ARTICLES

THE STRUCTURE OF INTERMEDIATE REVIEW

by
*R. Randall Kelso**

Today, there are two well-established versions of intermediate review: standard intermediate review, used for cases like gender discrimination or content-neutral regulations of speech in a public forum, and a heightened intermediate review standard used for content-based, subject-matter regulations of commercial speech under Central Hudson. *Yet, in actual use, four other kinds of intermediate review tests have been formulated by the Court in some cases. These four should be viewed as "mutations" of the two kinds of intermediate review proper to apply. This Article discusses both the well-established versions of intermediate review, and the four variations on intermediate review applied by the Court. This Article ultimately argues that the four mutated kinds of intermediate review should be rejected—the first three of these mutated anomalies should adopt standard intermediate review, and the fourth should adopt the established heightened intermediate review of* Central Hudson.

* Spurgeon E. Bell Distinguished Professor of Law, South Texas College of Law Houston. B.A., 1976, University of Chicago; J.D., 1979, University of Wisconsin-Madison School of Law.

INTRODUCTION

In *Whole Woman's Health v. Hellerstedt*,[1] Justice Thomas criticized existing Supreme Court doctrine regarding the "tiers of scrutiny," quoting a passage from an earlier Justice Scalia dissent stating that the "three basic tiers—'rational basis,' intermediate, and strict scrutiny—'are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.'" In two recent related articles, I have discussed a predictable and principled structure to make "more scientific" the rational basis[2] and strict scrutiny[3] "tiers" of scrutiny. This Article will attempt to make "more scientific" the intermediate review standard of scrutiny.[4]

Today, there are two well-established versions of intermediate review: (1) standard intermediate review used for cases like (a) gender or illegitimacy discrimination under the Equal Protection Clause, based upon *Craig v. Boren*,[5] or (b) content-neutral regulations of speech in a public forum, based upon cases like *Ward v. Rock Against Racism*;[6] and (2) a heightened intermediate review standard used for content-based, subject-matter regulations of commercial speech under *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*.[7]

In actual use, four other kinds of intermediate review tests have been used by the Court in some cases. These four can be viewed as "mutations" of the two kinds of intermediate review proper to apply. These four mutations involve: (1) a "hybrid" kind of reasonableness balancing/intermediate review used in some cases involving the Second Amendment right to bear arms, as in *NRA of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*,[8] or for a while under the commercial speech doctrine stated in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*;[9] (2) a "watered-down" intermediate review, used occasionally in cases like *City of Erie v. Pap's A.M.*,[10] involving content-neutral regulation of sexually

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[1] 136 S. Ct. 2292, 2327 (2016) (quoting United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting)).

[2] *See* R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review*, 45 S. ILL. U. L.J. (forthcoming 2021).

[3] *See* R. Randall Kelso, The Structure of Strict Scrutiny Review (Aug. 17, 2020) (unpublished manuscript), https://ssrn.com/abstract=3675841.

[4] A fourth article in this series addresses a structured approach on which test to apply in any individual case. *See* R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L.J. (forthcoming 2021).

[5] 429 U.S. 190 (1976), discussed *infra* text accompanying notes 37–68, 115–70.

[6] 491 U.S. 781 (1989), discussed *infra* text accompanying notes 183–206.

[7] 447 U.S. 557 (1980), discussed *infra* text accompanying notes 207–46.

[8] 700 F.3d 185, 194–98 (5th Cir. 2012), discussed *infra* text accompanying notes 247–70.

[9] 478 U.S. 328 (1986), discussed *infra* text accompanying notes 271–84.

[10] 529 U.S. 277 (2000), discussed *infra* text accompanying notes 285–302.

oriented businesses, or *Clark v. Community for Creative Non-Violence*,[11] involving protest activities in public parks; (3) heightened "exceedingly persuasive" intermediate review used in *United States v. Virginia*,[12] a case involving gender discrimination under the Equal Protection Clause; and (4) a heightened intermediate review kind of test used for content-neutral injunctions on freedom of speech in *Madsen v. Women's Health Center, Inc.*[13]

Part I of this Article will discuss the two well-established kinds of intermediate review. This discussion will provide a detailed treatment of a structured approach to phrasing and applying these standard kinds of intermediate review tests.[14] Following this discussion, Part II will discuss (1) the "hybrid" kind of intermediate review.[15] Part III will address (2) the "watered-down" kind of intermediate review.[16] Part IV will discuss (3) the "exceedingly persuasive" kind of intermediate review.[17] Part V will discuss (4) intermediate review in the context of injunctions on speech.[18]

Following this analysis, Part VI will discuss other doctrinal approaches to intermediate review occasionally suggested by members of the Court and will conclude that these other approaches, as well as the four mutated kinds of intermediate review, should be rejected, and that the first three of these mutated anomalies should adopt standard intermediate review, and the fourth should adopt the established heightened intermediate review of *Central Hudson*.[19] Following this discussion, this paper will end with a brief conclusion.[20]

I. THE ELEMENTS OF PROPER INTERMEDIATE REVIEW

A. Standard Intermediate Review

1. Historical Development of the Intermediate Review Test

As indicated in *Nordlinger v. Hahn*,[21] "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." To determine whether a statute "rationally furthers a legitimate state

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[11] 468 U.S. 288 (1984), discussed *infra* text accompanying notes 313–20.

[12] 518 U.S. 515 (1996), discussed *infra* text accompanying notes 321–38.

[13] 512 U.S. 753 (1994), discussed *infra* text accompanying notes 339–48.

[14] *See infra* text accompanying notes 21–246.

[15] *See infra* text accompanying notes 247–84.

[16] *See infra* text accompanying notes 285–320.

[17] *See infra* text accompanying notes 321–38.

[18] *See infra* text accompanying notes 339–48.

[19] *See infra* text accompanying notes 349–84.

[20] *See infra* text accompanying notes 385–96.

[21] 505 U.S. 1, 10 (1992).

interest," the Court considers three things. The first inquiry is (1) what government ends, or interests, support the statute's constitutionality. Under rational basis review, the government ends supported by the statute must be "legitimate": that is, they are within the usual "police power" of the state because they involve the health, safety, or general welfare of the people, broadly defined.[22] In practice, as noted in *Heller v. Doe*,[23] the Court presumes the legislature is motivated by legitimate interests, leaving the burden on the challenger to prove that there are no "reasonably conceivable" legitimate interests that might have motivated the legislature (or government actor, for executive or administrative action).

Once it is determined that the statute is advancing a "legitimate state interest," the next inquiry turns to whether the statute's means "rationally furthers" that interest. This inquiry has two parts: (2) whether or not the statute is rationally related to advancing the benefits sought to be achieved by the legitimate state interests (e.g., is the statute irrationally underinclusive); and (3) whether or not the statute is rational in terms of the burdens imposed by the statute (e.g., is the statute irrationally overinclusive).[24] As with the presumption that the statute's ends are legitimate, in practice, the Court presumes the statute's means are "rationally related" to furthering its ends, leaving the challenger to prove that no rational relationship exists.[25] In addition, in applying this rational review test, the Court grants substantial deference to legislative judgment regarding the rationality of the legislative classification because, as the Court has often observed, the judiciary does not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."[26] It has been noted, "The traditional deference *both* to legislative purpose [i.e., legislative interests or ends] *and* to legislative selections among means continues, on the whole, to make the rationality requirement largely

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[22] *See, e.g.*, Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872))).

[23] 509 U.S. 312, 320–21 (1993) ("[A] classification 'must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' . . . and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." (citing, *inter alia*, Dandridge v. Williams, 397 U.S. 471, 484–85 (1970))).

[24] For a discussion of underinclusiveness and overinclusiveness in the context of Equal Protection jurisprudence, see generally ERWIN CHEMERINSKY: CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 701–02, 714–16 (5th ed. 2015). On the rational basis standard of review generally, see Kelso, *supra* note 2, at Section II.A.1.b nn.41–66.

[25] *See, e.g.*, *Heller*, 509 U.S. at 320.

[26] *Id.* at 319 (citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)).

equivalent to a strong presumption of constitutionality."[27] For this reason, this standard of review has been called minimum rationality review, because the government action need only be minimally rational to be upheld.[28]

Where a classification does jeopardize a fundamental right or categorizes based on a suspect characteristic, however, the Court typically will apply some form of heightened review. The creation of these heightened levels of review came about gradually. In the modern post-1937 era, the possibility that the Court might apply a higher standard than minimum rationality review when considering constitutional clauses that protect civil rights was first suggested explicitly in 1938 in footnote 4 of *United States v. Carolene Products Co.*[29] The first use of the term "strict scrutiny" to invalidate a law appears to have been by Justice Douglas in 1942 in *Skinner v. Oklahoma*.[30] The phrase "most rigid scrutiny" was used by the Court in 1944 in one of the Japanese internment cases, *Korematsu v. United States*.[31] In 1971, the Court in *Graham v. Richardson*,[32] spoke of "strict judicial scrutiny" for classifications based

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[27] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.2, at 1442–43 (2d ed. 1988); *see also* CHEMERINSKY, *supra* note 24, at 700 ("The rational basis test is enormously deferential to the government, and only rarely have laws been declared unconstitutional for failing to meet this level of review.").

[28] *See generally* CHEMERINSKY, *supra* note 24, 699 ("The rational basis test is the *minimum* level of scrutiny that all *laws* challenged under equal protection must meet.") (emphasis added); Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431, 437 (2005) ("[I]nvalidating the law under *minimum rationality review* is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard.") (emphasis added). It should be noted that the term "rational basis review" or "rational review" could have been used wherever "minimum rationality review" appears in this Article and nothing would be changed in the analysis.

[29] 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, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry." (citations omitted)).

[30] 316 U.S. 535, 541 (1942) ("[I]n emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential . . . .").

[31] 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.").

[32] 403 U.S. 365, 375–76 (1971) ("[C]lassifications involved in the instant cases . . . are inherently suspect and are therefore subject to strict judicial scrutiny . . . .").

on alienage, nationality, or race. This use of "strict scrutiny" seems to have been cemented into place in 1973 in *Frontiero v. Richardson*.[33]

As to what kind of governmental interest will satisfy strict scrutiny, the first use of the term "compelling" to describe the required government interest appears to have been made in 1957 by Justice Frankfurter, concurring in *Sweezy v. New Hampshire*.[34] In 1967, the Court referred to a "legitimate overriding purpose" in *Loving v. Virginia*.[35] The use of the term "compelling" government interest seems to have been cemented into place by Justice Blackmun, writing in 1973 in *Roe v. Wade*,[36] where he said, "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."

In 1976, the Court announced in *Craig v. Boren*[37] a third standard of scrutiny between rational basis review and strict scrutiny: intermediate review. This came about in the following manner. Prior to 1971, there was no suggestion in Supreme Court opinions that anything other than minimum rational basis scrutiny would be applied to gender classifications in state or federal law.[38] That began to change in *Reed v. Reed*.[39] In 1971, an Idaho court appointed the father of a decedent, rather than his mother, to administer his estate. This was pursuant to an Idaho statute which provided that if several persons were otherwise equally entitled to administer an estate, "males must be preferred to females."[40] The purpose of the law was to reduce the workload on probate courts by eliminating the need for a hearing on the relative merits of eligible candidates.[41] Quoting from *Royster Guano Co. v. Virginia*,

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[33] 411 U.S. 677, 688 (1973) (plurality opinion of Brennan, J., joined by Douglas, White & Marshall, JJ.) ([C]lassifications based upon sex, like classifications based upon race, alienage or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

[34] 354 U.S. 234, 265 (1957) (Frankfurter, J., joined by Harlan, J., concurring in the judgment) ("For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling.").

[35] 388 U.S. 1, 11 (1967) ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

[36] 410 U.S. 113, 155 (1973) (citing, *inter alia*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

[37] 429 U.S. 190, 197 (1976).

[38] *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 62 (1961) (granting women, but not men, an automatic exemption from jury duty); Goesaert v. Clearly, 335 U.S. 464, 466–67 (1948) (upholding a Michigan statute that barred a female from being licensed as a bartender unless she was the wife or daughter of the male owner of the bar).

[39] 404 U.S. 71, 71–72 (1971).

[40] *Id.* at 72–73.

[41] *Id.* at 76.

Chief Justice Burger said that the test was whether a difference in the sex of competing applicants bears a "fair and substantial relationship" to the state's objective.[42] This reflects a heightened kind of rational review sometimes used pre-1937 for economic regulations, different than the substantial deference given to the government for standard social or economic legislation after 1937.[43] Without the deference usually given to legislatures under rational basis scrutiny, the Court found that the legislature's choice of males over females in the administration of estates was "arbitrary."[44]

Two years after *Reed*, the Court held in *Frontiero v. Richardson*[45] that discrimination against military service women in quarter allowances for dependents, designed to serve administrative convenience by assuming that women, but not men, were dependent on their military service spouses, was invalid. Writing for himself and Justices Douglas, White, and Marshall, Justice Brennan cited *Reed* for "implicit support" that sex classifications are suspect and entitled to strict scrutiny, and that gender discrimination solely to serve administrative convenience is arbitrary.[46] Justice Brennan said gender discrimination was analogous to race classifications because of history, current discrimination, the immutability of the characteristic, and because, unlike nonsuspect categories such as intelligence or physical disability, gender frequently bears no relation to ability to perform or contribute to society.[47] Justice Brennan also noted that Congress has been increasingly sensitive to gender discrimination in legislating under the 14th Amendment.[48] Chief Justice Burger, along with Justices Powell, Blackmun, and Stewart, concurred in the result, but used the rational basis scrutiny as applied in *Reed*.[49] Each of these Justices, except for Justice Stewart, also said that the Court should not go beyond *Reed* at this time because the issue was before the public in the form of the Equal Rights Amendment.[50] If the ERA had been passed, the legal effect of that would have been to make gender discrimination cases equal to race

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[42] *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[43] *See generally* CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW §§ 26.4.1 nn.424–31 & 27.3.2.1 nn.149–60 (2007 & Supp. 2020), http://libguides.stcl.edu/kelsomaterials; Kelso, *supra* note 2, at Section II.A.1.a nn.31–40 (pre-1937 cases); *id.* at Section II.A.1.b nn.41–66 (post-1937 cases).

[44] *Reed*, 404 U.S. at 76.

[45] 411 U.S. 677, 678–79 (1973) (plurality opinion of Brennan, J., joined by Douglas, White & Marshall, JJ.).

[46] *Id.* at 682–84.

[47] *Id.* at 684–87.

[48] *Id.* at 687–88.

[49] *Id.* at 691 (Stewart, J., concurring in the judgment); *id.* at 691–92 (Powell, J., joined by Burger, C.J. and Blackmun, J., concurring in the judgment).

[50] *Id.* at 692 (Powell, J., joined by Burger, C.J. and Blackmun, J., concurring in the judgment).

discrimination cases in triggering strict scrutiny.[51] Justice Rehnquist dissented in *Frontiero*, saying that under traditional rational basis scrutiny, the classification was rationally related to the legitimate interest of cost management.[52]

In 1976, faced with trying to get five Justices to agree to a uniform standard of review in gender discrimination cases, Justice Brennan abandoned his preference in gender discrimination cases for strict scrutiny as stated in *Frontiero* to adopt in *Craig v. Boren* what has come to be known as intermediate review.[53] Borrowing the "substantial relationship" language from *Reed*, Brennan said that gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[54] While the term "mid-level review" occasionally has been used to refer to this level of scrutiny,[55] the more common term is "intermediate" review.[56]

2. The Basic Elements of Intermediate Review and Strict Scrutiny

As applied, these two versions of heightened scrutiny—intermediate review and strict scrutiny—track the three inquiries that the Court uses at rational basis review. Those inquiries are: (1) what legitimate government interests support the government's action; (2) does the government's regulation rationally advance those interests; and (3) does the government irrationally burden individuals in advancing those interests.[57]

Each level of increased scrutiny increases the difficulty for the government to satisfy each element of this inquiry. As typically phrased under intermediate review, the government must prove the government action: (1) advances important, significant, or substantial government ends, not mere legitimate ends; (2) is substantially related to advancing those ends, not merely rationally related; and (3)

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[51] *See generally* CHEMERINSKY, *supra* note 24, at 787 (citing Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875 (1971)).

[52] *Frontiero*, 411 U.S. at 691 (Rehnquist, J., dissenting).

[53] Craig v. Boren, 429 U.S. 190, 197 (1976).

[54] *Id.* (quoting Reed v. Reed, 404 U.S. 71, 76 (1971) (cited *supra* text accompanying note 42)).

[55] *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (contrasting "mid-level review" with "strict scrutiny").

[56] *See generally* CHEMERINSKY, *supra* note 24, at 699, 786–89 (using the term "intermediate scrutiny"). The Court has indicated that this intermediate review applies to classifications which, though not "suspect," are "quasi-suspect," as with gender discrimination. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 437–38, 446 (1985) (refusing to recognize mentally impaired individuals as a "quasi-suspect" class to which "intermediate review" should apply).

[57] For a summarization of these three inquiries, see *supra* text accompanying notes 21–28. The discussion in this Section tracks the discussion in Kelso, *supra* note 2, at Section II.C nn.101–08.

is not substantially more burdensome than necessary to advance those ends, rather than not merely an irrational burden.[58] Important, significant, or substantial ends seem to reflect the same level of government interest, which is higher than mere legitimate interests at rational review, but less than compelling interests required at strict scrutiny.[59] Under intermediate review, government action must be shown to be substantially related to advancing the government's interest, not merely rationally or reasonably related to advancing the government's interest,[60] and the government action cannot be substantially more burdensome than necessary to achieve the government's interest.[61]

At strict scrutiny, the statute must: (1) advance compelling or overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends.[62] Only

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[58] *See generally* CHEMERINSKY, *supra* note 24, at 699 ("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."); *see also* CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2, at § 20.1 nn.12–15, 22–24, 28 (2020 orig. ed. 2014), http://libguides.stcl.edu/kelsomaterials.

[59] For the requirement of an "important/significant/substantial" interest at intermediate review, higher than a mere "legitimate/permissible" interest at minimum rationality review or reasonableness balancing, see United States v. Virginia, 518 U.S. 515, 533 (1996) (in discussing intermediate review used for gender discrimination, the Court noted: "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.'") (emphasis added) (citations omitted); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (in discussing intermediate review applicable to content-neutral time, place, or manner regulations under the First Amendment free speech doctrine, the Court noted: "[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a *significant* governmental interest, and that they leave open ample alternative channels for communication of the information.") (emphasis added); *id.* at 294 ("Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a *substantial* governmental interest, and if the interest is unrelated to the suppression of free speech.") (emphasis added).

[60] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important government objectives and must be substantially related to achievement of those objectives").

[61] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (under intermediate review government cannot "burden substantially more speech than is necessary" to further government ends).

[62] *See generally* CHEMERINKSY, *supra* note 24, at 699 ("Under strict scrutiny, a law is upheld if it is proved necessary to achieve a compelling government purpose. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."). *See also* KELSO & KELSO, *supra* note 58, at § 20.1 nn.1–11, 15–22, 25–28. Under strict scrutiny, the

"compelling" or "overriding" interests can justify a statute at strict scrutiny, not substantial interests of intermediate review or mere legitimate interests at rational review.[63] At strict scrutiny, the statute must be both substantially and directly related to advancing the compelling interests.[64] The government must use the least burdensome effective alternative, not merely, as at intermediate review, an alternative not substantially more burdensome than necessary.[65]

Under both intermediate review and strict scrutiny, the government bears the burden of justifying its action, rather than the challenger bearing the burden of proving unconstitutionality under minimum *rationality* review.[66] While "any conceivable legitimate interest" can be used to justify a statute at minimum

government always has the burden to justify its course of action. KELSO & KELSO, *supra* note 43, at § 26.1.3 n.82 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989)).

