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Justifying the Supreme Court's Standards of Review

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ARTICLE

JUSTIFYING THE SUPREME COURT'S STANDARDS OF REVIEW

R. RANDALL KELSO*

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I. INTRODUCTION

In *Whole Woman’s Health v. Hellerstedt*,¹ Justice Thomas criticized an existing Supreme Court doctrine regarding the “tiers of scrutiny,” quoting a passage from an earlier Justice Scalia dissent that the “three basic tiers— ‘rational basis,’ intermediate, and strict scrutiny— ‘are [1] no more scientific than their names suggests, and [2] 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.’” Justice Thomas added: “But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily [3] the Court tinkers with levels of scrutiny to achieve its desired result.”²

In three recent related articles, I have discussed a predictable and principled structure to make “more scientific” the rational basis,³ intermediate review,⁴ and strict scrutiny⁵ “tiers” of review. These articles

1. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (quoting *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting)).

2. R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review*, 45 S. ILL. U. L.J. (forthcoming 2021), https://libguides.stcl.edu/ld.php?content_id=56631179 [<https://perma.cc/4WJ3-E7NW>].

3. *Id.*

4. R. Randall Kelso, *The Structure of Intermediate Review*, 25 LEWIS & CLARK L. REV. (forthcoming 2021), https://libguides.stcl.edu/ld.php?content_id=56631192 [<https://perma.cc/KB8T-422P>].

5. R. Randall Kelso, *The Structure of Strict Scrutiny Review* (2020) (unpublished manuscript), https://libguides.stcl.edu/ld.php?content_id=56631214 [<https://perma.cc/GTL6-T4DR>].

addressed Justice Thomas's concerns about the scientific nature of the standards of review. This Article responds to Justice Thomas's concerns about the manipulability of which standard to apply by discussing: (1) a principled approach to when the Court should apply a rational basis, intermediate review, or strict scrutiny review; and (2) why the Court's current approach is better than competing alternatives.

In pursuit of objective (1), Part II of this Article summarizes the existing standards of review.⁶ Part III then discusses the various factors the Supreme Court uses to determine whether to apply a particular standard of review.⁷ Part IV provides an analysis of why the Court's current decision making regarding what standard of review to apply is sound and defensible as reflecting reasoned decision making.⁸

In pursuit of objective (2), Part V discusses competing alternatives to the current standards of review approach, such as a "sliding scale" approach⁹ or a single-standard "proportionality" approach,¹⁰ and why, in general, in the American constitutional context the current standards of review approach is better than these alternatives.¹¹ Part VI then discusses how more explicit acknowledgement of a background commitment to reasoned decision making would improve the Court's current approach.¹² Part VII discusses why that commitment to reasoned decision making supports interpretation based on the original meaning of the concepts used in the Constitution,¹³ and such interpretation reflects the original intent of the framers and ratifiers.¹⁴ Part VIII provides a brief conclusion.¹⁵

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6. *See infra* text accompanying notes 16–82.
 7. *See infra* text accompanying notes 83–148.
 8. *See infra* text accompanying notes 149–274.
 9. *See infra* text accompanying notes 275–89.
 10. *See infra* text accompanying notes 283–306.
 11. *See infra* text accompanying notes 307–22.
 12. *See infra* text accompanying notes 315–436.
 13. *See infra* text accompanying notes 437–60.
 14. *See infra* text accompanying notes 461–74.
 15. *See infra* text accompanying notes 475–78.

II. SUMMARY OF THE BASIC STANDARDS OF REVIEW: RATIONAL BASIS, REASONABLENESS REVIEW, INTERMEDIATE REVIEW, OR STRICT SCRUTINY

A. *Standards of Review*

Under rational review, which is used to review standard social or economic legislation under the Equal Protection and Due Process Clauses, the government action need only (1) advance legitimate government interests, (2) be rationally related to advancing these interests (e.g., not be irrationally underinclusive or fail to advance any legitimate interest), and (3) not impose irrational burdens on individuals (e.g., not be irrationally overinclusive or burden individuals for no benefit).¹⁶ In addition, the Court sometimes uses a higher level of legitimate government interest review. This level, which can be called “reasonableness balancing” or “second-order reasonableness review,” balances the extent of the government’s legitimate interests against the burden on the individual to determine whether, given this burden, the challenger can show the government regulation is “unreasonable” or “clearly excessive.”¹⁷

Sometimes the Court has shifted the burden to the government in these legitimate government interest cases to prove the government action is “reasonable.”¹⁸ Because requiring the government to justify the constitutionality of its action makes this standard of review more difficult for the government to meet, it can be called “heightened reasonableness balancing” or “[third]-order reasonableness review.”¹⁹ Notably, both of these reasonableness balancing tests are less rigorous than intermediate review, discussed next, for two reasons: (1) legitimate interests can be used

16. See generally Kelso, *supra* note 2 (manuscript at 6–12 nn.41–76) (discussing Rational Basis Review in the context of Equal Protection and Due Process); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 699–702 (5th ed. 2015) (“Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet.”).

17. For a full discussion of the difference between minimum rationality review and reasonableness balancing, see Kelso, *supra* note 2 (manuscript at 12–16 nn.77–96) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)) (discussing a case involving fundamental right to vote/access to ballot); Kelso, *supra* note 2 (manuscript at 35–47 nn.215–02) (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (discussing a Dormant Commerce Clause case using “clearly excessive” language); *Burdick*, 504 U.S. at 434 (discussing a right of access to ballot case using “reasonableness” standard); *BMW v. Gore*, 517 U.S. 559, 575–85 (1996) (highlighting the “grossly excessive” language used).

18. See Kelso, *supra* note 2, (manuscript at 51–56 nn.303–334) (citing *Dolan v. Tigard*, 512 U.S. 374, 388–91 (1994)) (discussing a Takings Clause case); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 572 n.4 (1968) (arguing the right of government workers to speak on matters of public concern).

19. Kelso, *supra* note 2, (manuscript at 16 nn.98–100, 53–56 nn.303–34).

to make the government action constitutional under reasonableness balancing, not the intermediate requirement of important or substantial interests; and (2) under reasonableness balancing there are not independent requirements the government action be “substantially related” to advancing the interests and be “not substantially too burdensome” as under intermediate review, but only a balancing of benefits and burdens to determine if the action is reasonable.²⁰

In contrast, the legislation under review must “(1) advance important . . . or substantial government ends, . . . ; (2) [be] substantially related to advancing [these] ends, . . . ; and (3) [not be] substantially more burdensome than necessary to advance these ends.”²¹ There is also a heightened intermediate review standard used in cases involving commercial speech. Under commercial speech doctrine, while adopting the same intermediate tests for prongs (1) and (3), under prong (2) the test for commercial speech requires the government means be “directly related” to advancing the government’s interests, which is the strict scrutiny standard of review, and not merely be substantially related.²²

Under strict scrutiny, the statute must (1) advance compelling governmental ends; (2) be directly related to advancing these ends; and (3) be the least restrictive effective means to advance the ends.²³ There is

20. For a discussion of the intermediate standard of review, see *infra* text accompanying notes 21–22. It is also notable the second-order reasonableness balancing is less rigorous than intermediate review for a third reason: the burden is on the challenger to prove unconstitutionality, not the burden on the government to justify the action as under intermediate review, as noted *infra* text accompanying notes 25–26.

21. See generally Kelso, *supra* note 4 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)); CHEMERINSKY, *supra* note 16, 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.”).

22. See Kelso, *supra* note 4, (manuscript at 32–38 nn.207–46) (citing, *inter alia*, *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)). For the strict scrutiny standard of review, see *infra* text accompanying note 23. The article cited here also discussed four “mutated” forms of intermediate review that have appeared in Supreme Court cases. Kelso, *supra* note 4 (manuscript at 38–58 nn.247–348). The article suggested each of these four mutations, as well as other problematic *dicta* in a few other Supreme Court cases, should be rejected in favor of the two well-established forms of intermediate review represented by *Boren*, 429 U.S. at 190, and *Central Hudson*, 447 U.S. at 557. See Kelso, *supra* note 4 (manuscript at 58–63 nn.349–80).

23. See Kelso, *supra* note 5 (manuscript at 5–22 nn.39–150) (discussing the basic elements of strict scrutiny review); CHEMERINSKY, *supra* note 16, 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.”). The Kelso article cited here discussed applications of strict scrutiny review in a number of contexts like (1) racial discrimination under the Equal Protection Clause, see Kelso, *supra* note 5 (manuscript at 22–33

also a form of “loose” strict scrutiny approach, which adopts prongs (1) and (2) of strict scrutiny, but prong (3) of intermediate review.²⁴

Under current doctrine, the challenger bears the burden of proving unconstitutionality under either minimum rationality review or under second-order reasonableness balancing.²⁵ The government bears the burden of justifying its action under third-order reasonableness balancing, intermediate review, or strict scrutiny, the government bears the burden of justifying its action.²⁶ While “any reasonably conceivable interest” can “be used to justify a statute at minimum rationality review,”²⁷ and any reasonably conceivable government interest “put forward by the

nn.151–208); (2) substantial burdens on fundamental rights under the Due Process Clause, Kelso, *supra* note 5 (manuscript at 33–37 nn.209–34); or (3) various kinds of cases under the First Amendment, Kelso, *supra* note 5 (manuscript at 37–41 nn.235–60).

24. Kelso, *supra* note 5 (manuscript at 48–50 nn.301–08) (citing *Bush v. Vera*, 517 U.S. 952, 956–59 (1996)) (discussing racial redistricting challenges under the Equal Protection Clause). Following this discussion, the article then discussed four “mutations” of strict scrutiny that have appeared in some cases: (1) a “hybrid” kind of intermediate/strict scrutiny review; (2) a “watered-down” kind of strict scrutiny; (3) suggestion of “extremely limited” possibilities for compelling interests to satisfy strict scrutiny; and (4) suggestion of a “categorical” approach of unconstitutionally when traditionally strict scrutiny has been applied. Kelso, *supra* note 5 (manuscript at 52–72 nn.321–440). The article proposed any hybrid kind of intermediate/strict scrutiny should adopt one of the two well-established forms of intermediate review or two well-established forms of strict scrutiny. Kelso, *supra* note 5 (manuscript at 72–73 nn.441–42). The article also proposed that the remaining (2)–(4) variations of strict scrutiny should just adopt standard strict scrutiny review. Kelso, *supra* note 5 (manuscript at 73 nn.443–44).

25. Regarding the burden of proof under minimum rationality review, see CHEMERINSKY, *supra* note 16, at 706–07 (stating “[t]he challenger has the burden on proof when rational basis review [is applied]”). See also *id.* at 700 (“State legislatures are presumed to have acted within their constitutional power . . .” (quoting *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961))). Regarding the burden of proof under “reasonableness balancing,” see, e.g., *Burdick v. Takashi*, 504 U.S. 428, 434, 437–38, 441–42 (1992), for a discussion on the burden of proof on challenger, as the Court “rejected the petitioner’s argument.”

26. Under intermediate review, the government has the burden to justify its course of action. CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW*, 1101 n.82 (2007 & Supp. 2020) (citing *United States v. Virginia*, 518 U.S. 515, 529 (1996)), https://libguides.stcl.edu/ld.php?content_id=36280424 [<https://perma.cc/DUF4-786F>]. 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, 511 (1989)). The burden is also on the government in cases of heightened reasonableness balancing. See Kelso, *supra* note 2 (manuscript at 47–53 nn.283–316) (citing *Dolan v. Tigard*, 512 U.S. 374, 388–91 (1994)) (discussing a Takings Clause case); *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (discussing a Dormant Commerce Clause case); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 572 n.4 (1968) (analyzing the right of government workers to speak on matters of public concern).

27. See 1–2 CHARLES D. KELSO & R. RANDALL KELSO, *AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK*, at 54 n.26 (2020 Orig. Ed. 2014) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)), https://libguides.stcl.edu/ld.php?content_id=32389692 [<https://perma.cc/DUF4-786F>].

government' in litigation" can be used where reasonableness balancing applies,²⁸ at intermediate review the government can only use "plausible" or "actual" government purposes to justify its action,²⁹ while at strict scrutiny the government can only use actual government purposes to meet its burden of satisfying strict scrutiny.³⁰

B. *Potential Problems from Not Acknowledging These Standards of Review*

Given this understanding of the Court's current practice, there are seven clear standards of review of the constitutionality of governmental action: rational review; two kinds of reasonableness balancing; two kinds of intermediate review, and two kinds of strict scrutiny.³¹ "[A] danger of increased confusion and unpredictability exists if the proliferation of levels continues. This could happen if:

- 1) The Court adopts additional kinds of inquiries different than the three basic inquiries used under minimum rational review, intermediate scrutiny, and strict scrutiny;

28. See Kelso, *supra* note 2 (manuscript at 13–14 nn.81–85) (citing *Burdick*, 504 U.S. at 434) ("A court . . . must weigh 'the character and magnitude of the asserted injury' . . . against 'the precise interests put forward by the State as justifications' . . ." (quoting *Burdick*, 504 U.S. at 434)). For a discussion where reasonableness balancing applies, see Kelso, *supra* note 2 (manuscript at 35–47 nn.215–82).

29. See Kelso, *supra* note 4 (manuscript at 10 n.67) (citing *KELSO & KELSO*, *supra* note 26, at 1103–1104 nn.92–99); *KELSO & KELSO*, *supra* note 27, at 55–62 nn.31–36; *Michael M. v. Super. Ct.*, 450 U.S. 464, 470 (1981), *quoted in* Kelso, *supra* note 4 (manuscript at 10 n.67) (considering whether a governmental interest "could have plausibly motivated an impartial legislature"); *Craig v. Boren*, 429 U.S. 190, 199 n.7 (1976), *quoted in* Kelso, *supra* note 4, (manuscript at 10 n.67) (discussing use of a government purpose while acknowledging whether "this was the true purpose is not all self-evident.").

30. See *KELSO & KELSO*, *supra* note 26, at 1102 nn.85–86; *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'"). For a discussion of what kinds of interests constitute compelling, substantial, or legitimate interests, see Kelso, *supra* note 5 (manuscript at 9–1 nn.59–76). For a discussion of illegitimate interests, see Kelso, *supra* note 2 (manuscript at 8 nn.56). For a discussion explaining decisions regarding illegitimate interests considering a commitment to reasoned decision making, see *infra* text accompanying notes 327–47.

31. See *supra* text accompanying notes 16–30. These seven standards are summarized in Appendix A to this Article. Appendix B to this Article summarizes in which constitutional doctrines each of these seven standards are currently used. On these seven standards of review, see also R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227–37, 258–59 (2002).

- 2) Additional mixings and matchings occur for different kinds of scrutiny for the governmental interests, relationship to benefits, and burden inquiries; or”
- 3) These seven standards—the “base” level of rational review and the “plus six” additional standards of review—are not clearly acknowledged.

Each of these concerns are real given some language in Supreme Court cases. They are discussed next.³²

1. Adopting Additional Kind of Inquiries

Two cases underscore the kind of problem the possible proliferation of additional kinds of inquiries can create. First, in the context of reviewing the constitutionality of a court injunction, the Court in *Madsen v. Women's Health Center, Inc.*³³ adopted an analysis under prong (3) of heightened scrutiny described as somewhere between the intermediate “not substantially more burdensome” test and the strict scrutiny “least restrictive alternative” test. From the opinion, it was not clear exactly how much more stringent this test was than traditional intermediate scrutiny, nor were other precedents of any help since the standard was not used in any other case. As the dissent noted in *Madsen*, “[t]he Court . . . creates, brand new[,] . . . an additional standard The difference between it and intermediate scrutiny . . . is frankly too subtle for me to describe”³⁴ In fact, the result in *Madsen* is consistent with applying the heightened intermediate review standard used in commercial speech cases under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.³⁵ Thus, if one agrees that higher scrutiny is appropriate for court injunctions rather than for other kinds of governmental action, as the majority held in *Madsen*,³⁶ there is a predictable standard of review that has been used in many other cases that could be adopted.

32. The discussion in this section is an updated version of concerns expressed in 2002 in Kelso, *supra* note 31, at 237–46.

33. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

34. *Id.* at 791 (1994) (Scalia, J., concurring in part and dissenting in part).

35. See Kelso, *supra* note 4 (manuscript at 57–58 nn.339–48). The elements of the *Central Hudson* test are noted at *supra* text accompanying note 22.

36. See *Madsen*, 512 U.S. at 765–66 (distinguishing ordinances from court-imposed injunctions, particularly the collateral bar rule, and noting that “these differences require a somewhat more stringent application of general First Amendment principles” for injunctions).

The gender discrimination case of *United States v. Virginia*³⁷ is another case of a potential increased proliferation of inquiries leading to an unnecessarily confused result. Although Justice Ginsburg's majority opinion initially cited standard intermediate review language as the appropriate standard to apply in a gender discrimination case,³⁸ the opinion ultimately seemed to require the State of Virginia show an "exceedingly persuasive justification" for its gender discrimination at the Virginia Military Institute (VMI), not merely a substantial relationship to important government interests.³⁹ As Chief Justice Rehnquist noted in his concurring opinion, adoption of the phrase "exceedingly persuasive justification . . . introduces an element of uncertainty" and "potential confusion" into the appropriate test, and is unnecessary to strike down the gender discrimination at issue at VMI.⁴⁰ Fortunately, in gender discrimination cases since *Virginia*, the Court has tended to use standard intermediate scrutiny language.⁴¹ Thus, the Court avoided throwing an additional idiosyncratic test—exceedingly persuasive analysis—into the mix.⁴²

2. Problems of Mixing and Matching Elements of Levels of Scrutiny

In addition to the versions of rational review discussed earlier in this article,⁴³ it would be possible for the Court to add levels of review mixing rational review and intermediate review. For example, the Court could suggest the government action must have a rational relationship to an

37. *United States v. Virginia*, 518 U.S. 515 (1996).

38. *Id.* at 533 (first alteration in original) (requiring "the [challenged] classification serve[] 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

39. *Virginia*, 518 U.S. at 534.

40. *Id.* at 559 (Rehnquist, C.J., concurring).

41. See Kelso, *supra* note 4 (manuscript at 54 nn.321–24), (citing Kevin N. Rolando, *Notes and Comments, A Decade Later: United States v. Virginia and the Rise and Fall of "Skeptical Scrutiny,"* 12 ROGER WILLIAMS L. REV. 182, 207 (2006)).

42. Like the "burden no more speech than necessary" language in *Madsen*, the "exceedingly persuasive justification" language in *United States v. Virginia* is idiosyncratic since it is not an established test used in any other area of the law. If the Court in *Virginia* had adopted, for example, a strict scrutiny test of "least burdensome effective alternative," but continued the important, but not compelling government interest analysis of intermediate review that would have created unnecessary proliferation problems of its own by adding an additional kind of review frustrating the stepladder approach of the current seven levels of review. See *infra* text accompanying notes 51–64.

43. See *supra* text accompanying notes 16–20.

important or substantial government interest. The Court appears to have done this in a voting rights case, *Timmons v. Twin Cities Area New Party*.⁴⁴ The Court could also suggest that the government action must have a substantial relationship to a legitimate government interest. The Court appears to have done this in the Takings Clause case of *City of Monterey v. Del Monte Dunes*.⁴⁵

Each of these decisions is troublesome by creating additional kinds of tests without demonstrating need for them. Fortunately, the Court has pulled back from these assertions. In *Lingle v. Chevron USA, Inc.*,⁴⁶ a unanimous Supreme Court explicitly rejected the language in *City of Monterey* and said that in the future general government regulation affecting property rights should be analyzed under the standard Takings Clause language of *Penn Central Transportation Co. v. City of New York*,⁴⁷ which adopts a reasonable balancing approach, with no “substantial advancement” requirement.⁴⁸ In voting rights/ ballot access cases after *Timmons*, the Court has not focused on whether the government interests are “important” or “substantial,” but instead has used “legitimate” government interests to support the constitutionality of the government’s action.⁴⁹ Thus, this

44. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 369–70 (1997) (“[A] State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”).

45. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999) (“[A]lthough this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions Given the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents.”). This “substantially advance” language appeared in some earlier Takings Clause cases, see for example *Agins v. Tiburon*, 447 U.S. 255, 260–61 (1980).

46. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–48 (2005).

47. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 127 (1978).

48. This decision is consistent with the call for rejecting the “substantially advance” language in Takings Clause cases in Kelso, *supra* note 31, at 249–50.

49. See, e.g., *Crawford v. Indiana*, 553 U.S. 181, 188–89 (2008) (plurality opinion) (upholding an Indiana voter identification law requiring citizens voting in person on election day or casting a ballot in person with the clerk prior to election day, to present government issued photo identification. Voters who lack proper identification could cast a provisional ballot, and then meet the statute’s requirement within ten days following the election.). In his opinion, Justice Stevens said that however slight the burden may appear, it must be justified by legitimate state interests sufficiently weighty to justify the limitations. *Id.* at 191. This is consistent with *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), whereby substantial burdens on voting rights trigger strict scrutiny, but less burdens trigger second-order rational review, where the test is whether the regulation is unreasonable or excessively burdensome. Justice Stevens concluded in *Crawford* the state’s interest in deterring and detecting voter

potential anomaly seems to have been properly avoided.⁵⁰

Given the three basic inquiries of governmental ends, relationship to benefits, and burdens, and three levels of scrutiny for each inquiry (i.e., legitimate, important, or compelling governmental ends; rational, substantial, or direct relationship to benefits; and not irrationally burdensome, not substantially more burdensome than necessary, or least restrictive alternative),⁵¹ mathematically this creates twenty-seven possible permutations of levels of review (3 x 3 x 3). With the addition at rational review of the balancing tests of second-order and third-order reasonableness review,⁵² their various linguistic variations (e.g., viewing unreasonable, “not reasonable and necessary,” clearly excessive, and “grossly excessive” as different levels of rigor),⁵³ the possibility of placing the burden of proof on the challenger or the government in any of these levels of scrutiny,⁵⁴ and the different sources that could be used to justify government action (“any reasonably conceivable” basis, any “reasonably conceivable basis put forward in litigation,” “plausible or actual” interests, or actual interests only),⁵⁵ the number of possible permutations rises to more than 200.⁵⁶

fraud, modernizing voting procedures, and safeguarding voter confidence justified the photo requirement, and given the evidence the challengers presented, it was not excessively burdensome on any class of voters. *Crawford*, 553 U.S. at 191–200.

