S. CONST. amend. XIII (abolishing slavery).

<sup>34</sup> For example, the three-part procedural due process test in *Mathews v. Eldridge* explicitly considers: (1) "the private interest" that will be burdened; (2) the means by which the existing procedures achieve the government's ends, including "the risk of an erroneous deprivation . . . through the procedures used and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest" or ends in the case. *Mathews*, 424 U.S. 319, 335 (1976). Under Dormant Commerce Clause analysis, as phrased in *Pike v. Bruce Church, Inc.*, the Court considers: (1) the State's "legitimate local public interest"; (2) the means by which the statute achieves these ends, including whether the benefits of the statute "could be



In some cases, a "third-order" rational review is also used by the Court. Unlike minimum rationality review and "second-order" rational review, where the challenger has the burden to prove that the statute is unconstitutional, in these cases the burden shifts to the government to prove that the governmental action is constitutional.<sup>35</sup> This shifting of the burden of proof to the government represents a higher standard of review because of the increased difficulty for the government to prevail in these cases.<sup>36</sup>

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promoted as well with a lesser impact on interstate activities"; and (3) given these considerations, whether the "burden" on interstate commerce is "clearly excessive" given the statute's benefits. *Pike*, 397 U.S. 137, 142 (1970). Cases under the Contract Clause have a similar structure. In *United States Trust Co. v. New Jersey*, the Court balanced: (1) the state's "legitimate" interest; (2) the statute's means, including whether the benefits of the statute could be served "equally well" by an "evident and more moderate course"; and (3) given these considerations, whether the "burdens" on contract rights are "reasonable" and "necessary" given the statute's benefits. *United States Trust Co.*, 431 U.S. 1, 22, 31 (1977).

These cases all involve a "second-order" kind of rational review, not minimum rationality review, because the Court does not defer to the legislature's judgment in these cases, but rather balances for itself the "reasonableness" of the statute's costs and benefits. Deference is not given where the Court is dealing with state legislatures altering their own contracts, as in *United States Trust Co.*, 431 U.S. at 7; or where state legislatures burden interstate commerce perhaps for parochial state reasons, as discussed in Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); or where governments deprive individuals of liberty or property rights, as in the procedural due process cases. See generally Kelso, *supra* note 2, at 525-27. When the Court deals with a state legislature altering general contract rights, and thus not acting in a self-interested manner, the Court applies minimum rationality review deference. See *id.* at 501-02, 520-21 (discussing *United States Trust Co.*, 431 U.S. at 22-23 ("As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis." (citations omitted))). It should be noted that although the Court does not give the standard minimum rationality review deference to legislative judgment in these cases, and thus these cases involve a "not toothless" or "substantially rigorous" kind of rational review analysis, see *supra*, notes 26-27, the Court will still give some deference to governmental judgment in these cases. On this point, see *infra*, note 94.

<sup>35</sup> See *Maine v. Taylor*, 477 U.S. 131 (1986) (finding the burden to be on the government where Maine statute prohibiting importation of live baitfish discriminated against interstate commerce); Kelso, *supra* note 2, at 501, 520 (discussing, inter alia, *Rankin v. McPherson*, 483 U.S. 378 (1987) (where "the burden shifted to the government to prove no unconstitutional action once a prima facie case had been shown")); Kelso, *supra* note 2, at 519-20 (explaining that where a statute directly discriminates against interstate commerce, the burden shifts to the government to justify the restriction); Kelso, *supra* note 3, at 12-15 (commenting on the Takings Clause case *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which employed a higher level of review than minimum rationality). See generally Kelso, *supra* note 2, at 585 app. a, tbl.1. As with the other cases involving individual rights, the structure of these doctrines reflects the same three-part analysis. See *supra* text accompanying notes 11-18, 34. Thus, in *Rankin v. MacPherson*, the Court balanced: (1) the government's "legitimate" ends; (2) the means by which the government action achieved these benefits, including whether the ends could be promoted through less drastic action; and (3) given these considerations, whether the government can show that the "burden" on the individual's First Amendment rights was "outweighed" by the government's benefits. *Rankin*, 483 U.S. at 388-92.

<sup>36</sup> Some persons might argue that the determination of who has the burden of proof is a separate question from the standard of review. However, because burdens of proof are critical in litigation, from a pragmatic standpoint it seems appropriate to recognize that a shifting bur-

## 2. *Levels of Review Between Intermediate and Strict Scrutiny*

The remaining two additional levels of review that have appeared in recent cases represent variations of scrutiny between intermediate and strict scrutiny. As noted earlier, under intermediate review, the legislation must: (1) advance important or substantial government interests; (2) be substantially related to advancing those interests; and (3) not be substantially more burdensome than necessary to advance this interests.<sup>37</sup> Strict scrutiny requires an increased level of scrutiny for each of these three questions. Under strict scrutiny, the statute must: (1) advance compelling governmental interests; (2) be directly related to advancing those interests; and (3) be the least restrictive effective means of doing so.<sup>38</sup>

The first additional level of scrutiny continues the intermediate level of scrutiny for elements one and three of the heightened scrutiny tests; it, however, increases the level of scrutiny under the second prong from the intermediate level of substantial relationship to the strict scrutiny level of direct relationship. This is the test used to determine the constitutionality of regulations of commercial speech. As the Court stated in *Central Hudson Gas & Electric Co. v. Public Service Commission*, “[W]e ask whether the asserted governmental interest is substantial . . . [Next] we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”<sup>39</sup> Because

den of proof does change the rigor of the review in any case to which that shifting burden is applied. In her commentary to Panel I of the Symposium, Kathryn Kolbert of the Annenberg School for Communication, who has litigated a number of constitutional cases, including *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), emphasized the same point regarding the importance in litigation of who has the burden of proof. See Kathryn Kolbert, Commentary at the University of Pennsylvania Journal of Constitutional Law Symposium: Equal Protection After the Rational Basis Era (Feb. 2-3, 2001) (videotape on file with the *University of Pennsylvania Journal of Constitutional Law*).

<sup>37</sup> See *supra* note 17 and accompanying text. In its phrasing of intermediate review, the Court has used the phrase “narrowly drawn” to reflect both the substantial relationship and the not substantially more burdensome than necessary elements of intermediate scrutiny. See, e.g., *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989) (requiring a “fit” between the legislature’s ends and the means chosen to accomplish those ends . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective” (citations omitted)).

<sup>38</sup> See *supra* note 18 and accompanying text. In its phrasing of strict scrutiny, the Court has used the terms “narrowly drawn” or “necessary” to reflect the fact that at strict scrutiny the statute must directly advance its ends and be the least restrictive means of doing so. See *United States v. Paradise*, 480 U.S. 149, 166-67 (1987); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). For a discussion of the idea that the phrase “precisely tailored” would be a better term and would more clearly separate strict scrutiny from intermediate review, see *infra* note 46.

<sup>39</sup> *Central Hudson Gas & Elec. Co. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980). The *Central Hudson* test for commercial speech as an example of this kind of heightened intermediate scrutiny was discussed in previous works. See Kelso, *supra* note 2, at 577-78; Kelso, *supra* note 3, at 20-31; Kelso, *supra* note 11, at 1294-95.

it adds only one strict scrutiny component (direct relationship) to an otherwise intermediate test, in previous articles I have called this level of scrutiny intermediate or mid-level review with bite.<sup>40</sup>

A second possible level of scrutiny adopts the strict scrutiny requirement for both elements one and two, but continues the intermediate level of scrutiny for element three. Because this level adopts two of the three levels of strict scrutiny, but dilutes element three to an intermediate level of inquiry, this additional level can be called "watered-down" or "loose" strict scrutiny. The most recent use of this standard of review occurred in the equal protection case of *Bush v. Vera*.<sup>41</sup> In that case, though generally applying a strict scrutiny compelling governmental interest analysis to a case of race discrimination, the majority, per Justice O'Connor, "reject[ed], as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'"<sup>42</sup> Instead, the Court adopted the intermediate prong three requirement, only that the racial redistricting not be "substantially more [burdensome] than is 'reasonably necessary.'"<sup>43</sup>

This development is good for purposes of predictable and principled application of the law regarding standards of review. The addition of loose strict scrutiny creates four clearly defined levels of heightened scrutiny, each one more rigorous than the preceding standard of review on only one element of the three-pronged standard of review test.<sup>44</sup> These levels of scrutiny thus provide a step-

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<sup>40</sup> See Kelso, *supra* note 2, at 505-06, 586 app. a, tbl.1; Kelso, *supra* note 3, at 4-5.

<sup>41</sup> 517 U.S. 952 (1996).

<sup>42</sup> *Id.* at 977 (quoting *Bush v. Vera*, 861 F. Supp 1304, 1343 (1996)).

<sup>43</sup> *Id.* at 979. Two earlier Supreme Court cases also seemed to adopt this loose strict scrutiny approach in the context of race-based affirmative action in the employment context. See *Paradise v. United States*, 480 U.S. 149, 184 (1987) (plurality opinion) (stating that despite a strict scrutiny approach, the affirmative action remedial plan was not required to satisfy the least restrictive alternative test); *Fullilove v. Klutznick*, 448 U.S. 448, 490-92 (1980) (Burger, C.J., joined by White & Powell, JJ., concurring) (refraining from adopting a rigorous strict scrutiny approach). However, in a majority opinion authored by Justice O'Connor, the Court clearly adopted traditional rigorous strict scrutiny for race-based affirmative action. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-39 (1995), *cert. granted sub nom. Adarand v. Mineta*, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001). The *Adarand* opinion followed Justice O'Connor's dissent in *Paradise* where she criticized the *Paradise* plurality for not adopting traditional rigorous strict scrutiny in a race-based affirmative action case. *Paradise*, 480 U.S. at 199 (O'Connor, J., dissenting) ("[T]o survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy."). Despite this criticism of "loose" strict scrutiny in *Paradise* and *Adarand*, the adoption by Justice O'Connor of "loose" strict scrutiny in her majority opinion in *Bush v. Vera* suggests that this standard of review has become part of modern Supreme Court doctrine, at least for racial redistricting cases.