[63] For discussion of the strict scrutiny requirement of a "compelling/overriding" interest to regulate, see Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'") (emphasis added) (citations omitted); Loving v. Virginia, 388 U.S. 1, 11 (1967) (in applying strict scrutiny to a ban on interracial marriage, the Court noted: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

[64] Because the regulation must be "necessary" to advance the government's ends under strict scrutiny, this means "unnecessary" underinclusiveness will render the regulation unconstitutional. In addition, the regulation must adopt means that "directly advance" the government ends, not merely "substantially advance" those ends, as at intermediate review. It is clear that this requirement of a "direct relationship" exists at strict scrutiny. Commercial speech cases involve a less rigorous form of scrutiny than strict scrutiny. *See* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 370–73 (2016). Yet the Court has stated that for commercial speech regulation, under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the regulation must "directly advance the governmental interest." Since a "direct relationship" is required in commercial speech cases, *a fortiori* such a requirement exists at strict scrutiny. *See generally* United States v. Alvarez, 567 U.S. 709, 725 (2012) (Kennedy, J., plurality opinion) ("The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.") (citation omitted).

[65] *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) (under strict scrutiny, a court "should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."); *see also* CHEMERINKSY, *supra* note 24, at 699 ("The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."). For further discussion of the strict scrutiny standard of review, see Kelso, *supra* note 3.

[66] Under intermediate review, the government always has the burden to justify its course of action. KELSO & KELSO, *supra* note 43, at § 26.1.3 n.82 (citing United States v. Virginia, 518 U.S. 515, 529 (1996)). Similarly, under strict scrutiny, the government has the burden to justify its course of action. KELSO & KELSO, *supra* note 43, at § 26.1.3 n.82, (citing *J.A. Croson Co.*, 488 U.S. at 510–11).

rationality review, at intermediate review the government can only use "plausible" or "actual" government purposes to justify its action.[67] At strict scrutiny, the government can only use "actual" government purposes to meet its burden of satisfying strict scrutiny.[68]

3. A Structured Approach to Intermediate Scrutiny Review

To adopt a complete analysis of intermediate review, it is necessary to look in depth at the three inquiries used in rational basis review, intermediate review, and strict scrutiny: (1) what government interests support the government's action; (2) how does the government's regulation advance those interests; and (3) how does the government burden individuals in advancing those interests.

a. Government Interests Used to Support Regulations at Heightened Scrutiny

The first inquiry is (1) what government interests, or ends, support the statute's constitutionality. Under rational basis review, the government ends supported by the statute must be "legitimate": that is, they are within the usual "police power" of the state because they involve the health, safety, or general welfare of the people, broadly defined.[69] At intermediate review, the government must advance

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[67] While the cases are not perfectly consistent, the best understanding is that at intermediate review "actual" or "plausible" interests may be considered to justify the statute, KELSO & KELSO, *supra* note 43, at § 26.1.3 nn.92–99; KELSO & KELSO, *supra* note 58, at § 22.3 nn.31–36, but not implausible reasons, even if put forward by the government in litigation, which can be used under "reasonableness balancing," *see* Kelso, *supra* note 2, at Section II.B.1 n.84, or "any reasonably conceivable" government interest, which can be used under minimum rationality review, *see id.* at Section II.A.1.b n.48 & Section II.B.1 n.82. *See generally* Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (plurality opinion) (asking whether the governmental interest "could not have been a goal of the legislation") (citation omitted); Craig v. Boren, 429 U.S. 190, 199 n.7 (1976) (using a governmental purpose while acknowledging that whether "this was the true purpose is not at all self-evident").

[68] *See* Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose.'"). *See generally* KELSO & KELSO, *supra* note 43, at § 26.1.3 nn.85–86.

[69] *See supra* text accompanying note 22 (citing Metro Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (the "States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872))). Of course, even at rational review, the government cannot use illegitimate interests to support regulation. *See generally* Kelso, *supra* note 2, at Section II.A.1.b nn.47–56 (citing, *inter alia*, Romer v. Evans, 517 U.S. 620, 632, 635 (1996) ("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., 473 U.S. 432, 448 (1985) (prejudice against the mentally impaired held to be an illegitimate governmental interest); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (prejudice against interracial marriage illegitimate); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534, 537 (1973) ("purpose

"important" or "substantial" governmental interests.[70] At strict scrutiny, the governmental interests must be not only important or substantial, but "overriding" or "compelling."[71]

The Court has noted that certain interests, like administrative cost considerations, while legitimate, are typically not important or substantial, and thus cannot be used to justify a statute at intermediate scrutiny.[72] On the other hand, certain interests, like diversity in broadcast programming, may be substantial, but are not compelling.[73] Thus, they could be used to justify a statute at intermediate scrutiny, but not at strict scrutiny. Finally, certain interests, like remedying one's own prior racial discrimination, are compelling, and thus can be used to justify a statute at strict scrutiny.[74] Examples of other interests that have been assumed to be compelling by judges while deciding cases are national security and military defense,[75] compliance with the Voting Rights Act,[76] improving the delivery of healthcare services to communities currently underserved,[77] operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools,[78] achieving the educational benefits that flow from having a diverse student body,[79] and ensuring both actual impartiality and the appearance of impartiality in candidates running for judicial office.[80]

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to discriminate against hippies" not legitimate interest to prevent "hippie communes" from food stamp program)).

[70] *See supra* text accompanying note 59.

[71] *See supra* text accompanying note 63.

[72] *See* Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (simply "sav[ing] the Government time, money, and effort . . . do[es] not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.").

[73] *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354–55 (D.C. Cir. 1998) ("diverse programming" in broadcasting, even if an "important" interest, is not "compelling.").

[74] *See* Adarand Constructors, Inc. v. Pena, 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.").

[75] *See* N.Y. Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *id.* at 728–29 (Stewart, J., joined by White, J., concurring); *id.* at 741–42 (Marshall, J., concurring).

[76] Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring).

[77] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (Powell, J., opinion).

[78] Hunter *ex rel.* Brand v. Regents of the Univ. of Cal., 190 F.3d 1061, 1063–64 (9th Cir. 1999).

[79] Grutter v. Bollinger, 539 U.S. 306, 322–27 (2003).

[80] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445–46, 457 (2015).

b. Means Elements of Heightened Review

Once the governmental interest part of the inquiry is finished, the attention then turns, as under rational basis review, to the way in which the statute's means furthers these ends. As has been noted, "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."[81] In contrast, "[u]nder strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government purpose. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."[82] On the other hand, as the Supreme Court has often stated, strict scrutiny is not "'strict in theory, but fatal in fact.'"[83] Sometimes, strict scrutiny can be met.

Logically, how a statute is (2) related to advancing its ends has two parts: "(a) the extent to which the statute fails to regulate all individuals who are part of some problem (the *underinclusiveness* inquiry); and (b) the way in which the statute serves to achieve its benefits on those whom the statute does regulate (the *service* inquiry)."[84] Similarly, how a statute (3) imposes burdens on individuals has two parts: "(a) the extent to which the statute imposes burdens on individuals who are not [part of the problem] (the *overinclusiveness* inquiry); and (b) the amount of the burden on individuals who are properly regulated by the statute (the *oppressiveness or restrictiveness* inquiry)."[85]

Viewed this way, the underinclusiveness and overinclusiveness inquiries are proper under an Equal Protection Clause analysis. With regard to (2)(a) underinclusiveness, at intermediate review the statute must be "substantially related" to achieving its ends.[86] Thus, the statute must regulate "substantially" all of the

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[81] *See* CHEMERINSKY, *supra* note 24, at 699.

[82] *Id.*; *see* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) (quoting *Grutter*, 539 U.S. at 326) ("[racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests"). Under strict scrutiny, the requirement of "narrowly tailoring" means that the government must use the "least restrictive/burdensome" effective alternative in adopting its action. *See supra* note 65 and accompanying text.

[83] *Fisher*, 570 U.S. at 314 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

[84] *See* 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, 1281 (1994).

[85] *Id.* (emphasis added).

[86] *See supra* notes 58, 60 and accompanying text. While not the focus of this Article, the strict scrutiny requirement that the regulation be "necessary" to advance its interests means that the court will not tolerate any unnecessary underinclusiveness at strict scrutiny review. *See supra* note 64 and accompanying text. A full treatment of strict scrutiny review is done in Kelso, *supra* note 3.

individuals who are part of creating some problem. For example, the Supreme Court held in *Railway Express Agency, Inc. v. New York*,[87] that a regulation banning commercial ads on the side of trucks to prevent driver and pedestrian distraction, but permitting ads for the truck owner's own business was rational, because "local authorities may well have concluded that those who advertise their wares on their own trucks do not present the same traffic problem in view of the nature [e.g., ads for one's own business may tend to be less splashy or eye-catching than commercial ads] or extent [e.g., more ads on the sides of trucks may be commercial] of the advertising which they use." Under intermediate review, the regulation would probably have been unconstitutional as not "substantially related" to achieving its ends because its exception for ads for the truck owners' own business probably left too many individuals unregulated by the act to satisfy the substantial relationship test.[88]

With regard to (3)(a) overinclusiveness, the statute at intermediate review must not burden "substantially more individuals than necessary" to achieve its ends.[89] In *New York City Transit Authority v. Beazer*,[90] the Supreme Court held that a subway system's complete ban on hiring former heroin addicts who had undergone methadone treatment was rational. Had the Court applied intermediate review, the fact that, according to the Court's opinion, probably 75% of the persons burdened by the ban had no heroin problem, would likely make the policy substantially more burdensome than it needed to be.[91] This would be true as long as some more individualized consideration of applicants would be more effective in weeding out

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[87] 336 U.S. 106, 110 (1949).

[88] *Id.* at 109–10. Failing this part of the test does not mean that the legislature cannot regulate at all. It means only that the current way the legislature has drawn the line is impermissible. Thus, as a matter of equal protection law, if New York City had banned all advertisements on the side of all trucks, that would have raised no problem of underinclusiveness under either rational basis or intermediate review, since all individuals whose advertisements on the side of trucks could cause problems of distraction would have been regulated. In 1949, at the time of the case, such a regulation would thus have been constitutional under minimum rationality review applied to standard social or economic regulation post-1937. *See* Kelso, *supra* note 2, at Section II.A.1.b nn.41–66; Section II.A.2 nn.67–76. After 1976, such a regulation would have to pass the intermediate with plus standard of review applicable to regulations of commercial speech. *See infra* text accompanying notes 207–54 (commercial speech doctrine discussed).

[89] *See supra* notes 58, 61 and accompanying text. While not the focus of this Article, the strict scrutiny requirement that the regulation be "the least restrictive/burdensome effective alternative" to advance the compelling governmental interests means that the court will not tolerate any overinclusiveness unless it is absolutely necessary to have an effective remedy. *See supra* note 65 and accompanying text. A full treatment of strict scrutiny review is done in Kelso, *supra* note 3.

[90] 440 U.S. 568, 570–80 (1979).

[91] *See id.* at 576 (incidence of drug use among methadone maintenance program users "may often approach and even exceed 25%").

the problem candidates, or if some more narrowly tailored ban would effectively advance the government's interest. As examples, the Court mentioned a "rule denying methadone users any employment unless they had been undergoing treatment for at least a year and [a] rule denying even the most senior and reliable methadone users any of the more dangerous jobs in the system."[92] At intermediate review, the extra costs associated with more individualized consideration of applicants would likely not be an effective argument to justify a complete ban, since saving administrative costs, while legitimate, and thus appropriate to use under rational basis review, is typically not viewed as an important or substantial governmental interest that can justify governmental action at intermediate review.[93]

Under a structured approach, the two remaining means inquiries—the (2)(b) service and 3(b) oppressiveness or restrictiveness inquiries—are proper for Due Process analysis. This is because "a statute which is neither underinclusive nor overinclusive, but which only minimally serves the government's interests, or greatly burdens individuals, does not deny a citizen equal protection of the laws, because the law is equally applied to all similarly situated parties. It may, however, deny the citizen due process if the burden on the individual is sufficiently great compared to the minimal benefit that is achieved."[94]

Thus, for intermediate review, the government action must (2)(b) "substantially serve" to advance the important or substantial interest in addition to not being (2)(a) "substantially underinclusive."[95] The government action must also not be (3)(b) substantially too burdensome on the individual without regard to whether it is (3)(a) substantially overinclusive or not.[96] In cases triggering

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[92] *Id.* at 589.

[93] *See* Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (simply "sav[ing] the Government time, money, and effort . . . do[es] not suffice to justify a gender-based discrimination . . . .").

[94] Kelso, *supra* note 84, at 1281.

[95] Case examples of this are discussed *infra* text accompanying notes 104–08 (content-neutral regulation of speech example); 122–24, 133–34 (gender discrimination examples); notes 147, 159 (illegitimacy cases); 179 (*Plyler v. Doe* example). While not the focus of this Article, the strict scrutiny requirement that the regulation not only "substantially advance" the government interest, but be "directly related" to advancing the ends, means the court will not tolerate at strict scrutiny any unnecessary "indirect" means to advance the government's interests. *See generally supra* note 64 and accompanying text. Full treatment of strict scrutiny review is done in Kelso, *supra* note 3.

[96] Case examples of this are discussed *infra* text accompanying notes 107–08, 203–06 (content-neutral regulation of speech example); note 127 (gender discrimination case); note 162 (illegitimacy case). While not the focus of this Article, under strict scrutiny, even if the regulation is "the least restrictive/burdensome effective alternative" to advance the government's interests, the regulation might still be unconstitutional under strict scrutiny if it is too burdensome. For example, in a sequence of cases involving the freedom of association, the Court found gender antidiscrimination laws requiring large, nationwide social groups to admit women satisfied strict scrutiny in being directly related to advancing compelling government interests and was the least

intermediate review under the Equal Protection Clause, such as gender and illegitimacy discrimination, the Court tends to go ahead and consider these (2)(b) and (3)(b) factors without discussing that technically they should be brought under a Due Process analysis.[97] The Court has said since *Bolling v. Sharpe* that Equal Protection is a component of Due Process,[98] so considering these issues under just a generic Equal Protection Clause analysis is not particularly problematic, but useful to note.

Because First Amendment scrutiny addresses both Equal Protection and Due Process concerns when applied to free speech issues, both questions of benefits ((2)(a) underinclusiveness and (2)(b) service) and questions of burdens ((3)(a) overinclusiveness and (3)(b) restrictiveness) are necessary for a complete First Amendment analysis.[99] Thus, in analyzing how the government is advancing its interests under the second prong of strict scrutiny and intermediate review, the Court considers, under the First Amendment, both the Equal Protection Clause question of the extent to which the government action fails to regulate all individuals who are part of some problem (the *underinclusiveness* inquiry),[100] and the Due Process Clause question of the way in which the government action serves to achieve its benefits on those whom the action does regulate (the *service* inquiry).[101] Similarly, under the third prong of strict scrutiny and intermediate review, the Court considers both the Equal Protection question of the extent to which the government action imposes burdens on individuals who are not intended to be regulated (the *overinclusiveness* inquiry),[102] and the Due Process question of the amount of the

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burdensome effective alternative in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–29 (1984), and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 544–50 (1987). In contrast, the Court held an antidiscrimination law concerned with sexual orientation failed strict scrutiny in *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–59 (2000). The difference in the two cases was that while the burden imposed by the antidiscrimination law on the Jaycees and Rotary Club's freedom of expressive association was held not to "materially interfere" with the ideas of the organization and thus was not a "serious" burden, *id.* at 657–58, the burden of the antidiscrimination law was viewed to "significantly affect" the Boy Scout's freedom of expressive association in *Dale*, and thus, was too burdensome under strict scrutiny review. *Id.* at 653–56. A full treatment of this, as well as other aspects of strict scrutiny review, is done in Kelso, *supra* note 3.

[97] *See infra* text accompanying notes 122–24, 133–34 (gender discrimination examples); notes 147, 159 (illegitimacy examples).

[98] 347 U.S. 497, 499 (1954) (segregated schools in Washington, D.C. are unconstitutional under the "equal protection" component of the Fifth Amendment's Due Process Clause, just as segregated schools in states are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, as held in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

[99] *See* Kelso, *supra* note 84, at 1281.

[100] *See* KELSO & KELSO, *supra* note 43, at § 26.1.1.1 nn.25–27.

[101] *Id.* at § 27.1.2 nn.43, 45.

[102] *Id.* at § 26.1.1.1 nn.28–31.

burden on individuals who are the focus of the regulation (the *restrictiveness* inquiry).[103]

For example, the Court noted in *City of Ladue v. Gilleo*,[104] "[T]he notion that a regulation of speech may be [(2)(a)] impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." As Justice Kennedy noted in *Ward v. Rock Against Racism*,[105] the content-neutral regulation of speech (2)(b) substantially served to advance the city's interest in controlling noise (the *service* inquiry). Further, as noted in *Ward*, the government action cannot be (3)(a) "substantially broader than necessary to achieve the government's interest" (the *overinclusiveness* inquiry),[106] nor can it (3)(b) place a substantial burden on speech by failing to "leave open ample alternative channels of communication" (the *restrictiveness* inquiry).[107] Thus, in *City of Los Angeles v. Alameda Books, Inc.*,[108] Justice Kennedy correctly observed that First Amendment analysis must consider both benefits and burdens on the speech, noting, "[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one [(2)(b)] may reduce the costs of secondary effects [the *service* inquiry] without [(3)(b)] substantially reducing speech [the *restrictiveness* inquiry]."

While this aspect of doctrine should be clear, occasionally it can cause some confusion. For example, in his dissent in *Alameda Books*, Justice Souter stated, "Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted government interest, not the burden on speech, which must simply be no greater than necessary to further that interest."[109] Justice Souter's "asserted government interest" is the intermediate requirement of a (1) substantial government interest, and Justice Souter's "no greater than necessary" analysis is the (3)(a) *overinclusiveness* inquiry, which must be done. The (3)(b) *restrictiveness* inquiry, however, must also be done to do a complete

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[103] *Id.* at § 27.1.2 nn.44–45.

[104] 512 U.S. 43, 51 (1994).

[105] 491 U.S. 781, 800 (1989) ("It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances.").

[106] *Id.* at 799–800 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interests . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.") (citation omitted).

[107] *Id.* at 802 ("The final requirement, that the guideline leave open ample alternative channels of communication, is easily met.").

[108] 535 U.S. 425, 450 (2002) (Kennedy, J., concurring). On each of these inquiries, see generally Kelso, *supra* note 85, at 1280–1300.

[109] *Alameda Books*, 535 U.S. at 464 n.8 (2002) (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

First Amendment intermediate review analysis of burdens. As the Court noted in *Ward*,[110] under intermediate review a regulation of speech cannot burden substantially more speech than necessary to further the interest ((3)(a) *overinclusiveness* inquiry), but it also cannot place a substantial burden on speech that fails to leave open ample alternative channels for communication ((3)(b) *restrictiveness* inquiry).

In its phrasing of intermediate review, the Court typically used the terms "narrowly drawn" or "narrowly tailored" to reflect both the substantial relationship and not substantially more burdensome than necessary elements of intermediate scrutiny.[111] In its phrasing of strict scrutiny, the Court has used the terms "precisely tailored" or "necessary" to reflect the fact that at strict scrutiny the statute must directly advance its ends and be the least restrictive effective means of doing so.[112] Unfortunately, the Court has often used the phrase "narrowly drawn" under strict scrutiny.[113]

To reflect the rigor of strict scrutiny analysis, and to separate this approach from the more flexible "substantially" narrowly drawn analysis of intermediate review, the terms "precisely tailored" or "necessary" are better terms to use than "narrowly tailored" for the strict scrutiny "least restrictive alternative" test. In the absence of definitive guidance from the Supreme Court, lower courts have used the phrase "narrowly drawn" for strict scrutiny, and "substantially related" for intermediate review, a practice consistent with the Supreme Court use in cases like *Kimel v. Florida Board of Regents*.[114]

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[110] 491 U.S. at 799–800 (1989), discussed *supra* text accompanying notes 106–07.