50. In his concurring opinion, although Justice Scalia phrased the *Burdick* test as involving “important regulatory interests”, he also noted it was a “deferential standard.” *Crawford*, 553 U.S. at 204 (Scalia, J., concurring). As with *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), instead of phrasing the test as intermediate “important” interests, but then using the word “deferential,” it would be better to phrase the test as second-order reasonableness review, asking if the government’s legitimate interests are excessively burdensome, as done in the plurality opinion, as argued in Kelso, *supra* note 31, at 249–89. In dissent, Justice Souter, joined by Justice Ginsburg, concluded the state interests failed to justify the limitations travel costs and fees needed for acquiring a photo, particularly for the poor or old, placed on the right to vote. *Crawford*, 553 U.S. at 210–16, 218–23 (Souter, J., joined by Ginsburg, J., dissenting). In a separate dissent, Justice Breyer similarly concluded the statute was unconstitutional for imposing a disproportionate burden on eligible voters who lack a driver’s license or other statutorily valid forms of photo ID. *Id.* at 237–41 (Breyer, J., dissenting).

51. See *supra* note 16, 21–24 and accompanying text.

52. See *supra* notes 16–20 and accompanying text.

53. See *supra* note 17 and accompanying text.

54. See *supra* notes 25–26 and accompanying text.

55. See *supra* notes 27–30 and accompanying text.

56. With twenty-seven permutations of the three basic levels of review multiplied by two possibilities for burden of proof multiplied by four possible different sources to consider, this yields 216 different possibilities. Adding in various versions of second-order and third-order reasonableness review creates even more possible levels of review.

However, practical reasonableness, a hallmark of the common law,⁵⁷ suggests the Court should resist such a proliferation in possible tests where there is no demonstrated need for such additional levels. For purposes of the discussion here, it is useful to note it would be best for the Court to stick with seven levels of review and not engage in any unnecessary and confusing additional proliferation. Of course, this does not mean the Court should not adopt a variation within a level of review if institutional needs so counsel. For example, in *Fiallo v. Bell*,⁵⁸ the Court noted the extra level of deference, more than the usual substantial deference of rational review, given to congressional regulations of immigration and naturalization, where “Congress regularly makes rules that would be unacceptable if applied to citizens.”

In addition to their number, there is also a problem if the Court were to adopt additional mixing and matching of levels of review in addition to the seven levels discussed here. For example, as a theoretical matter, the Court could adopt levels of scrutiny between traditional intermediate review and traditional strict scrutiny in addition to the intermediate with bite and loose strict scrutiny standards discussed earlier.⁵⁹ The Court could require, as a version of intermediate review with bite, the government to have a compelling government interest to regulate, but only require a substantial relationship between means and ends and require the action not substantively burden more persons than necessary. Alternatively, as a version of loose strict scrutiny, the Court could require compelling government interests, a least restrictive alternative test, but require only a substantial relationship, rather than a direct relationship, between means and ends. Adoption of such tests, however, would only add uncertainty to the law. Which version of intermediate review with bite is more rigorous—the current *Central Hudson* test (which adds to basic intermediate review only the strict scrutiny direct relationship requirement),⁶⁰ or the version suggested above (which adds to basic intermediate scrutiny only the strict scrutiny compelling government interest test)? Which version of loose strict scrutiny is more rigorous—*Busb v. Vera* (which only waters down the least restrictive

57. See Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992). See also Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38–49 (1981).

58. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

59. See *supra* text accompanying notes 22, 24.

60. See *supra* note 22 and accompanying text.

alternative requirement of strict scrutiny),⁶¹ or the version suggested above (which only waters down the direct relationship requirement of strict scrutiny)?

Having only one kind of intermediate review with bite and one kind of loose strict scrutiny, the “base plus six” model preserves a system where in each succeeding level of scrutiny is clearly more rigorous than the preceding level.⁶² Thus, each level of review represents a step-ladder increase in the rigor of scrutiny over the previous level.⁶³ In the absence of any showing that more than seven levels of scrutiny are needed to promote flexibility in decision making, the Court should stick with those seven levels and not engage in any unnecessary and confusing additional proliferation in the levels of review. Further, if seven levels are used, the seven levels currently used most frequently provide the soundest foundation on which to base existing doctrine.⁶⁴

3. Acknowledging the Seven Existing Levels of Scrutiny

In addition to these observations, it would help certainty and predictability in the law if the Court explicitly acknowledged the existence in current doctrine of the seven levels of scrutiny. Explicitly only acknowledging the three basic levels—rational review, intermediate scrutiny, and strict scrutiny—is valid for Equal Protection Doctrine.⁶⁵ In other areas of the law, a range of these four other standards are used to respond to the nuances of those individual situations.⁶⁶ It promotes neither

61. See *supra* note 24 and accompanying text.

62. Each level is clearly more rigorous since basic intermediate review involves all three prongs reflecting an intermediate standard of review; intermediate with bite adds one strict scrutiny inquiry (direct relationship); loose strict scrutiny adds two strict scrutiny inquiries (direct relationship and compelling government interests); strict scrutiny adopts a strict scrutiny inquiry for all three prongs of the test. See R. Randall Kelso, *United States Standards of Review Versus the International Standard of Proportionality: Convergence and Symmetry*, 39 OHIO N.U. L. REV. 455, 485 (2013).

63. The phrase “step-ladder” increase is used to underscore that each level of review is clearly more rigorous than the preceding level. Such a structure is useful for principled decision making as it permits the Court to raise or lower the standard of review depending on the factors used to determine the extent to which heightened scrutiny is appropriate, those factors discussed *infra* text accompanying notes 83–148.

64. See, e.g., Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 450–63 (1975) (discussing origins of the common law and wisdom of building on existing precedent where possible).

65. See Kelso, *supra* note 2 (manuscript at 4) (explaining how the rational basis review applies to the Equal Protection Clause).

66. See Kelso, *supra* note 2 (manuscript at 12) (discussing second-order and third-order reasonableness review); Kelso, *supra* note 4 (manuscript at 32) (discussing intermediate review with bite, in addition to standard intermediate review); Kelso, *supra* note 5 (manuscript at 48) (discussing

certainty nor predictability in the law to fail to acknowledge these standards of review.

For cases involving considering legitimate government interests, this means acknowledging the roles that second-order and third-order reasonableness review play in constitutional analysis. The Court should squarely face that in some cases a real choice exists between applying basic rationality review or either second-order and third-order reasonableness review, and should face that choice directly.⁶⁷ For example, the Court has applied strict scrutiny in cases involving significant burdens on the fundamental right to marry, as in *Zablocki v. Redhail*.⁶⁸ The Court has also applied strict scrutiny to significant burdens on the right to travel in *Shapiro v. Thompson*⁶⁹ and *Memorial Hospital v. Maricopa County*.⁷⁰ However, in cases involving less than substantial burdens on these unenumerated fundamental rights, the Court has applied some version of rational review, but seemingly without the usual deference to the legislative branch typical of minimum rationality review.⁷¹ Candid acknowledgment of this may also help explain the higher than basic rationality review given in other cases of a less than substantial burden on an unenumerated fundamental right.⁷²

Explicit acknowledgment of the seven levels of scrutiny would also help clarify various aspects of heightened scrutiny. For example, the Court has

loose strict scrutiny, in addition to standard strict scrutiny). As noted in *supra* note 31, the seven standards are summarized in Appendix A to this Article. Appendix B to this Article summarizes in which constitutional doctrines each of these seven standards are currently used.

67. One example of this issue being faced directly was in *Heller v. Doe*, 509 U.S. 312, 319–21 (1993), where the Court clarified cases involving the mentally impaired trigger standard rationality review, not any heightened rational review standard as suggested by *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 444 (1985). On this suggestion in *Cleburne*, see Kelso, *supra* note 2, at Part III.B.2 nn.167–82.

68. *Zablocki v. Redhail*, 434 U.S. 374, 386–88 (1978).

69. *Shapiro v. Thompson*, 394 U.S. 618, 629–38 (1969).

70. *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 253–60 (1974) (impinging on the right to travel does not promote compelling state interest and thus fails strict scrutiny).

71. See *Turner v. Safley*, 482 U.S. 78, 89–91 (1987) (finding restrictions on prisoners' ability to marry are not reasonable); see also *Sosna v. Iowa*, 419 U.S. 393, 407 (1985) (holding Iowa may reasonably decide to impose a residency requirement before individuals can obtain a divorce in the state).

72. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (providing a court must consider both "burdens a law imposes on abortion access together with the benefits those laws confer" (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899–901 (1992) (performing this balancing with respect to parental notification provision))), discussed in Kelso, *supra* note 2, at Part IV.A.2 nn.227–48; *Hodgson v. Minnesota*, 497 U.S. 417, 444–49, 455 (1990) (explaining a minor must wait forty eight hours after notifying one parent of intent to get abortion, and parental notification requirement with judicial by-pass option, constitutional as they "reasonably further" legitimate interests with "only a minimal burden" on minor).

struggled with details on the appropriate standard of review to apply to various kinds of free speech cases: cases involves government spending,⁷³ regulations of commercial speech;⁷⁴ cable television regulations;⁷⁵ and court injunctions on free speech rights.⁷⁶ Acknowledgment of the seven levels of scrutiny would also help explain the language in *Bush v. Vera*, which rejected a traditional strict scrutiny approach⁷⁷ while not undermining traditional strict scrutiny in areas like affirmative action in employment where the Court intends traditional strict scrutiny to apply.⁷⁸

Some Justices have suggested getting rid of the “intermediate with bite” and “loose strict scrutiny” test by rephrasing the commercial speech doctrine, currently *Central Hudson*, and racial redistricting cases, currently *Bush v. Vera*, as strict scrutiny cases.⁷⁹ That would get the standards of review to three basic tiers of review (rationality review, intermediate review, and strict scrutiny) and two reasonableness tests (burden on challenger in one; burden on the State in the other). On the other hand, there is some benefit in having intermediate with bite and loose strict scrutiny, as they are logically consistent steppingstones in the level of review between intermediate review and strict scrutiny,⁸⁰ and one can agree with the current approach that because commercial speech is “heartier” it does not need strict scrutiny protection⁸¹ and state governments should be given greater

73. These government spending cases include government speech cases, government advertising campaigns, government grants or subsidies, or public-school education cases. See R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 311–23 (2016) (comparing public school cases, government grant and subsidy cases, government speech cases, and governmental advertising cases).

74. *Id.* at 370–73.

75. *Id.* at 374–77.

76. *Id.* at 392–93.

77. See Kelso, *supra* note 5 (manuscript at 48–50 nn.301–08).

78. *Id.* (manuscript at 30–33 nn.191–208).

79. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (stating the *Central Hudson* test should not be used, and thus regular content-based strict scrutiny analysis would apply (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 (1996) (Thomas, J., concurring))); *Bush v. Vera*, 517 U.S. 952, 999–1003 (1996) (Thomas, J., joined by Scalia, J., concurring) (reaffirming the principle that all racial classifications should be governed by strict scrutiny, even for cases involving racial districting issues).

80. See *supra* text accompanying notes 62–64.

81. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 & n.24 (1976) (stating “commercial speech may be more durable than other kinds” of speech).

than strict scrutiny flexibility in making their political redistricting decisions.⁸²

III. DETERMINING PROPER LEVEL OF SCRUTINY: RATIONAL BASIS, REASONABLENESS REVIEW, INTERMEDIATE REVIEW, OR STRICT SCRUTINY

A. *Factors Used to Determine Level of Scrutiny*

1. Introduction

In deciding whether to adopt rationality review, reasonableness balancing, intermediate review, or strict scrutiny in any particular case, the Court uses a myriad of factors. The default position is rationality review. Under rationality review, the Court presumes government action is constitutional and defers to legislative or executive judgment as long as the government decision is rational, i.e., not arbitrary or capricious.⁸³ Discussing the requirement of a rational relationship, the Court noted in 1992 in *Nordlinger v. Hahn*:⁸⁴

As a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” Accordingly, this Court’s cases are clear that, unless 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.

As discussed below, ten separate factors are identifiable as relevant in determining whether a higher level of review should be applied. These factors are organizable around four main considerations: (1) is there any “text” in the Constitution, interpreted in light of context and history, suggesting the framers and ratifiers of that provision expected some more vigorous judicial review;⁸⁵ (2) is there any evidence suggesting the normal

82. *See Bush*, 517 U.S. at 977 (“[S]tate actors should not be ‘trapped between the competing hazards of liability’ by the imposition of unattainable requirements under the rubric of strict scrutiny.” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O’Connor, J., concurring))).

83. *See supra* text accompanying note 16 (discussing the elements of rationality review).

84. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citations omitted) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961)).

85. *See infra* text accompanying notes 89–93.

legislative or executive “process” is likely not to be functioning in an ordinary manner so the Court can feel comfortable deferring to the government result;⁸⁶ (3) is there any reason to suspect as a matter of “substance” the government action is burdening individuals in an irrational or unreasonable manner;⁸⁷ and (4) is recognition of heightened scrutiny consistent with the proper role of judicial review.⁸⁸ These four considerations—text, process, substance, and judicial role—form the basis for the factors used in Court opinions.

2. Discussion of Ten Factors Used

The first of these ten factors are: (1) whether arguments of text, context, and history suggest the classification is one the framers and ratifiers would have thought deserves heightened scrutiny. The Court has said, “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”⁸⁹ With regard to the text and history of the Equal Protection Clause, the Court noted as long ago as 1886 the provisions of the Fourteenth Amendment “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality.”⁹⁰ Because such cases involve the core purpose of the Fourteenth Amendment Equal Protection Clause, cases involving race, ethnicity, or national origin routinely trigger the highest kind of Equal Protection Clause review—strict scrutiny.⁹¹

The Court in footnote 4 in *United States v. Carolene Products Co.*, mentioned three additional factors.⁹² They are: (2) whether a fundamental right is involved, particularly a right that appears to be within the specific prohibitions of the Constitution, such as those of the first ten

86. See *infra* text accompanying notes 94–95, 103–106.

87. See *infra* text accompanying notes 96–99.

88. See *infra* text accompanying notes 100–02.

89. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

90. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

91. See CHEMERINSKY, *supra* note 16, at 724–25 (“[I]t is firmly established that race and national origin classifications must meet the most exacting standard of judicial review.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–25, 235–37 (1995) (“Any preference based on racial or ethnic criteria must necessarily receive a most searching examination[.]” (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986))); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (“When they touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling government interest.”).

92. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing additional factors to take into consideration when determining a statute’s constitutionality).

amendments;⁹³ (3) whether a deficiency exists in the “political process[] which can ordinarily be expected to bring about repeal of undesirable legislation”;⁹⁴ and (4) whether the statute is “directed [against] particular religious, . . . or national, . . . or racial minorities[,]” or reflects “prejudice against discrete and insular minorities” who cannot be expected to protect their interests adequately in the legislative process.⁹⁵

Three more factors were mentioned in *Frontiero v. Richardson*.⁹⁶ They are: (5) whether the classification burdens an immutable characteristic, like race, national origin, or gender;⁹⁷ (6) whether the classification, even if not immutable, burdens an individual for something not the product of that individual's choice, contrary to “the basic concept of our system that legal burdens should bear some relationship to individual responsibility [or wrongdoing]”;⁹⁸ and (7) whether the judge views the classification as a product of false stereotypes about individuals, particularly if based on outmoded notions of the relative capabilities of individuals, or part of a historical pattern of discrimination.⁹⁹

Two additional factors were discussed in *City of Cleburne v. Cleburne Living Center, Inc.*¹⁰⁰ They are: (8) the extent judges are competent to make substantive decisions heightened scrutiny require, which involve scrutinizing the legislative judgment as to whether the ends are sufficiently important or compelling, the means are sufficiently narrowly tailored or necessary, and whether any alternatives to the legislation would be effective or not,¹⁰¹ and (9) would a Pandora's box open where heightened scrutiny in the case would require heightened scrutiny in other similarly situated cases, creating increased litigation and more unpredictability in the law.¹⁰²

93. *Id.*

94. *Id.*

95. *Id.*

96. *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

97. *Id.* at 686.

98. *Id.* at 686–87 (quoting *Weber*, 406 U.S. at 175).

99. *Id.* at 684–86. One corollary to this factor asks whether in more recent times the legislature has shown a willingness to reject such outmoded stereotypes through “increase[ed] sensitivity” to such classifications, *id.* at 686–87, or adopt ameliorative legislation. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442, 443–45 (1985) (concluding the court below erred “in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review . . .”).

100. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

101. *Id.* at 442–43.

102. *Id.* at 445–46. Rationality review discourages litigation given its strong presumption of constitutionality but allows findings of unconstitutionality if the legislation does not advance

An additional concern (10) exists with specialized matters on government action not being the product of normal legislative enactment. For example, there is a suspicion of state legislative motives in cases involving Dormant Commerce Clause review because state legislatures, whom only in-state citizens elect, may have a political predisposition for advancing local state parochial interests to the detriment of the national interest.¹⁰³ Similarly, there is a concern with unbiased, normal legislative processes in Contract Clause cases involved with regulating only a narrow range of contractors or the government limiting the rights under its own contracts,¹⁰⁴ or the government singling out an individual for specialized regulatory treatment under the Takings Clause,¹⁰⁵ or Congress possibly intruding into the Court's power of judicial review under Congress enforcement powers of Section 5 of the Fourteenth Amendment.¹⁰⁶

B. *Analyzing the Factors Used*

1. Nordlinger Analysis

In terms of the two categories under *Nordlinger v. Hahn* that trigger heightened scrutiny, fundamental rights and suspect classifications,¹⁰⁷

"legitimate state interests" such as "a bare . . . desire to harm a politically unpopular group," or is not rationally related to advancing legitimate interests by being "arbitrary or irrational." *Id.* at 446–47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). For cases of findings of unconstitutionality under minimum rationality review, see *Kelso*, *supra* note 2, at Part III.A.1 nn.124–200 & Part III.A.2 nn.201–14.

103. *See, e.g.*, *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945) ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

104. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242–44, 248–50 (1978) (regulating a narrow range of contract actors by applying retroactive contract law only to business with more than 100 employees when employer closes in-state office or terminates pension plan); *see also U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22–24, 30–31 (1977) (limiting contract rights retroactively under its own state bonds triggers a different, and higher, standard of review than normal deference to the legislature).

105. *See Dolan v. City of Tigard*, 512 U.S. 374, 385–86, 388–91 (1994) (addressing individual singled out for individualized treatment under Takings Clause).

106. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (noting for Congress to invoke § 5, its remedy must be "congruent" and "proportionate" to conduct transgressing the Fourteenth Amendment), *superseded by statute*, 42 U.S.C. § 2000cc (2018), *as recognized in Holt v. Hobbs*, 574 S. Ct. 352, 357–58 (2015).

107. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (asking whether 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 . . ."); *see also supra* text accompanying note 84.

factor (1) on the framers and ratifiers' intent applies in both cases of fundamental rights and suspect or quasi-suspect classifications.¹⁰⁸ Factor (2) focuses directly on the question of whether a fundamental right exists.¹⁰⁹ Since all Bill of Rights are fundamental, with the exception of the Fifth Amendment grand jury requirement and Seventh Amendment right to jury trial cases,¹¹⁰ all other Bill of Rights cases should, and do, involve something more than basic rationality review.¹¹¹

In contrast, factors (3)—(7) focus primarily on whether a suspect class (triggering strict scrutiny) or quasi-suspect class (triggering intermediate review) is involved.¹¹² Factors (8) and (9) on judicial competence to scrutinize legislative judgment and concerns of a Pandora's box also predominantly apply in cases of suspect or quasi-suspect classifications.¹¹³ Given its focus on fundamental rights and suspect classes, *Nordlinger* does not address factor (10) and its concern with specialized matters on government action not being the product of normal legislative activity but more of a self-interested capacity.¹¹⁴

2. Text, Process, Substance, Judicial Role

A second way to organize the ten factors used to determine the proper level of scrutiny involves separating the factors into the considerations of

108. For a discussion of factor (1), see *infra* text accompanying notes 149–52 (proving an equal protection analysis); notes 219–20 (explaining fundamental rights due process analysis).

109. See *supra* text accompanying note 93 (discussing the “fundamental rights” aspect of *Carolene Products* addressed in footnote 4).

110. See generally KELSO & KELSO, *supra* note 27, at 643–44 (“As a matter of deference to state procedural practices, probably the only two aspects of the Bill of Rights that are not ‘fundamental’ today are the Fifth Amendment . . . and the Seventh Amendment . . .”).

111. See *District of Columbia v. Heller*, 554 U.S. 570, 628 & n.27 (2008) (noting rational basis should not be used “to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms” because, if so, the enumerated right protection “would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect”).

112. As discussed *infra* text accompanying notes 147–220, factors (3)–(7) tend to frame the levels of review used in Equal Protection Clause doctrine.