<sup>44</sup> Thus, there is basic intermediate or mid-level review (with all three elements of the standard of review reflecting an intermediate approach towards the governmental interests, relationship, and burden inquiries); intermediate or mid-level review with bite (two elements intermediate, the relationship element strict scrutiny); loose strict scrutiny (two elements strict

ladder approach towards standards of review, with each higher level of scrutiny clearly more rigorous than the preceding level. Each level of scrutiny is clearly defined in terms of doctrinal inquiries that have been discussed in many prior cases. These levels thus provide predictability, along with flexibility, which should be the Supreme Court's goal in developing an approach towards standards of review.<sup>45</sup> Further, because each level is composed of elements which are used in many cases, there are plenty of precedents available on how to apply that standard, even if few cases have applied that precise standard in the past.<sup>46</sup>

### C. Summary

This analysis indicates that in terms of actual case results, there are seven levels of scrutiny overall. These seven levels include a base level of minimum rationality review, and then six levels of scrutiny above that: two heightened rational review levels; two intermediate levels; and two levels of strict scrutiny.

All of these levels reflect increased scrutiny of the three basic questions asked in any inquiry into the constitutionality of legislation.

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scrutiny, only the burden inquiry intermediate); and traditional strict scrutiny (all three elements strict). *See generally infra* Appendix.

<sup>45</sup> *See* Kelso, *supra* note 2, at 513-16 (discussing the importance of predictability, but flexibility, in developing constitutional doctrines, and responding to possible concerns about the suggestion, restated here, that in fact similar standards of review are used by the Supreme Court in Equal Protection Clause, Due Process Clause, First Amendment, Dormant Commerce Clause, Takings Clause, and other individual rights doctrines). Of particular concern is that "such an attempt [to propose a uniform approach to these various doctrines] may rob the affected doctrines their needed flexibility or may impose a linguistic uniformity which is not helpful to careful consideration of the various problems before the court." Kelso, *supra* note 2, at 513.

<sup>46</sup> For example, although few cases currently have applied "loose strict scrutiny," there are plenty of strict scrutiny cases discussing "compelling" governmental interests and what a "direct" relationship entails, and plenty of intermediate review cases examining what the "not substantially more burdensome than necessary" test requires. *See supra* notes 41-43 and accompanying text.

To provide the maximum amount of clarity, it would be best if the Supreme Court used different terms to reflect the different levels of rigor under the intermediate and strict scrutiny "narrowly drawn" tests. For example, sometimes the Supreme Court uses the phrase "narrowly drawn" to reflect the fact that at strict scrutiny the statute must directly advance its ends and be the least restrictive means of doing so. *See* Kelso, *supra* note 2, at 507 n.64. However, the Court has also used the phrase "narrowly drawn" to reflect the intermediate "not substantially more burdensome than necessary" approach. *Id.* at 506-07 (citing *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)). To reflect the rigor of traditional strict scrutiny, and to separate this approach from the more flexible "substantially" narrowly drawn analysis—now used at intermediate review, intermediate review with bite, and loose strict scrutiny—the term "precisely tailored" is a better term to use than "narrowly tailored" for the strict scrutiny "least restrictive alternative" test. *See* Kelso, *supra* note 2, at 507 n.64. Adoption of the term "precisely tailored" is consistent with the Supreme Court's use of this phrase on occasion. *See id.* at 506 n.62 (noting the Court phrases the strict scrutiny test in terms of whether the regulation is "precisely tailored to serve [a] compelling state interest" (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990))).

At rational review, the increased scrutiny comes from an increasing lack of deference to the legislature when applying the rational review test. At higher levels of scrutiny, the increased rigor comes from gradually adding to intermediate review elements of a strict scrutiny approach on the inquiries of governmental ends, relationship to benefits, and burdens. This structure is summarized in a table that appears in Appendix A.

## II. POSSIBLE PROBLEMS WITH FUTURE PROLIFERATION OF SCRUTINY LEVELS

Given this understanding of the Court's current practice employing seven levels of scrutiny in assessing the constitutionality of governmental action, a danger of increased confusion and unpredictability exists if proliferation of levels continues. This could happen if:

(1) The Court adopts additional kinds of inquiries different than the three basic inquiries used under the three basic levels of scrutiny; or

(2) Additional mixing and matching of different kinds of scrutiny occurs for the governmental interests, relationship to benefits, and burden inquiries; or

(3) The "base plus six" standards are not clearly acknowledged. Unfortunately, each of these concerns are real given language in some recent equal protection and related Supreme Court cases.

### A. *The Problem of Additional Kinds of Inquiries*

Two recent cases underscore the kind of problem created by the possible proliferation of additional kinds of inquiries. First, in the context of reviewing the constitutionality of a court injunction, the Court in *Madsen v. Women's Health Center, Inc.* adopted an analysis under element three of heightened scrutiny that was described as being somewhere between the intermediate "not substantially more burdensome" test and the strict scrutiny "least restrictive alternative" test.<sup>47</sup> From the opinion, it is not clear exactly how much more stringent this test is than traditional intermediate scrutiny, nor are other precedents of any help, since the standard is not used in any other case. As the dissent noted in *Madsen*, "The Court . . . creates, brand new . . . an additional standard . . . . The difference between it and intermediate scrutiny . . . is frankly too subtle for me to de-

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<sup>47</sup> 512 U.S. 753, 764-65 (1994) (stating that where basic intermediate review requires that the restriction be "narrowly tailored to serve a significant government interest," the new standard requires that the restriction "burden no more speech than necessary to serve a significant government interest").

scribe . . . ."<sup>48</sup> As discussed later,<sup>49</sup> this additional version of the narrowly drawn analysis is unnecessary under the "base plus six" model of scrutiny discussed in this Article. This is true even if one agrees that higher scrutiny is appropriate for court injunctions rather than for other kinds of governmental action, as the majority held in *Madison*.<sup>50</sup>

The equal protection, gender discrimination case of *United States v. Virginia*<sup>51</sup> is another case of increased proliferation of inquiries leading to a confused result. Although Justice Ginsburg's majority opinion initially cited standard intermediate review as the appropriate standard to apply in a gender discrimination case,<sup>52</sup> the opinion ultimately seemed to require that the State of Virginia show an "exceedingly persuasive justification" for its gender discrimination at the Virginia Military Institute (VMI), not merely a substantial relationship to important government interests.<sup>53</sup> As Chief Justice Rehnquist noted in his concurring opinion, adoption of the phrase "exceedingly persuasive justification . . . introduces an element of uncertainty" and "potential confusion" into the appropriate test and is unnecessary to strike down the gender discrimination at issue at VMI.<sup>54</sup> As discussed later, if the Court wants to adopt a higher level of scrutiny for gender discrimination cases than traditional intermediate review, it would be preferable to adopt one of the heightened standards under the "base plus six" model—intermediate review with bite, loose strict scrutiny, or strict scrutiny—rather than add another uncertain standard of review—exceedingly persuasive analysis—into the mix.<sup>55</sup>

<sup>48</sup> *Id.* at 791 (Scalia, J., concurring in part and dissenting in part) (explaining the Court's expanded use of levels of scrutiny).

<sup>49</sup> See *infra* text accompanying notes 100-05 (discussing the proper response to the problem of proliferation).

<sup>50</sup> 512 U.S. at 765-66 (distinguishing ordinances from court-imposed injunctions, and noting that "these differences require a somewhat more stringent application of general First Amendment principles" for injunctions).

<sup>51</sup> 518 U.S. 515 (1996).

<sup>52</sup> *Id.* at 533 ("The State must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" (alteration in original) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

<sup>53</sup> *United States v. Virginia*, 518 U.S. 515, 534 (1996).

<sup>54</sup> *Id.* at 559 (Rehnquist, C.J., concurring).

<sup>55</sup> See *infra* text accompanying notes 106-07. On the uncertainty caused by the Court's opinion in *United States v. Virginia*, see generally Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169 (1998). During his commentary to Panel IV at the Symposium, Professor Lawrence Sager of the New York University School of Law suggested that perhaps Justice Ginsburg's use of the phrase "exceedingly persuasive justification" was an attempt to move outside the current levels of scrutiny analysis, in beginning to reassess whether the current scheme makes continued sense. See Professor Lawrence Sager, *Commentary at the University of Pennsylvania Journal of Constitutional Law Symposium: Equal Protection After the Rational Basis Era* (Feb. 2-3, 2001) (videotape on file with the *University of Pennsylvania Journal of Constitutional Law*).