[111] *See, e.g.*, Ward, 491 U.S. at 798 ("[A] regulation of the time, place or manner of protected speech must be narrowly tailored . . . ."); Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989) ("narrowly drawn").

[112] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990) ("precisely tailored to serve the compelling state interest"); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) ("necessary" used); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J., announcing the judgment of the Court) ("precisely tailored" used).

[113] *See* Boos v. Barry, 485 U.S. 312, 317 (1988) ("narrowly drawn"); United States v. Grace, 461 U.S. 171, 177 (1983) (same); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) ("narrowly tailored").

[114] 528 U.S. 62, 84 (2000) (racial classifications are constitutional only if they are "narrowly tailored measures that further compelling governmental interests"; gender classifications are constitutional if they are "substantially related" to achievement of "important governmental objectives" (citing *Adarand*, 515 U.S. at 220, 227)); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). For representative lower court cases, see, for example, Concrete Works of Colo., Inc. v. City & Cty. of Denver, 321 F.3d 950, 957–60 (10th Cir. 2003); Harrison and Burrows Bridge Constrs., Inc. v. Cuomo, 743 F. Supp. 977, 997 (N.D.N.Y. 1990).

4. Examples of Proper Intermediate Review

a. Gender Discrimination

The classic case of standard intermediate review is *Craig v. Boren*.[115] This case involved an Oklahoma regulation that barred only males aged 18–20 from buying low-alcohol 3.2% beer, but not females aged 18–20.[116] The Court found that barring only males aged 18–20 from buying low-alcohol 3.2% beer was not substantially related to the (1) important goal of traffic safety.[117] Although arrest statistics showed men in this age group were 10 times more likely to be arrested for drunk driving than women (.18% for females; 2% for males),[118] Justice Brennan pointed out that "Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18–20-year-old female companions)."[119] The relationship between the statute, which banned only the buying but not the drinking of beer, and traffic safety was thus far too tenuous to satisfy the "substantially related" part of the *Craig v. Boren* test.[120]

It is useful to note that this conclusion is not that the statute was (2)(a) "substantially underinclusive," the precise Equal Protection concern, since women in the 18–20 age group were 10 times less likely to be arrested for drunk driving than men.[121] The problem was that since only 2% of men were arrested for drunk driving, the statute did not (2)(b) "substantially serve" to advance the government's

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[115] 429 U.S. 190 (1976).

[116] *Id.* at 191–92.

[117] *Id.* at 199–200 ("We accept . . . the enhancement of traffic safety . . . represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective . . . ."). The use of "(1)" in the text reflects which aspect of intermediate review was the focus of the court's inquiry. For summary of issues (1), (2)(a), (2)(b), (3)(a), and (3)(b), see *supra* text accompanying notes 69–70, 84–85, 94–108.

[118] *Craig*, U.S. 429 at 201.

[119] *Id.* at 204.

[120] *Id.* at 201–02.

[121] *See supra* text accompanying note 118. The fact that the regulation dealt with probably 90% of the problem by regulating the men, who were 10 times more likely to have a problem with drunk driving (2.0% as opposed to .18%), meant the statute was only a little bit underinclusive by not regulating that .18%, but not substantially underinclusive. On underinclusiveness being the precise Equal Protection Clause concern with advancement, see *supra* text accompanying notes 84–98.

interest.[122] Although technically this is a Due Process concern,[123] the Court fully considered it as relevant in reaching the conclusion the statute was unconstitutional. As noted earlier,[124] in Equal Protection cases the Court routinely resorts to both Equal Protection and Due Process concerns.

In addition, under the standard phrasing today of the third prong of intermediate review, the Oklahoma statute probably would be viewed as being "substantially more burdensome than necessary," since it banned all 18–20-year-old males from buying 3.2% beer, even though statistics showed that only "2% of males in that age group were arrested for that offense."[125] Even if that 2% arrest rate suggests perhaps 10% of males were driving drunk, but just not stopped and arrested,[126] the law might still be viewed as (3)(a) "substantially overinclusive" in banning all males from buying beer as a way to deal with the problem of 10% of males.[127] Of course, banning all 18–20-year-olds from buying, or drinking, beer to deal with the serious problem of teenage drunk driving would just involve age discrimination, triggering only minimum rational review, and would likely be constitutional under that review.[128]

Mississippi University for Women v. Hogan[129] involved a state policy of excluding males from admission to a state School of Nursing. Justice O'Connor's

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[122] *Craig*, 429 U.S. at 201–02 ("Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'"). This conclusion was reinforced by the Court noting there was no evidence measuring the dangerousness of 3.2% beer in terms of traffic safety, and thus again the regulation did not "substantially serve" to advance its interest, particularly because "Oklahoma apparently considers the 3.2% beverage to be 'nonintoxicating.'" *Id.* at 203.

[123] *See supra* text accompanying note 94.

[124] *See supra* text accompanying notes 95–98.

[125] *Craig*, 429 U.S. at 201–02.

[126] *See id.* at 203 n.16 (In one Oklahoma study, "a blood alcohol concentration greater than .01% was discovered in 14.6% of the males compared to 11.5% of the females."). Since a blood alcohol content of .01% is substantially less than the normal blood alcohol level of .08% most states use to qualify as driving drunk, *see Blood Alcohol Level Chart: Are You Too Drunk to Drive?*, DRIVING LAWS, https://dui.drivinglaws.org/drink-table.php (last visited July 26, 2021), this would likely mean less than 10% of males tended to drive drunk. Even those studies which show a blood alcohol level of .02% can tend to create a decline in visual functioning indicate that perhaps only 10% of males were have any impaired driving function. *See How Does Alcohol Affect Your Motor(ing) Skills?*, SAFERAMERICA (Aug. 25, 2017), https://safer-america.com/alcohol-affect-motoring-skills/.

[127] If minimum rationality review applied, the law would likely be constitutional, as burdening 90% of males to deal with the impaired driving problem of 10% of males would likely not be viewed as an irrational burden.

[128] *See Craig*, 429 U.S. at 199 (legislatures may "realign their substantive laws in a gender-neutral fashion").

[129] 458 U.S. 718, 719–20 (1982).

majority opinion addressed two plausible state objectives for the discrimination: compensating for past or present discrimination against women with respect to obtaining nurse training or attaining positions of leadership in the field; and avoiding the disruption of the education of females that might be caused by having a male presence in the classroom.[130] With respect to the first interest, the Court noted that no such evidence of discrimination existed in the nursing field.[131] While the Court did not explicitly consider the issue in *Hogan*, later cases have clarified that using affirmative action to compensate for general societal discrimination is not an (1) important or compelling government interest.[132]

With respect to the second objective, the evidence showed that banning males from the classroom did not (2)(b) substantially serve to advance any concern with disrupting the education of females, in part because the school allowed men to audit

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[130] *Id.* at 727–28 (discrimination concern); *id.* at 730–31 (disruption of education concern). While dicta in *Hogan* did suggest the Court was focused on "actual" government purposes, *id.* at 730, not "actual" or "plausible" government purposes normally used at intermediate review, *see* text accompanying note 67, the requirement of "actual" government purposes is a strict scrutiny requirement whose use at intermediate review reflects a mutated heightened intermediate review analysis, as discussed *infra* at text accompanying notes 325–25, 331–36.

[131] *Hogan*, 458 U.S. at 729–30.

[132] This is consistent with *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–500, 505–06 (1989), where the Court held that responding to general societal discrimination is not a compelling interest. Under strict scrutiny, the discrimination must be in the same field/industry and effect the same group, and the discrimination must be, in part, the product of that government's action (federal, state, or local). *Id.* at 505–06. For intermediate review, while any societal discrimination must be in the same field/industry and effect that gender group, it is unclear whether it must be in part because of prior government action. *See, e.g.*, Concrete Works of Colo., Inc. v. City & Cty. of Denver, 321 F.3d 950, 960 (10th Cir. 2003) (citing Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1580 (11th Cir. 1994) ("Under the intermediate scrutiny test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself. One of the distinguishing features of intermediate scrutiny is that, unlike strict scrutiny, the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector."); Coral Constr. Co. v. King Cty., 941 F.2d 910, 932 (9th Cir. 1991) ("Unlike the strict standard of review applied to race-conscious programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy.")). In practice, this difference may not be all that important, as in most cases prior government action can be shown to have, in part, caused the societal discrimination. *See Concrete Works,* 321 F.3d at 960 ("We need not resolve this issue, however, because Denver has introduced evidence that links the City to gender discrimination in the local construction industry.").

classes, just not take courses for credit.[133] This is consistent with the burden being placed on the government under intermediate scrutiny to justify their action.[134]

A more recent case of gender discrimination is *Hayden v. Greensburg Community School Corp*.[135] In this case, a school district policy under which boys, but not girls, needed to keep their hair short in order to play basketball was ruled unconstitutional because there was no valid reason for the rule other than sexual stereotyping, which is an illegitimate interest.[136]

b. Illegitimacy Classifications

In *Trimble v. Gordon*,[137] decided in 1977, one year after *Craig v. Boren*, the Court used the phrases "carefully tuned" and "carefully tailored," which are similar to the "substantially related" language of intermediate scrutiny, to hold that classifications based on illegitimacy are invalid under the 14th Amendment if they are not so related to "substantial justifications."[138] Critical to applying this standard of review was the observation that illegitimate children are not responsible for their status.[139] One factor supporting heightened scrutiny is for discrimination based on classifications that are not the product of individual choice.[140]

Applying intermediate scrutiny in *Trimble*, the Court declared invalid an Illinois law that allowed an illegitimate child to inherit from its father only if the

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[133] *Hogan*, 458 U.S. at 730–31. As in *Craig v. Boren*, see *supra* text accompanying notes 121–24, this technical Due Process concern was fully considered in a case styled as dealing with Equal Protection.

[134] *Id.* at 731 ("In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals."). Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist, dissented. *Id.* at 733 (Burger, C.J., dissenting); *id.* at 733–34 (Blackmun, J., dissenting); *id.* at 736–42 (Powell, J., joined by Rehnquist, J., dissenting). Justice Powell, with whom Rehnquist joined, said the Court was creating needless uniformity in nursing education since plaintiff could attend another nursing school and Hogan had no constitutional right to attend his "home town" school. *Id.* at 736. In contrast, as the majority noted, he does have a right not to be discriminated against on account of his gender. *Id.* at 731. Soon after this decision, MUW went co-educational and is still a thriving institution today. By 2021, 21% of its students are male. *Mississippi University for Women*, U.S. NEWS & WORLD REPORT, www.usnews.com/best-colleges/mississippi-women-2422 (last visited July 26, 2021).

[135] 743 F.3d 569 (7th Cir. 2014).

[136] *Id.* at 571–72, 580–82. On sexual stereotyping being an illegitimate interest, see Craig v. Boren, 429 U.S. 190, 198–99 (1976) ("'archaic and overbroad' generalizations" and "outdated misconceptions concerning the role of females in the home" cannot be used to justify gender discrimination).

[137] 430 U.S. 762, 772 & n.14 (1977).

[138] *Id.* at 770–71.

[139] *Id.* at 769–70.

[140] *See generally* KELSO & KELSO, *supra* note 58, at § 19.1 n.51; Kelso, *supra* note 3, at Section III.A.2 n.98; Section IV.A.4 n.190.

father had acknowledged the child and married its mother.[141] Justice Powell said that the classification affecting illegitimate children was not substantially related to the goal of protecting the orderly distribution of estates.[142] Justice Powell explained that the law was (3)(a) substantially *overinclusive* because it excluded "significant categories" of illegitimate children who could be allowed to inherit "without jeopardizing the orderly settlement of estates," for example, those who had a "state-court paternity."[143] Applying rational basis scrutiny of the pre-1977 cases involving illegitimacy, Chief Justice Burger, along with Justices Stewart, Rehnquist, and Blackmun, dissented in the case.[144]

The following year, in *Lalli v. Lalli*,[145] Justice Powell, writing for a 5–4 Court and applying the intermediate standard of review articulated in *Trimble*, upheld a New York statute that allowed illegitimate children to inherit from their father only if an order of filiation had been entered during the father's lifetime. The Court also noted that the state's interests in the case were "substantial," thus foreshadowing complete adoption of intermediate scrutiny in these cases, even though nominally the Court followed the *Trimble* language of requiring only that the statute be substantially related to "permissible" interests.[146] With respect to means, Justice Powell admitted that some children who might be able to prove paternity without serious disruption of estate administration would be excluded (and thus the statute was (3)(a) somewhat, but not substantially *overinclusive*), but the statute was the product of careful study, which minimized the possibility of delay and uncertainty, enhanced accuracy, and made fraudulent assertions of paternity less likely to succeed (and thus (2)(b) substantially *served* to advance the government's interests).[147] Four Justices in dissent agreed that intermediate scrutiny was the proper standard, but said that the statute excluded forms of proof, such as acknowledgment of the child or marriage to the mother, and thus was not (2)(b) substantially related to advancing the state's interests.[148]

A result more favorable to illegitimate children was reached in *Clark v. Jeter*,[149] decided in 1988. Under Pennsylvania law, an illegitimate child had to prove

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[141] *Trimble*, 430 U.S. at 764–66.

[142] *Id.* at 770–73.

[143] *Id.* at 771–72. The Court added, "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." *Id.* at 772.

[144] *Id.* at 776–77 (Burger, C.J., joined by Stewart, Rehnquist & Blackmun, JJ., dissenting) (citing Labine v. Vincent, 401 U.S. 532 (1971)).

[145] 439 U.S. 259, 261, 264–66 (1978).

[146] *Id.* at 265, 271.

[147] *Id.* at 271–75.

[148] *Id.* at 277–79 (Brennan, J., joined by Marshall, White & Stevens, JJ., dissenting).

[149] 486 U.S. 456 (1988).

paternity before seeking support from the father.[150] While legitimate children could seek support at any time, illegitimate children had to sue within six years of birth.[151] The Court held that the classification was not "substantially related to an important governmental objective," thus phrasing the test in terms of standard intermediate scrutiny review.[152]

A similar requirement of a substantial relationship to an important government interest occurred in 2001 in *Nguyen v. INS*.[153] This case considered a requirement that in order to become a United States citizen, an illegitimate child born of a citizen father and a non-citizen mother must, before becoming 18, be "legitimated" or otherwise have "paternity" acknowledged by the father or found by a court.[154] Because there was no such requirement if the father had been the non-citizen and the mother the citizen, and there was no such requirement if the father and mother were married, the case involved both gender and illegitimacy discrimination.[155]

In applying intermediate scrutiny, the Court considered two important interests. The first interest was "the importance of assuring that a biological parent-child relationship exists." This interest was apparently not put forward in litigation by the government attorneys in the case.[156] Nevertheless, it would be appropriate for the Court to consider this interest if it were an "actual purpose" or a "plausible purpose" of the regulation, whether argued to the Court or not.[157] Given that birth from citizen parents is "often critical to our constitutional and statutory understanding of citizenship" and that the focus of the rule at issue in the case concerned "legitimation" or other determination of "paternity," a Court could easily find this was an actual or plausible purpose of the rule in question.[158]

The Court then noted that the statute's requirement of some legitimation or finding of paternity made before the age of 18 was (2)(a) substantially related to this

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[150] *Id.* at 457.

[151] *Id.*

[152] *Id.* at 461.

[153] 533 U.S. 53 (2001).

[154] *Id.* at 59–60.

[155] *Id.* at 60–61. In either case, without regard to any consideration the less than intermediate scrutiny might apply because of deference traditional given to Congress in immigrations and naturalization claims, the Court noted that the statute passed intermediate scrutiny anyway. *Id.* at 61.

[156] *See id.* at 79–80 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

[157] *See supra* text accompanying note 67.

[158] *Nguyen*, 533 U.S. at 62–63, 65, 68, 70. Four Justices in dissent criticized the majority for not establishing clearly enough that these two interests were important; that they were actual purposes of the legislation, rather than merely court-stated purposes; or that the rules at issue actually substantially advanced the government's ends. *Id.* at 74–91 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

interest in determining that a parent-child relationship exists.[159] The statute was perhaps not the least burdensome effective alternative, as the Court acknowledged that clear and convincing evidence of paternity might be established after 18 years of age today "given the sophistication of modern DNA tests."[160] However, since the case involved only intermediate scrutiny, the only requirement was that the statute not be (3)(a) "substantially more burdensome than necessary," which the Court said was met because "[o]nly the least onerous of the three options provided for [i.e., "legitimation," paternity "acknowledged" by the father, or "established" by a court] must be satisfied."[161] The statute was also viewed as being not (3)(b) substantially too burdensome, as only one of three options needed to be met. Thus, as the Court noted, "[W]e are mindful that the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is minimal. . . . Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship . . . .").[162]

The second important government interest was "to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and in turn, the United States."[163] This was an interest argued to the Court by the government attorneys.[164] Although no review was done by the Court to determine if this was an "actual purpose" of the legislation, under the normal intermediate review approach it would be enough if this was a "plausible" purpose.[165]

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[159] *Id.* at 63.

[160] *Id.*

[161] *Id.* at 71.

[162] *Id.* at 70–71. Part of the dissent focused on less burdensome alternatives—for the first interest, either allowing paternity to be established after 18 years through DNA testing or adopting a sex-neutral scheme requiring both fathers and mothers to prove paternity, and, for the second interest, requiring some degree of regular contact between the child and citizen parent over time. *Id.* at 74–91 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). However, it must be remembered that at intermediate scrutiny there is no least burdensome alternative requirement. Instead, the existence of alternatives is used at intermediate scrutiny to help show that the particular statute actually adopted does not "substantially advance" its ends, or that the statute is "substantially more burdensome" than it needs to be. In this case, while the statute is not as narrowly drawn as it could be and would fail strict scrutiny given the alternatives mentioned by the dissent, it is not surprising that the majority found the statute substantially related to its ends and not substantially more burdensome than necessary to survive intermediate scrutiny.

[163] *Id.* at 64–65.

[164] *Id.* at 67–68.

[165] *See id.* ("We ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation."); *see also supra* note 67 and accompanying text. *See generally* KELSO & KELSO, *supra* note 43, at § 26.1.3 nn.92–99.

The Court then noted that in the case of "a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth . . . ."[166] The Court acknowledged that the rules at issue in this case regarding the citizen father would not in every case create such a similar opportunity for a relationship to develop.[167] In terms of the standard of review, there is thus no "direct relationship" between the rules at issue in this case and the important governmental end.[168] However, as the Court noted, under intermediate scrutiny there is no requirement, as there is under strict scrutiny, of a direct relationship so that "the statute under consideration must be capable of achieving its ultimate objective in every instance."[169] It is enough if the statute is "substantially related to the achievement of" the important governmental end.[170]

c. Plyler v. Doe

Undocumented immigrants in the United States have also been held entitled to protection under the Equal Protection and Due Process Clauses, as they are "persons" textually entitled to such protection. However, they have not been characterized as a suspect class because entry into the class is the result of a voluntary act. Thus, state regulations affecting undocumented immigrants are typically subjected to mere rational basis review.[171]

However, in *Plyler v Doe*,[172] a case involving the rights of the children of undocumented immigrants to attend public school, a 5–4 Court applied intermediate scrutiny to find that Texas could not deny free public education to the children of undocumented immigrants. In his decision, Justice Brennan pointed to the gender discrimination and non-marital children cases as examples of classifications that "give rise to recurring constitutional difficulties" where the Court

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[166] *Nguyen*, 533 U.S. at 65.

[167] *Id.* at 65–67.

[168] *Id.* at 67 (noting the statute only provides "the opportunity" for a relationship to develop, not that one will necessarily develop).

[169] *Id.* at 70. For discussion of this requirement at strict scrutiny, *see supra* note 64 and accompanying text.