113. For a discussion of factors (8) and (9), see *infra* text accompanying notes 194–95, 201–202, 213 (providing equal protection analysis). The concern with judicial competence can also apply in fundamental rights cases and specialized cases of concern with government action, such as Court review of whether a burden on interstate commerce is “clearly excessive” under the Dormant Commerce Clause analysis, as discussed at KELSO & KELSO, *supra* note 26, at 880–801. The concern with a Pandora's box can occur in deciding on whether an additional unenumerated fundamental right exists, as referenced *infra* text accompanying notes 225–36.

114. See *supra* text accompanying notes 103–06 (concerning self-interest rather than legislative activity).

text, process, substance, and judicial role. As noted above, factors (1) and (2) focus on aspects of text, context, and history to determine areas where the Constitution's "text and design" invite more vigorous judicial review than minimum rationality.¹¹⁵ In contrast, factors (3) and (4) focus on legislative process concerns, as does factor (10) on aspects of the Dormant Commerce Clause, Takings Clause and Contract Clause doctrine.¹¹⁶ Substantive concerns are included in factors (5)–(7).¹¹⁷ Judicial role considerations are involved with factors (8)–(9).¹¹⁸

3. Whether the Factor Tends to Support Heightened Scrutiny or Not

Another way to classify the ten factors is whether the factor tends to support heightened scrutiny or tends to limit review to minimum rationality review. Factor (1) tends to limit heightened scrutiny to those clearly expected from text or design.¹¹⁹ Factor (2) is also limiting if restricted to enumerated fundamental rights in the Bill of Rights.¹²⁰ Factor (8) on judicial competence to second-guess legislative choices,¹²¹ and factor (9), on concern with a Pandora's box¹²² also tend to limit areas where heightened scrutiny may be appropriate.

115. *See supra* text accompanying notes 89–93 (mentioning the rationale for analysis under strict scrutiny).

116. *See supra* text accompanying notes 94–95, 103–106 (linking Factors 3 and 4 with legislative process concerns).

117. *See supra* text accompanying notes 96–99 (offering immutable characteristics as an example).

118. *See supra* text accompanying notes 100–02 (considering impacts of the judge's decision-making role).

119. *See supra* text accompanying notes 89–91 (suggesting heightened review for the core purpose of text, such as race, ethnic, or national origin discrimination under the Fourteenth Amendment Equal Protection Clause).

120. *See supra* text accompanying notes 110–11 (discussing how virtually all the Bill of Rights are viewed as fundamental, except for the Fifth Amendment grand jury requirement and Seventh Amendment right to jury trial).

121. *See supra* text accompanying note 103 (analyzing concerns about judicial competence to second-guess suggests deference to the legislature, as under rationality review).

122. *See supra* text accompanying note 104 (evaluating concerns about opening a Pandora's box of heightened scrutiny cases suggests limiting review to rationality review).

In contrast, the process factors (3) and (4)¹²³ and factor (10)¹²⁴ tend to expand the number of areas where heightened scrutiny might be appropriate by exploring where the outcome of the normal legislative process is generally untrustworthy. So, too, the substantive factors of (5), (6), and (7) raise concerns about the results of legislative action.¹²⁵ Factor (2) can also be used to expand heightened scrutiny if extended to unenumerated fundamental rights, as the Court has done in many areas.¹²⁶

4. Theories of Judicial Review

Another way to categorize the ten factors involves consideration of four main styles of judicial decision making. In general, “there are two main questions that lie behind any act of judicial interpretation”: (1) the nature of law and (2) “the nature of the judicial task.”¹²⁷ Concerning the nature of law, there are two approaches. “Under one approach, law is seen primarily as a set of rules and principles whose application is guided by an analytic methodology of logic and reason[:]” the *analytic*, or conceptualist, approach.¹²⁸ “Alternatively, law can be seen as ultimately to be judged not in terms of logical consistency, but as a means to some social end through a pragmatic or functional treatment of rules[:]” the *functional*, or pragmatic, approach.¹²⁹ “Concerning. . . the nature of the judicial task,” one approach views law as “solely . . . a body of rules and principles from which legal conclusions are derived[:]” the *positivist* assumption.¹³⁰ “In contrast, a judge could aim at producing law and applications of law that accord with certain moral principles embedded in society’s legal and moral culture[:]” a *normative*

123. See *supra* text accompanying notes 96–97 (determining deficiencies in the political process or legislation against discrete and insular minorities not likely to be able to protect their interests in the political process suggests greater judicial scrutiny of the legislative process is appropriate).

124. See *supra* text accompanying notes 105–08 (interpreting additional concerns about the result not being the product of normal legislative action suggests heightened judicial review is appropriate).

125. See *supra* text accompanying notes 99–101 (reviewing harms based on status matters like race, ethnicity, national origin or gender, or harm based on something not the product of individual choice, or harm in the context of a pattern of false stereotypes suggest the legislative outcome cannot be normally trusted and heightened judicial review is proper).

126. See *infra* text accompanying notes 225–43 (discussing Court development of unenumerated fundamental rights).

127. KELSO & KELSO, *supra* note 26, at 19.

128. *Id.* at 20.

129. *Id.*

130. *Id.* at 25.

assumption.¹³¹ Based on these observations, four main judicial decision-making styles exist: Formalism (analytic positivism), Holmesian (functional positivism), Instrumentalism (functional normative), and Natural Law (analytic normative).¹³²

No matter what their favored judicial decision-making style, not surprisingly, all justices begin with factor (1) concerning whether arguments of text, context, and history suggest the classification is one the framers and ratifiers would have thought deserves heightened scrutiny.¹³³ Predispositions to use the remaining factors vary depending on the judge's judicial decision-making style.

Two of the ten factors reflect an emphasis on clear and predictable rules, a focus of formalist judges.¹³⁴ These two factors are: (2) whether a fundamental right is involved, particularly a right appearing within the specific prohibitions of the Constitution, such as those of the first ten amendments;¹³⁵ and (9) would a Pandora's box open where heightened scrutiny in the case would lead to demands for heightened scrutiny in other similarly situated cases, creating more litigation and unpredictability in the law.¹³⁶

131. *Id.*

132. *Id.* at 31. For detailed discussion of each of the styles of judicial decision making, both generally and in the context of constitutional interpretation, see *id.* at 35, 295, 319, 342, 354 (referencing formalism, Holmesian, instrumentalism, and Natural Law principles). See R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIAMI L. REV. 112, 119–29 (2017) (summarizing the four judicial decision-making styles).

133. On factor (1), see *supra* text accompanying notes 89–91.

134. See KELSO & KELSO, *supra* note 26 at 39–40 (discussing the formalist emphasis on clear and predicable rules).

135. Factor (2) supports higher than basic rationality review for Bill of Rights provisions. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibitions of the Constitution, such as those of the first ten Amendments[.]”); see also *District of Columbia v. Heller*, 554 U.S. 570, 628 & n.27 (2008) (noting rational basis should not be used “to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms” because, if so, the enumerated right protection “would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect”). Formalist judges can also support heightened scrutiny for unenumerated fundamental rights that are part of our nation's history and tradition. See *infra* text accompanying note 233, citing, *inter alia*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race. . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential[.]”).

136. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445–46 (1985) (“[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be

Two other factors relate to the preference to defer to legislative and executive decision making, where possible. Holmesian jurists are predisposed to adopt these factors.¹³⁷ These factors ask: (3) whether a deficiency exists in the “political processes which can ordinarily be expected to bring about repeal of undesirable legislation”;¹³⁸ and (4) whether the statute is “directed at particular religious . . . national . . . or racial minorities,” or reflects “prejudice against discrete and insular minorities” who, because they are discrete and insular, cannot be expected to protect their interests adequately in the legislative process.¹³⁹ Where such a concern exists with the political process, judges are not prepared to exercise basic rational review deference. This concern with the nature of the legislative process also appears in cases involving factor (10) on Dormant Commerce Clause, Takings Clause, or Contract Clause review where concerns with the legislative process, particularly self-interested regulation, suggests higher review.¹⁴⁰

Two other factors reflect the concern that individuals should be held responsible for their own actions but should not be punished for things over which they have no control. These factors reflect a Natural Law committed to reason, which includes a background moral principle that burdens should bear some connection to individual responsibility.¹⁴¹ These two factors are: (5) whether the classification burdens an immutable characteristic, like race or gender;¹⁴² and (6) whether the classification, whether immutable or not, burdens an individual for something not the product of the individual's

difficult to find a principled way to distinguish a variety of other groups One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.”).

137. See KELSO & KELSO, *supra* note 26, at 43–45 (highlighting the Holmesian emphasis on deference to legislative and executive decision making).

138. See, e.g., *Carolene Products Co.*, 304 U.S. at 152 n.4.

139. *Id.*

140. On factor (10), see *supra* text accompanying notes 103–06.

141. For a discussion of natural law commitment to reason and reasoned decision making, see KELSO & KELSO, *supra* note 26, at § 3.4 nn.78–94. For a discussion of natural rights and burdens on individual liberty needing justification, such as preventing one individual from “violating the rights of another,” see Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 113–20 (1995). See also Jonathan Crowe, *Explaining Natural Rights: Ontological Freedom and the Foundations of Political Discourse*, 4 N.Y.U. J.L. & LIBERTY 70, 85 (2009) (discussing “natural rights” in the context of “the ethical personality of mature humans is dominated by their capacity for moral self-expression by means of responsible choice”).

142. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . .”).

choice, like status as an illegitimate child or being the child of parents who are illegally in the United States.¹⁴³

Two final factors reflect focus on more carefully scrutinizing burdens the judge feels are the product of wrong-headed thinking and on achieving sound social policy. These factors resonate with Instrumentalist judges.¹⁴⁴ These factors are: (7) whether the judges views the classification as a product of false stereotypes about individuals, particularly if based on outmoded notions of the relative capabilities of men and women or part of an historical pattern of such discrimination;¹⁴⁵ and (8) to what extent the judges are competent to make the substantive decisions required at heightened scrutiny, which involves scrutinizing legislative judgment as to whether the ends are sufficiently important or compelling, the means are sufficiently narrowly tailored or necessary, and whether any alternatives to the legislation would be effective.¹⁴⁶ Unsurprisingly, Instrumentalist judges, with their greater willingness to consider social policy in decision making, are often more willing to conclude they are competent to make the kind of substantive decisions necessary at heightened scrutiny.¹⁴⁷ Formalist, Holmesian, and Natural Law judges are less confident about this matter,

143. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)) (“[I]mposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .”).

144. For a discussion of Instrumentalist concern with sound social policy, see KELSO & KELSO, *supra* note 26, at 47–50 nn.51–61, 52–53 nn.69–77.

145. See, e.g., *Frontiero*, 411 U.S. at 684–85 (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes.”); *id.* at 686–87 (“[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”).

146. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) (“Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.”).

147. See *id.* at 472 (Marshall, J., concurring in part dissenting in part) (“Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day.”). For a categorization of recent justices on the Supreme Court as Instrumentalists, see KELSO & KELSO, *supra* note 26, at 325, 422, 423 (listing former Chief Justice Warren, and Justices Douglas, Brennan, Marshall, Fortas, Blackmun, Stevens, and Ginsburg; current Justices Breyer, Sotomayor, and Kagan).

particularly Holmesian judges with their preference for deference to legislative/executive action.¹⁴⁸

IV. ANALYZING EQUAL PROTECTION, DUE PROCESS, FREE SPEECH, AND OTHER CONSTITUTIONAL CONCERNS

A. *Factors Under Equal Protection*

Currently the Court uses rationality review not only for standard social or economic regulation,¹⁴⁹ but also for laws involving wealth, age, physical or mental disabilities, sexual orientation, or state discrimination against unlawful aliens or aliens in “political function” jobs.¹⁵⁰ Cases involving gender discrimination, discriminating against illegitimate children, or discrimination against the children of illegal aliens trigger intermediate review.¹⁵¹ Cases involving race, ethnic, or national origin discrimination, religious discrimination, or state discrimination against lawfully resident aliens trigger strict scrutiny.¹⁵²

1. Race, Ethnicity & National Origin Discrimination

The history surrounding adoption of the Equal Protection Clause indicates one clear purpose of the clause was to outlaw the “Black Codes” that had proliferated in many Southern states during the post-Civil War period after the Thirteenth Amendment outlawed slavery.¹⁵³ The Black Codes imposed severe legal restrictions on newly freed African-Americans.

148. *Cleburne Living Ctr.*, 473 U.S. at 442–43, 446–47 (majority opinion) (remaining justices on the Court unwilling to apply heightened scrutiny in *Cleburne*). For categorization of recent justices on the Supreme Court as Holmesian, see KELSO & KELSO, *supra* note 26, at §§ 10.1, 13.4, Table 13.4 (listing former Chief Justice Rehnquist and Justices Stewart, Harlan, and White; current Chief Justice Roberts); *id.* at §§ 9.1, 13.4, Table 13.4 (listing former Chief Justice Burger and Justices Black and Scalia; current Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett as Formalist judges); *id.* at §§ 12.1, 13.4, Table 13.4 (former Justices Powell, O'Connor, Kennedy and Souter as Natural Law judges).

149. See KELSO & KELSO, *supra* note 26, at 1182–84.

150. See *id.* at 1186 (wealth); *id.* at 1189 (age); *id.* at 1190 (physical or mental disabilities); *id.* at 1192 (sexual orientation); 1155–1158 (“political functions” exception).

151. See generally *id.* at 1165–1169 nn.363–76 (gender); *id.* at 1178 (illegitimacy); *id.* at 1158–1160 (children of illegal aliens).

152. See generally *id.* at 1105 (race, ethnic, or national origin); *id.* at 1161 (religious); *id.* at 1156 nn.316–24 (lawfully resident aliens).

153. See Robert J. Kaczorowski, *Congress's Power to Enforce the Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. LEGIS. 187, 241–46 (2005) (discussing Congress making illegal the violation of Civil Rights of other citizens under color of law or custom).

The Codes typically prohibited blacks from voting or holding office, serving on juries, or marrying whites. The Codes gave employers “contract rights and methods of enforcing contracts against black laborers that were not available in contracts with white laborers. Further, the [Codes] gave landowners methods of disciplining black tenants and field hands that they were not legally authorized to use against white tenants and field hands.”¹⁵⁴ The Black Codes authorized “employers and landowners, as well as ordinary whites organized into patrols, to enforce an informal, customary system of controls that restricted blacks’ freedom to move from place to place” through discriminatory application of vagrancy laws.¹⁵⁵ In addition, “blacks in the South were denied access to local systems of civil and criminal justice when they sought to redress violations of their rights and crimes committed against them.”¹⁵⁶

In response, Congress enacted the Civil Rights Act of 1866, which declared all persons born in the United States were “citizens of the United States” and listed their rights, including the right to own property, the right to enter contracts without racial discrimination, and the right to safety from corrupt law enforcement practices. One purpose of the Fourteenth Amendment was to make it clear the Civil Rights Act of 1866 was constitutional.¹⁵⁷ Given this history, the Court has always held a bare desire to discriminate on racial grounds constitutes an illegitimate governmental interest, as in the 1886 case of *Yick Wo v. Hopkins*.¹⁵⁸

In addition, cases of racial, ethnic, or national origin discrimination involve several factors supporting heightened scrutiny. Historically, racial, ethnic, or national origin minorities are (4) discrete and insular minorities unlikely able to protect themselves adequately in the political process.¹⁵⁹

154. *Id.* at 242.

155. *Id.*

156. *Id.*

157. See Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 n.22 (2002), *citing, inter alia*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67–71 (1872); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 64 (2000); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1281 (1997) (“The clearest and most indisputable purpose of the Fourteenth Amendment was to provide constitutional authority for the Civil Rights Act of 1866, which outlawed the Black Codes.”).

158. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

159. See *United States v. Carolene Prods., Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

Race, ethnic, or national origin are (5) immutable characteristics,¹⁶⁰ and (6) not the product of the person's choice.¹⁶¹ There is also (7) extensive history of race, ethnic, or national origin discrimination based upon false stereotypes.¹⁶² For all of these reasons, use of strict scrutiny review for discrimination against racial, ethnic, or national origin minorities has been relatively uncontroversial.¹⁶³ In cases of racial or ethnic affirmative action disadvantaging whites, there is not the same (4) discrete and insular minority argument or (7) history of discrimination against whites, and thus whether to apply strict scrutiny or some lesser form of scrutiny has been the subject of debate.¹⁶⁴

2. Alienage Discrimination

In 1971, in *Graham v. Richardson*,¹⁶⁵ the Court held with respect to persons in the United States alienage is a "suspect classification." The Court noted, "Aliens as a class are a prime example of [4] a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."¹⁶⁶ Alienage, while not immutable, is (6) not the product of an individual's choice.¹⁶⁷ State laws restricting the eligibility of lawfully resident aliens for welfare

160. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[R]ace and national origin [are] immutable characteristic[s] determined solely by the accident of birth . . .").

161. *Id.* (stating such discrimination "would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .'").

162. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2072–113 (2002) (discussing such history and legal attempts to counteract). See also *id.* at 2113–59 (describing the history of gender discrimination and legal challenges); *id.* at 2159–92 (discussing history of sexual orientation discrimination and legal challenges).

163. See generally Kelso, *supra* note 5 (manuscript at 22–25 nn.151–60).

164. See generally *id.* (manuscript at 25–26 nn.161–66), citing, *inter alia*, *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564–72 (1990) (providing the 5–4 decision of Instrumentalist Justices Brennan, Marshall, Blackmun, Stevens, and deference-to-government Holmesian Justice White adopting intermediate review for federal government race-based affirmative action program); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222–35 (1996) (providing the 5–4 decision adopting strict scrutiny in all race-based affirmative action programs, even federal, overruling *Metro Broadcasting*, with Instrumentalist Justices Blackmun, Stevens, Breyer, and Ginsburg in dissent). Note the (1) text and core purpose of the Fourteenth Amendment and arguments about (5) immutable characteristics and (6) not being burdened for something not the product of choice support strict scrutiny for all race-based classifications, even affirmative action, consistent with Formalist and Natural Law justices so holding in the *Metro Broadcasting* dissent and *Adarand* majority opinion.

165. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

166. *Id.* at 372 (internal citations omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–153 & n.4 (1938)).

167. *Id.* ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect . . .").

benefits merely because of their alienage conflict with national policies permitting residency in an area entrusted to the Federal Government, and thus (10) are not part of the normal legislative process.¹⁶⁸

On the other hand, under the political function exception, if state employment positions involve functions going to the heart of representative government then barriers against even legal resident aliens are given only rationality review. The reason is there is no similar (10) concern with legislative process where states are merely establishing their own form of government, and thus limiting the right to govern and exercise discretionary state power over others to persons who are full-fledged members of the political community.¹⁶⁹

Aliens who are illegally in the United States have been held entitled to protection under the Equal Protection and Due Process Clauses, as they are “persons” textually entitled to such protection, but such state regulations are typically subjected only to rationality review.¹⁷⁰ They have not been characterized as a suspect class because entry into the class is the result of (6) a voluntary criminal act, something for which individuals are responsible,¹⁷¹ and the presence in the United States (10) is not approved by the national government and thus such state laws do not conflict with national policies.¹⁷²

168. *Id.* at 377–78 (“Congress has not seen fit to impose any burden on restriction on aliens who become indigent after their entry into the United States. . . . State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.”).

169. *See* *Bernal v. Fainter*, 467 U.S. 216, 220–22 (1984); *Cabell v. Chavez-Salido*, 454 U.S. 432, 454 (1982); *Ambach v. Norwick*, 441 U.S. 68, 72–76 (1979) (using rationality review in all three cases for jobs part of representative democracy under “political functions” exception to strict scrutiny).

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

171. Thus, factor (6) does not apply in this kind of case. *See supra* text accompanying notes 98, 167.

172. Thus, factor (10) does not apply in this kind of case. *See supra* text accompanying note 168. Of course, there still might be in any individual case an argument for federal preemption of the state law as a statutory matter independent of constitutional review. *See* *Arizona v. United States*, 132 S. Ct. 2492, 2501–07 (2012) (holding 5–3 that federal immigration law preempted Arizona from enacting provisions making the failure to comply with federal alien-registration requirements a state misdemeanor, making it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona, and a provision authorizing state arrests for any individual if the officer has probable cause to believe the individual has committed some other offense that would make the individual removable from the United States); *Chamber of Com. of the U.S. v. Whiting*, 131 S. Ct. 1968, 1972–73 (2011) (emphasis added) (reasoning an Arizona’s requirement that every employer verify the employment eligibility of hired employees through a specific Internet-based was not preempted because the system fell within a “savings clause” in federal immigration law, which preempts “any State or local law imposing civil or

In *Plyler v. Doe*,¹⁷³ a case involving the rights of the children of illegal immigrants to attend public school, a 5–4 Court applied the intermediate scrutiny requirement of a substantial government interest, not rational review legitimate interest, to find Texas could not deny free public education to the children of illegal immigrants. The Court noted (6) children are not responsible for being in the country illegally, as that is a choice of the parents, and (8) not educating children within the state seemed to some justice's poor policy.¹⁷⁴

Similarly, in *Lewis v. Thompson*,¹⁷⁵ the Second Circuit considered part of the Welfare Reform Act of 1996 that denied for the first year after birth automatic eligibility to Medicaid benefits for citizen children of illegal alien mothers different than the automatic eligibility extended to the citizen children of citizen mothers. The plaintiffs contended the intermediate scrutiny applied in *Plyler* was appropriate because the discriminatory denial of automatic eligibility was imposed on the citizen children solely because of the unqualified alien status of their mothers.¹⁷⁶ The Court agreed, noting, “the Plaintiffs’ claim is stronger [than in *Plyler*] in that here it is asserted on behalf of citizen children, whereas the claimants in *Plyler* were alien children.”¹⁷⁷ Perhaps more simply, intermediate scrutiny was appropriate in *Lewis* because, as stated in *Plyler*, “imposing disabilities on the . . . child [in these circumstances] is contrary to the basic concept of our

criminal sanctions (*other than through licensing or similar laws*) upon those who employ . . . unauthorized aliens”).