## B. Problems of Mixing and Matching Levels of Scrutiny

### 1. Rational Review and Intermediate Mixing and Matching

In addition to the three versions of rational review discussed earlier in this Article,<sup>56</sup> it would be possible for the Court to add levels of review mixing rational review and intermediate review. For example, the Court could suggest that the government action must have a rational relationship to an important or substantial government interest. The Court appears to have done this in a voting rights case, *Timmons v. Twin Cities Area New Party*.<sup>57</sup> The Court could also suggest that the government action must have a substantial relationship to a legitimate government interest. The Court appears to have done this in the Takings Clause case of *City of Monterey v. Del Monte Dunes*,<sup>58</sup> relying in part on *Nollan v. California Coastal Commission*.<sup>59</sup>

Each of these decisions is troublesome. In addition to creating additional levels of review without demonstrating need for them, these cases violate the certainty gained under the "base plus six" model of knowing that each different level of review represents a step-ladder increase in the rigor of scrutiny over the previous level.<sup>60</sup> For example, which level of scrutiny is more rigorous—the *Timmons* rational relationship to important government interest test, the *Nollan/Del Monte Dunes* substantial relationship to legitimate government interest test, or the related Takings Clause case of *Dolan v. City of Tigard's* "rough proportionality" standard?<sup>61</sup> Presumably *Dolan* is more

Whether or not that was her intent, it is unlikely that a majority of the current Court shares an instinct to rethink levels of scrutiny analysis in any major way. See generally *infra* notes 72-75 and accompanying text.

<sup>56</sup> See *supra* text accompanying notes 22-36.

<sup>57</sup> 520 U.S. 351, 358, 369-70 (1997) ("[A] State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions'.... [T]he burdens Minnesota's fusion ban imposes on the New Party's associational rights are justified by 'correspondingly weighty' valid state interests in ballot integrity and political stability." (citations omitted)).

<sup>58</sup> 526 U.S. 687 (1999). The Court stated:

[A]lthough this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions... [g]iven the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents.

*Id.* at 704 (citations omitted).

<sup>59</sup> *Id.* (citing 483 U.S. 825, 834-35 n.3 (1987)).

<sup>60</sup> See *supra* text accompanying notes 44-46 and *infra* Appendix.

<sup>61</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (arguing that the "rough proportionality" standard is a different, and more vigorous, level of scrutiny than "the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause..."); see also Kelso, *supra* note 3, at 12-15 (discussing the Court's usage of heightened rational review scrutiny in *Dolan v. City of Tigard*).

rigorous than *Nollan/Del Monte Dunes*,<sup>62</sup> but that is not certain under the Court's current formulations.<sup>63</sup> Recasting *Timmons* and *Nollan/Del Monte Dunes* as versions of minimum rationality review or second-order rational review,<sup>64</sup> while acknowledging *Dolan* as third-order rational review, since the government clearly bears the burden of demonstrating the constitutionality of its action in *Dolan*,<sup>65</sup> would clarify this aspect of the law considerably.

## 2. *Intermediate and Strict Scrutiny Mixing and Matching*

As a theoretical matter, the Court could also adopt levels of scrutiny between traditional intermediate and traditional strict scrutiny in addition to the intermediate with bite and loose strict scrutiny standards discussed earlier.<sup>66</sup> For example, the Court could require, as a version of intermediate review with bite, the government to have a compelling government interest to regulate, but only require a substantial relationship between means and ends and require that the action not substantively burden more persons than necessary. Alternatively, as a version of loose strict scrutiny, the Court could require compelling government interests, a least restrictive alternative test, by requiring only a substantial relationship, rather than a direct relationship, between means and ends.

Adoption of such tests, however, would only add uncertainty to the law in terms of rigor in the standards of review. Which version of intermediate review with bite is more rigorous—the current *Central Hudson* test (which adds to basic intermediate review only the strict scrutiny direct relationship requirement),<sup>67</sup> or the version suggested above (which adds to basic intermediate scrutiny only the strict scrutiny compelling government interest test)? Which version of loose strict scrutiny is more rigorous—*Bush v. Vera* (which only waters down

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<sup>62</sup> See *Del Monte Dunes*, 526 U.S. at 704-05 (declining, in a regulatory takings case, to apply the *Dolan* analysis outside the *Dolan* context of required dedications or exactions).

<sup>63</sup> For example, it is not clear from the ordinary meaning of words that the “substantial relationship” required in *Nollan* is less rigorous than the “reasonable proportionality” of *Dolan*.

<sup>64</sup> See *infra* text accompanying notes 108-21. Neither *Timmons* nor *Nollan/Del Monte Dunes* represent third-order rational review, since in each case the challenger appears to bear the burden of proving that the government action is unconstitutional. See *Timmons*, 520 U.S. at 365-66 (focusing its analysis on the challenger's burden, with the Court speaking in terms of what “[p]etitioners contend” and “petitioners urge”); *Del Monte Dunes*, 526 U.S. at 700-01 (noting that jury instructions required the challenger to demonstrate that the government action was unconstitutional).

<sup>65</sup> See 512 U.S. at 388-91 (placing the burden on the municipality to show a reasonable relationship between the dedications and the municipality's needs for the land); *id.* at 413 (Souter, J., dissenting) (criticizing the majority for placing the burden on the government). For discussion of *Dolan* as representing an example of third-order rational review, see Kelso, *supra* note 3, at 12-15.

<sup>66</sup> See *supra* text accompanying notes 37-43.

<sup>67</sup> See *supra* text accompanying notes 39-40.



the least restrictive alternative requirement of strict scrutiny),<sup>68</sup> or the version suggested above (which only waters down the direct relationship requirement of strict scrutiny)? By having only one kind of intermediate review with bite and one kind of loose strict scrutiny, the "base plus six" model preserves a system where in each succeeding level of scrutiny is clearly more rigorous than the preceding level.<sup>69</sup> In the absence of any showing that more than seven levels of scrutiny are needed to promote flexibility in decision making, the Court should stick with those seven levels and not engage in any unnecessary and confusing additional proliferation in the levels of review.<sup>70</sup> Further, if seven levels are going to be used, the seven levels currently used most frequently provide the soundest foundation on which to base existing doctrine.<sup>71</sup> Of course, the Court could choose to scrap

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<sup>68</sup> See *supra* text accompanying notes 41-43.

<sup>69</sup> See *supra* text accompanying notes 44-46 and *infra* Appendix.

<sup>70</sup> In her commentary to Panel III of the Symposium, Professor Deborah Hellman, of the University of Maryland, noted that given the three basic inquiries of advancement (legitimate, important, or compelling), relationship to benefits (rational, substantial, or direct) and burdens (not irrationally burdensome, not substantially more burdensome than necessary, or the least burdensome alternative), and the three levels of scrutiny for each inquiry, mathematically there are twenty-seven possible permutations of levels of scrutiny. See Professor Deborah Hellman, Commentary at the University of Pennsylvania Journal of Constitutional Law Symposium: Equal Protection After the Rational Basis Era (Feb. 2-3, 2001) (videotape on file with the *University of Pennsylvania Journal of Constitutional Law*). With the addition of "substantial deference" versus "no substantial deference" under the rational basis standard of review, and the opportunity to place the burden on the challenger or the government, the number of possible permutations rises to more than sixty-four. Practical reasonableness, however, a hallmark of the Anglo-American common law, suggests that the Court should resist such a proliferation in possible tests where there is no demonstrated need for such additional levels. See, e.g., Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (discussing the benefits of statutory interpretation through practical reason as opposed to formalism); Fried, *supra* note 21, at 38-49 (discussing "the artificial reason of the law"); Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 450-63 (1975) (discussing the origins and development of common law). Of course, this does not mean that the Court should not adopt a variation within a level of review if institutional needs so counsel. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting the extra level of deference under minimum rationality review that is given to congressional regulations "over immigration and naturalization, [where] 'Congress regularly makes rules that would be unacceptable if applied to citizens'" (quoting *Mathews v. Dias*, 426 U.S. 67, 80 (1976))).

<sup>71</sup> Admittedly, in some respects the proposal in this Article that the Court should stick with the "base plus six" model for seven levels of scrutiny is somewhat arbitrary. For example, this article proposes that the two levels of heightened rational review should be "second-order" no substantial deference and "third-order" burden shifts to the government. See *infra* Appendix. Alternatively, similar to the two heightened review levels between intermediate review and strict scrutiny, which increase the level of rigor on succeeding elements of the three basic inquiries of advancement, relationship to benefits, and burdens, one could suggest that the two levels of heightened rational review should be the substantially related to legitimate interests test of *Del Monte Dunes*, see *supra* note 58, and then a substantially related to important government interests, but not irrationally burdensome, analysis; this is an approach not used in any current case. The advantage of the approach proposed in this Article to heightened rational review is that it builds on existing case-law, adopting levels of scrutiny that appear in numerous existing precedents. See *supra* text accompanying notes 22-36. Only a few cases, therefore, like *Del Monte*

the current levels of scrutiny, and adopt either a “sliding scale” approach<sup>72</sup> or some new theory entirely separate from the current doctrinal approach.<sup>73</sup> Practical considerations and historical experience suggest such a move would be neither a good idea<sup>74</sup> nor likely to be adopted by a majority of the Court.<sup>75</sup>

### C. Acknowledging the Six Standards of Heightened Review

In addition to these observations, it would help certainty and predictability in the law if the Court explicitly acknowledged the existence in current doctrine of the seven levels of scrutiny. Explicitly acknowledging only the three basic levels—minimum rationality re-

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*Dunes* or *Timmons*, require reconceptualization. See *infra* text accompanying notes 109-122. In the absence of strong reasons to the contrary, the lessons of the common law support building on existing precedent where possible. See, e.g., Jones, *supra* note 70, at 450-63.

<sup>72</sup> See, e.g., Leslie Friedman Goldstein, *Between the Tiers: The New(est) Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372 (2002) (discussing with approval the “sliding scale” approach touted by Justice Marshall in *San Antonio v. Rodriguez* and Justice Stevens in *Craig v. Boren*).