[170] *Id.*; *see also* Flores-Villar v. United States, 536 F.3d 990 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011) (4–4 decision; Kagan, J., took no part in the consideration or decision) (affirming a section of the Immigration and Nationality Act imposing a five-year residency requirement after the age of 14 on U.S. citizen fathers, but only one year for citizen mothers, before they can transmit citizenship to child born out-of-wedlock abroad to non-U.S. citizen), *abrogated by* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (differential treatment violates intermediate review; not justified by stereotypical view that unwed citizen fathers care less about, or have less contact with, their children than unwed citizen mothers; harsher five-year requirement applied to both unwed father and mother until Congress passes gender neutral provision).

[171] *See* Mathews v. Diaz, 426 U.S. 67, 84–86 (1976).

[172] 457 U.S. 202, 205, 223–24 (1982).

requires a state to further a "substantial" interest.[173] Justice Powell, concurring, with the crucial fifth vote, said the case was analogous to that of illegitimate children, where such children were often punished for the misdeeds of their parents.[174] Cases involving discrimination against illegitimate children trigger intermediate scrutiny.[175]

The Brennan opinion in *Plyler* was not particularly careful in its linguistic use and phrased the ultimate test as whether the statute could "be considered rational unless it furthers some substantial goal of the State."[176] Later cases have indicated, however, consistent with the thrust of both Justice Brennan's opinion for the Court, and Justice Powell's concurrence, that the level of review in *Plyler* is a standard intermediate scrutiny kind of test.[177]

Applying the intermediate "substantial goal" standard in *Plyler*, the Court found that Texas did not show that any substantial goal was implemented by the classification, be it preserving resources for its own citizens; guarding against an influx of undocumented immigrants (the record containing no evidence that undocumented entrants impose significant burdens on the state's economy); improving educational quality (the record not supporting the claim that excluding undocumented children will improve the overall quality of education in the state); or avoiding the education of people who will leave the state or not put their education to productive use within the state (the record making clear that many of the children disabled by the classification would remain indefinitely and some would become residents or citizens).[178] As Justice Powell noted, denial of education to the children of undocumented immigrants bears (2)(b) no substantial relation to any substantial state interest because no one benefits from the creation within our borders of a subclass of illiterate persons.[179]

Chief Justice Burger, dissenting with Justices White, Rehnquist, and O'Connor, said that the Court was adopting a policy role, abusing the 14th Amendment in an effort to become an "omnipotent and omniscient problem solver."[180] Once it is conceded, as here, that undocumented immigrants are not a suspect class and that education is not a fundamental right, the inquiry should be

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[173] *Id.* at 216–24.

[174] *Id.* at 238–40 (Powell, J., concurring).

[175] *See supra* text accompanying notes 137–70.

[176] *Plyler*, 457 U.S. at 224 (majority opinion).

[177] *See* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988) (declining to apply the "heightened" intermediate scrutiny in *Plyler* in a case where the children of undocumented immigrants have "not been penalized by the government for illegal conduct by [their] parents.").

[178] *Plyler*, 457 U.S. at 224–30. Administrative cost savings are usually not viewed as substantial government interests, as noted *supra* text accompanying note 72. *See generally* KELSO & KELSO, *supra* note 43, at §§ 26.1.1.2 n.44 & 26.1.4 n.100.

[179] *Plyler*, 457 U.S. at 239–41 (Powell, J., concurring).

[180] *Id.* at 242–44 (Burger, C.J., joined by White, Rehnquist & O'Connor, JJ., dissenting).

whether the classification bears a rational relationship to a legitimate state purpose.[181] It does here because it is rational for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is unauthorized as it has in providing for persons lawfully present.[182]

d. Content-Neutral Regulations of Speech in a Public Forum

The use of intermediate scrutiny for content-neutral regulations of symbolic speech or reasonable time, place, or manner regulations of speech is best illustrated in the 1989 case of *Ward v. Rock Against Racism*.[183] Previously, in 1968 in *United States v. O'Brien,*[184] the Court upheld the conviction of a protester who had violated federal law by burning his draft card on the steps of a courthouse as part of a demonstration against the Vietnam war. Chief Justice Warren stated: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[185]

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[181] *Id.* at 248.

[182] *Id.* at 246, 248–51. One consequence of *Plyler* has been an increasing number of children of undocumented immigrants graduating from American high schools. Beginning in 2002, a number of states (e.g., California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington) have enacted legislation allowing such undocumented immigrant students who have two to three years of residency to apply for, and receive, in-state tuition at one of their public colleges, as long as the students sign an affidavit promising to seek legal immigration status. While the states argue that such conditions are more stringent than for out-of-state students seeking to gain in-state tuition, since the student must come forward and agree to seek legal immigration status, lawsuits have been filed in a number of states arguing that such legislation discriminates against out-of-state United States citizens who wish to be granted in-state tuition status, and thus violates either the Equal Protection Clause or the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. There are no reported successes in those lawsuits. In terms of public universities' overall budgets, the amount of money involved in granting in-state tuition to such undocumented immigrant students is relatively small. So far, not many undocumented immigrants have taken advantage of these laws—in part because of the difficulty of obtaining federal or state financial aid and in part because such students are not legally employable upon graduation. As an example, in 2006, anecdotally, slightly over 100 such undocumented immigrant students were attending the University of Texas-Austin out of their population of 48,000 students. *See generally States Grapple with In-State Tuition for Illegal Immigrants*, FOX NEWS (Mar. 6, 2006), https://www.foxnews.com/story/states-grapple-with-in-state-tuition-for-illegal-immigrants.

[183] 491 U.S. 781 (1989).

[184] 391 U.S. 367 (1968).

[185] *Id.* at 377.

The *O'Brien* principle, although framed in the context of a regulation applied to a content-neutral regulation of symbolic speech, was extended in 1984 by *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,[186] to time, place, or manner regulations. The Court upheld a Los Angeles ordinance that prohibited the posting of signs on public property. The challengers were supporters of a candidate for the City Council whose posters were removed from utility poles by city employees. To justify the ordinance, the city said the law protected its interests in the aesthetic beauty of the environment, the safety of workers who must climb poles, and the elimination of traffic hazards.[187] The Court held that the ordinance was substantially related to advancing aesthetic beauty and was not substantially overbroad under the relevant standard for review set forth in *United States v. O'Brien*.[188] In both *O'Brien* and *Vincent*, however, the *O'Brien* test was not explicitly phrased as an intermediate standard of review.[189]

In *Ward v. Rock Against Racism*,[190] the Court considered the question of whether New York City deprived musicians of First Amendment rights by insisting

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[186] 466 U.S. 789, 804–05 (1984).

[187] *Id.* at 794–95.

[188] *Id.* at 805–10.

[189] Another early case to apply the intermediate scrutiny "narrowly tailored" requirement to a time, place, or manner regulation was *Grayned v. City of Rockford*, 408 U.S. 104, 112, 119–21 (1972) (citing Cox v. Louisiana, 379 U.S. 559 (1965) (upholding a ban on picketing in or near a courthouse); Cameron v. Johnson, 390 U.S. 611 (1968) (upholding a ban on picketing that unreasonably interferes with ingress or egress to any county courthouse)). There, the Court declared that an anti-noise ordinance was not invalid on its face which provided that persons adjacent to a school with classes in session shall not "willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session." *Grayned*, 408 U.S. at 107–08. Justice Marshall delivered the Court's opinion which recited that reasonable time, place, and manner regulations may prohibit expressive activity if, as in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), it "materially disrupts class work or involves substantial disorder or invasion of the rights of others." Justice Marshall said the ordinance went no further than *Tinker* permits, since the ordinance was narrowly tailored to further a substantial interest in not having a substantial disruption of school sessions. *Grayned*, 408 U.S. at 116–20; *see also* Faustin v. City & County of Denver, 423 F.3d 1192 (10th Cir. 2005) (city policy banning signs and banners from highway overpasses narrowly tailored to serve interest in traffic safety). While not the focus of this Article, it can be noted that *Tinker*, while pre-dating *Craig v. Boren*, did adopt, in essence, an intermediate standard of review, which is appropriate for a content-neutral secondary effects concern with disrupting school activities when applied to an activity, such as in *Tinker*, involving regulation of students wearing armbands to protest the Vietnam War in a public forum, such as school playgrounds, or speech in a cafeteria. For regulations at school in non-public forums, such as classrooms or school-sponsored activities, only a second-order reasonableness balancing should be done, as in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988). For further discussion of this point, *see* Kelso, *supra* note 64, at 312–17.

[190] 491 U.S. 781, 788–90 (1989).

that bandshell performers at the Naumberg Acoustic Bandshell in Central Park use sound-amplification equipment and a sound technician provided by the city. For the Court, Justice Kennedy first held that the regulation was content-neutral because two of its justifications (controlling noise in the park and avoiding undue intrusion into residential areas) had nothing to do with content.[191] Having concluded that the regulation was indeed a content-neutral time, place, or manner regulation rather than a regulation of content, Justice Kennedy applied the *O'Brien* rule to the facts, concluding that (2)(a) the city's regulation was not substantially underinclusive, as the problem with controlling noise had arisen from bandshell performances and the regulation applied to any band using the bandshell stage,[192] and (2)(b) the city's regulation requiring use of a sound technician provided by the city substantially served to advance the city's interest in controlling noise.[193]

Making clear this test is a form of intermediate review, Justice Kennedy next held that the Court of Appeals erred in drawing on *O'Brien* for a least intrusive means requirement, which the Court uses at strict scrutiny, since the Supreme Court had already made clear that "the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner regulations.'"[194] To underscore the point, he said, "[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so."[195] Instead of the strict scrutiny least burdensome effective alternative requirement, the Court used the intermediate standard of review that asks whether the regulation is substantially more burdensome than necessary. As phrased by Justice Kennedy in *Ward*, a content-neutral regulation of speech cannot be (3)(a) "substantially broader than necessary to achieve the government's interest,"[196] nor can it (3)(b) place a substantial burden on speech by failing to "leave

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[191] *Id.* at 791–93.

[192] *Id.* at 784–85 ("The city's regulation requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city. . . . Over the years, the city received numerous complaints about excessive sound amplification at . . . concerts [in the park].").

[193] *Id.* at 800 ("It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances.").

[194] *Id.* at 798.

[195] *Id.*

[196] *Id.* at 799–800 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

open ample alternative channels of communication."[197] It has become commonplace after *Ward* that regulations of speech "require[ ] . . . only intermediate scrutiny if they are content neutral."[198]

An instance where an ordinance was not narrowly tailored because it was (3)(a) "substantially overinclusive" occurred in *Deegan v. Ithaca*.[199] In this case, the Second Circuit held that a municipal ordinance prohibiting any noise audible from 25 feet away was not sufficiently narrowly drawn when applied to a street evangelist to quiet him in a public forum. The court noted that the regulation was substantially broader than necessary, particularly since it would ban the sound of a person stepping in high heel boots, the opening and closing of a door, or the ringing of a cell phone.[200] Similarly, in *Bowman v. White*,[201] a case involving a public university's five-day cap per semester on non-university persons speaking at a designated public forum on campus, the Eighth Circuit held that the five-day cap was (3)(a) substantially more burdensome than necessary to advance the university's content-neutral interests in protecting the students' educational experience, ensuring public safety, and encouraging diverse use of resources. The court noted that a more narrowly drawn policy might permit the plaintiff extra days when the space was not being used by others, but grant preference to individuals who have not already been granted five days of use.[202]

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[197] *Id.* at 802 ("The final requirement, that the guideline leave open ample alternative channels of communication, is easily met.").

[198] City of Los Angeles v. Alameda Books, 535 U.S. 425, 440 (2002).

[199] 444 F.3d 135 (2d Cir. 2006).

[200] *Id.* at 142–44.

[201] 444 F.3d 967, 972–74 (8th Cir. 2006).

[202] *Id.* at 981–82. Other noteworthy content-neutral regulation of speech cases include: *McCullen v. Coakley*, 573 U.S. 464 (2014) (Massachusetts law granting a 35 foot buffer zone around abortion clinic substantially burdens more speech than necessary to prevent harassment or obstruction of entry; in response Massachusetts passed a law empowering police to issue dispersal orders, enforceable for eight hours, against anyone blocking access to clinic, and prohibiting demonstrators from using "force or threat of force or . . . physical obstruction" against anyone entering or leaving clinic); *id.* at 497–498, 505 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment) (law is content-based regulation of pro-life speech triggering strict scrutiny); *Pine v. West Palm Beach*, 762 F.3d 1262 (11th Cir. 2014) (banning amplified noise within 100 feet of health care clinics more narrowly tailored than *McCullen*, and constitutional); *Left Field Media L.L.C. v. City of Chicago*, 822 F.3d 988 (7th Cir. 2016) (Chicago ordinance that bans peddling outside Wrigley Field to curtail crowding is content-neutral and valid under intermediate review); *Johnson v. Minneapolis Park & Recreation Board*, 729 F.3d 1094 (8th Cir. 2013) (attempt to restrict to festival booth Christian from distributing Bibles at Twin Cities Pride Festival substantially burdens more speech than necessary to prevent harassment/congestion); *Contributor v. City of Brentwood*, 726 F.3d 861 (6th Cir. 2013) (homeless people can be prohibited from selling newspapers they produce to motorists at street corners to deal with traffic safety and flow; ample alternatives to sell the paper, including to pedestrians).

City of Ladue v. Gilleo is an example of a case where the Court found (3)(b) "no ample alternative channels of communication," as thus a failure of the third prong of intermediate review.[203] There the Court held unconstitutional on its face an ordinance which prohibited all signs within the city except those that fell into one of 10 exemptions, but which did not contain an exemption for signs on private property (other than "For Sale" or "Sold" signs). The challenger wanted to put a 24″ by 36″ sign on her lawn with the words, "Say No to War in the Persian Gulf, Call Congress Now."[204] For the Court, Justice Stevens wrote that the interest in minimizing visual clutter was valid, but the ordinance did not leave open ample alternative channels for communication.[205] The Court was not convinced that adequate substitutes existed for the important medium of speech being closed off. Justice Stevens gave four reasons why no adequate substitute exists: (1) displaying a sign from one's own residence often carries a message distinct from what can be conveyed by other means; (2) residential signs are unusually cheap and convenient forms of communication, especially for persons of modern means and limited mobility; (3) a special respect for individual liberty in the home has long been part of our culture and our law; and (4) the need to regulate temperate speech from the home is less pressing than the need to mediate among various competing uses for streets and other public facilities.[206]

Another area where courts have considered limitations on picketing rights to protect privacy involves limiting the rights of picketers at funeral services. For a good article addressing this issue, which suggests that narrowly tailored regulations based on the content-neutral reason of protecting privacy of funeral mourners should survive the intermediate review applicable to content-neutral regulations in a public forum, see Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295 (2008). *See also* Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013) (law prohibiting protests "within three hundred feet of or about" a funeral from one hour before until one hour after funeral is constitutional under intermediate review; however, broader provision banning protests "in front of or about" any funeral is unconstitutional as failing to define sufficiently the extent of the spatial ban). An 8–1 Court held in *Synder v. Phelps*, 562 U.S. 443, (2011) (Justice Alito dissenting), that where speech involved a matter of public concern (Westboro Baptist Church members protesting against homosexuality at military funerals), the First Amendment shielded protestors from state tort law for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.

[203] 512 U.S. 43, 56 (1994).

[204] *Id.* at 45–48.

[205] *Id.* at 54, 56.

[206] *Id.* at 56–59.

B. Central Hudson Gas *and Heightened Intermediate Review*

1. The Central Hudson Gas *Test*

Commercial speech relates to economic transactions, including promotional ads as well as offers.[207] It is not converted into noncommercial speech by occurring in educational, political, or religious contexts (e.g., an ad for a church), but educational, political, or religious speech is analyzed under standard First Amendment doctrine.[208] Thus, under Equal Protection and Due Process Clause analyses, only rational basis scrutiny was given to the regulation of ads, as they involved economic regulation of business triggering rational review, as in 1942 in *Valentine v. Chrestensen*.[209] Similar treatment was given to offers made by door-to-door magazine sellers, and a ban on ads for optical appliances.[210] The result was that barriers to commercial speech were easily erected.

At first, the change in perspective came in small increments. In 1972, health concerns allowed a ban on the broadcast of cigarette ads in *Capital Broadcasting Co. v. Acting Attorney General*.[211] In 1973, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[212] a state was allowed to ban gender discrimination in help-wanted newspapers ads based on *Valentine v. Chrestensen*, but four Justices dissented from that result. However, the cases indicated some First Amendment concerns might be applicable. The transitional case was *Bigelow v. Virginia*,[213] decided in 1975. The Court said *Chrestensen* did not hold that all ads are unprotected per se. Justice Blackmun wrote that even commercial ads deserve some First Amendment protection when, unlike the ads in *Chrestensen* and *Pittsburgh Press*, they contain factual information with a clear public interest.[214]

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[207] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–64 (1980). The discussion in this Section tracks that in Kelso, *supra* note 64, at 370–73.

[208] *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–40 (1980) (state may not bar a utility from including a political message with its bill), discussed *infra* text accompanying note 231; Bd. of Trs. v. Fox, 492 U.S. 469, 482–86 (1989) (whether regulation of speech in campus dormitories was commercial speech or non-commercial speech), discussed *infra* text accompanying notes 232–34).

[209] 316 U.S. 52, 54–55 (1942).

[210] Breard v. City of Alexandria, 341 U.S. 622 (1951) (door-to-door sellers); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (optical appliances).

[211] 405 U.S. 1000 (1972) (holding that Congress may ban cigarette ads in any medium because of its power to regulate commerce).

[212] 413 U.S. 376, 383–91 (1973) (ruling that such an ad created a threat of unlawful employment discrimination); *id.* at 393 (Burger, C.J., dissenting); *id.* at 400 (Stewart, J., joined by Douglas, J., dissenting); *id.* at 404 (Blackmun, J., dissenting).

[213] 421 U.S. 809, 818–26 (1975). Only Justices White and Rehnquist were in dissent. *Id.* at 829–36 (Rehnquist, J., joined by White, J., dissenting).

[214] *Id.* at 822–26 (majority opinion).

The decisive case was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[215] decided in 1976. There the Court held that a state cannot bar licensed pharmacists from publishing truthful information on drug prices.[216] Justice Blackmun said there is a public interest in the flow of truthful information concerning lawful activities, including speech that merely proposes a commercial transaction,[217] and if information is not in itself harmful, the best means for persons to perceive their own best interests is to open the channels of communication.[218]

More important, perhaps, than the result in *Virginia State Board* was the creation of an analytical methodology for dealing with regulation of commercial speech. That approach was summarized in 1980 by Justice Powell in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, when he wrote:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, 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.[219]

Four aspects of the *Central Hudson* test are important. First, under this approach, minimum rational review would be given to regulations of unlawful, false, or misleading ads, since, without any special First Amendment protection, they would be viewed as standard economic regulations subject to rational review under the Equal Protection and Due Process Clauses.[220]

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[215] 425 U.S. 748 (1976). On the *Virginia State Board* case, see generally Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189 (2004).

[216] *Va. State Bd. of Pharm.*, 425 U.S. at 770–73.

[217] *Id.* at 763–65, 770.

[218] *Id.* at 770.

[219] 447 U.S. 557, 566 (1980).