173. *Plyer v. Doe*, 457 U.S. 202, 230 (1982). The four-Justice dissent would have applied minimum rationality review in the case. *Id.* at 242–43 (Burger, C.J., joined by White, Rehnquist & O’Connor, JJ., dissenting).

174. *Id.* at 220 (“[I]mposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))); *Plyer*, 457 U.S. at 221 (“[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”). The Court also analogized this case to cases involving illegitimate children, burdens on them also not the product of individual choice, and for whom intermediate review has been applied since 1977. *See infra* text accompanying notes 189–92. The majority in *Plyler* was composed of Instrumentalist Justices Brennan, Marshall, Blackmun, and Stevens, along with Natural Law Justice Powell. Justice O’Connor was in dissent in *Plyler*, but early in her tenure on the Court she was more of a Holmesian deference-to-government justice who later evolved into a Natural Law Justice. *See generally* KELSO & KELSO, *supra* note 26, at 395–397 nn.173–85.

175. *Lewis v. Thompson*, 252 F.3d 567, 590–92 (2d Cir. 2001).

176. *Id.* at 591.

177. *Id.*

system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”¹⁷⁸

Federal action with respect to aliens—whether by Congress, the President, or administrative agencies pursuant to validly delegated power—is tested using rational review.¹⁷⁹ Congress is primarily responsible for regulating the relations between the United States and aliens,¹⁸⁰ and so there is no concern here with (10) the legislative process overriding national policies. Further, the fact such regulations may implicate foreign relations also supports a deferential standard of review for Congressional or Presidential made decisions concerning regulation of aliens.¹⁸¹ As the Court noted in 1976 in *Mathews v. Diaz*,¹⁸² “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”

3. Gender Discrimination

In arguing for heightened scrutiny for gender discrimination, a 4-Justice plurality noted in *Frontiero v. Richardson*,¹⁸³

[S]ince sex, like race and national origin, is an [5] immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate [6] “the basic concept of our system that legal burdens should bear some relationship to individual responsibility”

In addition, the plurality noted, “[t]here can be no doubt that our Nation has had [7] a long and unfortunate history of sex discrimination.”¹⁸⁴ An

178. *Plyer*, 457 U.S. at 220 (quoting *Weber*, 406 U.S. at 175); see also *Lewis*, 252 F.3d at 591 (discussing penalizing children for the illegal conduct of their parents).

179. *Mathews v. Diaz*, 426 U.S. 67, 77–84 (1976).

180. *Id.* at 77–80.

181. See generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 853–63 (1987).

182. *Mathews*, 426 U.S. at 79–80.

183. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion of Brennan, J., joined by Douglas, White & Marshall, JJ.) (quoting *Weber*, 406 U.S. at 175).

184. *Frontiero*, 411 U.S. at 684. The plurality added:

Traditionally, such discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave

additional argument the plurality opinion made supporting the conclusion of (7) a history of discrimination based upon sexual stereotyping is that “Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”¹⁸⁵

Conversely, concern with gender discrimination was not (1) a core purpose of the Fourteenth Amendment, as it was for race.¹⁸⁶ Further, gender discrimination lacks the (4) discrete and insular minority argument with respect to women, as there is with respect to race, ethnicity, or national origin, as women comprise slightly more than 50% of the electorate.¹⁸⁷ The lack of support for heightened scrutiny from these factors supports the Court's eventual use of intermediate review for gender classification, as opposed to strict scrutiny for race, ethnicity, national origin, or, as the

codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself “preservative of other basic civil and political rights”—until adoption of the Nineteenth Amendment half a century later.

Id. at 684–85 (internal citations omitted).

The plurality also noted such discrimination was often based on false stereotypes, stating, “[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.” *Id.* at 686–87.

185. *Id.* at 687–88 (citations omitted). On this point, the plurality noted:

In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of “race, color, religion, sex, or national origin.” Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act “shall discriminate . . . between employees on the basis of sex.” And [Section] 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Id.

186. *See supra* text accompanying notes 89–91, 153–58 (emphasizing the Fourteenth Amendment's purpose to address racial discrimination).

187. *Cf. Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 704 (9th Cir. 1997) (questioning whether it makes sense “to apply ‘political structure’ equal protection principles” if burdened group is “a majority of the electorate”).

plurality opinion in *Frontiero* suggests, for gender discrimination.¹⁸⁸

4. Illegitimacy Discrimination

In *Trimble v. Gordon*,¹⁸⁹ the Court used the phrase “carefully tuned” and “carefully tailored,” which are similar to the “closely related” or substantially related language of intermediate scrutiny, to hold classifications based on illegitimacy are invalid under the Fourteenth Amendment if they are not so related to “permissible state interests.” Critical to applying this standard of review was the observation that illegitimate children (6) are not responsible for their status.¹⁹⁰ Further, there has been [7] a history of discrimination against illegitimate children.¹⁹¹ Also, (4) illegitimate children are not likely to be adequately protected in the political process.¹⁹²

5. Age Discrimination

The Court has consistently rejected heightened scrutiny for cases involving the elderly or children.¹⁹³ Support for this conclusion is drawn from the fact neither the elderly nor children were (1) among the original focus of the framers and ratifiers to protect;¹⁹⁴ the elderly are not (4) a discrete and insular minority groups without either direct ability to vote or participate in the political process,¹⁹⁵ or, for children, parents, including

188. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying intermediate review); *Frontiero*, 411 U.S. at 688 (applying strict scrutiny for gender discrimination and race discrimination).

189. *Trimble v. Gordon*, 430 U.S. 762, 772 & n.14 (1977).

190. See *id.* at 769–70 (1977) (noting “the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))).

191. *Id.* at 769 (“The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage.”).

192. Children, of course, have no right to vote on their own. While children are often viewed as adequately protected because of many special interest groups concerned with rights of children generally, see *infra* text accompanying note 194, since there are fewer number of illegitimate children, special interest groups are less likely to adequately protect their interests in the political process.

193. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–14 (1976) (holding elderly discrimination is not subject to strict scrutiny).

194. See *supra* text accompanying notes 144–46 (outlining discriminatory legislative action).

195. The elderly are the most reliable voting bloc and legislatures are quite responsive to their concerns. See *Murgia*, 427 U.S. at 313 (stating unlike other suspect classes, like racial minorities, the elderly are not “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))).

legislators who are parents, who will protect their interests as surrogates.¹⁹⁶ There does not exist (7) a strong or sustained pattern of discrimination based upon false stereotypes not truly indicative of their abilities;¹⁹⁷ and there are concerns about (8) scrutinizing legislative judgment, particularly regarding children, because as the Court often notes states have “greater latitude to regulate the conduct of children[,]” in part because the law has regarded “minors as having a lesser capability for making important decisions.”¹⁹⁸ There is also concern with (9) opening a Pandora’s box.¹⁹⁹ These arguments all outweigh any argument of (6) heightened scrutiny based on the status not being the product of individual choice.²⁰⁰

196. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472–73 n.24 (1985) (Marshall, J., concurring in part, dissenting in part) (“Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.”); Stuart N. Hart & Laura Thetaz-Bergman, *The Role of Nongovernmental Organizations in Implementing the Convention on the Rights of the Child*, 6 TRANS. L. & CONT. PROBS. 373, 379–90 (1997) (discussing a range of children’s advocacy groups both in the United States and around the world). *But see* Hiroharu Saito, *Equal Protection for Children: Toward the Childist Legal Studies*, 50 N. MEX. L. REV. 235, 252–53 (2020) (discussing children as politically powerless because of their inability to vote and age requirements to hold office).

197. See *Murgia*, 427 U.S. at 313 (“While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”). Most statutes involving children or the aged are uncontroversial as based on understandable concerns. *But see* Saito, *supra* note 196, at 254–55 (discussing “exaggerated negative stereotype of children”).

198. *Carey v. Population Servs., Inc.*, 431 U.S. 678, 693 n.15 (1977) (plurality opinion) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170–71 (1944)); *Ginsberg v. New York*, 390 U.S. 629, 637–43 (1968). *But see* Saito, *supra* note 196, at 255–66 (arguing society tends to underestimate children’s ability to make decisions, while overestimating the decision-making ability of adults).

199. See *Cleburne Living Ctr.*, 473 U.S. at 445–46 (noting a Pandora’s box problem with “the aging, the disabled, the mentally ill, and the infirm”).

200. Naturally, no one chooses to be a child or elderly; it is simply biology. *Cf.* Saito, *supra* note 196, at 268 (noting while both may seem equally immutable in this sense, since the majority of adults know they will one day become elderly, but they have outgrown their childhood, they are more likely “to empathize” with conditions for the elderly to “avoid imposing any future disadvantages on themselves.” Thus, the argument for childhood being a suspect class is stronger than the elderly on this factor).

6. Mental/Physical Disability Discrimination

Cases involving physical or mental disability also trigger rationality review.²⁰¹ As the Court noted in *City of Cleburne v. Cleburne Living Center*,²⁰² mental retardation is (6) not the product of the individual's choice, and sometimes is (5) an immutable characteristic. Many factors support applying minimum rationality review to classifications disadvantaging the mentally retarded, including: (4) such groups are not politically powerless—as demonstrated by effective lobbying groups on their behalf;²⁰³ the (7) lack of recent history of legislative discrimination against the disabled;²⁰⁴ (8) a concern with the ability of courts to scrutinize legislative decisions regarding the disabled, a “difficult and often a technical matter, very much a task for legislators guided by qualified professionals”;²⁰⁵ and a concern with (9) opening up a Pandora's box where the elderly, the infirm, and individuals at various levels of mental or physical disability²⁰⁶ would all claim grounds for heightened scrutiny.

7. Sexual Orientation Discrimination

Classifications involving sexual orientation currently trigger rationality review under the United States Constitution.²⁰⁷ This is true despite possible arguments regarding the fact sexual orientation appears not to be a lifestyle preference, but (5) a substantially immutable characteristic genetics and hormonal influences predominantly determine, and (6) not the product of individual choice,²⁰⁸ and (7) there is a history of discriminatory legislation

201. *Heller v. Doe*, 509 U.S. 312, 320–21 (1993); *Cleburne Living Ctr.*, 473 U.S. at 442–47.

202. *Cleburne Living Ctr.*, 473 U.S. at 442–47.

203. *Id.* at 445.

204. *Id.* at 443–45.

205. *Id.* at 442–43.

206. *Id.* at 445–46. Because some factors support heightened scrutiny, some Instrumentalist Justices, or Natural Law Justices with Instrumentalist leanings, like Justice Souter, see KELS0 & KELS0, *supra* note 26, at 400–02 nn.198–209, have suggested something higher than minimum rationality review should be used in cases of the mentally impaired. *See Heller*, 509 U.S. at 335–37 (Souter, J., dissenting).

207. *See, e.g., Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (“Because this court has not recognized sexual orientation as a suspect classification, [plaintiff's] claim is governed by rational basis review.” (citing *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006))).

208. *See generally* Jeffrey A. Kershaw, *Toward an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555, 580–93 (2005) (discussing and analyzing research concerning explanations of

based upon false stereotypes.²⁰⁹

Under state constitutions, some state supreme courts have ruled sexual orientation discrimination is a suspect class, triggering heightened scrutiny.²¹⁰ Another possible argument, as a practical matter, is discrimination based upon sexual orientation draws distinctions based upon sex, and thus should trigger intermediate review as a form of gender discrimination.²¹¹ Despite such arguments, the Supreme Court, and thus lower federal courts, subject cases of sexual orientation discrimination under the United States Constitution only to rationality review.²¹²

8. Wealth Discrimination

Wealth discrimination ordinarily triggers rationality review.²¹³ Support for this conclusion comes after noting wealth classifications: (1) were not

homosexuality); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 937–46 (1989).

209. See, e.g., *Pedersen v. Off. of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314–20 (D. Conn. 2012) (discussing the history of discriminatory legislation against gays and lesbians (in today's terminology LGBTQ+ individuals), while noting the discrimination “bears no relation whatsoever to an individual's ability to perform[.]” (citing *Equal Found. of Greater Cincinnati, Inc. v. Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994))).

210. See *In re Marriage Cases* [six consolidated appeals], 183 P.3d 384 (Cal. 2008) (applying strict scrutiny to sexual orientation cases); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 445–48 (Or. Ct. App. 1998); *State v. Wasson*, 842 S.W.2d 487, 499–502 (Ky. 1992). This view has also appeared in some dissenting state supreme court opinions. *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (Fairhurst, J., dissenting); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (Kaye, C.J., dissenting).

211. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (holding discrimination on the basis of sexual orientation is subject to intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Baehr v. Lewin*, 852 P.2d 44, 63–67 (Haw. 1993). Cf. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1756–57 (2020) (Alito, J., dissenting) (providing discrimination based on sexual orientation or transgender status qualifies as sex discrimination under Title VII of the 1964 Civil Rights Act).

212. See generally *Equal Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Nat'l Gay Task Force v. Bd. of Educ. of City of Okla. City*, 729 F.2d 1270 (10th Cir. 1984). In 1988, a Ninth Circuit panel did apply strict scrutiny to the Army's policy of discrimination related to sexual orientation in *Watkins v. United States*, 847 F.2d 1329 (9th Cir. 1988), but on en banc review the case was resolved on grounds of equitable estoppel preventing the government from failing to reenlist the individual in the case. *Watkins v. United States*, 875 F.2d 699 (9th Cir. 1989). Since *Watkins*, the Ninth Circuit has applied minimum rationality review in these cases. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563 (9th Cir. 1990).

213. See, e.g., *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.” (citing *James v. Valtierra*, 402 U.S. 137 (1971))). See generally CHEMERINSKY, *supra* note 15, at 819–21.

the original focus of the framers and ratifiers to protect;²¹⁴ the poor do not have a strong (4) discrete and insular minority group argument without the ability to vote and protect their interests in the political process;²¹⁵ there does not exist (7) a strong or sustained pattern of discrimination based upon false stereotypes not truly indicative of their abilities;²¹⁶ and real concerns about (8) second-guessing legislative judgment and (9) opening a Pandora's box in these kind of cases.²¹⁷ These reasons can be viewed to outweigh any argument of heightened scrutiny based on the condition of being poor (6) often not being the product of individual choice.²¹⁸

Despite this doctrine, the Court has applied strict scrutiny to substantial burdens on the poor in the context of exercise of a fundamental right.²¹⁹ For example, poll taxes that substantially burden the poor from exercising their fundamental right to vote trigger strict scrutiny;²²⁰ filing fees or fees for record preparation to permit an appeal trigger strict scrutiny if a

214. See *supra* text accompanying notes 153–58.

215. While there are barriers to full participation by the poor in the political process, depending upon exactly how “the poor” are defined, they are a larger pool of voters than historically black, Hispanic, or other racial or religious minority groups. *But see* Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect-Class Determinations and the Poor*, 104 CAL. L. REV. 323, 343–4 (2016) (“[P]oor’s lack of descriptive representation contributes to the poor’s lack of substantive representation[]” and as a “measure of political power, the Court should deem the poor a suspect class.”).

216. Most laws impacting the poor are based on accurate understandings of their impact on the poor. Parties disagree about whether tax policy is too favorable to the rich or not, but that is part of political debate, not any background assumption. *But see* Ross & Li, *supra* note 215, at 344 (reasoning the poor “have suffered a well-chronicled history of discrimination. This history includes prejudicial and exclusionary laws, social stigmatization of the poor, and broader social indifference about the needs of the poor.”).

217. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (citations omitted) (“The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.”). Most laws impact those without wealth more than those with wealth. This would open heightened scrutiny for almost all economic laws, and some social legislation. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40–44 (1973) (concern about whether “all local [or national] fiscal schemes become subjects of criticism” under strict scrutiny).

218. The poor may often be trapped in a system which makes it practically impossible for a large number to generate income. On the other hand, being poor is not (5) an immutable characteristic, as individuals can, and sometimes do, rise up and down the income scale. Note under the second-order reasonableness test of *Mathews v. Eldridge*, see *infra* text accompanying note 341, the Constitution does “impose . . . procedural safeguards upon systems of welfare administration.” *Dandridge*, 397 U.S. at 487 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

219. See *infra* text accompanying notes 220–22.

220. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666–70 (1966) (holding the Equal Protection Clause requires strict scrutiny where fundamental rights and liberties are at stake).

substantial burden is placed on the right of access to courts;²²¹ and financial burdens on welfare recipients that substantially burden the right to travel trigger strict scrutiny.²²² In contrast, because there is no fundamental right in the United States Constitution to equal public school educational funding, rational review applies for challenges to disparities in funding.²²³ On the other hand, under state constitutions, textual language guaranteeing rights to equal or efficient education may trigger some kind of heightened strict scrutiny.²²⁴

B. *Determining Whether Fundamental Rights Exist*

The doctrine of substantive due process has two parts: “enumerated” rights and “unenumerated” rights. Enumerated rights are those rights textually stated in the Constitution which are deemed fundamental.²²⁵ This includes virtually all the Bill of Rights from the First Amendment to the Eighth Amendment—except for the Fifth Amendment grand jury indictment in criminal cases and the Seventh Amendment right to jury trial in civil cases.²²⁶

Unenumerated rights include those rights which the Court has found are “implicit in the concept of ordered liberty,” even though not textually stated in the Constitution.²²⁷ One justification for this branch of fundamental rights is the Ninth Amendment. The Ninth Amendment provides, “[t]he enumeration in the Constitution, of certain rights, shall not be construed to

221. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 113–20 (1996) (discussing precedent where the indigent are entitled to counsel).

222. See, *Maricopa Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 253–70 (1974) (discussing the implications of interstate and intrastate travel bans on the indigent); *Shapiro v. Thompson*, 394 U.S. 618, 634–38 (1969).

223. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–44 (1973) (outlining the Court’s reasoning for not recognizing less affluent families as a suspect class).

224. See generally *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *McDuffy v. Sec’y of Educ.*, 615 N.E.2d 516 (Mass. 1993). See also R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125 (2004) (providing extensive review of state court decisions).

225. See generally CHEMERINSKY, *supra* note 16, at 826.

226. See KELSO & KELSO, *supra* note 27, at 643–44.

227. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (observing the Due Process Clause protects fundamental rights and liberties that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty”).

deny or disparage others retained by the people.”²²⁸ This text, taken literally, does not itself create rights. Instead, the text states a rule of constitutional interpretation calling upon those who construe the Constitution to recognize the people have retained some rights not specified by the Constitution.²²⁹ From this perspective, the Ninth Amendment is a reminder of the background natural law theory that animated the Constitution’s drafting—individuals have natural rights the government is created to protect.²³⁰

One concern Madison and other founders had in drafting the Bill of Rights was that under the maxim of construction, *expressio unius est exclusio alterius* (the expression of one thing implies exclusion of others), the enumeration of certain rights in the Bill of Rights may suggest the federal government had plenary power over all other matters.²³¹ As Justice Joseph Story wrote in 1833:

[The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and *é converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.²³²

228. U.S. Const. Amend. IX. On the Ninth Amendment, see generally CHEMERSINKY, *supra* note 16, at 828 (stating the Ninth Amendment functions as a protector of unenumerated rights rather than granting rights).

229. As previously noted, “The Founding generation disagreed about many things, but the existence of natural rights was not one of them. From James Madison to Roger Sherman, from *The Federalist Papers* to the Antifederalist papers, both supporters and opponents of the Constitution repeatedly affirmed their shared belief in natural rights.” Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074–75 (1991) (citations omitted).

230. On this natural law background, see generally David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee*, 16 S. ILL. U. L.J. 313 (1992); Randy Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 CHI. L. REV. 1127 (1987).

231. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 619 n.92 (2005).

232. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 619 (2005) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898 (Fred B. Rothman & Co. 1991) (1833)).

The classic definition of what rights are “implicit in the concept of ordered liberty” occurred in *Palko v. Connecticut*,²³³ where Justice Cardozo asked whether the right is “so rooted in the traditions and [collective] conscience of the people as to be ranked as fundamental.” In *Griswold v. Connecticut*,²³⁴ Justice Goldberg said such rights derive “from experience with the requirements of a free society.”²³⁵ In *Bowers v. Hardwick*,²³⁶ Justice White asked whether the right is “deeply rooted in this Nation’s history and tradition.”

The definition of fundamental rights has two separate branches. As Chief Justice Rehnquist phrased in *Washington v. Glucksberg*,²³⁷ the two branches of what rights are “implicit in the concept of ordered liberty” are “[1] those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or [2] so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.”²³⁸ In general, formalist and Holmesian judges, as positivists, rely more on history and traditions in their development of fundamental rights. This is true for formalist judges,²³⁹ who focus on historical traditions at the time of a constitutional provision ratification. It is also true for Holmesian judges,²⁴⁰ whose deference-to-government predisposition, suggests fundamental rights should emerge from legislative and executive traditions, not court action. Natural Law²⁴¹ and

233. *Palko v. Connecticut*, 302 U.S. 319 (1937).

234. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

235. *Palko*, 302 U.S. at 325–26 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

236. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

237. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

238. *Id.* at 721, 727.