<sup>73</sup> See, e.g., Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights* 4 U. PA. J. CONST. L. 281 (2002) (proposing a new theory of the Court’s role in protecting individual rights in which equal protection law contains no form of heightened scrutiny).

<sup>74</sup> See Kelso, *supra* note 2, at 517 (noting that “a sliding scale standard provides little guidance for lower courts faced with resolving equal protection and due process cases and might provide lower courts with too much discretion in applying the sliding scale standard”). This is particularly true given the growth in the dockets of the lower federal courts, which makes it “essentially impossible for the Court to engage in meaningful ‘error correction.’” Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 996 (2000). With regard to adopting a new theory of individual rights, a suggestion often promoted by progressive constitutional theorists disappointed at the current state of some doctrinal outcomes, John Hart Ely’s caution of two decades ago is still relevant. John Hart Ely, *The Supreme Court 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 17 (1978) (“[T]here is absolutely no assurance that the Supreme Court’s life-tenured members will be persons who share your values.”). See also Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 318 (2002) (“Progressives are likely to influence present constitutional meanings only by devising arguments that convince some conservative officeholders to maintain what progressives perceive to be a very imperfect status quo.”).

<sup>75</sup> The fact that versions of the standards of review appear in so many doctrines, see *supra* notes 11-65 and accompanying text, suggests strong institutional support at the Supreme Court for doctrine to be developed in that way. Further, unlike the experience in France during the French Revolution, where much old doctrine was thrown out in favor of new doctrine developed by non-judicial actors and imposed through the Napoleonic Code, there are few examples in our common law system of judges rejecting doctrines so well-developed and entrenched as the standards of review. Perhaps the only similar example would be the Supreme Court’s rejection in 1937 of the *Lochner*-era Court’s approach to substantive due process and the Commerce Clause. That rejection, however, was a product of the well-known constitutional conflict between President Roosevelt and the Court. See, e.g., RONALD ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 188-89 (6th ed. 2000) (discussing “The Court Packing Plan of 1937”). No conflict of that magnitude is on the horizon today regarding the standards of review under the Equal Protection Clause or any of the other constitutional doctrines where versions of the standards of review are used, like due process, freedom of speech, Dormant Commerce Clause, Contract Clause, or the Takings Clause.

view, intermediate scrutiny, and strict scrutiny—while in fact adopting in individual cases a myriad of different formulations of review to respond to the nuances of those individual situations, as discussed above,<sup>76</sup> promotes neither certainty nor predictability in the law.

At rational review, this means acknowledging the roles that “second-order” and “third-order” rational review play in constitutional analysis. Instead of the possible implicit use of such review, as in the cases discussed above,<sup>77</sup> this would mean that the Court should squarely face that in some cases, a real choice exists between whether to apply minimum rationality review or either second-order or third-order rational review; that choice should be faced directly. For example, such a choice of whether to apply minimum rationality review or second-order rational review may implicitly have been made in the 1985 equal protection case *City of Cleburne v. Cleburne Living Center, Inc.*<sup>78</sup> In 1993, a five Justice majority ducked this issue in *Heller v. Doe*, suggesting that only minimum rationality review exists.<sup>79</sup> A four Justice dissent supported the *Cleburne* kind of rational review.<sup>80</sup> Given the change in the membership of the Court since 1993, the dissent may have five votes for its position today.<sup>81</sup> If so, it would help if the next opinion to address the issue was phrased in terms of *Cleburne*—explicitly representing second-order rational review—with the elements of that standard of review used as defined herein.<sup>82</sup>

Such an acknowledgment would not represent an additional proliferation in the levels of review. Due to its skepticism of the legislative agenda, the Court does not currently defer to state legislative judgments under Dormant Commerce Clause analysis or the Contract Clause when the State is attempting to alter its own contractual obligations.<sup>83</sup> Thus, this level of review already exists in the Court’s

<sup>76</sup> See *supra* text accompanying notes 11-65.

<sup>77</sup> See *supra* text accompanying notes 26-36.

<sup>78</sup> 473 U.S. 432, 449-50 (1985) (majority opinion phrased the question in terms of minimum rationality review in dealing with the mentally impaired); *id.* at 458-60 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in part and dissenting in part) (noting that the majority opinion actually applied “second-order” rational review). See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1444 (2d ed. 1988) (noting that in *Cleburne* the Court did not defer to the legislature’s judgment concerning the rationality of the statute as is usual under minimum rationality review, but rather determined for itself “whether the policies hypothesized to save the challenged action were actually supported by fact . . .” (citations omitted)); Kelso, *supra* note 2, at 499-500 (discussing *Cleburne* as a possible case of second-order rational review).

<sup>79</sup> 509 U.S. 312, 319-21 (1993).

<sup>80</sup> *Id.* at 336-37 (Souter, J., joined by Blackmun, Stevens, & O’Connor, JJ., dissenting).

<sup>81</sup> Three of the *Heller* dissenters, Justices Stevens, O’Connor, and Souter, are still on the Court today. The two most recent additions to the Court, Justices Ginsburg and Breyer, would likely join them in a similar case today. However, in the interests of faithfulness to precedent, it is not certain that all five would support the *Heller* dissent today. See, e.g., *Bd. of Trs. v. Garrett*, 125 S. Ct. 955, 963 (2001) (Justice O’Connor joining a five Justice majority opinion making reference to *Cleburne* adopting the “minimum ‘rational basis’ review”).

<sup>82</sup> See *supra* text accompanying notes 26-34.

<sup>83</sup> See *supra* note 34.

individual rights jurisprudence. Such an acknowledgment in *Cleburne*, or in another appropriate case,<sup>84</sup> would exemplify the Court's candidness in stating that based on the rationales for applying heightened scrutiny, the lack of deference routinely applied in Dormant Commerce Clause cases and some Contract Clause cases is also appropriate for the Equal Protection Clause case in question.<sup>85</sup>

A second area that would benefit from a candid acknowledgment of second-order rational review includes cases involving less than undue burdens on unenumerated fundamental rights. For example, the Court has applied strict scrutiny in cases involving significant burdens on the fundamental right to marry, as in *Zablocki v. Redhail*.<sup>86</sup> The Court has also applied strict scrutiny to significant burdens on the right to travel in *Shapiro v. Thompson*<sup>87</sup> and *Memorial Hospital v. Maricopa County*.<sup>88</sup> However, in cases involving less than substantial burdens on these unenumerated fundamental rights, the Court has applied some version of rational review, but seemingly without the usual deference to the legislative branch typical of minimum rationality review.<sup>89</sup> Candid acknowledgment of this may also help explain the higher than minimum rationality review seemingly given in an-

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<sup>84</sup> See, e.g., *Brian B. ex rel. Lois B. v. Pennsylvania Dep't of Educ.*, 230 F.3d 582, 587, 590 (3d Cir. 2000) (applying minimum rationality review to hold there was no violation of equal protection where a Pennsylvania statute limited education to youths convicted as adults and incarcerated in adult, county correctional facilities, but did not so limit education to youths incarcerated in state facilities; dissent applied a *Cleburne*-like rational review because "isolation of this particular group of school-age inmates awakens my skepticism"), *cert. denied sub nom. Brian B. ex rel. Louis B. v. Hickok*, 121 S. Ct. 1603 (2001). Even incarcerated persons, of course, have constitutional rights. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (holding that a ban on a prisoner's right to marry failed rational review as not reasonably related to any legitimate government interest).

<sup>85</sup> See *supra* note 20 and accompanying text.

<sup>86</sup> 434 U.S. 374 (1978) (holding invalid a statute requiring court approval orders for marriages of state residents who have child support obligations, on grounds that it violated the Equal Protection Clause and the right to marry).

<sup>87</sup> 394 U.S. 618 (1969) (holding invalid a statute that denied welfare benefits to residents of certain states who resided there for less than a year).

<sup>88</sup> 415 U.S. 250 (1974) (holding invalid a state requirement of a year's residence to receive medical benefits).

<sup>89</sup> See *Turner v. Safley*, 482 U.S. 78 (1987) (finding restrictions on prisoners' ability to marry not "reasonable"); *Sosna v. Iowa*, 419 U.S. 393, 407 (1985) (holding that Iowa may "reasonably" decide to impose a residency requirement before individuals can obtain a divorce in the state). On this issue of less than undue burdens on fundamental rights perhaps triggering "second-order" rational review, rather than minimum rationality review, see generally *Kelso*, *supra* note 2, at 596-99. Of course, if the right to travel is reconceptualized as a privileges and immunities issue, see *Saenz v. Roe*, 526 U.S. 489 (1999) (striking down, under the Privileges and Immunities Clause, a California statute denying cash assistance to persons with less than a year's residence), then perhaps those cases should be analyzed under intermediate review, as in the Art. IV, § 2, cl. 1 privileges and immunities cases that adopt intermediate review. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (striking down, under the Privileges and Immunities Clause, a New Hampshire Supreme Court Rule limiting bar admission to state residents). For further discussion of *Piper*, see *Kelso*, *supra* note 2, at 505.

other case of a less than substantial burden on an unenumerated fundamental right, *Hodgson v. Minnesota*.<sup>90</sup>

A third area in which acknowledgment of the variations of rational review would aid clarification of the law involves *City of Boerne v. Flores*<sup>91</sup> and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.<sup>92</sup> In these cases, the Supreme Court required that when Congress legislates pursuant to its Section 5 enforcement power under the Fourteenth Amendment that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>93</sup> Given the level of scrutiny in both cases concerning whether Congress had satisfied this test, it is reasonably clear that these cases were not adopting the deferential minimum rational review level of scrutiny.<sup>94</sup> In both cases, however, it is unclear whether the challenger or the government has the burden of demonstrating whether "congruence and proportionality" exist. Explicit acknowledgment of the seven standards of review would raise the visibility of this question, and help clarify whether *City of Boerne* and *Florida Prepaid* were adopting second-order or third-order rational review.<sup>95</sup>

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<sup>90</sup> 497 U.S. 417 (1990) (holding, in an abortion rights case dealing with parental notification, that a judicial bypass was constitutionally required). For further discussion, see Kelso, *supra* note 2, at 529 n.196.