[220] *Id.* at 566–67. For regulations of speech that might possibly be misleading or create confusion among consumers, the Court decided in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), that where the government could show the "possibility of consumer confusion or deception," even though the commercial speech could not be proven to be unlawful, false, or misleading, then the government could require "factual and uncontroversial" disclosures as long as they were "reasonably related to the State's interest in preventing deception of consumers" because "disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech." These cases thus involve some form of a reasonableness balancing test. While historically this was a reasonableness balancing test like those used for nonpublic forum cases, since the Court phrased the issue as whether the challenger could show the government regulation was unreasonable, *id*. at 651 n.15, without formal consideration or acknowledgement, in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138

Second, as phrased, the test for commercial speech is more stringent than regular intermediate scrutiny, since the test requires that the regulation "directly advance" the government's interest, a strict scrutiny kind of standard, rather than merely "substantially advance" the government's interest.[221] This increase in review is what makes the *Central Hudson* test an example of intermediate review with bite.[222]

Third, commercial speech cases do involve a less rigorous form of scrutiny than traditional First Amendment doctrine for content-based regulations of speech, which ordinarily trigger strict scrutiny.[223] In *Board of Trustees of the State University of New York v. Fox*,[224] the Court clarified that the "no more extensive than necessary" language in *Central Hudson* should be interpreted to mean not the "least restrictive alternative" analysis of strict scrutiny, but rather the "not substantially too burdensome" test of intermediate review.[225]

Fourth, the *Central Hudson* test should lower First Amendment protection only for content-based, subject-matter regulations of commercial speech. Content-neutral time, place, and manner restrictions of commercial speech, like content-neutral regulations of fully protected speech, still should be tested under basic intermediate review, which requires only that they substantially serve a significant public interest, and that they leave open ample alternative channels for communication, with no requirement of direct advancement.[226] Similarly, viewpoint discrimination in regulations of commercial speech should trigger the strict scrutiny applicable even to viewpoint discrimination in cases otherwise not

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S. Ct. 2361, 2377–78 (2018), the Court placed the burden on the government not only to show the "possibility of consumer confusion" to trigger the *Zauderer* test, but also to prove the disclosure requirement was "reasonable." This is discussed in R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 421–23 (2019).

[221] *See supra* notes 60, 64 and accompanying text. Note that this requirement of a direct relationship in *Central Hudson*, 447 U.S. at 566, is higher than the language suggested in *Virginia State Board*, which merely suggested that a standard intermediate review be applied to commercial speech. 425 U.S. at 771 (phrasing the test for commercial speech as consistent with the intermediate standard of review adopted in *O'Brien*).

[222] *See generally* KELSO & KELSO, *supra* note 43, at § 7.2.1 nn.36–37.

[223] *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 426 (1993) ("The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

[224] 492 U.S. 469 (1989).

[225] *Id.* at 475, 479–81.

[226] For discussion of basic intermediate review, see *supra* text accompanying notes 58–61. Although the Court has not had a case directly on point, since regulation of commercial speech is thought to involve less vigorous regulation than ordinary free speech review, *see supra* note 223 and accompanying text, content-neutral regulations should trigger at most intermediate review, not *Central Hudson* review. Otherwise, commercial speech regulation would be higher than normal free speech review.

protected by free speech doctrine, such as advocating illegal conduct, fighting words, or obscene speech.[227] The Court has made clear that in commercial speech cases the First Amendment doctrine of "substantial overbreadth" does not apply because commercial speech is more "hardy" since individuals have an economic incentive to advertise, and thus overbreadth doctrine is not needed to ensure that speech is not "chilled."[228]

Applying this standard of review, the Court held in *Central Hudson* that a state regulation that completely banned promotional advertising by electrical utilities in order to encourage energy conservation was (3)(b) substantially overinclusive because a number of ads, such as those for electric devices, would produce overall energy conservation.[229] Disagreeing with the standard of review applicable to the case, Justices Brennan and Blackmun wanted strict scrutiny of restrictions on commercial speech that is accurate and concerns lawful activity.[230]

In applying *Central Hudson*, care must be taken to distinguish commercial from non-commercial speech. For example, it was held in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*[231] that a state may not bar a utility from including a political message with its bills. In *Board of Trustees of the State University of New York v. Fox*,[232] the Court concluded that those aspects of university regulations that banned corporations from doing product demonstrations in campus dormitory rooms, such as "Tupperware parties," were targeting commercial speech. Both the majority and the dissent noted, however, that to the extent the regulation also prohibited a wide range of fully protected speech, for example, speech in a dormitory room, such as consultation with a lawyer or doctor, even though it was speech for which the speaker received a profit, standard First

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[227] This follows from noting that commercial speech regulations should not be given lesser review than speech not otherwise protected by free speech doctrine, such as advocating illegal conduct, fighting words, and obscene speech cases. Since viewpoint discrimination in those areas trigger strict scrutiny, *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 384–92 (1992), viewpoint discrimination in commercial speech cases should trigger strict scrutiny. The Supreme Court reserved resolution of this issue in a related area of trademark protection in *Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017) (plurality opinion of Alito, J., joined by Roberts, C.J., and Thomas & Breyer, JJ.) (four Justices applied *Central Hudson* review to viewpoint discrimination in trademark case); *id.* at. 1765–67 (Kennedy, J., joined by Ginsburg, Sotomayor & Kagan, JJ., concurring in part and concurring in the judgment) (four Justices said viewpoint discrimination should trigger strict scrutiny); *id.* at 1765 (Justice Gorsuch took no part in the consideration or decision).

[228] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6, 565 n.8 (1980); *see also* Bates v. State Bar of Arizona, 433 U.S. 350, 280–81 (1977) ("substantial overbreadth" doctrine does not apply in commercial speech cases).

[229] *Id.* at 569–71.

[230] *Id.* at 574–79 (Blackmun, J., joined by Brennan, J., concurring in the judgment).

[231] 447 U.S. 530, 537–40 (1980).

[232] 492 U.S. 469, 473–76 (1989).

Amendment doctrine would apply to that part of the regulation.[233] The majority remanded the case for determination of whether the statute could be held constitutional as applied to non-commercial speech, while the dissent concluded that the statute was unconstitutional on that ground.[234]

2. Examples of Commercial Speech Doctrine

In *Greater New Orleans Broadcasting Association, Inc. v. United States*,[235] the Court held that Congress could not bar the broadcast advertising of lotteries and casino gambling in Louisiana, where such gambling is legal. Justice Stevens wrote for the Court that the federal law contained so many exceptions, such as for gambling by Indian casinos, lotteries run by government or non-profit organizations, and "occasional and ancillary" commercial casinos, that the regulation failed the third and fourth part of the *Central Hudson* test. Specifically, the speech restriction was not shown (2)(b) to directly and materially advance the government's interest in reducing the social cost of gambling or assist states in restricting gambling within their borders.[236]

In *Thompson v. Western States Medical Center*,[237] a 5–4 Court held that a ban on advertising or promoting particular compounded drugs (drugs tailored to the needs of an individual patient) failed the *Central Hudson* test because it was (3)(a) more extensive than necessary to service the government's interests. The government said it was trying to prevent large-scale manufacturing of compound drugs and that advertising was serving as a proxy.[238] The Court replied that there were non-speech-related means of drawing that line, including banning commercial scale manufacturing, capping the amount of compounded drugs druggists may sell in a given period of time, barring offering the drugs at wholesale, or requiring a prescription or a history of receiving a prescription.[239] Four Justices in dissent concluded that the government had met their burden.[240]

Consistent with the recent trend of courts being vigorous in applying the *Central Hudson* test, in *IMS Health, Inc. v. Ayotte*,[241] a district court in New Hampshire struck down New Hampshire's first-in-the-nation law banning the sale

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[233] *Id.* at 485–86; *id.* at 487–89 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

[234] *Id.* at 486 (majority opinion); *id.* at 487–88 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

[235] 527 U.S. 173, 176 (1999).

[236] *Id.* at 183–96.

[237] 535 U.S. 357, 360, 368–77 (2002).

[238] *Id.* at 368–70.

[239] *Id.* at 370–77.

[240] *Id.* at 378–79 (Breyer, J., joined by Rehnquist, C.J., and Stevens & Ginsburg, JJ., dissenting).

[241] 490 F. Supp. 2d 163, 165, 171 (Dist. Ct. N.H. 2007).

of data on individual doctors' drug prescribing habits. The court indicated that the law was not narrowly tailored, in that (3)(a) the regulation was substantially overbroad because the state could deal with its concern that distributing such information might be improperly used by pharmaceutical companies in their marketing plans to individual doctors, by regulating improper inducements to influence prescribing practices, issuing best practice guidelines, or requiring continuing education about prescriptions.[242] The Supreme Court similarly ruled in *Sorrell v. IMS Health, Inc.*,[243] that a Vermont law that restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of doctors was unconstitutional. Similar to *Ayotte*, the Court held the regulation was (3)(a) substantially broader than it needed to be.[244]

In contrast, in *Coyote Publishing Co. v. Miller*,[245] the Ninth Circuit upheld a Nevada statute that prohibited brothels from advertising in "any public theater, on the public streets of any city or town, or on any public highway" in the 11 rural counties in Nevada where licensed prostitution is legal. The Ninth Circuit said the restrictions were narrowly drawn and left open ample alternative channels of communication; they only banned advertising in public places where "it would reach residents who do not seek it out, but permitt[ed] other forms of advertising likely to reach those already interested in patronizing the brothels."[246]

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[242] *Id.* at 176–83.

[243] 564 U.S. 552, 557 (2011).

[244] *Id.* at 577–80. Three Justices concluded that the law was not substantially overbroad because there was not "any adequately supported, similarly effective 'more limited restriction.'" *Id.* at 599 (Breyer, J., joined by Ginsburg & Kagan, JJ., dissenting); *see also* Dwyer v. Cappell, 762 F.3d 275 (3d Cir. 2014) (requiring attorneys to post entire opinion to use judicial compliment on website (3)(a) substantially overbroad); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012) (FDA rule requiring tobacco companies to place graphic images on all packages of cigarettes sold in the United States unconstitutional, since FDA did not provide substantial evidence that graphic warnings would (2)(b) directly advance its interest in reducing smoking rates to a material degree).

[245] 598 F.3d 592, 597, 611 (9th Cir. 2010).

[246] *Id.* at 608–11. In *Educational Media Co. at Virginia Tech., Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2010), the Fourth Circuit upheld regulations restricting advertising for alcohol in college newspapers as being directly related to the state's interest in enforcing laws restricting alcohol use by persons under 21. *See also* POM Wonderful, L.L.C. v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (adopting deferential "substantial evidence" standard, not *de novo* review, to review FTC's finding statements are "deceptive and misleading"); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (required disclosure of purely factual information, like regulations to prevent false or deceptive advertising, trigger *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), rather than *Central Hudson Gas*).

In a case dealing with lawyer advertising, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624–35 (1995), Justice O'Connor wrote for a 5–4 Court that a rule forbidding solicitation of accident victims during a 30-day period after the accident was valid under the *Central Hudson* test. Four Justices in dissent said the rule prejudiced victims to vindicate a desire for more dignity

II. HYBRID KIND OF INTERMEDIATE REVIEW

A. The Problem Stated

Sometimes the court defines intermediate review as requiring that the regulation be "reasonably adapted to a substantial government interest," as in *NRA of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives.*[247] This approach is actually a hybrid level of review between standard intermediate scrutiny, which requires a regulation to be "substantially" (not merely "reasonably") related to "a substantial government interest" and reasonableness balancing, which requires the regulation be reasonable and not an "excessive" or "undue" burden given the state's "legitimate" (not "substantial") interest in regulating.[248]

While the Court in *United States v. O'Brien*[249] applied the correct test for intermediate review, loose language in *O'Brien* has caused this difficulty in later cases. Chief Justice Warren summed up the doctrine from *O'Brien* by stating: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it *furthers* an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[250] This phrasing of "it furthers an important or substantial interest" may suggest only "reasonable" furtherance is required, not the standard intermediate requirement that the regulation "substantially further" the government interest.[251] This loose linguistic language is particularly understandable given that *O'Brien* in 1968 predated the formal

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in the legal profession. *Id.* at 635–37 (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). Distinguishing *Florida Bar* on grounds that the need for immediate counsel is more pressing for criminal defendants than for accident victims, courts have ruled that a 30-day ban on direct-mail solicitation of criminal defendants is unconstitutional. *See, e.g.*, Ficker v. Curran, 119 F.3d 1150, 1151–56 (4th Cir. 1997).

[247] 700 F.3d 185, 194–98 (5th Cir. 2012), and cases cited therein.

[248] For full discussion of such reasonableness balancing, see Kelso, *supra* note 2, at Section II.B nn.77–100; Part V nn.215–302; Part VI nn.303–334; *see also* Kelso, *supra* note 64, at 307–15 (reasonableness balancing in free speech cases); R. Randall Kelso, *The Structure of* Planned Parenthood v. Casey *Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L. REV. 75, 87–90, 94–111 (2015) (reasonableness balancing for less than substantial burdens in unenumerated fundamental rights cases).

[249] 391 U.S. 367 (1968).

[250] *Id.* at 377 (emphasis added).

[251] On the normal intermediate review requirement of "substantial furtherance," see *supra* text accompanying notes 58–60. Case examples of this are discussed *supra* text accompanying notes 104–08 (content-neutral regulation of speech example); 122–24, 133–34 (gender discrimination examples); notes 147, 159 (illegitimacy cases); 179 (*Plyler v. Doe* example).

adoption of an intermediate scrutiny approach in *Craig v. Boren* in 1976, eight years later.[252]

Nonetheless, in the *O'Brien* opinion itself, Justice Warren noted specifically how the ban on burning drafts cards was "substantially related" to the effective functioning of the selective service system because it "substantially furthered" that end.[253] Use of the "substantial furtherance" language was adopted by Justice Kennedy in *Ward v. Rock Against Racism*.[254] However, occasionally Supreme Court Justices or lower courts can slip back into only requiring a "rational" or "reasonable" relationship between means and ends at intermediate review.

B. Examples of Hybrid Intermediate Review

1. Second Amendment Cases

In *District of Columbia v. Heller*,[255] the Court held 5–4 that the Second Amendment protects an individual right to keep and bear arms, and that this right was violated by the District of Columbia's prohibition on the possession of usable handguns in the home. Justice Scalia's opinion made clear that the right is not unlimited, and that existing precedents and legislative and executive practices should be respected. Providing a non-exhaustive list of examples, he said that nothing in the opinion should be taken "to cast doubt on longstanding prohibitions on possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[256] The Court also noted that the right only extends to the "sorts of weapons" that were "in common use" at the time the Second Amendment was adopted. Thus, the right does not protect "dangerous and unusual weapons."[257]

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[252] *See supra* text accompanying notes 37–56 (discussing the development of intermediate scrutiny review).

[253] *O'Brien*, 391 U.S. at 381 ("We think it apparent 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. . . . It is equally clear that the [regulation] specifically protects this substantial government interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates . . . .").

[254] 491 U.S. 781, 797–99 (1989).

[255] 554 U.S. 570, 628–36 (2008).

[256] *Id.* at 626–27.

[257] *Id.* at 627–28. In the same way that today virtually all of the Bill of Rights Amendments are applicable to the states through the 14th Amendment's incorporation doctrine, *see* KELSO & KELSO, *supra* note 43, at § 27.2.5.1, the Court's Second Amendment analysis in *Heller* was made applicable to the states through the 14th Amendment's incorporation doctrine in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The attorneys who litigated *Heller* were awarded $1,132,182 in attorneys' fees. Heller v. District of Columbia, 832 F. Supp. 2d 32 (D.D.C. 2011).

Justice Scalia said that the District of Columbia law would violate any standard of scrutiny higher than minimum rationality review, which he rejected since that standard applies to any typical social or economic regulation under Equal Protection or Due Process review, and here a fundamental right was involved.[258] In dissent, Justice Breyer called for something less than strict scrutiny, but greater than minimum rationality review, making reference to a balancing test of some sort.[259] As discussed below, lower courts have vacillated on which approach to adopt.[260]

Without guidance from the Supreme Court on the proper standard of review, lower courts have vacillated a bit, but most have coalesced around a two-step analysis. The first step asks whether the regulation concerns matters historically not protected by the Second Amendment (what courts call the "first step" in a two-part analysis) and thus *Heller* does not apply at all.[261] If the Second Amendment applies

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Justice Stevens, dissenting with Justices Souter, Ginsburg, and Breyer, said in *Heller* that the text of the Second Amendment, the history of its adoption, and the decision in *United States v. Miller*, 307 U.S. 174 (1939), all indicate that the Amendment protects the right to keep and bear arms for military purposes, but does not limit the legislature's power to regulate nonmilitary use and ownership of weapons. *Heller*, 554 U.S. at 636–52 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). *Miller* is discussed in KELSO & KELSO, *supra* note 43, at § 23.1.1 nn.7–8.

[258] *Heller*, 554 U.S. at 628–29 & n.27 (majority opinion).

[259] *See id.* at 689–90 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). The Court could adopt the doctrine used in unenumerated fundamental rights cases, as discussed in KELSO & KELSO, *supra* note 43, at § 21.2.3, that substantial burdens on the right trigger strict scrutiny, but less than substantial burdens trigger a reasonable analysis under second-order rational review. This would be consistent with how many states read their protection for gun ownership under their state Constitutions, as Justice Breyer noted in his dissent. *Heller*, 554 U.S. at 689–91 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) (citing, *inter alia*, Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007)). It would also be consistent with unenumerated fundamental rights doctrine if one concluded that *Heller* was wrong in stating that an individual right to own guns was consistent with the literal text of the Second Amendment, but then decided that an unenumerated right to individual gun ownership has become part of the Constitution, in the same way the First Amendment literal text regarding the right to assemble now has a related unenumerated freedom of association. *See generally* CHEMERINSKY, *supra* note 24, at 1221 ("'association' is not listed among those freedoms enumerated in the [First] amendment") (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958) (freedom of association nonetheless protected by Due Process Clause)). As with unenumerated fundamental rights doctrine, substantial burdens trigger strict scrutiny, while less than substantial burdens trigger reasonableness balancing. *See* Kelso, *supra* note 2, at Section V.A nn.216–42; Kelso, *supra* note 248, at 87–90, 94–111 (2015) (reasonableness balancing for less than substantial burdens in unenumerated fundamental rights cases). Freedom of association cases could also be viewed in that way. *See* Kelso, *supra* note 3, at Section II.A.4.c.iv n.296.

[260] *See infra* text accompanying notes 261–70.

[261] *See, e.g.*, United States v. Cox, 906 F.3d 1170 (10th Cir. 2018) ("silencers" not protected by Second Amendment); Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc) (assault weapons and large-capacity magazines not protected by Second Amendment (nine judges), and

(what courts call the "second step" in the two-part analysis), the trend in the courts seems to be to adopt strict scrutiny for "core" burdens on Second Amendment rights, but what they call "intermediate scrutiny" for less severe burdens. This is based on an analogy to free speech cases where serious content-based regulations on the freedom of speech in a public forum trigger strict scrutiny, while reasonable time, place, and manner regulations trigger only intermediate review.[262]

In applying this "intermediate scrutiny" test, some courts define that review as requiring that the regulation be "reasonably adapted to a substantial government interest," the hybrid level of review.[263] Since this approach only requires the regulation to be "reasonably" related to "a substantial government interest," not

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that law would survive intermediate review anyway (ten judges)); Bezet v. United States, 714 F. App'x 336 (5th Cir. 2017) (no right to convert semi-automatic pistol into fully automatic rifle); Teixeira v. County of Alameda, 873 F.3d 670 (9th Cir. 2017) (en banc) (eight of 11 judges en banc hold gun sellers, as opposed to gun owners, have no Second Amendment rights); Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015) (ban on large-capacity magazines, defined as more than 10 rounds, and semi-automatic guns that use such magazines, constitutional); United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, 822 F.3d 136 (3rd Cir. 2016) (federal law prohibiting person from possessing a machine gun extends to trusts); Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) (en banc) (county ordinance barring guns on county property survives challenge by gun show organizers seeking to set up a booth at a local fairgrounds; four judges concurred in the judgment indicating law would be valid even under intermediate scrutiny); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185 (5th Cir. 2012) (federal law which prohibits federally licensed firearms dealers from selling to anyone under 21 is constitutional and would be valid even under intermediate scrutiny); United States v. Huet, 665 F.3d 588 (3d Cir. 2012) (right to own firearms not a bar to prosecuting an individual for aiding and abetting her live-in boyfriend's unlawful possession of a gun based on being convicted felon); United States v. Decastro, 682 F.3d 160 (2d Cir. 2012) (federal statute prohibiting transportation into one's state of residence firearms acquired out of state, without meeting in-state licensing requirements, is not a substantial burden, and thus no form of heightened review is appropriate); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011) (undocumented immigrants have no Second Amendment right to firearms); United States v. Fincher, 538 F.3d 868 (8th Cir. 2008) (ruling that a machine gun, as well as sawed-off shotgun, are not covered by *Heller* because they are "dangerous and unusual weapons"); *see also* Hoven v. Walgreen Co., 751 F.3d 778 (6th Cir. 2014) (Walgreen has right to fire pharmacist after he tried to ward off robbers with concealed handgun he was legally carrying).