239. See *Lawrence v. Texas*, 539 U.S. 558, 592–95 (2003) (Scalia, J., dissenting) (discussing an originalist approach to deciding on substantive and fundamental rights); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (stating in determining fundamental rights the Court should consider “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 692–97 nn.122–52 (1997).

240. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., dissenting) (arguing in favor of legislative or executive action basis for fundamental rights); Benjamin N. Smith, Note, *Using Popular Referendums to Declare Fundamental Rights*, 11 B.U. PUB. INT. L.J. 123, 124 (2001) (discussing the role of popular referendum in determining fundamental rights).

241. See *Lawrence*, 539 U.S. at 578–79 (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once

Instrumentalist²⁴² judges are more willing to embrace the second branch of fundamental rights analysis concerning evolving standards of “conscience” and “requirements of a free society,”²⁴³ as the judges perceive these to have developed over time, and thus create a greater concern opening up a Pandora’s box of newly created rights.

C. *First Amendment Free Speech Considerations*

The standards of review used in First Amendment cases are relatively stable. While there are issues surrounding certain aspects of the doctrine,²⁴⁴ these are the kind of ordinary disagreements among members of the Court, or lacunae in existing doctrine, that do not undermine the basic predictability of free speech doctrine. Under modern doctrine regarding the freedom of speech, the Court distinguishes between content-based regulations involving viewpoint discrimination versus content-based regulations involving only subject-matter or topic discrimination.²⁴⁵ Viewpoint discrimination occurs when government action is triggered depending on which side of a topic the individual supports.²⁴⁶ Subject-matter or discrimination occurs when government action is triggered whenever a topic or subject-matter is discussed without regard to the

thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”); *see also Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring) (refusing to join Justice Scalia’s limitation on identifying fundamental right noted at *supra* note 237).

242. *See Michael H.*, 491 U.S. at 137–41 (Brennan, J., dissenting) (rejecting Justice Scalia’s limitation on identifying fundamental rights noted at *supra* note 239 in favor of “the living charter that I have taken to be our Constitution”); *see also* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 441–42 (1986) (exploring the obligation of Article III judges to speak for the current community in constitutional interpretation).

243. Brennan, Jr., *supra* note 242, at 442.

244. As noted *supra* text accompanying notes 73–76, explicit acknowledgement of the seven levels of judicial review would benefit a range of free speech issues. There are also a few issues focused on viewpoint discrimination. *See* R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 401–02 (2019) (outlining content-based versus content-neutral regulations); *id.* at 402–05 (determining whether viewpoint discrimination triggers strict scrutiny or whether it is categorically barred); *id.* at 406–07 (providing an overview of scrutiny issues in grant and subsidy cases); *id.* at 408–18 (providing an overview of scrutiny issues in school cases).

245. *See* CHEMERINSKY, *supra* note 16, at 1014 (“The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject matter neutral.”).

246. *Id.* at 1014 (citing Amy Sabin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993) (“Viewpoint neutral means that the government cannot regulate speech based on the ideology of the message”)).

person's views on that topic or subject-matter.²⁴⁷ While any form of content-based discrimination is troubling,²⁴⁸ viewpoint discrimination is a more troublesome form of content discrimination because it involves the government taking sides in a debate.²⁴⁹

The level of scrutiny given to content-based regulations varies depending on whether the regulation operates in a public forum, on private property, or in a government-owned nonpublic forum.²⁵⁰ Classic examples of public fora are places like public streets and public parks, which "have immemorially been held in trust for the use of the public."²⁵¹ Classic examples of government-owned nonpublic fora are places like prisons or military bases.²⁵² The Court has also discussed what are called "designated" or "limited" public forums. Where the forum has been designated as opened to the public for some purposes, speech regulations relating to those purposes trigger public forum standards.²⁵³ If the forum has been limited to the public, and thus closed for other purposes, nonpublic forum

247. CHEMERINSKY, *supra* note 16, at 1015 (citing Sabin, *supra* note 246, at 1217 ("Subject matter neutral means that the government cannot regulate speech based on the topic of the speech.")); *see also* *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The prohibition [on discussion of nuclear power in bill inserts], the Commission contends, is [constitutional because it is] related to subject matter rather than to the views of a particular speaker. . . . The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

248. *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim Bd.*, 502 U.S. 105, 116, 118 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. . . . In order to justify such differential treatment, 'the State must show that is regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" (quoting *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987))).

249. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

250. *See* Kelso, *supra* note 73, at 293–316.

251. *See, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

252. *See, e.g.*, *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (holding the Constitution permits the government to use its own property for "its own lawful discriminatory purpose[.]" in the prison context); *Greer v. Spock*, 424 U.S. 828, 836–40 (1976) (opining military bases are not traditional public forums).

253. *Perry Educ. Ass'n*, 460 U.S. at 45–46 ("The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . . Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

standards apply to regulations related to those limited purposes.²⁵⁴

In terms of ordinary First Amendment review, regulations of speech involving viewpoint discrimination receive strict scrutiny review, no matter where the speech occurs.²⁵⁵ Strict scrutiny also applies in a public forum or on private property for content-based, subject-matter regulations of speech (i.e., those content-based regulations not involving viewpoint discrimination).²⁵⁶ In contrast, regulations of speech in a public forum or on private property that are content-neutral receive intermediate review.²⁵⁷ This intermediate standard was stated in *Ward v. Rock Against Racism*,²⁵⁸ where Justice Kennedy said for the Court:

Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions '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 information.'²⁵⁹

For government action in a nonpublic forum, free speech review is much different. While viewpoint discrimination still triggers strict scrutiny, subject-matter regulations of speech or content-neutral regulations of

254. *Id.* at 46 (“[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”).

255. *See* *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993) (finding strict scrutiny applies in a limited public forum opened to public); *see also Perry Educ. Ass’n*, 460 U.S. at 48–49 (finding strict scrutiny for viewpoint discrimination even in a nonpublic forum); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385–92 (1992) (holding viewpoint discrimination triggers strict scrutiny even in a case involving fighting words not otherwise protected by the First Amendment). As discussed in *Kelso*, *supra* note 244, at 402–05, in some recent public forum cases the Court has suggested that viewpoint discrimination is categorically barred, rather than triggering a strict scrutiny analysis.

256. *United States v. Alvarez*, 567 U.S. 709, 724–33 (2012); *Boos v. Barry*, 485 U.S. 312, 321–22 (1988). Because it is as intrusive, if not more intrusive, to regulate speech on an individual’s own private property as opposed to regulating speech in public fora, government action regulating speech on an individual’s private property triggers the same heightened scrutiny as regulating speech on public fora. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 48–51 (1994) (explaining an ordinance regulating signs on private property triggers same free speech review as regulation of signs on public property in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)).

257. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (reinforcing the Court’s approach to analyzing content-neutral municipal ordinances under intermediate scrutiny).

258. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

259. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

speech receive only reasonableness review. As the Court stated in *Minnesota Voters Alliance v. Mansky*,²⁶⁰ “[t]he government may reserve such a [nonpublic] forum ‘for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.’”

D. *Other Constitutional Doctrines*

A number of constitutional doctrines change the standard of review depending on the extent to which under factor (10) the Court becomes more of less suspicious of the legislative or executive action.²⁶¹ For example, in every Dormant Commerce Clause cases, the Court is somewhat suspicious of legislative action burdening interstate commerce because state legislatures, whom in-state citizen participate in electing, may have a political predisposition for advancing local state parochial interests to the detriment of the national interest.²⁶² Thus, in every Dormant Commerce Clause case courts determine the extent of the legitimate purposes and whether the means reflect a clearly excessive burden on interstate commerce.²⁶³ The Court’s concerns increase regarding state action because it involves facial discrimination against interstate commerce or involves a discriminatory state purpose. As a result, the Court increases the level of

260. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018). There is also a question of who has the burden to prove the forum is a public forum or nonpublic forum, or whether viewpoint discrimination or content-neutral regulation exists. On this issue, see Kelso, *supra* note 244, at 372–75. In some cases, no free speech review applies. This occurs for regulation of conduct only, see R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, a “Reasonableness” Balancing*, 8 ELON L. REV. 291, 323–24 (2016) (explaining First Amendment analysis does not extend to conduct); the government funding its own speech, including generic government advertising, or enlisting parties to convey the government’s message, *id.* at 317–23; or non-viewpoint discrimination involving advocacy of illegal conduct, true threats, fighting words, obscenity, or indecent photographing of children, *id.* at 324–36, 341–53.

261. For a discussion of factor (10), see *supra* text accompanying notes 103–06.

262. See *supra* text accompanying note 103.

263. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 476 n.2 (1981) (Powell, J., concurring in part and dissenting in part) (noting Commerce Clause analysis empowers courts to disregard “legislature’s statement of purpose if it considers it a pretext.”); *Kassel v. Consol. Freightways Co.*, 450 U.S. 662, 670–71 (1981); *id.* at 691–93 (Rehnquist, J., dissenting) (reasoning if traffic safety law is not merely a pretext for discrimination, the Court should ask only whether it is rational). As the district court made these factual conclusions, they are entitled to deference on appeal and subject to being reversed on appeal only if they are “clearly erroneous.” See *Maine v. Taylor*, 477 U.S. 131, 144–46 (1986) (explaining the district court’s factual findings are reversible only if they are clearly erroneous in the instant case).

scrutiny from the second-order reasonableness balancing test of *Pike v. Bruce Church, Inc.*,²⁶⁴ to the higher level of scrutiny *Maine v. Taylor*²⁶⁵ involved.²⁶⁶

Under the Contract Clause, the Court applies rationality review to standard state regulations which substantially burden, retroactively, the enforceability of contracts, as in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*²⁶⁷ In contrast, the Court applies second-order reasonableness balancing for Contract Clause cases involving a narrow range of actors, as in *Allied Structural Steel Co. v. Spannaus*,²⁶⁸ or for impairing the obligations of the state's own bonds, as in *U.S. Trust Co. of New York v. New Jersey*.²⁶⁹ For normal Takings Clause cases, the Court applies second-order reasonableness balancing articulated in *Penn Central Transportation Co. v. City of New York*.²⁷⁰ However, where the Court is more suspicious of legislative or executive action is when an individual is singled out for individualized

264. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

265. *Maine v. Taylor*, 477 U.S. 131 (1986).

266. See KELSO & KELSO, *supra* note 26, at 402–03 nn.209–16 (noting while the better view is facial discrimination against interstate commerce, such as in *Maine v. Taylor*, 477 U.S. 131, 144–46 (1986), merely adopts a third-order reasonableness balancing approach where the government now has the burden to justify its regulation. Some courts have suggested the “virtual per se” invalidity language in cases such as *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978), means the standard is strict scrutiny, despite no requirement of compelling interests, but only legitimate interests to regulate.

267. *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412–13 n.14 (1986) (providing when a state is not a contracting party “[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” (quoting *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977))). Note under modern Contract Clause review, even this rationality kind of review is only triggered if the state regulation is a “substantial burden” on Contract Clause rights. In the absence of a substantial burden there is no Contract Clause review at all. *Energy Rsrvs. Grp.*, 459 U.S. at 411–12 (1986). Although there would naturally be rational review analysis under Equal Protection and Due Process analysis as for any general social or economic regulation.

268. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

269. *U.S. Tr. Co. of N.Y.*, 431 U.S. 1 (1977). On these Contract Clause cases, see generally KELSO & KELSO, *supra* note 26, at 957–59 nn.26–33; Kelso, *supra* note 2 (manuscript at 45–46 nn.269–72) (citing cases discussing Contracts Clause analysis requirements).

270. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123–38 (1978) (holding no takings because zoning law permitted “reasonably beneficial use” of the property). As the Court recognized in *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), the Court balances under *Penn Central* the burden on the individual in terms of “the economic impact of the regulation [and] its interference with reasonable investment backed expectations [burdens], the character of the government action [government action in light of alternatives] and the benefits of the government action [benefits]” to determine whether given this balance, including whether the individual is left with a reasonable rate of return on the investment, the burden represents a substantial burden on Takings Clause rights. See generally *Palazzolo*, 533 U.S. at 617–34 (O’Connor, J., concurring).

administrative action, the Court switches to third-order reasonableness balancing of *Dolan v. City of Tigard*.²⁷¹

A similar third-order reasonableness balancing test was applied in *Boerne v. Flores*.²⁷² For Instrumentalist Justices who are not as concerned about Congress using its power under section 5 of the Fourteenth Amendment, only a rationality review approach is used to test Congress' power under section 5, as in *Katzenbach v. Morgan*.²⁷³

Finally, when concerned with excessive punitive damage awards under due process, the Court applies a second-order reasonableness balancing approach under *BMW v. Gore*.²⁷⁴

V. JUSTIFICATION FOR USING LEVELS OF REVIEW

A. *Tiers of Review Versus Single-Standard Alternatives*

There are four versions of a single standard of review separate from the existing levels of review. They are: (1) a flexible sliding scale approach; (2) a flexible rational review approach; (3) a proportionality approach; and (4) proportionality review under international law. Despite surface differences between the existing approach and the single standard approaches, all approaches use the same building blocks in developing the relevant standard of review.²⁷⁵ Each standard is based on a means/end

271. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). On these Takings Clause cases, see generally KELSO & KELSO, *supra* note 26, at 375–378 nn.87–103; Kelso, *supra* note 2 (manuscript at 43–44 nn.277–80; 49 nn.303–04).

272. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (“[T]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect”). The burden seems to be on Congress to prove this connection. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (“[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”). The “congruence and proportionality” test seems similar to the “rough proportionality” in *Dolan* Takings Clause cases. See *supra* note 265 and accompanying text.

273. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

274. *BMW v. Gore*, 517 U.S. 559, 575–85 (1996); see *Katzenbach*, 384 U.S. at 650 (adopting minimum rationality review to test Congress’ power under § 5 of the Fourteenth Amendment by adopting “appropriate legislation” language from *McCulloch v. Maryland*, 17 (4 Wheat.) 316, 421 (1816), used in *Ex Parte Virginia*, 100 U.S. 339, 345–46 (1879)). On this issue, see generally KELSO & KELSO, *supra* note 26, at 362–367 nn.31–58; Kelso, *supra* note 2 (manuscript at 53–54 nn.327–334).

275. See generally R. Randall Kelso, *United States Standards of Review Versus the International Standard of Proportionality: Convergence and Symmetry*, 39 OHIO N. L. REV. 455, 457–66 (2013) (dissecting each approach and finding they share many similarities in their construction and application).

analysis, focusing both on the ends the government is seeking to advance and the means used to advance those ends.²⁷⁶ Each standard focuses on the extent to which the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate.²⁷⁷ Each standard analyzes whether the government's interests are strong enough to justify the burden on individual rights.²⁷⁸

1. Flexible Sliding Scale Approach

In *San Antonio Independent School District v. Rodriguez*,²⁷⁹ Justice Marshall noted in dissent:

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.²⁸⁰

Instead of supporting explicit creation of a range of levels of review between rational review and strict scrutiny, Justice Marshall advocated for what has come to be called a sliding scale approach.²⁸¹

In Justice Marshall's words, the sliding scale approach “comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized

276. *Id.* at 457–60 (discussing “how strong the government end has to be to justify the regulation and how well the means have to be drafted to achieve that end.”).

277. *Id.* at 460–63 (discussing “whether the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate.”).

278. *Id.* at 463–66 (discussing “whether the marginal benefit of the government regulation to advance the legitimate public interest is greater than the marginal burdens on the individual.”).

279. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

280. *Id.* at 98–99.

281. See generally Angelo Guisado, *Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 NEB. L. REV. 1, 27 (2013) (discussing with approval Justice Marshall's “sliding scale” approach); see also Leslie Freidman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372, 382 (2002) (containing a similar discussion on the sliding scale standard).

invidiousness of the basis upon which the particular classification is drawn.”²⁸² Justice Marshall then added:

I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which “concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”²⁸³

2. Flexible Single Rational Review Standard

Justice Stevens noted in *City of Cleburne v. Cleburne Living Center*,²⁸⁴

“I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.” . . . In my own approach to these cases, I have always asked myself whether I could find a “rational basis” for the classification at issue.

This version of rational review differs from the standard version of deferential rationality review stated in cases like *Heller v. Doe*.²⁸⁵ As Justice Stevens indicated in *Cleburne*,

The term “rational,” of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word “rational”—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.²⁸⁶

282. *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting).

283. *Id.* (alteration in original) (quoting *Dandridge v. Williams*, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting)).

284. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (alteration in original) (internal citation omitted) (quoting *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring)).

285. *Heller v. Doe*, 509 U.S. 312 (1993).

286. *Cleburne Living Ctr.*, 473 U.S. at 452. Justice Stevens continued:

In addition, Justice Stevens noted,

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a “tradition of disfavor” by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?²⁸⁷

How to balance all these considerations is not discussed by Justice Stevens. He did say in *Cleburne*:

The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an “intermediate standard of review” in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.²⁸⁸

As discussed below, absent a more fully developed theory of how to apply Justice Stevens’ questions in these sorts of cases, the current system of defined levels of scrutiny to guide lower court decision making is a more predictable decision making framework.²⁸⁹

3. Proportionality Review Under American Doctrine

In several cases, Justice Breyer has pushed for what he calls “proportionality review” for cases not involving rationality review or strict scrutiny. As he noted in *United States v. Alvarez*,²⁹⁰

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen’s willingness or ability to exercise that civil right.

Id. at 452–53.

287. *Id.* at 453.

288. *Id.* at 453–54.

289. See *infra* text accompanying notes 317–22.

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

Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as “strict scrutiny” implies) nor near-automatic approval (as is implicit in “rational basis” review).²⁹¹

He added, “I have used the term ‘proportionality’ to describe this approach.”²⁹²

In discussing this approach, Justice Breyer noted that in deciding several such cases:

[T]his Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.²⁹³

However, in the cases Justice Breyer cited as indicative of this approach; the Court explicitly adopted different tests to what is required to satisfy the appropriate standard of review.

To pretend all the cases involved the same analysis is erroneous. The cases Justice Breyer cited as evidence of this proportionality review involve levels of scrutiny from the second-order reasonableness of *Burdick v. Takushi*;²⁹⁴ to third-order reasonableness of *Pickering v. Board of*

291. *Id.* at 731 (Breyer, J., concurring).

292. *Id.* at 731 (Breyer, J., concurring) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 536–37 (2001) (Breyer, J., concurring); and then *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402–03 (2000) (Breyer, J., concurring)).

293. *Alvarez*, 567 U.S. at 709.

294. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (discussing the standards of review applicable in an election regulation case), *discussed in*, Kelso, *supra* note 2 (manuscript at 13–16 nn.79–96); *Pickering v. Bd. of Ed.* 391 U.S. 563, 568 (1968) (concerning the standards of review applicable in a government employee speech case), *discussed in*, Kelso, *supra* note 2 (manuscript at 51–52 nn.307–14); *Cen. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 566 (1980) (examining the standard applicable to non-misleading commercial speech), *discussed in*, Kelso, *supra* note 4 (manuscript at 32–36 nn.207–34); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–52 (1994) (considering the standard applicable in a “must-carry” cable regulations case), *discussed in*, Kelso, *supra* note 5 (manuscript at 53–54 nn.327–34).

Ed.;²⁹⁵ to standard intermediate review, *United States v. O'Brien*,²⁹⁶ to the heightened intermediate review of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*;²⁹⁷ to possible “loose strict scrutiny” in *Turner Broadcasting System, Inc. v. FCC*.²⁹⁸ It is not useful to pretend each of these different standards of review all involve the same level of analysis.

4. Proportionality Review Under International Law

Rights review in constitutional courts around the world tend to make use of one basic approach: proportionality.²⁹⁹ There are three basic steps to proportionality analysis: (1) *suitability*, which examines whether the government action is rationally related to a legitimate government interest; (2) *necessity*, which asks whether the government has used the least restrictive means to advance its goals, in order to ensure that the government does not burden the right more than is necessary for the government to achieve its goals; and (3) *balancing* “*stricto sensu*,” which asks whether the marginal benefit of the government regulation to advance the legitimate public interest is greater than the marginal burden on the individual.³⁰⁰ Some courts use a preliminary “fourth step” entitled “*legitimacy*”.³⁰¹ Under this step, the “judge confirms that the government is constitutionally-authorized to take such a measure” before continuing to apply the suitability, necessity, and balancing steps of the analysis.³⁰² From an analytic perspective, this inquiry into legitimacy is best understood as part of the suitability inquiry into whether the government is rationally advancing a legitimate government interest, rather than being viewed as an independent inquiry.³⁰³

295. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

296. *United States v. O'Brien*, 391 U.S. 367 (1968).

297. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557 (1980).

298. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

299. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L 72, 74 (2008) (summarizing the material discussed in Kelso, *supra* note 269, at 456–57, 496–97).

300. Sweet & Mathews, *supra* note 299, at 75–76.

301. *Id.* at 75.

302. *Id.*

303. *Id.* at 75 n.8. It should be noted that if both a “legitimacy” and “suitability” analysis are done, it does not matter whether they are conceived as two separate steps, or as part of one rational basis means/end. *Id.* at 74.

A more detailed discussion of proportionality analysis would note, at minimum, there are two kinds of narrow tailoring analysis³⁰⁴ and two kinds of *stricto sensu* balancing.³⁰⁵ The gives four possible proportionality approaches: (1) loose narrow tailoring and loose balancing; (2) loose narrow tailoring and strict balancing; (3) strict narrow tailoring and loose balancing; and (4) strict narrow tailoring and strict balancing.