<sup>91</sup> 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as beyond the power of Section 5 of the Fourteenth Amendment).

<sup>92</sup> 527 U.S. 627 (1999) (holding that Congress could not, under Section 5 of the Fourteenth Amendment, abrogate a state's sovereign immunity to patent infringement cases).

<sup>93</sup> *Id.* at 639 (quoting *Boerne*, 521 U.S. at 519-20).

<sup>94</sup> See *Florida Prepaid*, 527 U.S. at 640-44 (scrutinizing Congress' rationale for enacting the Patent Remedy Act); *Boerne*, 521 U.S. at 530-34 (showing little deference for Congress' action and rationale in passing the Religious Freedom Restoration Act). Despite this lack of minimum rationality review deference, some deference to governmental judgment is given in these heightened rational review cases. See, e.g., *Boerne*, 521 U.S. at 536 (Congress' "conclusions are entitled to much deference"); *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989) (asserting that while the *Turner v. Safley* "reasonableness" standard for determining marriage rights of prisoners "is not toothless," "[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder"); *Mathews v. Eldridge*, 424 U.S. 319, 349 (holding that under procedural due process analysis "substantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs"). See Kelso, *supra* note 2, at 526 n.177 for a further discussion of *Mathews*. On the deference given generally to governmental judgment in these heightened rational review cases, see also notes 26-27, 34 and accompanying text.

<sup>95</sup> To the extent that the two cases themselves provide any guidance, they seem to point in opposite directions. *Boerne* seems to suggest that the burden is on the challenger, as the Court acknowledges the "broad" power of Congress under Section 5 of the Fourteenth Amendment. *Boerne*, 521 U.S. at 536. On the other hand, *Florida Prepaid* seems to put the burden on Congress to demonstrate congruence and proportionality. *Florida Prepaid*, 527 U.S. at 639 ("[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."). The burden also seems to be placed on Congress in *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, 964 (2001) ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a his-

Explicit acknowledgment of the seven levels of scrutiny would also help clarify various aspects of heightened scrutiny. For example, the Court has struggled with the appropriate standard of review to apply to various kinds of free speech cases: content-based versus content-neutral regulations in both public and nonpublic forums; reasonable time, place, and manner regulations; regulations of commercial speech; regulations of television and radio versus cable television regulations; court injunctions on free speech rights; and prior restraints on speech.<sup>96</sup> Acknowledgment of the seven levels of scrutiny might help sort out some of the Court's current confusion in cases like court injunctions or cable television regulation.<sup>97</sup>

Acknowledgment of the seven levels of scrutiny would also help explain the language in *Bush v. Vera*, which rejected a traditional strict scrutiny approach,<sup>98</sup> while not undermining traditional strict scrutiny in areas like affirmative action in employment where the Court intends traditional strict scrutiny to apply.<sup>99</sup>

### III. THE PROPER RESPONSE TO THE PROBLEM OF PROLIFERATION

The proper response to each of the problems posed by the potential proliferation of levels of review discussed in Part II is to adopt the "base plus six" model of review, and then to recast each of the troublesome cases under that model. Given the flexibility inherent in the "base plus six" model, this recasting is easy to do.

For example, as discussed earlier, in the context of reviewing the constitutionality of a court injunction, the Court adopted in *Madsen v. Woman's Health Center, Inc.* an analysis under element three of heightened scrutiny that was described as being somewhere between the intermediate "not substantially more burdensome" test and the strict scrutiny "least restrictive alternative" test.<sup>100</sup> Such proliferation of inquiries is unnecessary. It is understandable that the Court might wish to adopt in *Madsen* a standard of review higher than traditional intermediate scrutiny, which applies to a content-neutral regulation of speech, because *Madsen* involves review of a court injunction

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tory and pattern of unconstitutional . . . discrimination by the States . . ."). Placing the burden on the government would mean that the "congruence and proportionality" test tracks in rigor the "rough proportionality" test of *Dolan*. See *supra* notes 61-65 and accompanying text. For further discussion of *Boerne* and its place in contemporary constitutional law, see Edward McGlynn Gaffney, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality*, 4 U. PA. J. CONST. L. 394 (2002).

<sup>96</sup> See generally Kelso, *supra* note 2, at 557-82; Kelso, *supra* note 3, at 20-37.

<sup>97</sup> See *infra* text accompanying notes 100-05; 122-29.

<sup>98</sup> See *Bush v. Vera*, 861 F. Supp. 1304 (1996); *supra* notes 41-43 and accompanying text.

<sup>99</sup> See *supra* note 43 (discussing *Adarand v. Peña*, 515 U.S. 200 (1995), *cert. granted sub nom. Adarand v. Mineta*, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001), and *Paradise v. United States*, 480 U.S. 149 (1987)).

<sup>100</sup> 512 U.S. 753, 764-65 (1994). See *supra* text accompanying notes 47-50.

rather than a generally applicable ordinance.<sup>101</sup> The "base plus six" model gives the Court three well-formed options from which to choose—intermediate with bite, loose strict scrutiny, or strict scrutiny. The dissent in *Madsen* opted for strict scrutiny.<sup>102</sup> The majority could basically have achieved its same result by adopting intermediate review with bite. As the majority's analysis reveals, where the injunction at issue in *Madsen* was constitutional, it was because it was directly related to the perceived harms and was a close enough fit to satisfy the intermediate "not substantially more burdensome than necessary" test.<sup>103</sup> Where the injunction was unconstitutional, it was because it was not directly related to perceived harms,<sup>104</sup> or not a close enough fit, and thus substantially overbroad.<sup>105</sup> Thus, in terms of predictable and stable levels of scrutiny, it would be better if the majority recast the increased scrutiny for court injunctions in *Madsen* as a case involving intermediate review with bite, rather than the new, unclear version of the narrowly-drawn analysis that the majority actually adopted in *Madsen*.

The gender discrimination case of *United States v. Virginia*, discussed earlier,<sup>106</sup> is another case of unnecessary proliferation of inquiries leading to a confused result. If the Court wants to adopt a higher level of scrutiny for gender discrimination cases than traditional intermediate scrutiny, it would be preferable to adopt one of the heightened standards under the "base plus six" model—intermediate with bite, loose strict scrutiny, or strict scrutiny—rather than add another uncertain standard of review—exceedingly persuasive analysis—into the mix.<sup>107</sup>

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<sup>101</sup> 512 U.S. at 764-66 (discussing the differences between ordinances and injunctions, and concluding that "these differences require a somewhat more stringent application of general First Amendment principles in this context").

<sup>102</sup> *Id.* at 792-94 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and dissenting in part) (asserting that "speech-restricting injunction[s]" should always be given strict scrutiny).

<sup>103</sup> *Id.* at 767-70 (finding that a thirty-six foot buffer zone in front of an abortion clinic is directly related to protecting unfettered ingress and egress from the clinic, and a close enough fit given the deference due to the state court's familiarity with the factual background); *id.* at 772-73 (finding that regulation of noise levels is directly related to the need for noise control around hospitals and medical facilities).

<sup>104</sup> *Id.* at 771 (finding that inclusion of thirty-six foot buffer zone at the back and side of the clinic is not directly related to ingress and egress from clinic); *id.* at 773-74 (finding prohibition on all uninvited approaches to persons seeking to enter the clinic not directly related to preventing clinic patients from being stalked or shadowed).

<sup>105</sup> *Id.* at 773 (holding that a ban on all images observable from the clinic is not narrowly drawn given the substantially less burdensome option for the clinic to "pull its curtains"); *id.* at 774-75 (holding that a three hundred foot ban on picketing around the clinic was "much larger" than the buffer zone found permissible in *Frisby v. Schultz*, 487 U.S. 474 (1988)).

<sup>106</sup> 518 U.S. 515 (1996). See *supra* text accompanying notes 51-55.

<sup>107</sup> Similarly, the Court should remain predictable about the determination of what governmental interests are appropriate to consider in determining the constitutionality of legislation. Under its usual approach over the last fifteen years, the Court has used any conceivable gov-

A third case involving an unnecessary proliferation of levels of scrutiny is *Timmons v. Twin Cities Area New Party*. In *Timmons*, both the majority and the two dissenting opinions agreed that for "severe" burdens on an individual's First Amendment associational rights, a strict scrutiny standard is appropriate.<sup>108</sup> For less than severe burdens, however, the majority did not adopt any traditional standard of review.<sup>109</sup> As discussed earlier,<sup>110</sup> the majority's reference to a reasonable relationship to important government interests is confusing in terms of the "base plus six" model. Since none of the opinions in *Timmons* demonstrated the traditional minimum rationality review deference to governmental decision making,<sup>111</sup> the real choice that must have been made in a case like *Timmons* was whether to adopt a version of heightened rational review, either second-order or third-order, or to adopt intermediate scrutiny.