[262] This alternative is discussed in KELSO & KELSO, *supra* note 43, at § 23.1.1 n.19, citing, *inter alia*, David G. Browne, Note, *Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply its First Amendment Expertise to the Great Second Amendment Debate*, 44 WM. & MARY L. REV. 2287 (2003); *cf.* N.Y. State Rifle & Pistol Ass'n. v. City of New York, 883 F.3d 45, 61–62 (2d Cir. 2018) (because the regulation does not impose a substantial burden on core Second Amendment rights, intermediate review, not strict scrutiny, applied); Nordyke v. King, 644 F.3d 776, 782–85 (9th Cir. 2011) (citing cases holding only substantial burdens trigger strict scrutiny).

[263] *See, e.g.*, *Nat'l Rifle Ass'n*, 700 F.3d at 194–98 and cases cited therein; *see also* cases cited *infra* note 264 (all these cases phrased intermediate review in this "hybrid" manner).

"substantially related," it is perhaps no surprise that the government has tended to win these cases somewhat easily.[264]

Other courts in these Second Amendment cases have properly stated the standard test of intermediate scrutiny and then upheld the regulation.[265] In some of

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[264] *See* Pena v. Lindley, 898 F.3d 969 (9th Cir. 2018) (provisions of California's Unsafe Handgun Act, which require new models of handguns to have a chamber load mechanism and a magazine detachment mechanism, both of which are designed to limit accidental discharges, and require handguns to stamp microscopically the handgun's make model, and serial number onto each fired shell casing, are constitutional under hybrid kind of intermediate scrutiny); Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017) (allocating $5 of $19 firearms transfer fee to combat illegal firearms purchases is valid); Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016) (10-day waiting period before purchasers can obtain firearms valid); United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011) (constitutional to ban carrying guns into national parks); United States v. Staten, 666 F.3d 154 (4th Cir. 2011) (federal law banning someone previously convicted of domestic violence from possessing firearm valid applying intermediate review?); Norman v. Florida, 215 So. 3d 18, 22 (Fla. 2017) (complete state ban on openly carrying guns valid). For additional cases using such a hybrid approach to review, see, for example, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (upholding a statute restricting carrying firearm outside the home to (1) good reason to fear injury, which requires more than just ordinary self-defense of any member of general public and (2) sport, target practice, or other such specialized use; although claiming to apply "intermediate scrutiny" the court eventually adopted a "reasonable fit" test and the statute not burdening "more conduct than is reasonably necessary" test, *id.* at 674, and exercised significant deference to government judgments regarding how much the statute "substantially related" to the government's interests in public safety); *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) (federal law banning any person who is "an unlawful user of or addicted to any controlled substance" from owning a gun was validly applied to Nevada citizen who had medical marijuana card under Nevada law, as possession is unlawful under federal law; law does not violate Second Amendment as being reasonably related to significant government interest, a hybrid form of intermediate review); *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (San Francisco ordinance banning sale of hollow-point ammunition and requiring citizens to disable or lock-up handguns when not physically carrying them constitutional).

[265] *See* Fortson v. L.A. City Att'y's Office, 852 F.3d 1190 (9th Cir. 2017) (10-year possession ban for misdemeanor domestic violence conviction constitutional, even though conviction later vacated after probation completed); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015) (ban on semi-automatic weapons and large-capacity magazines was constitutional, but a ban on a 7-round load limit and non-semiautomatic shotgun was unconstitutional); United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013) (federal law lifetime ban on possessing firearms for individuals convicted of domestic violence valid); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (10–1 en banc) (federal law prohibiting persons convicted of domestic violence from owning firearms constitutional); Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (registration requirement presumptively valid; bans on assault weapons and large-capacity guns valid as content-neutral regulation to protect police officers and control crime); *see also* Mance v. Sessions, 896 F.3d 699 (5th Cir. 2018) (federal law preventing federally licensed gun dealers from selling handguns to out-of-state residents was constitutional even assuming strict scrutiny, not intermediate review, applies); Commonwealth v. Cassidy, 96 N.E.3d 691 (Mass. 2018) (Massachusetts rules on high-capacity and assault weapons apply to Texas resident who moved to

these cases, it has been alleged the court did not apply intermediate review, even though stating the proper standard of review.[266] To the extent that is true, these cases would be another example of the kind of "watered-down" application of intermediate review discussed in Part III.[267] In addition, it would also be useful if the courts would clarify who has the burden of proof: the government, as at standard intermediate review or third-order reasonableness review, or the challenger, as at second-order reasonableness review.[268]

In some cases, the Second Amendment challenge has prevailed under intermediate review.[269] Time will tell whether the courts eventually move in the

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Massachusetts; criminal punishment was constitutional when proved defendant knew his weapons were "large capacity" as defined in Massachusetts statutes).

[266] *See* N.Y. State Rifle & Pistol Ass'n. v. City of New York, 883 F.3d 45 (2d Cir. 2018) (New York City rule limiting carrying guns outside the home only for purposes going to second home or approved firing range in New York City valid under intermediate scrutiny), *vacated and remanded*, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (case mooted after certiorari granted because New York State passed a law preempting the New York City law, which permits carrying a handgun to any licensed shooting range or if taken directly to a second home, regardless of location); *id.* at 1527 (Kavanaugh, J., concurring) ("I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."); *id.* at 1541–42 (Alito, J., joined by Gorsuch, J., dissenting) ("Although the courts below claimed to apply heightened scrutiny, there was nothing heightened about what they did."); *see also* Silvester v. Becerra, 138 S. Ct. 945 (2018) (Thomas, J. dissenting from the denial of certiorari) (although the Ninth Circuit claimed to apply some version of intermediate review, the opinion actually applied minimum rationality review).

[267] *See infra* text accompanying notes 285–320.

[268] *See, e.g.*, Hamilton v. Pallozzi, 848 F.3d 614, 623–24, 629 (4th Cir. 2017) (since prohibitions on felons possessing firearms are presumptively valid, felon has the burden to show he is now a "law-abiding, responsible citizen"; to make that showing he would have to show he "has received a pardon or the law forming the basis of conviction has been declared unconstitutional or otherwise unlawful"); Binderup v. Att'y Gen., 836 F.3d 336, 350–53 (3d Cir. 2016) (splintered en banc opinion) (controlling opinion held defendants met their burden to show misdemeanor convictions were not sufficiently serious; intermediate review applied and government did not meet its burden to ban defendants owning guns); *Skoien*, 614 F.3d at 653–54 (Sykes, J., dissenting) (showing lack of clarity as to whether the majority required "the government to shoulder its burden" under standard intermediate scrutiny). *See generally* KELSO & KELSO, *supra* note 43, at § 7.2.1 & Table 7.2, at 176.

[269] For example, after holding that bans on all firing ranges within Chicago likely is unconstitutional, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the Seventh Circuit held unconstitutional a later ordinance which effectively foreclosed gun ranges by not permitting a gun range within 100 feet of another range or 500 feet of a residential district, school, place of worship, or multiple other uses, leaving only 2.2% of the city's total acreage available. Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (ban on any person under 18 from entering gun range also failed intermediate review). A 2–1 panel of the Seventh Circuit held an Illinois law prohibiting most people from carrying a gun in public unconstitutional, *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (case mooted by passage of Illinois Firearm Concealed Carry Act in *Shepard v. Madigan*, 958 F. Supp. 2d 996 (S.D. Ill. 2013)). *See generally* Peruta v. County of San Diego, 824

direction of reasonableness balancing, maintain a hybrid approach, adopt standard intermediate review, or adopt strict scrutiny or a categorical ban approach.[270]

2. Posadas *and Commercial Speech Cases*

Another example of the Supreme Court adopting the "hybrid" kind of intermediate review is *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.[271] In *Posadas*, the Court held that Puerto Rico may restrict ads for casino gambling aimed at residents.[272] In deciding whether Puerto Rico had satisfied the intermediate review test of *Central Hudson Gas,* Justice Rehnquist said the law only needed to reasonably advance a substantial government interest.[273] As Justice Rehnquist phrased it, "The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one."[274]

In *44 Liquormart, Inc. v. Rhode Island*,[275] the Court clarified the interpretation and application of *Central Hudson* in the context of a case involving a challenge to a Rhode Island law that barred advertising the price of alcoholic beverages offered for sale in the state. The state sought to justify its law on the ground that it directly advanced the state's interest in promoting temperance, and was no more extensive than necessary.[276] Part IV of the opinion of Justice Stevens, joined by Justices Kennedy and Ginsburg, stated that to sustain a blanket ban on commercial speech,

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F.3d 919 (9th Cir. 2016) (en banc) (no right to concealed carry of gun outside home; any right to open carry not considered); Palmer v. District of Columbia, 59 F. Supp. 3d 173 (D.D.C. 2014) (total ban on carrying gun outside home unconstitutional); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) ("justifiable need" to carry gun constitutional); Kachalsky v. County of Westchester, N.Y., 701 F.3d 81 (2d Cir. 2012) ("proper cause" to obtain permit to carry gun constitutional). *Cf.* Gadomski v. Tavares, 113 A.3d 387 (R.I. 2015) (individual entitled to more than "mere recital" denying permit to carry a gun); Walters v. Wolf, 660 F.3d 307 (8th Cir. 2011) (city violated due process for not having procedures for return of a handgun following dismissal of charges).

[270] S*ee, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017) (2–1 panel decision) (right to carry a concealed weapon a "core" right which, under *Heller*, would be "categorically" unconstitutional to limit to a "good reason" to carry; acknowledging Second, Third, and Fourth Circuits have held regulations regarding concealed weapons trigger only intermediate review and are typically upheld). Under Takings Clause doctrine, the Court eventually rejected a "reasonableness/intermediate review" hybrid approach in favor of normal reasonableness balancing in *Lingle v. Chevron, Inc.*, 544 US. 528, 542, 544–45 (2005). *See generally* KELSO & KELSO, *supra* note 43, at § 22.2.5.1 n.94.

[271] 478 U.S. 328 (1986).

[272] *Id.* at 330–31.

[273] *Id.* at 341–42.

[274] *Id.*

[275] 517 U.S. 484, 488–92 (1996) (Stevens, J., announcing the judgment of the Court in Part IV, which was joined by Kennedy & Ginsburg, JJ.).

[276] *Id.* at 504.

the state must show that its regulation will advance a substantial interest to a material degree—here, that a price-ad ban would significantly reduce alcohol consumption—and that its restriction on speech is no more extensive than necessary.[277] In the case at bar, there was no fact finding or evidentiary support to show that the ban on price-ads would significantly advance the state's interest in promoting temperance, and impermissible speculation or conjecture would be required to reach that conclusion.[278] Justice O'Connor, concurring in the judgment with Chief Justice Rehnquist and Justices Souter and Breyer, similarly noted that subsequent to *Posadas*, the Court has taken a closer look at the fit between a state's professed goal and the speech restriction put into place to further it, requiring, as is appropriate at intermediate scrutiny, a substantial relationship between means and ends, not merely a rational relationship, as suggested by the Court's opinion in *Posadas*.[279]

The Court also adopted in *Posadas* an additional position inconsistent with standard intermediate review which was overruled in *Liquormart*. In considering less burdensome alternatives, Justice Rehnquist rejected the idea in Posadas that the legislature had to promulgate additional speech which discourages gambling rather than suppress speech designed to encourage it.[280] If gambling could be prohibited, said Justice Rehnquist, the government could allow the conduct, but reduce the demand through restrictions on ads. As Rehnquist stated, "In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[281]

This aspect of *Posadas* is inconsistent with standard doctrine. For example, in *Craig v. Boren*,[282] the government could engage in the "greater power" of banning all persons less than 21 years old from buying 3.2% beer, but could not engage in the "lesser power" of banning only males below 21 from buying the beer, but not the 18–20 years old women, as that constituted gender discrimination. Following

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[277] *Id.* at 501–04.

[278] *Id.* at 505 ("[W]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.").

[279] *Id.* at 528–34 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment). Justice Thomas expressed an even more speech-protective view. He said that an attempt to keep the legal users of a product or service ignorant in order to manipulate their choices in the marketplace is *per se* illegitimate and there is no need to apply the balancing test of *Central Hudson*. *Id.* at 518 (Thomas, J., concurring in part and concurring in the judgment).

[280] *Posadas*, 478 U.S. at 344.

[281] *Id.* at 345–46.

[282] *See supra* text accompanying note 128.

Posadas, commentators almost uniformly criticized this aspect of the decision.[283] The Supreme Court followed suit, rejecting this aspect of *Posadas* ten years later in *44 Liquormart, Inc. v. Rhode Island*.[284]

III. PROBLEM CASES APPLYING SOMETHING LESS THAN STANDARD INTERMEDIATE REVIEW

A. The Basic Problem Stated

Time, place, or manner regulations involve regulating speech not because of its content, but because the time, place, or manner of the speech conflicts with content-neutral government concerns.[285] Such concerns can involve "considerations of time, like trying to prevent two groups from demonstrating at the same time in the same place; considerations of place, such as protecting residential privacy by regulating speech activities outside residential homes; or considerations of manner, like limiting noise pollution by restricting the decibel level of speech."[286] In some of these cases, while stating that intermediate review is being applied, the Court does not really require the government to meet its burden of justifying the regulation under intermediate review, particularly in terms of showing that their regulation is substantially related to advancing the important or substantial government interest.

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[283] *See generally* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 696–97 nn.18–22 (2002) (collecting numerous citations of such criticism).

[284] *Liquormart*, 517 U.S. at 509–10 ("Posadas clearly erred in concluding that it was 'up to the legislature' to choose suppression of a less-speech restrictive policy."); *id.* at 511 ("Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct."); *id.* at 513("[W]e think it equally clear that its power to ban the sale of liquor entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product. As the entire Court apparently now agrees, the statements in the Posadas opinion on which Rhode Island relies are no longer persuasive.").

[285] *See* CHEMERINSKY, *supra* note 24, at 1194 (citing Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (the Court has "often approved reasonableness time, place, and manner restrictions 'provided they are justified without reference to the content of the regulated speech, that they serve significant government interests, and that in doing so they leave open ample alternative channels for communication of the information.'").

[286] CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3: THE FIRST AMENDMENT 119 (2020 orig. ed. 2014), https://libguides.stcl.edu/kelsomaterials.

B. Examples of Watered-Down Intermediate Review

1. Regulation of Sexually-Oriented Business or Activities

a. Zoning and Other Such Cases

The classic case involving regulating a sexually-oriented business through a zoning regulation is *Renton v. Playtime Theatres, Inc.*[287] *Renton* involved a zoning ordinance that prohibited "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[288] While regulating only movie theaters that showed the content of adult films, the regulation was viewed as a content-neutral secondary effects regulation dealing with the effects of declining property values and increased crime, particularly prostitution and drug dealing, around adult motion picture theaters.[289] In applying intermediate review to a content-neutral regulation of speech in a public forum, the Court noted in *Renton* that while the "Court of Appeals imposed on the city an unnecessarily rigid burden of proof" by requiring "studies specifically related to 'the particular problems or needs of Renton,'" 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 *Northern Cinema* opinion, in enacting its adult theater zoning ordinance."[290]

Two aspects of the analysis in *Renton* are a bit troubling, but perhaps understandable. First, as noted in the dissent, "[E]ven assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton has no basis for determining if any of the 'findings' made by these cities were relevant to *Renton's* problems or needs."[291] Second, in terms of the intermediate requirement that the government action "leave open ample alternative channels of communication," the Renton ordinance left only 5% of the city property where such a theater could be located and much of that land was already occupied.[292]

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[287] 475 U.S. 41 (1986).

[288] *Id.* at 43.

[289] *Id.* at 47–49.

[290] *Id.* at 50–51. *See generally* Entm't Prods. Inc. v. Shelby County, 721 F.3d 729, 739 (6th Cir. 2013) (rejecting defendant's argument that governments attempting to prove the existence of secondary effects may only rely on evidence satisfying the scientific validity requirements of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), but instead holding governments may rely on "land-use studies, prior judicial opinions, surveys of real-estate professionals (such as real-estate appraisers), anecdotal testimony, police reports, and other direct and circumstantial evidence").

[291] *Renton*, 475 U.S. at 61 (Brennan, J., joined by Marshall, J., dissenting) (emphasis in original).

[292] *Id.* at 63–64.

The case of *City of Erie v. Pap's A.M.*[293] is more troubling. *Pap's A.M.* involved a regulation of an adult dancing establishment that required "dancers must wear, at a minimum, 'pasties' and a 'G-string.'"[294] In applying this test, the plurality opinion justified the ordinance based upon the same kind of secondary effects argument used in *Renton* that such establishments tend to create harmful secondary effects of a decrease in property values and increase in crime.[295] Unlike *Renton*, however, where the zoning ordinance moved the theater out of the neighborhood, and thus was substantially related to dealing with the negative effects in the neighborhood of such adult establishments, in *Pap's A.M.*, the establishment did not move; the regulation only required the dancers to wear "pasties" and a "G-string," not dance totally nude. On this issue, the plurality simply noted, "To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects."[296] As noted earlier, this is an inaccurate reading of *O'Brien*.[297] As an intermediate review test, the regulation must "substantially advance" the government interest, and here the government presented no real evidence that the impact of wearing "pasties" and a "G-string" is likely to substantially reduce the secondary effects in the neighborhood as long as the dancing establishment is allowed to remain.[298]

Independent of this concern with the evidentiary basis stated by the plurality in *Pap's A.M.*, Justice Souter noted:

> [T]he record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed 'findings' of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism.[299]

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[293] 529 U.S. 277 (2000).

[294] *Id.* at 284 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.).

[295] *Id.* at 296–97 (citing *Renton*, 475 U.S. 41, 51–52).

[296] *Id.* at 301.

[297] *See supra* text accompanying notes 249–54.

[298] Note that two Justices avoided this problem entirely by viewing the regulation as one of the conduct of dancing nude, not a regulation of expression, and thus outside free speech analysis. *Pap's*, 529 U.S. at 307–08 (Scalia, J., joined by Thomas, J., concurring in the judgment).

[299] *Id.* at 314 (Souter, J., concurring in part and dissenting in part) (citations omitted). Justice Souter's opinion continued:

Justice Souter acknowledged he had not always required a proper level of evidentiary proof in some earlier sexually-oriented business cases, but indicated, "I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late."[300]

In cases involving regulation of adult entertainment, some courts have continued to adopt the more flexible approach to intermediate review used by Justice O'Connor in the *Pap's A.M.* case.[301] Other courts have begun to approach the cases from more standard intermediate review.[302]

> The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary to reconcile competing policies. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–845 (1984). That aside, it is one thing to accord administrative leeway as to predictive judgments in applying "'elusive concepts'" to circumstances where the record is inconclusive and "evidence . . . is difficult to compile," *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796–797 (1978), and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression. As to current fact, the city council's closest approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. But that reference came at the end of a litany of concerns ("free condoms in schools, drive-by shootings, abortions, suicide machines," and declining student achievement test scores) that do not seem to be secondary effects of nude dancing.