Perhaps the adoption of an approach in the middle of the America standards of review would be the best approach for one consistent proportionality analysis. This would adopt the looser or intermediate review form of narrow tailoring analysis, but the stricter “marginal benefit is greater than marginal burden” approach for *stricto sensu* balancing. A rigorous strict scrutiny kind of least restrictive alternative test is perhaps too restrictive on needed government discretion in many cases. Truly does it make sense for courts to second-guess government decision making in every case by requiring the government to prove the government used the least burdensome alternative in every case? In contrast, requiring the government to eschew an approach substantially more burdensome than necessary, and thus not to be on the end of being the most burdensome kind of regulation, seems a more appropriate of a standard if one uniform standard for every case is desirable. On the other hand, once the government has done this, the government should have the responsibility to show the benefits of the regulation truly outweigh the burdens. This kind of proportionality analysis would thus be slightly more rigorous than third-order American rationality review (because it would have an intermediate narrow tailoring component), but less vigorous than American intermediate review (since it would have third-order reasonableness balancing, not a requirement that the government be substantially advancing important or substantial interests, not merely legitimate interests).³⁰⁶

304. See Kelso, *supra* note 275, at 460–62 (discussing *strict* “narrow tailoring” similar to strict scrutiny’s “least restrictive alternative” approach versus *loose* intermediate review’s “not substantially more burdensome than necessary” approach).

305. *Id.* at 463–64 (discussing *strict stricto sensu* balancing to ensure “the marginal benefit of the government regulation . . . is greater than the marginal burden on the individual” versus *loose* balancing that seeks to ensure “no factor of significance to either side has been overlooked.”).

306. See *id.* (explaining such an approach would provide greater structure to current international proportionality analysis, which would be beneficial). See generally Stefan Sottiaux & Gerhard van der Schyff, *Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights*, 31 HASTINGS INT’L. & COMP. L. REV. 115, 115–17 (2008). But this approach rejects any view that *stricto sensu* balancing should not be part of the proportionality test. See Georg Nolte, *Thin or Thick? The Principle of Proportionality and International*

B. *Benefits and Drawbacks of Each*

1. Benefits of Single Standard over Tiered Standards of Review

Several benefits exist with single standards of review. For example, as has been noted about the single-standard international proportionality analysis (PA), “PA offers judges the possibility of building trans-substantive coherence, since it can be applied across the board, to virtually all disputes involving rights.”³⁰⁷ “[E]mbracing PA is a low-cost move, compared to the costs of developing an untested alternative PA is a simple but comprehensive doctrinal structure, which facilitates diffusion. Lawyers, law students, and judges can learn the basics quickly and deploy the framework with ease”³⁰⁸ To use PA, one does not need the entire superstructure developed under American constitutional doctrine to decide what test to use in any case, with seven kinds of scrutiny³⁰⁹ based on consideration of ten factors to determine the level of review.³¹⁰

Further, because single standard would apply to every case, it likely would provide more stringent review of ordinary social and economic regulation than under American rationality review.³¹¹ For persons supportive of court review of individual economic rights this is a benefit. For example, in *Williamson v. Lee Optical of Oklahoma*,³¹² the Court upheld a regulation requiring a prescription from an optometrist before getting an optician to make a new lens.³¹³ Under American rationality review, this was upheld as being rationally related to a legitimate interest in ensuring regular eye exams, even if unnecessary in many cases.³¹⁴ Under international proportionality review, this regulation is unlikely to survive the narrow tailoring requirement that the government use the least restrictive means, or at least means not

Humanitarian Law, 4 L. & ETHICS HUM. RGTS. 243, 248–49 (2010) (arguing *stricto sensu* balancing should not be part of proportionality analysis because, it is alleged, it places the judge more in the role of a legislator balancing public policy considerations, rather than in the role of a judge).

307. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 807 (2011).

308. *Id.* at 808.

309. *See supra* text accompanying notes 15–30.

310. *See supra* text accompanying notes 83–106.

311. Mathews & Sweet, *supra* note 307, at 807.

312. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 491 (1955).

313. *Id.* at 491.

314. *Id.* at 487–88.

substantially more burdensome than necessary, to advance its goal.³¹⁵ The regulation might not even survive *strictu sensu* balancing, as the minimal benefit of the regulation might not be greater than the burden on opticians and their customers.³¹⁶

2. Benefits of American Tiers of Scrutiny over Single Standards of Review

While single standards thus have several benefits, single standards provide little guidance for American lower courts faced with resolving constitutional disputes in various settings, which may call for greater or less deference to government in various contexts. This is particularly true given growth in lower federal courts' dockets, which makes it "essentially impossible for the [Supreme] Court to engage in meaningful 'error correction.'"³¹⁷

In addition, the ease of application of a single standard is overstated. Under Justice Marshall's approach, you must consider "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."³¹⁸ For Justice Stevens, the issues relate to the legitimacy and neutrality of the regulation, including considering what "class is harmed by the legislation," has it been subjected to a "tradition of disfavor" by our laws, what "public purpose" is served by the law, and what is "the characteristic of the disadvantaged class that justifies the disparate treatment."³¹⁹ For Justice Breyer, consider "the seriousness" of the harm, the "nature and importance of the provision's countervailing objectives," the "extent to which the provision will tend to achieve those objectives," and whether "there are other, less restrictive ways of doing so."³²⁰ Under the tiers of

315. See Mathews & Sweet, *supra* note 307, at 838–41 (discussing *Williamson v. Lee Optical of Okla., Inc.* from this perspective). See also note 304 and accompanying text (discussing whether the international narrow tailoring requirement is more like American strict scrutiny or intermediate review).

316. Mathews & Sweet, *supra* note 307 at 842–43. See Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 INT'L J. CONST. L. 56, 82–86 (2004) (comparing European "right to commerce" law with post-1937 American deference to economic regulations under the *Carolene Products* and *Lee Optical* doctrine).

317. Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 996 (2000).

318. *Rodriguez*, 411 U.S. at 99; see *supra* text accompanying notes 275–76.

319. See *supra* text accompanying notes 286–87.

320. See *supra* text accompanying note 293.

review, the Court has structured considerations relating to such matters as *legitimacy*, a *tradition of disfavor*, the *seriousness of the harm*, or *characteristic of the disadvantaged class* and provided guidance to lower courts how stringently to review the legislation.³²¹ Leaving everything to an *ad hoc* balancing in every case promotes neither stability nor predictability in the law.

Furthermore, American strict scrutiny tends to ensure a higher level of review than any of the forms of a single standard of review. For persons supportive of court review of individual rights in those areas triggering strict scrutiny that can be a real advantage. For example, First Amendment freedom of speech protections, even in the context of hate speech, is vigorous in America, more so than hate speech regulation in Europe.³²²

VI. STANDARDS OF REVIEW AND COMMITMENT TO REASONED DECISION MAKING

“Justice Kennedy has remarked, ‘[R]eason, which is the distinguishing mark of the human race, must be embodied in the law if our civilization is to aspire to excellence.’”³²³ More precise attention to elements of standards of review for rational basis and reasonableness balancing would make them more reasoned, predictable, and scientific.³²⁴ The same thing is true for

321. On *legitimacy*, see *supra* text accompanying notes 94, 103–06 on process concerns of factor (3) and (10) on whether the legislative process can be trusted, and *supra* text accompanying notes 96–98 on substantive factors on (5) immutable characteristics and (6) not the product of individual choice. On *tradition of disfavor*, see *supra* text accompanying note 99 on factor (7) history of discrimination. On *seriousness of the harm*, see *supra* text accompanying notes 89–93 on factor (1) on constitutional text, purpose, and history and factor (2) on fundamental rights. On *characteristic of the disadvantaged class*, see *supra* text accompanying notes 95 on factor (4) and its focus on discrete and insular minorities. Factors (8) on judicial competence and factor (9) on Pandora’s box concerns are sensible additional concerns with judicial review not particularly well-captured by any of the single standards of review. See *supra* text accompanying notes 100–02.

322. See generally John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006).

323. Anthony Kennedy, Assoc. Just. of the Sup. Ct. of the U.S., Commencement Address at Univ. of the Pacific, McGeorge Sch. of L. (May 21, 1988), cited in KELSO & KELSO, *supra* note 26, at 157 n.97; see also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690–93 (1984) (“[G]overnment action” must reflect something other than “raw political power . . .”). This principle is based on eighteenth-century natural law Enlightenment commitment to “reason” and “reasoned elaboration of the law.” See KELSO & KELSO, *supra* note 26, at 157 nn.96–97; 367–69 nn.60–70. See generally THE FEDERALIST NO. 78 (Alexander Hamilton) (stating the federal judiciary lacks ultimate “influence over either the sword or the purse,” and thus “may truly be said to have neither FORCE nor WILL but merely judgment.”).

324. See Kelso, *supra* note 2 (“*The Structure of Rational Basis and Reasonableness Review*”).

intermediate review³²⁵ as it is for strict scrutiny.³²⁶ Additional elements of reasoned decision making involving all elements of review are discussed below.

A. *Rationality Review: Legitimate Versus Illegitimate Interests*

One aspect of modern standards of review doctrine is that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”³²⁷ In a sequence of cases, the Court applied this principle to both federal and state action involving various kinds of discrimination.³²⁸ The idea behind these cases is that irrational hostility toward a particular group cannot be used to satisfy even rationality review.³²⁹

Judges more willing to defer to historical or traditional attitudes are willing to count irrational prejudices as legitimate if they reflect the attitudes of the electorate as reflected in legislation.³³⁰ For example, dissenting in

325. See Kelso, *supra* note 4 (“*The Structure of Intermediate Review*”).

326. See Kelso, *supra* note 5 (“*The Structure of Strict Scrutiny Review*”).

327. See *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original) (using “bare congressional desire” language); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“[I]nvidious racial discrimination” is an illegitimate interest); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (“[S]egregation of children in public schools solely on the basis of race” violates equal protection).

328. See *Moreno*, 413 U.S. at 534, 537 (1973) (“[P]urpose to discriminate against hippies” not legitimate interest to prevent “hippie communes” from food stamp program); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (discussing prejudice against interracial marriage illegitimate); *Cleburne Living Ctr.*, 473 U.S. at 448 (holding prejudice against the mentally impaired to be an illegitimate governmental interest); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (agreeing “animus” against a politically unpopular group, in this case animus based upon sexual orientation, an illegitimate governmental interest).

329. See Randy E. Barnett, *Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge “Irrational or Arbitrary” Statutes*, 14 GEO. J.L. & PUB. POL’Y 355, 368–69 (2016) (“Such improper ends include: (a) the end of assisting favored persons or groups at the expense of other citizens; (b) the end of harming some individuals or groups; or (c) the end of stigmatizing or making costlier the exercise of a liberty of which some disapprove.”); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (“[A]nimus is present where the public laws are harnessed to create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct.”).

330. Following a focus on historical attitudes and deference to legislative and executive practice, some judges adopt the view such that legislation can constitute a legitimate government interest since they reflect the views of the majority, which should be followed in a democracy. *Romer*, 517 U.S. at 640–43 (Scalia, J., dissenting); see also *Lawrence v. Texas*, 539 U.S. 558, 589–91 (2003) (Scalia, J., dissenting) (citing precedent upholding law banning homosexual sodomy as constitutional based on traditional moral disapproval of homosexual conduct); *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (“In determining the question or reasonableness, [a court] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their

Lawrence v. Texas,³³¹ Justice Scalia noted if the belief of a state's citizens that certain forms of sexual behavior are "immoral and unacceptable" was not a legitimate interest, then state laws "against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" likewise were subject to constitutional attack. Judicial decision making based upon reason provides an answer to this critique.

Most major secular philosophic doctrines adopt a background principle that individuals should not behave in a self-interested capacity, but should treat others with "equal concern and respect" giving equal weight to others' interests as one's own.³³² This equal concern and respect principle is reflected in the foundational religious doctrine of all major religions that affirm as moral the basic principle of "love thy neighbor as thyself," also phrased as the Golden Rule of "do unto others as you would have them do unto you."³³³ The notion is also reflected in rational thought based upon

comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable . . .").

331. *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

332. See R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 QUINNIPIAC L. REV. 433, 434–440 (2011), (citing, *inter alia*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–73 (1977)) ("Government must not only treat people with concern and respect, but with equal concern and respect."); JOHN RAWLS, *A THEORY OF JUSTICE* 17–22 (1971) ("The Original Position and Justification"); 1 ENCYC. OF ETHICS 666 (Becker & Becker eds. 1992) ("This yields the first formulation of Kant's categorical imperative, the Formula of Universal Law: 'Act only on a maxim which you can at the same time will to be a universal law. . . .' This leads Kant to a new formulation of the categorical imperative: 'Act always so that you treat humanity, in your own person or another, never merely as a means but also at the same time as an end in itself.'") (discussing generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785); IMMANUEL KANT, *CRITIQUE OF PURE REASON* (F. Max Muller trans., London, The MacMillan Co. 2d rev. ed. 1886); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 221 (1759), *cited in* Kelso & Kelso, *supra* note 26, at 510–11 n.11 (considering the "impartial spectator" and its principle that we "must view him, neither from our own place nor yet from his, but from the place and with the eyes of a third person who has no particular connection with either, and who judges impartially between us.")).

333. *Mark* 12:31 ("Thou shalt love thy neighbor as thyself."); Kelso, *supra* note 332, at 436 (citing Isaac Herzog, 1 *THE MAIN INSTITUTIONS OF JEWISH LAW* 386 (Soncino Press 1936) ("[B]ring the law as much as possible into line with the highest ethical norms, [which] commanded, 'Love thy neighbour as thyself and 'Love the stranger as thyself.'" (citing Leviticus, 19:19, 19:33–34.")), *cited in* Amihai Radzyner, *Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time in the Field*, 23 J.L. & REL. 189, 208 (2007–2008)); Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 13 (2008) ("For Jefferson, the fundamental precepts of morality, which he believed were held in common in all religions, were captured by Jesus' maxims, 'Treat others as you would have them treat you' and 'Love [thy] neighbor as thyself.'" (citing

insight that “to comprehend accurate physical reality, in an Einsteinian universe of relativity, it is necessary to give equal concern and respect to others’ frames of reference in addition to one’s own in order to give an adequate account of the physical universe.”³³⁴

One obvious corollary to the principle of giving persons equal concern and respect means that “self-interested coercion or exploitation of other persons is wrong.” Coercive sexual practices, as well as exploitative sexual practices, thus violate the principle of equal concern and respect. These principles of equal concern and respect and arbitrary coercion is wrong make it possible to draw distinctions among Justice Scalia’s legislative list, *supra* note 331. Bestiality can be prohibited as there can be no meaningful consent given by animals.³³⁵ Prostitution³³⁶ or obscene speech that “lacks serious literary, artistic, political, or scientific value”³³⁷ also raise clear issues of exploitative sexual activity. Bigamy (or polygamy) raises issues of whether one can give equal concern and respect to multiple spouses, particularly given the historical practice of exploitation of women often accompanying societies permitting men to have multiple wives.³³⁸ Concerns with the

KERRY S. WALTERS, *RATIONAL INFIDELS: THE AMERICAN DEISTS* 181 (1992)); Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 WASH. & LEE L. REV. 1529, 1541 (2007) (discussing “the recognition of equality between men and women in Islam, the imperative of *ijtihad* (independent reasoning to arrive at a legal principle) in modern times, [and] the dynamics between what is universal for all times and what is particular to seventh century Arabia . . .”); Feisal Abdul Rauf, *What is Islamic Law?*, 57 MERCER L. REV. 595, 599–600 (2005) (“Islamic Law, called Sharia, starts off from” these two commandments Jesus instructed his people to follow—“love the Lord thy God” and “love thy neighbor as thyself.”); R. Mary Hayden Lemmons, *Tolerance, Society, and the First Amendment: Reconsiderations*, 3 U. ST. THOMAS L.J. 75, 89 (2005) (“Hinduism: ‘One should never do that to another which one regards as injurious to one’s own self; and, Buddhism: ‘Hurt not others in ways that you yourself would find hurtful.’”).

334. Kelso, *supra* note 332, at 457. For further discussion of this insight, including locating the views of Thomas Hobbes in *LEVIATHAN* (1651), Friedrich Nietzsche in *BEYOND GOOD AND EVIL* (1886), or Robert Nozick in *ANARCHY, STATE, AND UTOPIA* (1974), that rational thought is self-interested in a Newtonian understanding of physics and childish egocentrism, see Kelso, *supra* note 332, at 434, 454–62.

335. See, e.g., Antonio M. Haynes, *The Bestiality Proscription: In Search of a Rationale*, 21 ANIMAL LAW 121, 148–49 (2014) (grounding laws against bestiality in concerns with coercion).

336. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1664–65 (2010) (discussing views that all prostitution always “is exploitative and degrading to women” or in any event “voluntary prostitutes represent only a small minority of ‘prostituted women.’”), and sources cited therein.

337. *Miller v. California*, 413 U.S. 15, 24 (1973).

338. On the topic of polygamy, see generally Cyra Akila Choudhury, *Between Traditions and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. COLO. L. REV. 963 (2012) (discussing polygamy from the perspective of a concern to ban exploitation, while recognizing that in

possibility of inevitable exploitation of deep emotions built up between family members suggest consent could never be truly non-exploitative in the context of adult incest.³³⁹ Further, as a matter of history and tradition, the first branch of substantive due process analysis, the legislative practice of virtually every state banning obscenity, prostitution, bigamy and polygamy, and incest, and a vast majority banning bestiality, is different than only thirteen states banning sodomy when *Lawrence v. Texas* was decided.³⁴⁰

On the other hand, it may well be true any attempt to regulate fornication would raise difficult problems of justification.³⁴¹ Even with respect to adultery, while adulterous conduct in most circumstances would violate the principle of giving one's spouse equal concern and respect³⁴²—though it would be different if both parties knowingly and voluntarily agreed to have an “open marriage”—the question would arise whether this morality is a matter for state regulation or for private individual response, such as filing for divorce. Few states have criminal laws against fornication still on their books, and only a dozen or so states still have civil actions for alienation of affection.³⁴³ Around twenty states still have laws criminalizing adultery, but such laws are almost never enforced, with novel penalties when

some cases polygamy might not involve coercion or exploitation of the parties involved); *see also* Stephanie Forbes, “Why Just Have One?: An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause,” 39 HOUS. L. REV. 1517, 1541–46 (2003) (discussing account more sympathetic to polygamy and how such relationships can foster women's self-independence and children's welfare); *see also* Brown v. Buhman, 822 F.3d 1151, 1157 (10th Cir. 2016) (noting sheriff's policy in a Utah county only to prosecute for bigamy or polygamy where someone commits “child or spouse abuse, domestic violence, welfare fraud, or any other crime”).

339. *See* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 348–55 (2004) (discussing incest laws and regulatory justifications, including “protecting relations within the family from becoming overly-sexualized”). Note this argument does not affect relationships where one adult partner, perhaps for inheritance-based reasons, adopts the other adult partner thus technically creating an incestuous relationship under the law of many states. *See* Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?*, 32 HAMLIN L. REV. 95, 95–98 (2009).

340. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (noting only thirteen states had criminal sodomy laws in 2003, nine against both same-sex and opposite sex sodomy, and four against same-sex sodomy only; even in those states there was a “pattern of nonenforcement with respect to consenting adults acting in private”). On “history and tradition” representing the “first branch” of substantive due process analysis, *see supra* text accompanying notes 237–43.

341. *See* Martin v. Zihlerl, 607 S.E.2d 367, 369–71 (Va. 2005) (holding the state fornication statute unconstitutional after *Lawrence*, and thus preventing fornication barring suit for herpes transmission).

342. R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 QUINNIPIAC L. REV. 433, 435 (2011).

343. *See, e.g., Lawrence*, 539 U.S. at 570 (discussing state laws).

enforced.³⁴⁴ Thus, the legislative and executive practice with respect to fornication and adultery is much like *Lawrence*.³⁴⁵ That such laws exist, however, can make a difference in divorce cases regarding custody and financial arrangements, or other civil contexts, such as barring a tort case involving herpes transmission, or refusing to extend protection to cohabitators under laws prohibiting housing discrimination, if adultery or fornication has occurred.³⁴⁶ In *Obergefell v. Hodges*, the issue of the constitutionality of same-sex marriage was resolved in favor of a constitutional right to same-sex marriage.³⁴⁷

B. Reasonableness Balancing

It is typically thought a person behaves “reasonably” when the person engages sensibly in a “cost-benefit” analysis.³⁴⁸ That is, in why the Court balances benefits against burdens in cases involving second-order reasonableness balancing. For example deciding whether some state law is a “clearly excessive” burden under the Dormant Commerce Clause *Pike v. Bruce Church* test, the court balances the benefits of the law against its burdens on interstate commerce.³⁴⁹ Similarly, under the *BMW v. Gore* test, the Court balances benefits and burdens to determine whether a punitive damage award is “grossly excessive.”³⁵⁰ When the court applies the test of

344. See generally Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837 (2006) (noting twenty-three states continue to recognize adultery as a crime, although statutes rarely enforced).

345. *Lawrence*, 539 U.S. at 570.

346. Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 174–78 (1997).

347. *Obergefell v. Hodges*, 579 U.S. 644, 675–81 (2015). For a good article underscoring regulation on grounds of traditional “morals” accepted from 1873–1954, see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1247–58 (2004). Since 1954 the Court has almost never upheld a statute based on “moral” grounds alone, except for the 5–4 decision in *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986), which was overruled by *Lawrence*, 539 U.S. at 566–72, 575.

348. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (considering the burden on interstate commerce against statute’s benefits).

349. Under *Pike*, the Court considers: (1) the state’s “legitimate local public interest”; (2) the means by which the statute achieves these ends, including whether the benefits of the statute could be promoted “as well with a lesser impact on interstate activities;” and (3) given this, whether the “burden” on inter-state commerce is “clearly excessive” given the statute’s benefits. *Pike*, 397 U.S. at 142.