Justice Souter's dissent in the case clearly opted for intermediate scrutiny,<sup>112</sup> and thus has the advantage of clarity. By considering only those interests put forward by the government in litigation, Justice

ernment interest to support a statute under rational review; it has considered any plausible governmental interest asserted during the litigation under intermediate review; and it has considered only actual governmental purposes under strict scrutiny. See generally Kelso, *supra* note 3, at 7-9; Kelso, *supra* note 2, at 530-36. To the extent Justice Ginsburg's opinion in *United States v. Virginia* suggested that at intermediate review the Court will only consider actual governmental interests, this was a departure from traditional analysis. See *Virginia*, 518 U.S. at 535-36.

The two cases cited by Justice Ginsburg in *United States v. Virginia* to support using an actual purpose analysis at intermediate scrutiny are over twenty years old, and do not clearly support that position. In the first case, *Weinberger v. Wiesenfeld*, while the Court did conduct an inquiry "into the actual purposes" underlying the statutory scheme, it indicated that this inquiry was for the purpose of determining whether or not "the asserted purpose could not have been a goal of the legislation." Thus, the focus of the case was on whether the asserted purpose was "plausible," the typical intermediate scrutiny. *Weinberger*, 420 U.S. 636, 648 & n.16 (1975). In the second case, *Califano v. Goldfarb*, Justice Ginsburg cited the four Justice plurality opinion, which seemed to adopt an actual purpose inquiry. See *Califano*, 430 U.S. 199, 212-13 (1977). Justice Stevens's concurrence, however, which provided the critical fifth vote in the case, phrased the test as whether the Court, faced with an interest "put forward by the Government as its justification," *id.* at 223, "might presume that Congress had such an interest in mind." *Id.* at 223 n.9 (Stevens, J., concurring). Implausible *post hoc* justifications for a statute can only be used under the any conceivable interest test of rational review. Under the *Califano* test, however, the Court can evaluate plausible governmental interests put forward in litigation at intermediate scrutiny because the Court can presume Congress had such an intent in mind.

<sup>108</sup> 520 U.S. 351, 358 (1997); *id.* at 374 (Stevens, J., joined by Ginsburg & Souter, JJ., dissenting); *id.* at 382-83 (Souter, J., dissenting).

<sup>109</sup> *Id.* at 358-59. On this issue of the amount of burden on a constitutional right triggering a different level of scrutiny, see *supra* notes 86-90 and accompanying text; Kelso, *supra* note 3, at 9-11; Kelso, *supra* note 2, at 510-12.

<sup>110</sup> See *supra* text accompanying notes 60-65.

<sup>111</sup> Even the majority opinion, which upheld the state law in *Timmons*, did so only after a careful and detailed analysis of the government's interests in the case. *Timmons*, 520 U.S. at 363-70.

<sup>112</sup> *Id.* at 383 n.2 (Souter, J., dissenting) ("[T]he midlevel scrutiny that applies in commercial speech cases, which is similar to what we apply here, '[u]nlike rational basis review . . . does not permit us to supplant the precise interests put forward by the State with other suppositions.'" (alteration in original) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993))).



Stevens's dissent also appeared to adopt an intermediate form of scrutiny.<sup>113</sup> Because of its willingness to consider conceivable government interests, the majority opinion is best viewed as either second-order or third-order rational review, depending on whether the majority thinks the challenger or the government has the burden of establishing the constitutionality of the government action.<sup>114</sup> The majority's language in *Timmons* about the government needing "important" regulatory interests, rather than merely "legitimate" interests, an intermediate, rather than rational review inquiry into governmental interests, appears to be completely unnecessary to the case, and to serve no useful purpose. The language in *Timmons* about the state's interest needing to be "sufficiently weighty" is best handled under second-order rational review by the real balancing test of benefits and burdens that takes place at second-order review.<sup>115</sup> Indeed, when cataloguing the state's interests, the majority noted that "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes,"<sup>116</sup> without any further finding that those interests were important or substantial. Thus, the Court should recast the majority opinion in *Timmons* as an example of second-order rational review, instead of creating a new, rationally related to important government interest test, unused in any other context, and unnecessary to resolve the *Timmons* case.

The use in *City of Monterey v. Del Monte Dunes* of a substantial relationship to a legitimate government interest test<sup>117</sup> is similarly a mistake. In adopting this test, the Court relied in part on the earlier case of *Nollan v. California Coastal Commission*.<sup>118</sup> The Court noted in *Del Monte Dunes* that given "the posture of the case before us" the Court would "decline" to revisit the *Nollan* precedent in this case.<sup>119</sup> As with the term "sufficiently weighty" in *Timmons*, the greater than minimal rationality review scrutiny required by use of the phrase "substantial

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<sup>113</sup> *Id.* at 377-78 (Stevens, J., joined by Ginsburg & Souter, JJ., dissenting). For discussion of consideration of only the interests put forward in litigation representing an intermediate level of review, see *supra* note 107 and accompanying text.

<sup>114</sup> The burden appears to be on the challenger in *Timmons*, and thus it presents another example of second-order rational review. See *id.* at 369-70 (citing to the similar voting rights case of *Burdick v. Takushi*, 504 U.S. 428, 437-38 (1992), and discussing whether the Court "rejected the petitioner's argument" in the case, thus suggesting that the challenger had the burden of proof in the case).

<sup>115</sup> See *supra* notes 26-34 and accompanying text.

<sup>116</sup> 520 U.S. at 364.

<sup>117</sup> 526 U.S. 687, 704 (1999) ("[A]lthough this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," the Court upheld the trial court's jury instructions laying out the test of what constitutes a regulatory taking.).

<sup>118</sup> *Id.* (citing 483 U.S. 825, 834-35 n.3 (1987)).

<sup>119</sup> *Del Monte Dunes*, 526 U.S. at 704.

relationship" in *Nollan* is best handled by the real balancing test of benefits and burdens of government action that takes place at second-order rational review.<sup>120</sup> Thus, whenever the Court decides to revisit Takings Clause precedents, it is hoped that the *Nollan/Del Monte Dunes* test can be recast as a version of second-order rational review,<sup>121</sup> while acknowledging *Dolan v. City of Tigard* as third-order rational review, since the government bears the burden of demonstrating the constitutionality of its action in *Dolan*.<sup>122</sup>

The Court's recent opinions regarding the proper standard of review to apply to regulations of cable television are also problematic. Recent cases in this area have failed to produce any clear majority-endorsed standard of review.<sup>123</sup> Part of the problem may lie in the Court's official focus upon intermediate review or strict scrutiny as the only two heightened scrutiny choices. Some members of the Court perhaps think that strict scrutiny, applicable to newspapers and books,<sup>124</sup> is too rigorous,<sup>125</sup> while other members of the Court may feel that intermediate review, applicable to over-the-air radio and television,<sup>126</sup> is too loose.<sup>127</sup> Under the "base plus six" model of levels of review, perhaps this impasse can be resolved. Like regulations of commercial speech, cable television regulation may be an appropriate area for intermediate review with bite, as I have previously sug-

<sup>120</sup> See *supra* notes 26-34 and accompanying text (discussing second-order rational review).

<sup>121</sup> Neither *Timmons* nor *Nollan/Del Monte Dunes* represent third-order rational review, since in each case the challenger appears to bear the burden of proving that the government action is unconstitutional. See *supra* note 64 (discussing the challengers' burden in *Timmons* and *Nollan/Del Monte Dunes*).

<sup>122</sup> See *supra* note 65.

<sup>123</sup> See, e.g., *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (declining to adopt a per se standard of review in First Amendment cases); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (applying intermediate scrutiny to a federal law requiring cable television systems to carry a certain amount of local stations).

<sup>124</sup> See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a state statute that mandated publication of specified editorials in a newspaper violated the First Amendment).

<sup>125</sup> See *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 739-41 (Breyer, J.) (plurality opinion). Justices Stevens and Souter concurred in the opinion, while Justice O'Connor concurred in part and dissented in part. All of the Justices, however, joined Justice Breyer in Part II of his opinion, where he recognized that strict scrutiny may be too rigorous in some First Amendment media cases. See *id.* at 740-42. See also *id.* at 777-78 (Souter, J., concurring).

<sup>126</sup> See *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (using intermediate review in holding that federal ban on editorializing in noncommercial television and radio violates the First Amendment).

<sup>127</sup> See *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 820-23 (1996) (Thomas & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (criticizing adoption of an intermediate standard of review rather than strict scrutiny for cable television regulation); *id.* at 784-87 (Kennedy & Ginsburg, JJ., concurring in part and dissenting in part) (suggesting that strict scrutiny is the proper standard to use, at least in the context of "public and leased access programmers whose speech is put at risk nationwide by these laws").

gested,<sup>128</sup> or loose strict scrutiny, following the model of Justice O'Connor's opinion in *Bush v. Vera*.<sup>129</sup>

Two final cases provide useful examples of the advantage of explicit acknowledgment of the "base plus six" model for determining standards of review. In *City of Erie v. Pap's A.M.*,<sup>130</sup> both the plurality opinion of Justice O'Connor,<sup>131</sup> and Justice Souter's dissent,<sup>132</sup> purported to apply the content-neutral regulation of free speech test of *United States v. O'Brien* to Erie's nude dancing regulation.<sup>133</sup> However, because of a lack of attention to the basic elements of this test in both *O'Brien* and in Justice O'Connor's plurality opinion, the plurality opinion failed to apply *O'Brien* properly, and instead adopted a "watered-down" version of the *O'Brien* test.<sup>134</sup>

At issue in *O'Brien* was whether a government statute banning the burning of draft cards violated the First Amendment right to freedom of speech.<sup>135</sup> In *Pap's*, as well as prior cases, the Supreme Court viewed the *O'Brien* test as a version of intermediate review.<sup>136</sup> As noted earlier, under traditional intermediate review the government has the burden to demonstrate that the statute advances substantial or important governmental interests, that the statute is substantially related

<sup>128</sup> See Kelso, *supra* note 3, at 32-35.