Id. at 314–15 (footnote omitted) (some citations omitted).

[300] *Id.* at 317. Two additional Justices dissented in *Pap's A.M.* on the ground that secondary effects intermediate review should never apply to a "complete ban" on activity, and thus this case should have triggered strict scrutiny. *Id.* at 319 (Stevens, J., joined by Ginsburg, J., dissenting). This conclusion is in error. To the extent a regulation is based on secondary effects concerns, any regulation, whether a complete ban or a time, place, or manner regulation, can be constitutional as long as it really is "substantially related" to advancing a "substantial" government interest and is not "substantially too broad" and "leaves open ample alternative channels of communication." Even in *Pap's A.M.*, the regulation could be conceived not as a "complete ban" on nude dancing, but, as the plurality opinion indicated, it could be conceived as a "manner" regulation of erotic dancing requiring wearing "pasties" and a "G-string." *Id.* at 292–93 (plurality opinion).

[301] *See* Entm't Prods. Inc. v. Shelby County, 721 F.3d 729, 734 (6th Cir. 2013) ("So long as the state is reasonable in its belief that the evidence upon which it relied is relevant, it will meet [its] burden.").

[302] *See* Annex Books, Inc. v. City of Indianapolis, 740 F.3d 1136 (7th Cir. 2014) (city cannot force adult bookstores to close overnight, if other businesses allowed to remain open, because its justification of "fewer armed robberies" was not statistically significant); Foxxy Ladyz Adult World, Inc. v. Vill. of Dix, 779 F.3d 706 (7th Cir. 2015) (village must present evidence that nude dancing has adverse secondary effects on "health, welfare, and safety of its citizens"); *cf.* Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015) (city must present evidence that its ban on soliciting funds at all intersections is not substantially too burdensome a response to traffic safety and traffic flow concerns).

b. Statutory Rape Law Example

In *Michael M. v. Superior Court*,[303] the Court was confronted with a California statutory rape law that involved gender discrimination. Under the statute, only men could be prosecuted for statutory rape, not women.[304] Although there was no evidence that it was an actual purpose of the regulation, Justice Rehnquist explained that a plausible purpose was to protect women from the risks of teenage pregnancy, and such a purpose is a substantial government interest.[305] The Court then used that purpose to decide whether the statute could meet intermediate review.

In applying intermediate review, the Court said the statute could be "substantially related" to advancing that interest if the state of California could prove, as they alleged, that "a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution."[306] However, although the plurality stated that the state "persuasively contends that a gender-neutral statute would frustrate its interest in effective enforcement,"[307] there was no actual evidence of that in the record. As the dissent pointed out, the vast majority of states at the time had gender neutral statutory rape laws, and there was no evidence on the record that those laws were less effective as a deterrent or involved substantially less reporting.[308]

With regard to statute's burdens, the statute was not (3)(a) substantially overinclusive, since no individuals were being burdened who were not part of the problem.[309] However, under (3)(b), there still is an issue whether the regulation is

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[303] 450 U.S. 464, 466–67 (1981) (plurality opinion of Rehnquist, J., joined by Burger, C.J., and Stewart & Powell, JJ.).

[304] *Id.* at 467.

[305] *Id.* at 469–70.

[306] *Id.* at 473–74.

[307] *Id.* at 473.

[308] *Id.* at 491–94 (Brennan, J., joined by White & Marshall, JJ., dissenting). Indeed, in 1993, California amended its statutory rape law to make it gender neutral, like all states today. Crimes—Unlawful Sexual Intercourse, 1993 Cal. Legis. Serv. 596 (West) (1993 amendment to CAL. PENAL CODE § 261.5 (West 2011)). There has been no reported undermining of statutory rape law enforcement in the state. Many states, of course, have greater punishments the more one of the parties is significantly older than the party under 18—a form of age discrimination rationally related to protecting younger persons from exploitation. That is constitutional under rationality review applicable to age discrimination. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam). Of course, in practice, it may be the case that prosecutors using their discretion in deciding whether to prosecute offending men and women under gender neutral statutory rape laws choose to prosecute offending men more often.

[309] The statute was, of course, underinclusive by not providing for women to be criminalized, but that would not be a critical problem if the underinclusiveness could be explained by it being substantially related to advancing the interest in effective enforcement, discussed *supra* text accompanying notes 306–08. The fact there was no real evidence of such a substantial

"substantially too burdensome" under the "oppressiveness" inquiry. While the statute was not (3)(b)(i) "substantially more burdensome than necessary," since to enforce statutory rape against men, men have to be prosecuted, the Court also went ahead to note that the statute was not (3)(b)(ii) "substantially too burdensome" on men, since a "criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes," as only women have the risk of an unwanted pregnancy.[310]

While the dissent was right in questioning whether the state had met its burden of showing the gender discrimination in the law was substantially related to advancing the interest in deterring teenage pregnancy, Justices Brennan, White, and Marshall applied a strict scrutiny (2)(a) underinclusiveness analysis in their opinion. The dissent indicated that the California law would only be constitutional if California established that a gender neutral law would be less effective as a deterrent, and thus the state could establish that the gender discrimination in the law was "necessary" to advancing its interest.[311] However, under intermediate review, as long as the actual statute which the state did adopt is "substantially related" to advancing its ends, and not "substantially overinclusive" or "substantially too burdensome," it does not matter whether some other effective statute would be less burdensome, unless that alternative is "substantially less burdensome" than the statute the government adopted.[312]

2. Regulation of Protest Activities in Public Parks

In *Clark v. Community for Creative Non-Violence,*[313] the Court was faced with protestors against government inaction concerning the homeless who wanted to sleep overnight in a public park. Both the majority and dissenting opinions in the

relationship, but the statute was upheld anyway, makes this a "watered-down" form of intermediate review.

[310] *Michael M.*, 450 U.S. at 473. Justice Blackmun concurred in the judgment, saying that the California law was a sufficiently reasoned effort to control the problem of teenage pregnancy. *Id.* at 481–82 (Blackmun, J., concurring in the judgment). This "sufficiently reasoned" standard also represents a "watered-down" form of intermediate review.

[311] *Id.* at 494 (Brennan, J., joined by White & Marshall, JJ., dissenting).

[312] *Id.* at 496 ("the State has not shown that [its law] is any more effective than a gender-neutral law would be in deterring minor females from engaging in sexual intercourse"). Note this is not really an issue of (3)(a) "least burdensome effective alternative" analysis, since a gender discriminatory or gender-neutral law equally burdens the men who are regulated. It can be (2)(a) underinclusive in not regulating women, or (2)(b) not substantially related to achieving its end, or (3)(b) substantially too burdensome on men as opposed to women. Justice Stevens also dissented in the case, concluding that the gender discrimination in this case that "authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially," almost a categorical ban on any underclusiveness, higher than even a strict scrutiny. *Id.* at 497 n.4, 502 (Stevens, J., dissenting).

[313] 468 U.S. 288, 289 (1984).

case agreed on the proper phrasing of the intermediate review applicable to the case: "[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[314]

According to the majority, the significant government interest advanced by denying respondents' request to engage in sleep-speech was the interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."[315] That interest is indeed significant. However, as the dissent noted, neither the Government nor the majority adequately explained how prohibiting respondents' planned activity would substantially further that interest. The dissent noted:

> The flaw in these two contentions is that neither is supported by a factual showing that evinces a real, as opposed to a merely speculative, problem. The majority fails to offer any evidence indicating that the absence of an absolute ban on sleeping would present administrative problems to the Park Service that are substantially more difficult than those it ordinarily confronts. A mere apprehension of difficulties should not be enough to overcome the right to free expression. Moreover, if the Government's interest in avoiding administrative difficulties were truly "substantial," one would expect the agency most involved in administering the parks at least to allude to such an interest. Here, however, the perceived difficulty of administering requests from other demonstrators seeking to convey messages through sleeping was not among the reasons underlying the Park Service regulations. Nor was it mentioned by the Park Service in its rejection of respondents' particular request.[316]

The majority's erroneous application of the standard for ascertaining a reasonable time, place, and manner restriction is also revealed by the majority's conclusion that a substantial governmental interest is served by the sleeping ban because it will "limit wear and tear on park properties."[317] The majority cited no evidence indicating that sleeping engaged in as symbolic speech, just for one night, would cause substantial wear and tear on park property.[318] Furthermore, as the

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[314] *Id.* at 293; *id.* at 308 (Brennan, J., joined by Marshall, J., dissenting) (agreeing with the "standard enunciated by the majority").

[315] *Id.* at 296.

[316] *Id.* at 311 (Brennan, J., joined by Marshall, J., dissenting) (footnotes omitted).

[317] *Id.* at 299.

[318] The Court noted, "There is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to [the park]. . . . We do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation

dissent noted, the Government's application of the sleeping ban in the circumstances of this case is "strikingly underinclusive."[319] As the dissent noted, "The majority acknowledges that a proper time, place, and manner restriction must be 'narrowly tailored.' Here, however, the tailoring requirement is virtually forsaken inasmuch as the Government offers no justification for applying its absolute ban on sleeping yet is willing to allow respondents to engage in activities—such as feigned sleeping—that is no less burdensome."[320]

IV. PROBLEM CASES APPLYING SOMETHING HIGHER THAN STANDARD INTERMEDIATE REVIEW

A. The Problem Stated

In *United States v. Virginia*,[321] the Court held that the male-only admissions policy at Virginia Military Academy (VMI) denied equal protection to women and was not adequately remedied by the state's creation of the Virginia Women's Institute for Leadership (VWIL). Justice Ginsburg stated the current standard of review for gender discrimination cases, but also used the "exceedingly persuasive justification" language from Justice O'Connor's opinion in *Hogan* not only as a preliminary observation about the difficulty of meeting intermediate scrutiny, but throughout her opinion as if it were part of the test.[322] Concurring in the result, Chief Justice Rehnquist disagreed with such use, and stated that the Court should stick with the standard "substantially related to important government interests"

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is to be attained." *Id.* at 299. However, under intermediate review, the government does have the burden to justify to a court its regulation and to establish that its regulation is "substantially related" to advancing the government's interest. The level of deference suggested in the majority's quote is reminiscent of minimum rationality review, or perhaps second-order reasonableness balancing.

[319] *Id.* at 312 (Marshall, J., dissenting).

[320] *Id.* A number of noteworthy cases involving the Occupy Wall Street movement decided by lower federal courts have followed normal intermediate review in analyzing various kinds of limitations on demonstrations in public parks. *See, e.g.*, Occupy Minneapolis v. County of Hennepin, 866 F. Supp. 2d 1062 (D. Minn. 2011) (Minneapolis did not violate the First Amendment when it cut off electricity to Occupy Minneapolis protestors assembled in public plazas or when it banned tents in the plaza; the city was advancing a content-neutral interest in controlling the aesthetic appearance of the plazas); Occupy Fort Myers v. City of Fort Myers, 882 F. Supp. 2d 1320 (M.D. Fla. 2011) (ban on erection of temporary shelters at park occupied by Occupy Fort Myers was constitutional; broad permit system attempting to regulate protests and parades at the parks likely unconstitutional, justifying preliminary injunction against enforcement); Occupy Columbia v. Haley, 866 F. Supp. 2d 545 (D. S.C. 2011) (South Carolina attempt to ban protestors after 6 p.m. from occupying park likely unconstitutional, justifying preliminary injunction against enforcement).

[321] 518 U.S. 515, 534 (1996).

[322] *Id.* at 531, 533–34.

test.[323] The Court's more recent gender discrimination case, *Nguyen v. INS*,[324] which also involved illegitimacy, followed this advice and did not repeat the "exceedingly persuasive justification" language except as an adjunct to the "substantial relationship" test.

Justice Ginsburg also mentioned several corollaries of intermediate review, including that justification must be genuine, not hypothesized or invented *post hoc* in response to litigation, and thus, in her view, an "actual" purpose.[325] As discussed earlier,[326] it is not clear that the Court's precedents on intermediate review support this requirement of looking only to "actual purposes," rather than "plausible purposes."

B. Examples of the Problem

1. Equal Protection Gender Discrimination

As indicated, the Court held in *United States v. Virginia*[327] that the male-only admissions policy at VMI denied equal protection to women and was not adequately remedied by the state's creation of the VWIL. Justice Ginsburg used the "exceedingly persuasive justification" language from Justice O'Connor's opinion in *Hogan* not only as a preliminary observation about the difficulty of meeting intermediate scrutiny, but throughout her opinion as if it were part of the test.[328] Applying this kind of intermediate review, Justice Ginsburg said that VMI had not

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[323] *Id.* at 558–60 (Rehnquist, C.J., concurring in the judgment).

[324] 533 U.S. 53, 60–61, 70 (2001). This fact was noted and criticized by four Justices in dissent. *Id.* at 79–80, 89 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ. dissenting). On the uncertainty caused by Justice Ginsburg's opinion in *Virginia*, see generally Jason M. Skaggs, Comment, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia*'s "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169 (1998). For discussion that the Court has rejected this standard in later gender discrimination cases in favor of standard intermediate scrutiny language, see generally Kevin N. Rolando, Comment, *A Decade Later:* United States v. Virginia *and the Rise and Fall of "Skeptical Scrutiny,"* 12 ROGER WILLIAMS L. REV. 182 (2006).

[325] *Virginia*, 518 U.S. at 533, 536, 539–40.

[326] *See supra* text accompanying note 67; *see also* KELSO & KELSO, *supra* note 43, at § 26.1.3 nn.92–99.

[327] *Virginia*, 518 U.S. 515, 532–34, 538–40 (Ginsburg, J., for the Court). Justice Thomas, whose son was enrolled in VMI, did not participate in the decision in the case. Joan Biskupic, *Supreme Court Invalidates Exclusion of Women by VMI*, WASH. POST (June 27, 1996), https://www.washingtonpost.com/wp-srv/local/longterm/library/vmi/court.htm.

[328] *Virginia*, 518 U.S. at 531, 533–34. In *Mississippi University for Women v. Hogan*, Justice O'Connor wrote for five Justices that the government's burden is to show an "exceedingly persuasive justification" for gender classifications and that this burden is met "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are substantially related to the achievement of those objectives." 458 U.S. 718, 724 (1982) (citations omitted).

shown that its exclusion of women was supported by an "exceedingly persuasive justification."[329] However, even under standard intermediate review, Justice Ginsburg noted that VMI's goal of producing citizen-soldiers was not substantially advanced by women's categorical exclusion in total disregard of their individual merit, as it had been found that some women can meet VMI's physical standards and that its implementing methodology is not inherently unsuitable to women.[330]

VMI had contended that single-sex education provides important educational benefits and contributes to diversity in educational approaches. Justice Ginsburg replied that the record contained no persuasive evidence that VMI was created or maintained for the "actual purpose" of advancing diverse educational options, and thus that interest could not be considered.[331] Justice Rehnquist agreed there was "scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only," but noted that even if there were such evidence the state's position "would still be problematic."[332]

2. Illegitimacy and Nguyen v. INS *Dissent*

A similar requirement of a substantial relationship to an important government interest occurred in 2001 in *Nguyen v. INS*.[333] This case considered a requirement that in order to become a United States citizen, an illegitimate child born of a citizen father and a noncitizen mother must, before becoming 18, be "legitimated" or otherwise have "paternity" acknowledged by the father or found by a court.[334] In dissent, Justice O'Connor, joined by Justices Souter, Ginsburg, and Breyer, criticized the majority for not establishing clearly enough that these two interests

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[329] *Virginia*, 518 U.S. at 546.

[330] *Id.* at 540–46. With respect to remedy, Justice Ginsburg cited *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), which held that a remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of the discrimination. *Virginia*, 518 U.S. at 547. The creation of VWIL did not meet this test because it did not qualify as VMI's equal in terms of student body, faculty, course offerings, and facilities. *Id.* at 547–54. Further, VWIL graduates are not united with the legions of VMI graduates who have distinguished themselves in military and civilian life. *Id.* at 552.

[331] *Virginia*, 518 U.S. at 535–40.

[332] *Id.* at 562 (Rehnquist, C.J., concurring in the judgment). Chief Justice Rehnquist noted that one way Virginia could have shown that educational diversity was their policy was to establish, shortly after *Hogan* made it clear that VMI's men-only admissions policy was open to serious question, single-gender undergraduate institutions for women, with support substantially comparable to that given VMI. In short, the state had not demonstrated that its interest in providing some single-sex education for men was matched by an interest in providing the same opportunity for women. *Id.* at 563–64. Thus, on these facts, VMI could not have even argued that an interest in educational diversity was "plausible."

[333] 533 U.S. 53 (2001).

[334] *Id.* at 59–60; *see supra* text accompanying notes 153–70.

were actual purposes of the legislation, rather than merely court-stated purposes.[335] As noted earlier, the Court considered plausible purposes to support the government regulation without any finding that they were "actual" purposes, which is consistent with standard intermediate review analysis.[336]

Part of the dissent focused on less burdensome alternatives—for the first interest, either allowing paternity to be established after 18 years through DNA testing or adopting a sex-neutral scheme requiring both fathers and mothers to prove paternity, and, for the second interest, requiring some degree of regular contact between the child and citizen parent over time.[337] However, it must be remembered that at intermediate scrutiny there is no least burdensome alternative requirement deriving from an "exceedingly persuasive" requirement.[338]

V. THE PROBLEM OF *MADSEN V. WOMEN'S HEALTH CENTER*

In *Madsen v. Woman's Health Center, Inc.*,[339] the Court was confronted with the constitutionality of an injunction regulating speech of anti-abortion protestors around an abortion clinic. Because the case involved an injunction rather than a generally applicable ordinance,[340] the majority opinion in *Madsen* discussed the differences between ordinances and injunctions and concluded that "these differences require a somewhat more stringent application of general First Amendment principles in this context."[341] The Court then adopted under prong three of heightened scrutiny a "burden no more speech than necessary" test that was described as being somewhere between the intermediate "not substantially more burdensome" test and the strict scrutiny "least restrictive alternative" test.[342]

It is understandable 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.[343] From the opinion, it is not clear exactly how much more stringent

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[335] *Id.* at 78–79 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ. dissenting).

[336] *See supra* text accompanying notes 156–58, 163–65 (majority decision in *Nguyen*); *supra* text accompanying note 67 (discussing standard used in intermediate review of "actual" or "plausible" government interests).

[337] *Nguyen*, 533 U.S. at 80–81, 88 (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ. dissenting).

[338] *See supra* text accompanying notes 61, 65.

[339] 512 U.S. 753, 757 (1994) (Rehnquist, J., opinion for the Court).

[340] *Id.* at 764–66.

[341] *Id.* at 765.

[342] *Id.* at 765–66.

[343] *Id.* at 764 ("Injunctions . . . are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances."). In addition, the "collateral bar" rule

this test is than traditional intermediate scrutiny, nor are other precedents of any help, since the standard is not used in any other case.[344]

The dissent in *Madsen* opted for strict scrutiny.[345] The majority could have achieved the same result it reached in the case by adopting the heightened intermediate review standard of *Central Hudson*. 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.[346] Where the injunction was unconstitutional, it was because it was not directly related to perceived harms, or not a close enough fit, and thus substantially overbroad.[347] Conceptualizing *Madsen* as an intermediate plus case following the analysis in *Central Hudson* responds to the concern that the review be higher than intermediate review, but provides a structured doctrinal approach with predictable standards of review.[348]

applies to injunctions, so that an individual can still be punished for violating an injunction even if the injunction is later ruled to be unconstitutional. *See generally* CHEMERINSKY, *supra* note 24, at 1000–02.

[344] *See Madsen*, 512 U.S. at 791 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and dissenting in part) ("The Court does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny . . . is frankly too subtle for me to describe.").