350. Under *BMW*, the Court considers: (1) the degree of reprehensibility of the conduct; (2) the ratio between the punitive damage award and the compensatory damage award; and (3) sanctions for comparable misconduct in the law, to determine whether the challenger can show the punitive damage award is grossly excessive. *BMW v. Gore*, 517 U.S. 559, 575–85 (1996).

U.S. Trust Co. of New York v. New Jersey to review government action burdening the state's own contract obligations under the Contract Clause, the Court balances benefits and burdens to determine whether the government action is "reasonable and necessary."³⁵¹ A similar balancing test is done under the Takings Clause for purposes of the *Penn Central* test.³⁵²

The same balancing is done in other constitutional doctrines. The Court analyzes both benefits and burdens under the Procedural Due Process doctrine of *Mathews v. Eldridge*.³⁵³ The right of government workers to speak on matters of public concern also involves a balancing test of benefits and burdens under the *Pickering* test.³⁵⁴ A similar balancing takes place under the access to ballot/right to vote cases of *Anderson v. Celebrezze*³⁵⁵ and *Burdick v. Takushi*.³⁵⁶ Even the reasonableness test

351. Under *U.S. Trust*, the challenger has the burden of showing—given a three-part factor balancing of the state's legitimate interest; the statute's means, including whether the benefits of the statute could be served "equally well" by an "evident and more moderate course"; and the burden on individual contract rights—that the burden was not "reasonable and necessary" given the statute's benefit. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 30, 31 (1977).

352. Under *Penn Central*, the Court balances the burden on the individual in terms of the economic impact of the regulation, its interference with reasonable investment backed expectations, and whether it leaves the individual with a reasonable rate of return on the investment against the benefits of the government action to determine whether the regulation is a "taking" as a too "sever[e]" burden on the individual. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124–25, 136–38 (1978).

353. Under *Mathews*, the Court considers: (1) "the private interest" that the government action will burden; (2) the means by which existing procedures achieve the government's ends, including "the risk of an erroneous deprivation . . . through the present procedures used and the probable value, if any, of additional or substitute procedu[re]s;" and (3) "the Government's interest" or ends in the case. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

354. Under *Pickering*, the Court considers: (1) the government's legitimate ends in "promoting the efficiency of the public services it performs through its employees;" (2) prevails in a balance against "the interests of the [employee]" in free speech; (3) including whether the government could act with more "narrowly drawn grievance procedures." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 572 n.4 (1968).

355. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

356. Under *Burdick* and *Celebrezze*, "the state's important regulatory interests are generally sufficient to justify reasonable [nondiscriminatory] restrictions. . . . A court . . . must [first] weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Burdick v. Takushi*, 504 U.S. 428, 428, 433–34 (1992) (quoting *Celebrezze*, 460 U.S. at 788–89). It then must identify and evaluate "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 434 (quoting *Celebrezze*, 460 U.S. at 789). In passing judgment, the Court also must consider "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434 (quoting *Celebrezze*, 460 U.S. at 789).

Chief Justice Roberts used in *Morse v. Frederick*³⁵⁷ involved considering whether the burden on free speech rights was determined to be reasonable in light of the “important” benefit of “educating students of the dangers of illegal drug use.”³⁵⁸

In each of these cases, the Court balances the benefits of the government action against the burdens to determine whether the government action is reasonable or “excessive.” In the context of Dormant Commerce Clause review, Justice Scalia noted long ago such a reasonableness balancing tests involve weighing considerations, which are not precisely equal.³⁵⁹ However, in Dormant Commerce Clause cases, and the other doctrines stated above, the Court performs that exact balancing inquiry. The Court has shown over decades that it can be done. That is part of the act of judging. Over time, the balance becomes more predictable as cases get decided.³⁶⁰

For this reason, any argument in an isolated area of the law against second-order reasonableness balancing because it is not, in practice, a manageable test is flawed.³⁶¹ Such an argument would represent result-

357. *Morse v. Frederick*, 551 U.S. 393 (2007).

358. Under *Morse*, the Court balanced the burden on free speech rights in light of the important benefit of “educating students about the dangers of illegal drug use” to determine whether the principal’s action was reasonable. *Id.* at 405–10.

359. *Benedix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“[J]udging whether a particular line is longer than a particular rock is heavy.”). See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) (noting under balancing tests “predictability is destroyed; judicial arbitrariness is facilitated.”).

360. Indeed, under the Administrative Procedure Act, the Court has required administrative agencies to balance costs versus benefits in deciding whether to adopt regulations in order to satisfy their obligation to engage in reasoned decision making. *Michigan v. EPA*, 576 U.S. 743, 749–53 (2015) (stating it would be unreasonable for EPA not explicitly to consider costs before deciding whether regulation is appropriate and necessary under the Clean Air Act); *id.* at 764–65 (Kagan, J., dissenting) (taking costs into account in deciding how much to regulate adequate without an independent explicit cost analysis). As another example, the theory of modern negligence law in torts is based on such a cost-benefit analysis. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[I]f the probability be called P; the injury L; and the burden B; liability depends on whether B is less than L multiplied by P . . .”).

361. Justice Scalia and Justice Thomas have rejected the Court’s normal Dormant Commerce Clause analysis. See *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 359–60 (2008) (Scalia, J., concurring); *id.* at 361–62 (Thomas, J., concurring). They have also rejected Court review of punitive damages under *BMW v. Gore*, 517 U.S. 559, 598 (1996). *Exxon Shipping v. Baker*, 554 U.S. 471, 515 (Scalia, J., concurring). However, Justice Scalia did apply, and Justice Thomas continues to apply, balancing in all the other areas mention here, and the remaining conservatives on the Court, including Chief Justice Roberts, have applied balancing in all the doctrines mentioned above. See *supra* text accompanying notes 348–58, 360.

oriented jurisprudence at its worst, as seemed to recently occur in *June Medical Services L.L.C. v. Russo*³⁶² in Chief Justice Roberts' concurring opinion.³⁶³ Where a fundamental right is involved, review should always be higher than minimum rationality review, as Justice Scalia noted respecting the Second Amendment in *Heller*.³⁶⁴

C. Means Analysis

As part of overall consideration of ends, means, and burdens, there are three kind of means inquiries. The first is rational review, where the government action must be rationally related to legitimate interests, and substantial deference given to the government's judgment on rationality under *Heller v. Doe* and *Williamson v. Lee Optical*.³⁶⁵ Prior to 1937, the Court phrased this doctrine as reasonably related.³⁶⁶ This may be similar to what Chief Justice Roberts mentioned in *Russo*.³⁶⁷ In theory, one could have two

362. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (plurality opinion).

363. *Id.* at 2135–39 (Roberts, C.J., concurring) (suggesting reasonableness as “whether there was a substantial burden, not whether benefits outweighed burdens . . .”). This approach is inconsistent with all the other “reasonableness balancing” discussed at *supra* text accompanying notes 348–58, 360, and inconsistent with our general sense of how a reasonable person makes decisions.

364. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (minimum rationality review cannot be used when dealing with a fundamental right, like the Second Amendment, because then “the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws”). Of course, if you conclude there is no fundamental right, then minimum rationality review would be appropriate. In the context of abortion law, that would involve overruling *Casey*, as *Casey* reaffirmed the core holding in *Roe* that a fundamental right was involved. See *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833, 877–79 (1992) (noting “[o]ur adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding.”). Absent such overruling, since the *Russo* case involved at a minimum a less than substantial burden on unenumerated fundamental right, the Court should adopt a second-order reasonableness balancing approach as held in *Hellerstedt* and the plurality in *Russo*. See *June Med. Servs.*, 140 S. Ct. at 2212–13 (citing *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016)). For further discussion supporting the *Russo* plurality’s understanding of *Casey* and rejecting Chief Justice Roberts’ view as inconsistent with less than substantial burdens on fundamental rights generally, see Kelso, *supra* note 2 (manuscript at 35–39 nn.221–48).

365. See *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (providing an examination of rational basis review in an equal protection case); *Williamson v. Lee Optical Co. of Okla.*, 348 U.S. 483, 487–89 (1955) (examining the application of rational basis in a due process case). See Kelso, *supra* note 2 (manuscript at 6 nn.41–46; 9–10 nn.67–69).

366. Kelso, *supra* note 2 (manuscript at 4–6 nn.31–40) (citing, *inter alia*, *Gulf, Colo. & Santa Fe R.R. Co. v. Ellis*, 165 U.S. 150, 155 (1897) (“[L]aw ‘must always rest on some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . .’”).

367. In his separate concurrence, Chief Justice Roberts said he viewed *Casey* and *Hellerstedt* as asking only (1) whether the regulation is a substantial obstacle on abortion choice and (2) even if not,

kinds of rational review: standard substantially deferential rational review and Chief Justice Roberts' reasonable rational review.³⁶⁸ Since 1937, the Court has decided the substantially deferential rationality review test of *Heller* and *Lee Optical* is appropriate for standard social and economic regulation.³⁶⁹ There seems no real point to adding another level of reasonable rational review that would call for justification of whether that reasonable review or standard rationality review applies. Where some level higher applies, as for less than substantial burdens on fundamental rights, the full second-order reasonableness review balancing test used in many doctrines is available to be done.³⁷⁰

For intermediate scrutiny, the Court adopts the requirement the regulation must be substantially related to advancing the government interests.³⁷¹ While there is no exact mathematical test for when government action is substantially related to advancing ends, rather than merely rationally or reasonably related, over time cases have helped clarify how much of a regulation is required to satisfy that standard,³⁷² and what connection will not satisfy that standard.³⁷³ In all these cases, it is based on

is the regulation reasonably related to a legitimate interest, but that determination is only made by considering whether it is reasonable to think the law provides some benefits, not a balancing of benefits and burdens. *June Med. Servs.*, 140 S. Ct. at 2135–39 (Roberts, C.J., concurring).

368. See generally *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (regarding rational review in the context of equal protections); see also *Williamson v. Lee Optical Co. of Okla.*, 348 U.S. 483, 487–89 (1955) (concerning rational review in the context of due process).

369. *Heller*, 509 U.S. at 320–21; *Lee Optical*, 348 U.S. at 487–89.

370. See *supra* text accompanying notes 348–58. On the *Heller* and *Lee Optical* tests, see *supra* text accompanying note 16.

371. See *supra* text accompanying note 21.

372. See *Nguyen v. INS*, 533 U.S. 53, 59–60 (2001) (requiring some legitimation or finding of paternity made before the age of eighteen substantially related to determining a parent-child relationship exists for illegitimate child born to citizen father and non-citizen mother); *Ward v. Rock Against Racism*, 491 U.S. 781, 783, 800 (1989) (“[C]ity’s . . . interest in limiting sound volume” during concerts in Central Park is substantially related to “the requirement that the city’s sound technician control the mixing board during performances.”); *United States v. O’Brien*, 391 U.S. 367, 377 (banning burning a draft card substantially related to effective function of Selective Service System); *Occupy Minneapolis v. Cnty. of Hennepin*, 866 F. Supp. 2d 1062 (D. Minn. 2011) (validating Minneapolis’s action when it cut off electricity to Occupy Minneapolis protestors assembled in public plazas or when it banned tents in the plaza; city was substantially advancing content-neutral interest in controlling the aesthetic appearance of the plazas).

373. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (imposing a five-year residency requirement after age of fourteen 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 violates intermediate review, as not substantially related to a concern that unwed citizen fathers care less about, or have less contact with, their children than unwed citizen mothers; harsher five-year requirement

a reasonable person's view about the substantiality of the relationship, not the subjective view of any legislature or individual about what appears substantial to them.³⁷⁴

For intermediate review with bite and strict scrutiny, the requirement is the government action be “directly and substantially related” to advancing the government's interests.³⁷⁵ While there is no exact mathematical test for when government action is directly related to advancing ends, over time cases have helped clarify how much of a regulation is required to satisfy that standard,³⁷⁶ and what connection will not satisfy that standard.³⁷⁷ As with

applied to both unwed father and mother until Congress passes gender neutral provision); *Clark v. Jeter*, 486 U.S. 456, 457–61 (1988) (requiring illegitimate children to seek support from their putative father within six years of birth, but no such restriction on legitimate children, not substantially related to orderly administration of justice); *Craig v. Boren*, 429 U.S. 190, 199–203 (1976) (barring only males aged eighteen through twenty from buying low-alcohol 3.2% beer was not substantially related to the goal of traffic safety because the statute does not ban the eighteen to twenty year-old males from drinking beer bought by female companions or twenty-one-year-old males and statistics showing 2% of eighteen to twenty-year-old males were likely to be arrested for drunk driving an unduly tenuous fit); *Occupy Columbia v. Haley*, 866 F. Supp. 2d 545 (D.S.C. 2011) (providing South Carolina's attempt to ban all protestors after six p.m. from occupying park likely unconstitutional, justifying preliminary injunction).

374. For example, in *United States v. Virginia*, 518 U.S. 515, 541–46 (1996), the Court held Virginia Military Institute's categorical exclusion of women was not substantially related to an effective adversative method of instruction, as the evidence revealed some women could meet VMI's physical standards and its implementing methodology. The issue was not whether VMI thought women could meet the standards, but whether in fact the standards could be met.

375. See *supra* text accompanying notes 22–23. The direct part focuses on the immediate causal connection between the statute and the benefits, with no unnecessary under inclusiveness.

376. See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20–30 (2010) (deciding the Patriot Act's provision criminalizing providing material support to foreign terrorist organizations, including providing “expert advice or assistance” even to lawful, non-violent activities such as applying to the United Nations for humanitarian aid, is directly and substantially related to combating terrorism because money is fungible and aid to one part of terrorist organization makes all parts of the terrorist organization stronger); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–29 (1984) (opining gender antidiscrimination laws requiring large, nationwide social groups to admit women satisfy strict scrutiny under the Freedom of Association because the laws were directly and substantially related to advancing compelling government interests in ending such discrimination); *United States v. Lee*, 455 U.S. 252, 254–56 (1982) (requiring all employers, including Amish employers, to pay social security taxes directly and substantially related to the compelling interest in the financial solvency of the Social Security System); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 569–71 (1976) (banning promotional advertising on energy use by electrical utilities directly related to reducing demand for electric use).

377. See *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (Kennedy, J., plurality opinion) (finding no direct causal link between criminalizing lying about receiving a military medal and protecting the honor and integrity of the military award system) (citing *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)) (determining California cannot show a direct causal link between violent video games and harm to minors); *Johnson v. California*, 543 U.S. 499, 509–11 (2005) (stating there is

intermediate review, in all these cases the decision is based on a reasonable person's view about the "directness" of the relationship, not the subjective view of any legislature or individual about what appears substantial to them.³⁷⁸

D. *Burden Analysis*

1. Normal Burden Analysis

For minimum rationality review, the government action must not be an irrational, arbitrary, or capricious burden.³⁷⁹ This test has been easy to meet. For example, in *New York City Transit Authority v. Beazer*³⁸⁰ the Supreme Court held a subway system completely banning hiring former heroin addicts who had undergone methadone treatment was rational even though according to the Court's opinion probably 75% of the persons burdened by the Act had no heroin problem. This possibly made the statute substantially more burdensome than necessary and thus invalid under intermediate review.³⁸¹

no direct causal link between racially segregating prisoners for initial period of incarceration and reducing violence in prisons); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986) (plurality opinion) (providing minority role models was not directly related to responding to any compelling government interest in remedying any racial discrimination in employment which had previously occurred); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1215–16 (D.C. Cir. 2012) (holding an 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 evidence the graphic warnings would substantially and directly advance its interest in reducing smoking rates).

378. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 313 (2013) (noting a court cannot rely on good faith assurances that the program uses race in a permissible manner but must instead give "close analysis to the evidence of how the program works in practice.").

379. As the Court noted in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592 n.39 (1979) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)) ("[L]egislative classifications are valid unless they bear no rational relationship to the State's objectives."). The question is thus whether Congress achieved its purpose by burdening innocent individuals in an arbitrary or irrational way.

380. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

381. *Id.* at 576 (discussing the incidence of drug use among methadone maintenance program users "may often approach, or] exceed[,] 25%."). Invalidation under intermediate review would be true as long as some more individualized consideration of applicants would be effective in weeding out problem candidates, or if some more narrowly tailored ban would effectively advance the government's interest, such as, as mentioned in the Court's opinion, 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." *Id.* at 589.

When engaging in the balance of benefits and burdens under reasonableness balancing, both the amount of the benefit and the amount of the burden should be determined by looking to how much the burden would appear to a “reasonable man.” As noted in *Crawford v. Marion County Election Board*,³⁸² in a facial challenge to a law, the Court should consider in determining burdens the “nature, extent, and likely impact” of the burden on “reasonably diligent” individuals as what matters is a “general assessment of the burden,” not “peculiar circumstances of individual[s].”³⁸³ In *Gonzales v. Carhart*,³⁸⁴ the Court phrased the issue as determining the amount of burden on a “large fraction of relevant cases[,]” the use of the term “relevant” is important. As the controlling plurality opinion noted in *Planned Parenthood v. Casey*,³⁸⁵ “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”³⁸⁶

This approach to burdens also leaves open the possibility of a more individualized challenge to a law if special circumstances so counsel. For example, the Court indicated in *Gonzales* that while the law was not an undue burden in the context of a “large fraction of relevant cases,” there is the possibility of finding a “substantial obstacle” to abortion choice given an individual woman’s medical condition.³⁸⁷ It must also be remembered that under the Equal Protection Clause there can be “class of one” cases where the focus would be on the specific individual’s burden.³⁸⁸

382. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 206–07 (2008) (Scalia, J., concurring) (quoting *Storer v. Brown*, 415 U.S. 724, 738, 742 (1974) (emphasis omitted)).

383. *Id.*

384. *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

385. *Planned Parenthood of Se Pa. v. Casey*, 505 U.S. 833 (1992).

386. *Id.* at 894. For this reason, the Court noted a spousal notification law was a substantial obstacle and undue burden on a married woman despite only about 20% of women who obtain abortions are married and 95% of such women notify their husbands, meaning the effects of the spousal notification law would only affect 1% of all abortions. For the women whom the statute would restrict—married women who would not want to notify their husbands—the law was a substantial obstacle because, as the Court stated, “there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands” and “[s]hould these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.” *Id.* at 893–94.

387. *Carhart*, 550 U.S. at 126, 168.

388. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (explaining what a “class of one” case is). For a discussion of “class of one” cases, see KELSO & KELSO, *supra* note 26, at 1085 n.8.

Opressiveness in applying intermediate review and strict scrutiny is also based on court consideration of burdens as viewed by the reasonable person.³⁸⁹ Court cases under intermediate review³⁹⁰ and strict scrutiny³⁹¹ are consistent with this approach. Any other approach would create “a system in which each conscience is a law unto itself.”³⁹²

2. Specialized Free Exercise of Religion Considerations

The Free Exercise Clause applies to protect individuals' sincerely held religious beliefs.³⁹³ Under traditional Free Exercise Clause doctrine prior to 1963, the Free Exercise Clause was interpreted to protect religious *opinions* from government interference, but the protection did not carry over to religious *actions*. Thus, in *Reynolds v. United States*,³⁹⁴ the Court upheld a bigamy conviction despite the law burdening Mormon religious practice

389. See Kelso, *supra* note 4 (manuscript at 13–15 nn.85, 90–93, 96); Kelso, *supra* note 5 (manuscript at 13–14, 20–22 nn.87–94, 135–46).

390. See *City of Ladue v. Gilleo*, 512 U.S. 43, 56–58 (1994) (discussing how sign regulation is a substantial burden that does not leave open ample alternative channels of communication following court consideration of (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 form[s] of communication[,] [e]specially for persons of modest means or 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); *Ward v. Rock Against Racism*, 491 U.S. 781, 788–93, 802 (1989) (insisting bandshell performers at the Naumberg Acoustic Bandshell in Central Park use of sound-amplification equipment and city a provided sound technician is not a substantial burden and leaves open ample alternative channels for musical expression; any sincerely held belief the group had that the city’s requirement was a substantial burden on their musical expression was irrelevant).

391. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–49, 653–59 (2000) (exploring the burden an antidiscrimination law imposed “significantly affect[ed]” the Boy Scout’s freedom of association, while the antidiscrimination law was held not to “materially interfere” with the ideas of the organization and thus was not objectively a “serious” burden in *Roberts v. United States Jaycees*, 468 U.S. 609, 623–29 (1984) or *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544–50 (1987), despite any members’ subjective views to the contrary). See also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 579–80 (1995) (forcing parade organizers to permit a gay pride float was objectively too substantially burdensome on the organizer’s rights to promote their own message of Irish-American pride in the parade).

392. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990).

393. See, e.g., *United States v. Seeger*, 380 U.S. 163, 165 (1965). See also *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 824 (D. Neb. 2016) (concluding a prisoner’s worship of Flying Spaghetti Monster is a parody, not a sincerely held religious belief).