<sup>129</sup> 517 U.S. 952 (1996). On *Bush v. Vera*, see *supra* notes 41-43 and accompanying text. For example, Justices Kennedy and Ginsburg might be able to reach a compromise with the plurality in *Denver Area Educational Telecommunications Consortium*—Justices Breyer, Stevens, O'Connor and Souter, see *supra* note 127—to command a majority for loose strict scrutiny. Or perhaps Justices Kennedy and Ginsburg will unite with Justices Thomas, Scalia, and Chief Justice Rehnquist, see *supra* note 127, to command a majority for traditional strict scrutiny. In either event, a majority of the Court adopting some specific level of scrutiny for cable television regulation would aid predictability and certainty in the law.

<sup>130</sup> 120 S. Ct. 1382 (2000).

<sup>131</sup> See *id.* at 1387, 1395 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., Kennedy & Breyer, JJ.).

<sup>132</sup> See *id.* at 1402 (Souter, J., concurring in part and dissenting in part).

<sup>133</sup> *Id.* at 1388 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

<sup>134</sup> In this respect, the plurality opinion in *Pap's A.M.* is similar to the Court's opinion in the commercial speech case of *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), which watered down the commercial speech test of *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Eventually, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), a majority of the Court, including the author of *Posadas de Puerto Rico Associates*, Chief Justice Rehnquist, acknowledged that *Posadas* represented an improper application of *Central Hudson*, and to that extent was overruled. *44 Liquormart, Inc.*, 517 U.S. at 509-10 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.); *id.* at 531-32 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ.).

<sup>135</sup> 391 U.S. at 369.

<sup>136</sup> See *Pap's A.M.*, 120 S. Ct. at 1394 (O'Connor, J.) (analogizing *O'Brien* to *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), which adopted an intermediate "narrowly tailored to serve a significant governmental interest" test, and *Ward v. Rock Against Racism*, 491 U.S. 781, 798 & n.6 (1989), which also adopted intermediate "narrowly tailored" analysis, explicitly rejecting the strict scrutiny "least restrictive alternative" test); *Pap's A.M.*, 120 S. Ct. at 1402 (Souter, J. concurring in part and dissenting in part) (noting that in cases like *O'Brien* "we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment").

to advancing those interests, and that the statute is not substantially more burdensome than necessary.<sup>137</sup> In the First Amendment context, the Court usually requires that for a statute not to be substantially burdensome the statute must “leave open ample alternative channels for communication.”<sup>138</sup> The Court’s opinion in *O’Brien* required each of these elements.

As to the first element, the Court concluded in *O’Brien* that the government’s interest “in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances” was a “vital interest,” thus satisfying the requirement that the government’s interest be important or substantial.<sup>139</sup> Second, the Court required the government to establish “that the continuing availability to each registrant of his Selective Service certificates *substantially furthers* the smooth and proper functioning of the system that Congress has established to raise armies.”<sup>140</sup> Indeed, the Court spent a number of pages in its opinion discussing how the requirement of a certificate *substantially furthers* the government’s interest, thus giving the government a “substantial interest in preventing their wanton and unrestrained destruction.”<sup>141</sup> Finally, the Court noted that the statute was “an appropriately *narrow* means of protecting [the government’s] interest and condemns only the independent non-communicative impact of conduct within its reach.”<sup>142</sup>

When summing up this approach in *O’Brien*, however, the Court conflated the inquiry of government ends and the inquiry into statutory means. The Court concluded that because the statute involved “vital” government ends, and “substantially furthers” the government’s ends, that meant the government had a “substantial interest” in assuring the continued existence of Selective Service certificates.<sup>143</sup> The Court then phrased the *O’Brien* test as whether the government regulation “furthers an important or substantial governmental interest.”<sup>144</sup>

Devoid of the context of the rest of the Court’s opinion in *O’Brien*, this phrasing of the test may suggest that the government only needed to show some rational reason to believe that its interest is furthered to some extent—a kind of rational relationship test. This is how Justice O’Connor’s plurality opinion in *Pap’s A.M.* read the *O’Brien* test, accusing Justice Souter, in his dissent, of “conflat[ing]

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<sup>137</sup> See *supra* notes 17, 37 and accompanying text.

<sup>138</sup> *Clark*, 468 U.S. at 293.

<sup>139</sup> 391 U.S. at 381 (emphasis added).

<sup>140</sup> *Id.* (emphasis added).

<sup>141</sup> *Id.* at 380 (emphasis added).

<sup>142</sup> *Id.* at 382 (emphasis added).

<sup>143</sup> *Id.* at 381.

<sup>144</sup> *Id.* at 377.

two distinct concepts under *O'Brien*: whether there is a substantial government interest and whether the regulation furthers that interest.<sup>145</sup> However, when *O'Brien* is read in context, the Court clearly required the statute to "substantially further" the government's interest. As noted above, the Court's use of the phrase "substantial government interest" in *O'Brien* included both a requirement that the government's interest be "substantial" and that the statute "substantially further" those ends.<sup>146</sup> Thus, to be consistent with *O'Brien*, one should consider the *O'Brien* test as the standard phrasing under intermediate scrutiny: that the statute substantially further important or substantial governmental interests, and not be substantially more burdensome than necessary. Additionally, as an intermediate scrutiny test, the government has the burden in *O'Brien* to make this showing, which is what Justice Souter required in his dissent in *Pap's A.M.*<sup>147</sup>

A similar conflation of means and ends routinely occurs in cases involving race-based affirmative action in education. In the typical case, courts ask whether having a diverse student body is a compelling government interest.<sup>148</sup> Following Justice Powell's plurality opinion in *Regents of the University of California v. Bakke*,<sup>149</sup> most lower courts have concluded there is a compelling government interest,<sup>150</sup> but some courts have not.<sup>151</sup> This way of phrasing the issue, however, is wrong.

<sup>145</sup> *Pap's A.M.*, 120 S. Ct. at 1396-97.

<sup>146</sup> See *supra* notes 139-41, 143-144 and accompanying text.

<sup>147</sup> 120 S. Ct. at 1404-05 (Souter, J., concurring in part and dissenting in part). In applying this test, however, Justice O'Connor is right in stating in her plurality opinion that the government need not always conduct its own studies, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 1395 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). But the ultimate burden of proof should remain on the government, as it did in both *O'Brien* and *Playtime Theatres*. See *O'Brien*, 391 U.S. at 382 ("In conclusion, we find that because of the Government's substantial interest . . . a sufficient governmental interest has been shown to justify O'Brien's conviction."); *Playtime Theatres*, 475 U.S. at 50-51 (noting that while the "Court of Appeals imposed on the city an unnecessarily rigid burden of proof," the burden still remained on Renton, which was "entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance"). The Supreme Court will have an opportunity either to correct or compound this problem during its 2001 term. The Court recently granted certiorari in *City of Los Angeles v. Alameda Books*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 1223 (2001), a case involving the secondary effects of an adult bookstore/arcade in Los Angeles, in which the *O'Brien/Playtime Theatres* test again will be applied.

<sup>148</sup> See generally Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 266 n.36 (2002) (citing, inter alia, *Hunter ex rel. Brandt v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)).

<sup>149</sup> 438 U.S. 265, 311-13 (1978) (discussing the asserted goal of maintaining a diverse student body).

<sup>150</sup> See Bhagwat, *supra* note 148, at 263-69, 266 nn.32-42 and accompanying text (discussing *Hunter ex rel. Brandt*, *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000), *Gratz v. Bollinger*, 122 F. Supp. 811 (E.D. Mich. 2000), and *Smith v. Univ. of Wash. Law Sch.*,

The real question of government ends in these cases is whether there is a compelling government interest in effective and efficient education. That is the end that governments seek regarding education.<sup>152</sup> Diversity in the student body is one means to obtain this end. As Justice Powell indicated in *Bakke*, merely having diversity for diversity's sake is not only not a compelling government interest, it is not even a legitimate interest.<sup>153</sup> Properly understood, then, the strict scrutiny analysis that should take place in race-based affirmative action cases involving education is as follows: (1) is there a compelling governmental interest in education; (2) is having a diverse student body directly related to advancing this interest; and (3) is the affirmative action program adopting the least restrictive alternative that would effectively advance the government's interest in education.<sup>154</sup>

This first question of governmental interest should be a question of law for the court to resolve. Whether a particular governmental interest is illegitimate, legitimate, important, or compelling typically does not turn upon the facts of any particular case, but on the nature of the interest. Certain interests, like prejudice against the mentally impaired, are not legitimate;<sup>155</sup> interests like administrative cost considerations, while legitimate, are not important;<sup>156</sup> interests like diver-

233 F.3d 1188 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001)).

<sup>151</sup> See Bhagwat, *supra* note 148, at 264 nn.19-23, 268 n.48 and accompanying text (discussing *Hopwood* and *Johnson v. Bd. of Regents*, 106 F. Supp. 2d. 1362 (S.D. Ga. 2000)).

<sup>152</sup> See, e.g., TEX. CONST. art. VII, § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."). See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (discussing Article 7 of the Texas Constitution).