[345] *Id.* at 791–94 ("speech-restricting injunctions" should always be given strict scrutiny).

[346] The Court found that a 36-foot buffer zone in front of an abortion clinic was 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, and the Court concluded that the regulation of noise levels was directly related to the need for noise control around hospitals and medical facilities. *Id.* at 768–70, 772–73 (majority opinion).

[347] The Court concluded that inclusion of 36-foot buffer zone at the back and side of the clinic was not directly related to ingress and egress from clinic, nor was the prohibition on all uninvited approaches to persons seeking to enter the clinic directly related to preventing clinic patients from being stalked or shadowed, and that banning all images observable from the clinic was not narrowly drawn given the substantially less burdensome option for the clinic to pull its curtains, and the 300-foot ban on picketing around the clinic was "much larger" than necessary and substantially overbroad. *Id.* at 771, 773–75.

[348] This gives guidance to lower courts as there are plenty of commercial speech cases applying the *Central Hudson* test on which lower courts can rely. *See supra* text accompanying notes 219–46.

VI. ANALYTIC CONFUSION IN INTERMEDIATE REVIEW CASES

A. Poorly Stated Dicta in Free Speech Cases

1. Content-Neutral Free Speech Cases

In *City of Los Angeles v. Alameda Books*,[349] Justice Souter correctly noted in his dissent that there are in fact two different versions of intermediate scrutiny used in the Court's First Amendment cases. One version, which Justice Souter termed the "comparatively softer intermediate scrutiny," is appropriately used for "restriction[s] going only to time, place, and manner of speech," since in those cases "[n]o one has to disagree with any message to find something wrong with a loudspeaker at three in the morning."[350] In other cases, however, where there is a greater reason to "ensure that an asserted rationale does not cloak an illegitimate governmental motive," as in cases involving the "[r]egulation of commercial speech," the Court uses the higher intermediate review standard of *Central Hudson*.[351]

Having made these points, Justice Souter observed in *Alameda Books* that regulations of speech that are content-neutral because the government's focus is on secondary effects, or in Justice Souter's words "content-correlated," are logically different than regulations of speech that are content-neutral because they are merely reasonable time, place, or manner regulations.[352] Historically, such secondary effects regulations have been given the same kind of "basic" or "softer" intermediate scrutiny as time, place, or manner regulations.[353] Justice Souter, however, made an argument in *Alameda Books* that such content-correlated regulations should perhaps be given higher scrutiny, something on the order of the *Central Hudson* approach, because in such content-correlated cases there is a greater reason to fear that pretextual content-based regulation is taking place.[354]

The intermediate review with bite used in *Central Hudson* tracks Justice Souter's concerns in *Alameda Books*, and thus would seem appropriate to use. As

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[349] 535 U.S. 425, 454–55 (2002) (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

[350] *Id.* at 455–56.

[351] *Id.* at 458 n.3 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980)). As discussed *supra* text accompanying notes 221–25, the "intermediate review with bite" standard of *Central Hudson* is more stringent than basic intermediate scrutiny on the second prong of the test—that is, it requires that the governmental statute satisfy the strict scrutiny requirement of both directly and substantially advancing the government's interest, not mere indirect, substantial advancement. However, the *Central Hudson* test adopts the intermediate scrutiny test for the third prong of the analysis, by not requiring a least restrictive alternative analysis, but only that the statute not substantially burden more speech than necessary.

[352] *Id.* at 456–57.

[353] *See supra* text accompanying notes 104–08.

[354] *Alameda Books*, 535 U.S. at 457–60 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

Justice Souter indicated, the real extra concern in these "content-correlated" cases is a risk of viewpoint discrimination. He noted that:

> This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself.[355]

Or to phrase it more simply, it should be possible to show that the regulation is "directly" related to dealing with the property devaluation and crime problem without resorting to an indirect chain of causation beginning with "suppressing the expressive activity itself."[356]

If this understanding were adopted, then all secondary effects cases, like *United States v. O'Brien*, would use this "higher" intermediate review with bite kind of intermediate review, while time, place, or manner cases would use the "softer" basic intermediate review. Once this issue is addressed, there likely will be debate in the Court whether the current understanding of *O'Brien* adopts this higher standard of scrutiny. In *Alameda Books*, Justice Souter indicated his belief that the *O'Brien* test does represent this more stringent kind of intermediate scrutiny consistent with *Central Hudson*.[357] While the precise language in *O'Brien* speaks only of furthering the government's interest, not "direct" furtherance, it is true on the facts in *O'Brien* that the government's ban on burning a draft card did directly advance the government's interest in preserving the card for use in the Selective Service System, so the government in *O'Brien* could have met the *Central Hudson* test.[358] Historically, as indicated in Justice Kennedy's majority opinion in *Ward v. Rock Against Racism*,[359] *O'Brien* has been viewed as a basic intermediate scrutiny case, similar to time, place, or manner regulations.

Whether the additional level of rigor supported by Justice Souter's analysis of "content-correlated" regulations is worth adopting a separate level of scrutiny for

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[355] *Id.* at 457.

[356] As discussed *supra* text accompanying notes 221–22, such a showing of a direct relationship between means and ends is what distinguishes the intermediate review with bite standard of *Central Hudson* from basic intermediate review.

[357] *Alameda Books*, 535 U.S. at 456 n.2 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

[358] *See id.* at 456 n.2 & 458 n.3.

[359] 491 U.S. 781, 798–99 (1989); *see also supra* text accompanying notes 249–54 (*O'Brien* itself used the language of "substantial furtherance," the standard intermediate level of review, not "direct").

these cases, higher than the scrutiny for "time, place, or manner" regulations, rather than just having all content-neutral regulations, whether "content-correlated" secondary effects cases or "time, place, or manner" cases subjected to one intermediate standard of review, is open to some doubt. Difficult line-drawing decisions would have to be made under Justice Souter's approach if different standards were adopted for "secondary effects" and "time, place, or manner" regulations. The reality is that most regulations based on secondary effects involve a time, place, or manner regulation,[360] raising the question of which standard would be adopted in such cases. If only complete bans based on secondary effects trigger the higher *Central Hudson* test, then Justice Souter's proposed approach would have little practical effect. Further, it would call for line-drawing on whether a ban on complete nudity, like that in *Pap's A.M*, is a complete ban on totally nude dancing, as it was viewed by Justices Stevens and Ginsburg, or is merely a manner of regulation permitting erotic dancing but only with a G-string, as viewed by Justice O'Connor in her opinion for the Court.[361]

The Court can avoid all these difficult category questions by just continuing the current approach that any content-neutral secondary effects case, and any content-neutral time, place, or manner regulation, triggers the same intermediate standard of review. Any heightened intermediate scrutiny, such as the standard proposed by Justice Souter in *Alameda Books* in 2002, does not seem to be worth the trouble to find a principled way it could be applied in practice. Further, any truly complete ban on speech based on a secondary effects rationale would seem to have trouble, even under current doctrine, meeting the intermediate prong three *restrictiveness* requirement that it not be "substantially too burdensome" on speech, but instead leave open "ample alternative channels for communication."[362]

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[360] One need only look at some of the major cases discussed in this Article: *Ward*, 491 U.S. 781, 799–802 (time, place, and manner regulation of sound in public park during concerts related to concern with secondary effects of noise pollution and residential privacy), discussed *supra* text accompanying notes 105–07, 190–98; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 47–48 (1986) (zoning regulation regulating places where adult theaters can show movies related to secondary effects concern with property values and increased crime in neighborhoods that have such theaters), discussed *supra* text accompanying notes 287–92; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293–96 (1984) (time, place, and manner regulation banning sleeping in public parks overnight related to concern with secondary effects of wear and tear on park), discussed *supra* text accompanying notes 313–20; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 794–95 (1984) (time, place, and manner regulation that prohibited the posting of signs on public property related to secondary effects concern with interest in aesthetic beauty of the environment, the safety of workers who must climb poles, and the elimination of traffic hazards), discussed *supra* text accompanying notes 186–89.

[361] *See supra* note 300 and accompanying text.

[362] This, of course, assumes the Court does standard intermediate review, and not any form of "watered-down" review, *see supra* text accompanying notes 287–320, that does not apply intermediate review with appropriate rigor.

2. Reed v. Gilbert *Problem*

Regarding how to determine if a regulation is content-based or content-neutral, the Court muddied the waters a bit in 2015 in *Reed v. Town of Gilbert*.[363] *Reed* involved a sign code regulation that provided different sizes and lengths of posting times for signs based upon whether the sign was an "Ideological Sign," "Political Sign," or "Temporary Directional Sign Relating to a Qualifying Event."[364] Under traditional doctrine, use of intermediate review would depend on the town proving they had "actual" or "plausible" content-neutral substantial government interests (e.g., visual clutter, aesthetics, etc.). Concurring in the judgment, Justice Kagan noted the town provided "no reason at all" for the distinctions they drew among signs, and thus the regulation "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[365]

Instead of following this analysis, the majority adopted a rigid rule that if a regulation is content-based "on its face," strict scrutiny is automatically triggered.[366] This is inconsistent with traditional doctrine, such as in *Renton v. Playtime Theatres, Inc.*, where zoning regulations employing "on their face" content-based regulation of "adult motion picture theaters" trigger only intermediate review because the regulation is justified by "actual" or "plausible" secondary effects concerned with increased crime around such theaters, particularly prostitution and drug trafficking, and the impact such theaters have on retail trade and maintaining property values.[367] The breadth of *Reed* was mitigated by a concurrence listing ways the sign ordinances could avoid strict scrutiny.[368]

Despite this limitation, the breadth of *Reed* suggests a range of cases would now be viewed as strict scrutiny cases, not intermediate review.[369] The breadth may suggest the Court may want to rethink this dicta in later cases, as its impact is much

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[363] 135 S. Ct. 2218 (2015).

[364] *Id.* at 2224–25.

[365] *Id.* at 2239 (Kagan, J., joined by Ginsburg & Breyer, JJ., concurring in the judgment).

[366] *Id.* at 2228.

[367] *See supra* text accompanying notes 287–92.

[368] *Reed*, 135 S. Ct. at 2233 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring) (regulating size for all signs, lighted versus unlighted signs, signs on public versus private property or commercial versus residential property, total number of signs, signs advertising a one-time event).

[369] *See* Herson v. City of Richmond, 631 F. App'x 472 (9th Cir. 2016) (Richmond's sign height and size restrictions meet strict scrutiny); Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015) (ordinance against "spoken" requests for donations, while allowing "signs," was content-neutral given greater coercive effect of spoken request, but after *Reed* is content-based and invalid under strict scrutiny); March v. Mills, No. 2:15-CV-515-NT, 2016, WL 2993168 (D. Me. May 23, 2016) (law prohibiting noise with intent to disrupt medical care, such as abortion, was content-based under *Reed*, and therefore invalid).

larger than its problematic application to sexually oriented business cases.[370] For example, when schools regulate the clothing of their students to deal with gang insignia or other disruption concerns, those regulations are often content-based on their face.[371] Under current doctrine, the content-neutral concerns trigger either second-order reasonableness review if viewed as regulation of non-public forum activity, since worn in the classroom,[372] or *Tinker* intermediate review since worn outside the classroom and not part of a school-sponsored event.[373] Under *Reed*, schools would have to justify all such regulations under strict scrutiny.[374]

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[370] *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (ban on registered sex offender accessing commercial social network sites where minors may be present, like Facebook and Twitter, substantially overbroad assuming intermediate review applied; the Court dodged the issue of whether the law's facial content-based member criteria should trigger strict scrutiny under *Reed*, or whether it was content-neutral time, place, or manner regulation to protect minors, as might be found under *O'Brien/Renton*), *rev'g*, State v. Packingham, 777 S.E.2d 738 (N.C. 2015) (*Reed* does not apply and regulation upheld under intermediate review); BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (applying *Renton*, not *Reed*, to regulation of "sexually explicit entertainment"). *But see* Free Speech Coal., Inc. v. Att'y Gen., 825 F.3d 149 (3d Cir. 2016) (requiring adult film producers to keep identity and age records of every performer to stop child pornography triggers strict scrutiny after *Reed*).

[371] *See* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 664–75 (2002) (discussing various kinds of school dress code or student uniform requirements).

[372] *See, e.g.*, Boroff v. Bd. of Educ., 220 F.3d 465, 468–71 (6th Cir. 2000) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 689 (1986) and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)) (concluding it was not "manifestly unreasonable" to ban student from wearing Marilyn Manson t-shirt).

[373] *See, e.g.*, Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 776–79 (9th Cir. 2014) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)) (California high school may require students not to wear shirts showing the American Flag during a school-sanctioned Cinco de Mayo celebration); Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 438 (4th Cir. 2013) (citing Tinker, 393 U.S. at 513) (South Carolina school district may prohibit students from wearing shirts displaying the Confederate Flag when wearing them would, under *Tinker*, "materially and substantially disrupt the work and discipline of the school").

[374] For examples of strict scrutiny currently being applied to specific kinds of t-shirt regulation, see *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (Iowa State University's restrictions on student group selling t-shirts with marijuana logo on back was viewpoint discrimination; found invalid under strict scrutiny); *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014) (school uniform policy mandating "Tomorrow's Leaders" be displayed on shirt, but making exemption for uniforms of nationally recognized youth organization such as Boy Scouts or Girl Scouts on regular meeting days, was content-based triggering strict scrutiny).

B. Resolving the Four Anomalous Standards of Review

1. Three Should Be Standard Intermediate Review

Intermediate review should be principled, and the same standards should be applied, where possible, to each case triggering intermediate review. Thus, the Court should reject the "hybrid" kind of intermediate review discussed in Part II,[375] the "watered-down" kind of intermediate review discussed in Part III,[376] and the "heightened" kind of intermediate review discussed in Part IV.[377] In each of these cases, standard intermediate review should be applied.[378]

2. Madsen *Should Be Intermediate Review with Bite*

Because injunctions do pose a slightly different problem than ordinances, a slightly higher standard of scrutiny may well be appropriate to apply in those cases. That standard, however, should not be the amorphous kind of review stated by the majority opinion in *Madsen* discussed in Part V.[379] Instead the Court should adopt the intermediate with bite standard of scrutiny used in *Central Hudson* for regulations of commercial speech, which would yield the same precise result in *Madsen*.[380]

3. Distinguishing Time, Place, and Manner Versus Content-Neutral Regulations of Speech

The Court should continue to reject any distinction in content-neutral cases between secondary effects or reasonable time, place, and manner regulations such as that proposed by Justice Souter in *Alameda Books*, as discussed in Section VI.A.[381] They all should receive the same level of scrutiny based upon *Ward v. Rock Against Racism*, *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, and other such cases which all reflect a standard intermediate review approach.[382]

4. Distinguishing Content-Based Versus Content-Neutral Regulations of Speech

The Court should reject the dicta in *Reed v. Gilbert* concerning facial content-based regulations always triggering strict scrutiny, discussed in Section VI.B,[383] in favor of the traditional doctrine that permits, in cases such as *Renton v. Playtime*

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[375] *See supra* text accompanying notes 247–84.

[376] *See supra* text accompanying notes 285–320.

[377] *See supra* text accompanying notes 321–38.

[378] For summary of standard intermediate review, see *supra* text accompanying notes 57–144 & *infra* text accompanying notes 394–98.

[379] *See supra* text accompanying notes 339–48.

[380] *See supra* text accompanying notes 346–48.

[381] *See supra* text accompanying notes 349–61.

[382] *See supra* text accompanying notes 360–62.

[383] *See supra* text accompanying notes 363–74.

Theatres, Inc.,[384] for governmental action regulating based upon content-neutral reasons to trigger intermediate review even if they use on their face a content-based category, such as regulating adult motion picture theaters in *Renton* based on their secondary effects to decrease property values and increase crime in the area, particularly prostitution and gambling.

CONCLUSION

This Article discussed in Part I the two well-established kinds of intermediate review: (1) standard intermediate review used for cases like (a) gender or illegitimacy discrimination under the Equal Protection Clause or (b) content-neutral regulations of speech in a public forum[385] and (2) a heightened intermediate review standard used for content-based, subject-matter regulations of commercial speech.[386]

Following this discussion, Part II discussed (1) a "hybrid" kind of intermediate review.[387] Part III discussed (2) a "watered-down" kind of intermediate review.[388] Part IV discussed (3) the "exceedingly persuasive" kind of intermediate review.[389] Part V discussed (4) intermediate review in the context of injunctions on speech.[390] Part VI then discussed other doctrinal approaches to intermediate review occasionally suggested by members of the Court and concluded that these other approaches, as well as the mutated kinds of intermediate review should be rejected in favor of standard intermediate review, except the fourth kind of mutated intermediate review dealing with injunctions on speech should adopt the established heightened intermediate review test of *Central Hudson*.[391]

With regard to standard intermediate review, the Supreme Court stated in *Craig v. Boren*[392] the classic language that under intermediate review the government action "must serve important governmental objectives and must be substantially related to achievement of those objectives." The first inquiry under this test is whether the government action "serve[s] important governmental objectives." As typically phrased, under intermediate review the government must prove the government action (1) advances important, significant, or substantial government ends, not mere legitimate ends.[393] To be "substantially related to achievement of

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[384] *See supra* text accompanying notes 287–92.

[385] *See supra* text accompanying notes 57–206.

[386] *See supra* text accompanying notes 207–46.

[387] *See supra* text accompanying notes 247–84.

[388] *See supra* text accompanying notes 285–320.

[389] *See supra* text accompanying notes 321–38.

[390] *See supra* text accompanying notes 339–48.

[391] *See supra* text accompanying notes 349–84.

[392] 429 U.S. 190, 197 (1976).

[393] S*ee supra* notes 58–59, 69–80 and accompanying text.

those objectives," four things must be examined: (2)(a) is the government action "substantially underinclusive" in failing to regulate individuals who are part of some problem (the *underinclusiveness* inquiry); (2)(b) does the government action "substantially serve" to achieve its benefits on those whom the statute does regulate (the *service* inquiry); (3)(a) is the government action "substantially overinclusive" in imposing burdens on individuals who are not part of the problem (the *overinclusiveness* inquiry); and (3)(b) is the government action "substantially too burdensome" considering (3)(b)(i) the amount of the burden on individuals who are properly regulated (*restrictiveness* inquiry) and (3)(b)(ii) does the government action leave open ample alternative channels of action (for Equal Protection and Due Process cases) or expression (for free speech cases) (*oppressiveness* inquiry).[394]

Under intermediate review, the government bears the burden of justifying its action, rather than the challenger bearing the burden of proving unconstitutionality under minimum rationality review.[395] While "any conceivable legitimate interest" can be used to justify a statute at minimum rationality review, at intermediate review the government can only use "plausible" or "actual" government purposes to justify its action.[396]

[394] S*ee supra* notes 60–61, 81–114 and accompanying text. A summary of all the seven basic standards of review discussed in this Article appears in Kelso, *supra* note 4, at Appendix A. A summarized categorization for where all these standards of review apply also appears in that article. *Id.* at Appendix B: Tables 1 & 2.

[395] Under intermediate review, the government always has the burden to justify its course of action. KELSO & KELSO, *supra* note 43, at § 26.1.3 n.82 (citing United States v. Virginia, 518 U.S. 515, 529 (1996)). Similarly, under strict scrutiny, the government has the burden to justify its course of action. *Id.* (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989)).

[396] While the cases are not perfectly consistent, the best understanding is that at intermediate review "actual" or "plausible" interests may be considered to justify the statute, KELSO & KELSO, *supra* note 43, at § 26.1.3 nn.92–99, but not implausible reasons even if "put forward by the government in litigation, which can be used under "reasonableness balancing," *see* Kelso, *supra* note 2, at Section II.B.1 n.84, or "any reasonably conceivable" government interest, which can be used under minimum rationality review, *see id.* at Section II.A.1.b n.48 & Section II.B.1 n.82.