<sup>153</sup> *Bakke*, 438 U.S. at 307 ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid." Further, "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

<sup>154</sup> Of course, a similar tracking of standard strict scrutiny analysis should also be applied in other affirmative action cases. For example, in *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), discussed in Bhagwat, *supra* note 148, at 277-78 nn.75-78, the Court had to decide whether a prison could adopt a racial preference in hiring officers for a "boot camp" for young, non-violent criminal offenders. The Court analyzed the case as whether the government had a compelling government interest in staffing a diverse group of officers for the boot camp. *Wittmer*, 87 F.3d at 919-20. The proper analysis should have been: (1) is having an effective, rehabilitative "boot camp" program a compelling government interest; (2) is having a diverse group of officers directly related to a successful "boot camp" program; and (3) is the extent of the affirmative action program adopted to achieve that diverse group the least restrictive alternative that will effectively advance the government's rehabilitative end.

<sup>155</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 ("Private biases" against the mentally impaired "may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))), discussed *supra* notes 13, 24.

<sup>156</sup> See *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (noting that simply "sav[ing] the Government time, money, and effort . . . [does] not suffice to justify a gender-based discrimination in the distribution of employment-related benefits").

sity in broadcast programming, are important, but not compelling;<sup>157</sup> and certain interests, like remedying prior racial discrimination, are compelling.<sup>158</sup> In this case, I assume that it is uncontroversial that education is a compelling government interest, particularly for state governments where most educational affirmative action takes place.<sup>159</sup>

In contrast to governmental ends, the two means questions of the statute's relationship to benefits and burdens are fact questions which depend on the particular program before the court for their proper resolution. Thus, after hearing the government's evidence, since the government bears the burden in these cases, a district court should decide whether having a racially diverse student body is directly related to efficient and effective education,<sup>160</sup> and whether the particular program is the least restrictive alternative to achieving these educational benefits.<sup>161</sup>

<sup>157</sup> See *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-55 (D.C. Cir. 1998) (holding that "diverse programming" in broadcasting, even if an "important" government interest is not "compelling") (citations omitted).

<sup>158</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."), *cert. granted sub nom. Adarand v. Mineta*, 121 S. Ct. 1401 (2001) *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001). Regarding the question raised by Professor Bhagwat of whether in the context of challenges to race-conscious decision making there are any compelling governmental ends other than remedying prior racial discrimination, see Bhagwat, *supra* note 148 and text accompanying note 63, many court opinions have held, or strongly implied, that such additional compelling governmental interests exist. See, e.g., *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring) ("[C]ompliance with the . . . Voting Rights Act (VRA) is a compelling state interest."); *Bakke*, 438 U.S. at 310 ("improving the delivery of health-care services to communities currently underserved" is "assumed" to be "sufficiently compelling to support the use of a suspect classification"); *Hunter*, 190 F.3d at 1063 ("California's interest in the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools is a *compelling state interest*"); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) ("[W]e are bound by this Court's determination in *Andrew Jackson I and II* that a compelling interest *can* be found in a program that has as its object the reduction of racial isolation and what appears to be *de facto* segregation.").

<sup>159</sup> See generally *Hunter*, 170 F.3d at 1063 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) ("[E]ducation is perhaps the most important function of state and local governments." (alteration in original)). As Professor Bhagwat notes, currently courts are split on the question of whether analyzing government ends is a fact question or question of law. See Bhagwat, *supra* note 148 and text accompanying note 62. However, that may be because the courts have been conflating the means and ends inquiries by asking whether having a diverse student body in the context before the court is a compelling government interest. See *supra* notes 148-51 and accompanying text. Once it is understood that this way of viewing the question is wrong, it should become clear that the proper question of governmental ends, such as whether efficient education is a compelling governmental interest, is a question of law for the court to resolve.

<sup>160</sup> As a professor, I think it is obvious that having a racially diverse student body is directly related to efficient and effective education. For non-professors, however, it may be necessary to marshal the evidence.

<sup>161</sup> This prong of the strict scrutiny test is the most difficult to meet. It will depend upon the factual circumstances of each case whether there are less restrictive alternatives than the particular affirmative action program adopted by the institution that would advance as effectively

## CONCLUSION

This Article has discussed the various levels of scrutiny used by the Supreme Court to determine the constitutionality of governmental action under the Equal Protection Clause and related constitutional doctrines that deal with individual rights, such as due process or the freedom of speech. Part I discussed the current standards of review in terms of seven basic levels of review used by the Court in different contexts. These seven levels involve a base level of minimum rationality review, and then six levels of heightened scrutiny: two heightened rational review levels; two intermediate levels of review; and two levels of strict scrutiny. This approach is named in this Article the "base plus six" model of review.

Building on this "base plus six" model of review, Part II of this Article discussed the problems posed by the increased proliferation of levels of review beyond these seven levels that have occurred in some recent Supreme Court cases. Part III noted that since all of the recent troublesome cases are capable of reconceptualization as part of the "base plus six" model, the Court should simply follow the "base plus six" model of review. That model gives the Court a flexible set of

the government's compelling interest in efficient and effective education.

Despite this difficulty, for progressives worried about upholding affirmative action programs, this approach is more likely to result in the programs being upheld than trying to convince the Court to adopt a new theory of equal protection, which on normative grounds will uphold these programs. *See, e.g.*, Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 17 (2000) (advocating refocusing equal protection doctrine around "the principle of equal concern" for groups, rather than individuals, i.e., focusing on whether affirmative action harms "white students" as a group, rather than the obvious concrete harm to "individual white applicants"). The major difficulties with convincing the Court to adopt this approach are the text of the Equal Protection Clause, which states that it protects "any person" from discrimination, and the Court's holding in *Adarand*, 515 U.S. at 223-25, 227, that the Equal Protection Clause does indeed protect "individuals," not "groups." *See also* Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350 (2002) (advocating rethinking the intent test of *Washington v. Davis*, 426 U.S. 229 (1976)). The major difficulty with this approach is the Court's continued adherence to the *Davis* test, although perhaps a slight modification of the test may be possible. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 968 (2001) (Kennedy, J., joined by O'Connor, J., concurring). In *Board of Trustees of the University of Alabama*, Justice Kennedy wrote:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves . . . [However the] failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause.

*Id.* at 968. Similarly, given the institutional stake the Court has in the levels of scrutiny, *see supra* note 75, the suggestion that all strict and intermediate scrutiny be scrapped so that legislative effects of race-based affirmative action will not have to be analyzed under a heightened standard of review, is not likely to meet with much success. *See, e.g.*, Griffin, *supra* note 73, at 301-04.



choices for the appropriate level of scrutiny while providing needed predictability and guidance to lower courts in their application of whatever level of scrutiny is appropriately applied.

APPENDIX<sup>162</sup>Levels of Review of the Constitutionality of Government Action:  
The "Base Plus Six" Model of Review

Level of Scrutiny	Government Ends	Statutory Means to Ends	
	Government Interest to be Advanced	Relationship to Benefits	Burdens
<b>"Base" Minimum Rationality Review</b>			
Minimum Rational Review	Legitimate (substantial deference to gov't)	Rational (substantial deference to gov't)	Not Irrational <sup>163</sup>
<b>The "Plus Six" Standards of Increased Scrutiny</b>			
<b>Heightened Rational Review Standards</b>			
Basic Rational or Second-Order Review: As with minimum rationality review, challenger has the burden to prove that the statute is unconstitutional	Legitimate (no substantial deference to gov't)	Rational (no substantial deference to gov't)	Not Irrational <sup>164</sup> (no substantial deference to gov't)

<sup>162</sup> This Table is a condensed version of a similar table that appears at Kelso, *supra* note 2, at 585-89 app. a, tbl.1. The main difference is the addition in this Table of a seventh level of scrutiny, loose strict scrutiny, which the Court used in the recent case of *Bush v. Vera*. See *supra* text accompanying notes 41-43. The phrases "substantial deference to government" and "no substantial deference to government" reflect the difference between the deference given to the government's choice of means and ends under minimum rationality review, and the fact that such deference is not given under second-order or third-order rational review. See *supra* notes 26-32, 34 & 94 and accompanying text.

<sup>163</sup> This standard of review is summarized at *supra* notes 16, 22-25 and accompanying text.

<sup>164</sup> This standard of review is summarized at *supra* notes 26-34 and accompanying text.

<b>Heightened Rational Review Standards, Cont.</b>			
Rational Review with Bite or Third-Order Review: Burden shifts to the government to prove that the statute is constitutional. The burden remains on the government for all versions of intermediate and strict scrutiny review	Legitimate (no substantial deference to gov't)	Rational (no substantial deference to gov't)	Not Irrational <sup>165</sup> (no substantial deference to gov't)
<b>Intermediate Review Standards</b>			
Intermediate Review	Substantial/important	Substantially Related	Not Substantially <sup>166</sup> More Burdensome Than Necessary
Intermediate Review with Bite	Substantial/important	Directly Related	Not Substantially <sup>167</sup> More Burdensome Than Necessary
<b>Strict Scrutiny Standards</b>			
Loose Strict Scrutiny	Compelling	Directly Related	Not Substantially <sup>168</sup> More Burdensome Than Necessary
Strict Scrutiny Review	Compelling	Directly Related	Least Restrictive <sup>169</sup> Alternative

<sup>165</sup> This standard of review is summarized at *supra* notes 35-36 and accompanying text.

<sup>166</sup> This standard of review is summarized at *supra* notes 17, 37 and accompanying text.

<sup>167</sup> This standard of review is summarized at *supra* notes 39-40 and accompanying text.

<sup>168</sup> This standard of review is summarized at *supra* notes 41-43 and accompanying text.

<sup>169</sup> This standard of review is summarized at *supra* notes 18, 38 and accompanying text.