394. *Reynolds v. United States*, 98 U.S. 145 (1878).

involved in the case.³⁹⁵ Similarly, in *Braunfeld v. Brown*,³⁹⁶ the Court refused to require an exception to a Sunday closing law for a Jewish merchant whose faith required him to close on Saturday. The Court said there was a legitimate interest in one uniform day of rest for all workers, and merely because the law, as applied, would result in a religious Jew closing on two days did not raise a Free Exercise Clause problem.³⁹⁷ Whether the rational review test applied in the case was based on the Free Exercise Clause, or whether there was no Free Exercise review for burdens on religious actions, but rational review applied under the Equal Protection and Due Process Clauses was left unclear.³⁹⁸

An important change in the level of protection given to the free exercise of religion occurred in 1963. Writing for the Court in *Sherbert v. Verner*,³⁹⁹ Justice Brennan stated strict scrutiny should apply when a law imposes a burden on religious belief-based conduct. Under *Sherbert*, the Court applied strict scrutiny to *any* burden on religious belief or conduct imposed by law.⁴⁰⁰ While strict scrutiny was met in a number of cases following *Sherbert*,⁴⁰¹ a concern with how strict scrutiny might frustrate reasonable government action led Justice Brennan to propose in *Lyng v. Northwest Indian Cemetery Protection Association*⁴⁰² that only government actions burdening beliefs “central” or “indispensable” to their religious practices should trigger

395. *Id.* at 162–67 (1878) (discussing how an offender cannot escape punishment merely because of a religious belief that the law ought never to have been made).

396. *Braunfeld v. Brown*, 366 U.S. 599, 600–06 (1961).

397. *Id.* at 607–09.

398. Perhaps the better view would be that such a neutral, generally applicable law does not trigger Free Exercise review at all. That would preserve the notion that any constitutional burden on a fundamental right trigger something higher than minimum rationality review. *Cf.* *Dist. of Columbia v. Heller*, 554 U.S. 570, 628, 723 n.27 (2008) (explaining the review for Second Amendment right must be higher than minimum rationality review because, like freedom of speech, a fundamental right is involved).

399. *Sherbert v. Verner*, 374 U.S. 398 (1973).

400. *Id.* at 403 (1973) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963) (emphasis added)) (“[A]ny incidental burden on the free exercise of appellant’s religion may be justified by a ‘compelling state interest’”).

401. *See Hernandez v. Comm’r of the IRS*, 490 U.S. 680, 699–700 (1989) (requiring income payment of income taxes for services the Church of Scientology provided satisfies strict scrutiny where payment cannot reasonably be viewed as a charitable contribution, but rather as a fee for service); *United States v. Lee*, 455 U.S. 252, 254–60 (1982) (stating employers mandatory participation in Social Security System satisfies strict scrutiny when challenged by Amish employer who has religious objections to Social Security as undermining individual and community self-reliance principles of Amish faith).

402. *Lyng v. Nw. Indian Cemetery Prot. Ass’n*, 485 U.S. 439 (1988).

Sherbert's strict scrutiny approach. To determine whether the belief is central, Justice Brennan proposed the test would be whether the religious adherent's statement that the religious belief was central was sincerely held.⁴⁰³

Based on a concern about strict scrutiny applying in too many cases, a majority of the Court in 1990 changed Free Exercise doctrine in *Employment Division v. Smith*.⁴⁰⁴ Under *Smith*, use of strict scrutiny in Free Exercise cases does not extend beyond: (1) unemployment compensation cases involving denial for refusing to work for religious reasons on one's sabbath, based on *Sherbert v. Verner* being settled law;⁴⁰⁵ (2) cases involving "hybrid" claims, i.e., claims based on a conjunction of free exercise claims combined with other constitutional protections, such as freedom of speech, or, as in *Wisconsin v. Yoder*,⁴⁰⁶ the right of parents to direct the education of their children, where the related right would trigger strict scrutiny on its own;⁴⁰⁷ or (3) cases involving discrimination against religion, such as in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁴⁰⁸ The majority rejected the attempt to limit *Sherbert* to religious beliefs central to the individual's religion, noting that "it is not within the judicial ken to question the centrality of particular religious beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."⁴⁰⁹ A four-Justice concurrence

403. *Id.* at 475–76 (1988) (Brennan, J., dissenting). The majority in *Lynx* rejected this approach. *Id.* at 456–58.

404. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990) ("The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . .").

405. *Id.* at 883–85 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

406. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

407. *Smith*, 494 U.S. at 881–82 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

408. *Id.* at 877 (providing the government may not "impose special disabilities on the basis of religious views or religious status."). A classic case of this kind is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–28, 531–33 (1993). See *Church of the Lukumi Babalu Aye*, 508 U.S. at 525–28, 531–33 (explaining how a city adopting different rules regarding animal slaughter depending on whether the slaughter was for meat-packing purposes or for a religious ceremony).

409. *Smith*, 494 U.S. at 887 (quoting *Hernandez v. Comm'r*, 490 U.S. 690, 699 (1989)). The Court added: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890.

characterized *Sherbert* as requiring strict scrutiny “to justify any substantial burden on religiously motivated conduct”⁴¹⁰

Reacting to the *Smith* case, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).⁴¹¹ RFRA prohibits the “[g]overnment [from] . . . substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁴¹² While this statute was ruled unconstitutional in *Boerne v. Flores* as applied to state laws,⁴¹³ it has been held as constitutional as applied to federal laws.⁴¹⁴

Since 1983, twenty-one states, most in the South and Southwest, have passed similar state RFRA applicable to the those states’ laws, and ten states track that doctrine under their own state constitutions.⁴¹⁵ A similar issue arises under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which applied strict scrutiny to “substantial burdens” if (1) that burden affects, or removal of that burden would itself affect, interstate commerce; (2) the burden is imposed in a program or activity

410. *Id.* at 894–95 (O’Connor, J., concurring in judgement). This language was based on dicta in cases between 1963 and 1990 which adopted substantial burden language. See *Hernandez*, 490 U.S. at 699 (citing *Hobbie v. Unemp. Appeals Comm’n of Fla.*, 480 U.S. 136, 141–43 (1987)) (“The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–19 (1981) (noting the burden in the case was substantial); *Yoder*, 406 U.S. at 217–20 (noting the burden in the case was substantial and severe).

411. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb(1–4)).

412. *Id.*

413. *Boerne v. Flores*, 521 U.S. 507, 516–36 (1997).

414. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424–25, 439 (2006) (discussing why Congress passed RFRA and its application to federal law).

415. See *State Religious Freedom Restoration Acts*, NAT’L CONF. STATE LEGISLATURES (<https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>) [<https://perma.cc/KKM4-2XMX>] (showing twenty-one states have passed state RFRA statutes). Another ten states will trigger strict scrutiny under their own state Constitutions, bringing the number to thirty-one states which will apply a strict scrutiny approach for RFRA-like cases. Cf. *Religious Freedom Restoration Act of 1993 (1993)*, THE FIRST AMENDMENT ENCYCL., <https://mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of-1993> [<https://perma.cc/9K9V-BWYK>] (“As a result of *Boerne*, a number of states adopted their own “mini-RFRAs” to address free exercise claims in their court systems.”). For a law firm focusing in religious liberty cases and analysis, see generally BECKETT: RELIGIOUS LIBERTY FOR ALL, <http://www.becketlaw.org> [<https://perma.cc/32J3-7U2E>].

receiving federal financial aid; (3) the burden is imposed in any regulation permitting individual assessments of proposed property use; or (4) a substantial burden on religious exercise of a person residing in or confined to an institution that received federal financial assistance or affects commerce with foreign Nations, among the several states, or with the Indian tribes.⁴¹⁶

The language in RFRA and RLUIPA, including use of the substantial burden language, tracks Justice O'Connor's concurrence in *Sherbert*.⁴¹⁷ Under RFRA and RLUIPA, the issue is presented how to determine a substantial burden on conduct based on religious beliefs. As the Supreme Court noted in *Burwell v. Hobby Lobby Stores, Inc.*,⁴¹⁸ "we must next ask whether the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion."

In *Burwell*, the majority provided little guidance on how to determine whether a particular burden on religious belief is substantial.⁴¹⁹ The Court majority did note:

[P]roviding the coverage demanded by the HHS regulations is connected to the destruction of an embryo [and this] belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.⁴²⁰

While Justice Scalia, Thomas, and other conservatives rejected Brennan's sincerely held religious belief test in *Lynn* and *Smith*,⁴²¹ once the substantial

416. Religious Land Use & Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc *et. seq.*).

417. *See supra* text accompanying note 410.

418. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

419. *Id.* at 719–20 ("We have little trouble concluding that it does. As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS [Health & Human Services] acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.").

420. *Id.* at 724.

421. *See supra* text accompanying notes 402–03, 409.

burden element was mandated by RFRA and RLUIPA, the majority seemed to adopt such a sincerely held belief standard in *Burwell*.⁴²²

In contrast, the dissent in *Burwell* opted for the courts to apply some version of a reasonable person standard. The dissent stated: “RFRA, properly understood, distinguishes between ‘factual allegations that [plaintiffs]’ beliefs are sincere and of a religious nature,’ which a court must accept as true, and the ‘legal conclusion . . . that [plaintiffs]’ religious exercise is substantially burdened,’ an inquiry the court must undertake.”⁴²³ In the absence of any further guidance from the Supreme Court, lower federal courts have split on the issue of how to determine if a burden is substantial between two tests, both versions of a reasonable person standard: (1) whether the burden has to involve a religious exercise which is compelled by the religion or otherwise forces the individual to a “stark choice”;⁴²⁴ or (2) whether it is enough if the objection to following the government regulations is “religiously motivated” or otherwise “important” to religious practice by putting “substantial pressure” on an adherent to violate religious beliefs.⁴²⁵ At some point, the Court will have to determine which of these various approaches to substantial burden should be adopted, or create a different test for determining substantial burdens on its own.⁴²⁶

The issue of whether a regular reasonable person definition or a sincerely held religious beliefs should be the standard is also raised in the context of the ministerial exception to government laws. In *Our Lady of Guadalupe School*

422. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (explaining rather than “[a]rrogating the authority to provide a binding national answer to this religious and philosophical question, we have . . . [r]epeatedly and in many different contexts . . . have warned that courts must not presume to determine . . . the plausibility of a religious claim.” (citations omitted)).

423. *Id.* at 759 (Ginsburg, J., dissenting) (citing *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). In *Burwell*, the dissent concluded: “It is doubtful that Congress, when it specified that burdens must be ‘substantial[],’ had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed.” *Id.* at 760 (Ginsburg, J., dissenting).

424. *See United States v. Sterling*, 75 M.J. 407, 417–19 (C.A.A.F. 2016) (discussing how the claimant must show a religious exercise is important for free exercise of religions; adopted by Third, Fourth, Ninth, and District of Columbia Circuits).

425. *Id.* at 417–19 (option adopted by First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits).

426. The Court dodged that issue in *Zubik v. Burwell*, 136 S. Ct. 1557, 1159–60 (2016) (explaining the compromise by the parties after oral argument in the case rendered decision unnecessary), *vacating Sharpe Holdings, Inc. v. HSS*, 801 F.3d 927, 937–42 (8th Cir. 2015) (discussing how the Court initially cited “important to religious practice” approach to determining substantial burden, but later applying a sincerely held religious belief approach to decide the case).

v. Morrissey-Berru,⁴²⁷ the Court extended *Hosanna-Tabor's* ministerial exception to the application of government laws to include virtually every teacher in a religious school by focusing on the language in Justice Alito's concurrence in *Hosanna-Tabor* that the "ministerial" exception should apply to any employee who "serves as a messenger or teacher of its faith." Justice Thomas, joined by Justice Gorsuch, continued his view that the Court should defer to a religious organization's "good faith" view that any employee, not just a teacher, is a "minister."⁴²⁸ A two-Justice dissent emphasized the breadth of the majority's holding in exempting religious organizations from employment discrimination laws regarding "race, sex, pregnancy, age, disability, or other traits" or even "animus."⁴²⁹ The dissent said the focus should be on someone with more of an objective leadership role within the church, as was true in *Hosanna-Tabor*.⁴³⁰

An issue also exists in determining whether religious discrimination is sufficient to trigger the strict scrutiny standard under *Smith*, used in *Hialeah*, both as to state laws burdening religious conduct⁴³¹ and to government spending programs limiting or denying the participation of religious organizations.⁴³² One solution is to adopt the approach used for race

427. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

428. *Id.* at 2069–70 (Thomas, J., concurring).

429. *Id.* at 2072 (Sotomayor, J., dissenting) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194–95 (2012)).

430. *See id.* at 2073–75, 2081–82 (Sotomayor, J., dissenting) (describing the Court's approach in *Hosanna-Tabor* as well-rounded in analyzing objective factors to balance First Amendment concerns and avoiding overbreadth).

431. *See Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–66 (3d Cir. 1999) (positing a police department's decision to provide medical exemptions to its no-beard requirement, while refusing religious exemptions from same requirement, subject to heightened scrutiny based on religious discrimination). *See generally* Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y. City Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (considering a city ordinance prohibiting any person from performing direct oral suction as part of circumcision without written signed consent triggers strict scrutiny as singling out religious practice, but remanded for trial on whether ordinance is constitutional given state interest in preventing spread of herpes simplex virus to male infants, which can be fatal due to their undeveloped immune systems).

432. *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2283–88 (2020) (Breyer, J., dissenting) (stating blanket refusal to include religious schools in state scholarship program based on Montana Constitution's "no aid" to church provision violates Free Exercise Clause as discrimination against religion based on "religious status" triggering strict scrutiny, as opposed to "use" of funds for religious "training of clergy" in *Locke*; and the dissent describing how the case is more like *Locke* than *Trinity*); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (excluding churches from a state program providing grants to non-profit organizations to purchase rubber playground surfaces made from recycled tires constituted discrimination against religion; *Locke* distinguished by noting the program there went "a long way toward including religion in its benefits"

discrimination under Equal Protection Clause analysis: wherein only facial discrimination based on religion⁴³³ or a finding that discriminatory intent was a motivating factor behind the regulation⁴³⁴ is sufficient to trigger strict scrutiny. A second approach, adopting a reasonable person definition of discrimination, would ask whether discrimination existed considering the “nature, extent, and likely impact” of the burden in a “large fraction of relevant cases.”⁴³⁵ A result more favorable to religious entities would be to conclude discrimination exists if any secular organization is given a benefit, but that benefit is not extended to the religious organization.⁴³⁶

VII. ORIGINAL PUBLIC MEANING

A. *Conceptions v. Concepts*

One issue concerning interpretation of a Constitutional provision based on text, context, and history is determining the level of generality within

and only prevented using the funds to get a religious degree, a case raising greater Establishment Clause concerns than use of recycled tires (quoting *Locke v. Davey*, 540 U.S. 712, 724 (2004))).

433. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 5 n.4, 9–11 (1967) (using race as a classification mechanism in a statute triggers strict scrutiny).

434. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68, 270 n.21 (1977) (showing race was a motivating factor in the decision considering: (1) the impact or effect of the official action; (2) the “historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes[;]” (3) “legislative or administrative history, including the specific sequence of events leading up to the challenged decision[;]” any departures from normal procedural practices; and any substantive departures, “particularly if factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached[;]” and (4) any other evidence of discriminatory motive; if the challenger can make a *prima facie* case of discriminatory intent, the burden then shifts to the government to establish the same decision would have been made even if the impermissible purpose had not been considered, and if the government fails to meet this burden, strict scrutiny is triggered). Under this approach, the ability to foresee disparate impact because of a law does not, without more, trigger a finding of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242–43 (1976) (positing how invidious discriminatory purpose can be inferred from surrounding circumstances yet discriminatory impact is not dispositive); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (describing how discriminatory intent implies more than awareness of consequences; it implies the action was taken “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects on an identifiable group”).

435. *See supra* text accompanying notes 382–86. *See, e.g., S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (“Similar or more severe restrictions [related to COVID-19] apply to comparable secular gatherings.”).

436. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting) (“[I]t is not enough for the government to point out [] other secular organizations or individuals are also treated *unfavorably*. The point is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated.” (quoting Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22 (2016))).

which text and “historical insights should be viewed.” For example, a judge could remain focused on the specific examples the framers and ratifiers seemingly held about a particular provision of the Constitution.⁴³⁷ Alternatively, a judge could focus on the general concept the framers and ratifiers held about a provision.⁴³⁸ An intermediate position holds that whether the interpreter should focus on the specific examples the framers and ratifiers held about a provision, or their general concepts, depends on the provision in question.⁴³⁹ To the extent a provision is “relatively direct, specific, and focused,” this may suggest the framers and ratifiers intended the provision to reflect only detailed, specific choices. If so, judges should naturally remain focused on those choices. Where history suggests instead that the framers and ratifiers embedded in the Constitution broad concepts, like those dealing with the First Amendment, Equal Protection Clause, and Due Process Clause, history may suggest the framers and ratifiers intended “to provide no hard-and-fast answers . . . , and to let the answers develop over time in common-law fashion.”⁴⁴⁰

As an example, Justice Kennedy stated in *Lee v. Weisman*,⁴⁴¹ “the lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.”⁴⁴² That concept would likely counsel a judge to find unconstitutional such practice as officially organized prayer in public schools, despite the fact such prayer was a specific example framers and ratifiers thought constitutional according to “historical practices and understandings.”⁴⁴³

437. See KELSO & KELSO, *supra* note 26, at 116 nn.70, 72–74 (citing RONALD DWORKIN, *LAW'S EMPIRE* 71 (1986) (discussing the focus on specific, discrete ideas or examples held by individuals, such as the authors of the Fourteenth Amendment apparently did not specifically intend to abolish segregation in the public schools)).

438. *Id.* at nn.71–73, 75, (citing RONALD DWORKIN, *LAW'S EMPIRE* 71 (1986) (explaining the focus on more abstract concepts held by individuals, such as the intent by the framers and ratifiers of the Fourteenth Amendment to “establish a regime in which white and blacks received equal protection of the laws[.]” which supports the Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954))).

439. *Id.* at n.76, (citing Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 679 (1991)).

440. DANIEL A. FARBER ET AL., *THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 77, 79 (1993).

441. *Lee v. Weisman*, 505 U.S. 577 (1992).

442. *Id.* at 591–92.

443. Compare *Engel v. Vitale*, 370 U.S. 421, 425–33 (1962) (describing school prayer unconstitutional based upon “widespread awareness among many Americans of the dangers of a union

Similarly, as Justice Ruth Bader Ginsburg noted during her confirmation hearing, the general concept of equality in the Declaration of Independence and the Equal Protection Clause of the Fourteenth Amendment is broad enough to embody a principle of equal rights for women, despite the fact that the specific views of President Thomas Jefferson and others in the eighteenth and nineteenth century were not ready for women to be equal participants in public life.⁴⁴⁴ During her confirmation hearing, Justice Ginsburg quoted Jefferson, who said that: “The appointment of women to public office is an innovation for which the public is not prepared. . . . Nor, . . . am I.”⁴⁴⁵ Nevertheless, as Justice Ginsburg noted, she presumed if Jefferson were alive today he would have a different specific view on the role of women in public life based on the general concept of equality in which Jefferson believed—each individual’s equal and unalienable right to “life, liberty, and the pursuit of happiness.”⁴⁴⁶

Additionally, sometimes changed social practice will require an individual to change views because the general concept the individual believes interacts with the social environment in a different way. For example, Justice Ginsburg has noted one of the main reasons the Supreme Court changed its specific views in gender discrimination cases in the 1970s was the Court’s newly-formed conclusion that the differential treatment of women and men in certain statutes was “burdensome to women,” and thus violated the Court’s concept of equality.⁴⁴⁷ She attributed this result in part to the “[r]apid growth in women’s employment outside the home, attended and stimulated by a revived feminist movement; [and] changing patterns of marriage and reproduction[,]” all of which better allowed the Court to see that women were being “unfairly constrained” by laws “ostensibly to shield

of Church and State” and “each separate government in this country should stay out of the business of writing or sanctioning official prayers”), *with id.* at 445–50 (Stewart, J., dissenting) (positing voluntary school prayer should be constitutional based upon specific “history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government”).

444. See *The Supreme Court: Excerpts from Senate Hearings on Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at A12, <https://www.nytimes.com/1993/07/21/us/the-supreme-court-excerpts-from-senate-hearings-on-the-ginsburg-nomination.html> [<https://perma.cc/YJG8-TE8N>], cited in KELSO & KELSO, *supra* note 26, at 196 n.94.

445. *Id.*

446. *Id.*

447. Justice Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 L. & INEQ. 17, 20 (1988) (emphasis in original).

or favor” them. This result required an interplay among “change in society’s practices, constitutional amendment, and judicial interpretation.”⁴⁴⁸

Such reasoning from general moral concepts to specific conclusions is, of course, a mainstay of much philosophic inquiry, particularly in the Enlightenment tradition. The goal of such reasoning is to convince “a person who wishes, consistent with the [E]nlightenment tradition, to apply consistently a general concept in which the individual believes[,]” that the person “may have to adjust one or more specific views that currently are not consistent with that general concept.”⁴⁴⁹ Through this process:

[A] dynamic is created whereby over time more of an individual’s specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social [practices,] rather than [the individual’s] specific views merely being the product of the individual’s past experiences, unthinking adherence to [custom or] tradition, idiosyncratic preferences, or prejudice.⁴⁵⁰

Given the normative approach of natural law and instrumentalist judges to the nature of the judicial task, they are the most likely to embrace such general use of concepts. This is particularly true for natural law judges, given their special commitment to precedent and reasoned elaboration of the law.⁴⁵¹ Applied to constitutional interpretation, this process would require the Court to adopt a reasoned elaboration of the general moral concepts placed into the Constitution, such as the moral principles of equal protection and due process of law.⁴⁵²

448. *Id.* at 17–20.

449. See R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY’S L.J. 1051, 1068 (1995) [hereinafter Kelso, *Natural Law Tradition*] (quoting R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American History*, 29 VAL. U. L. REV. 121, 135 (1994)).

450. *Id.* at 1068 (quoting Kelso, *Natural Law Tradition*, *supra* note 449, at 135). “This tension between moral reasoning based upon reason versus adherence to custom or tradition is discussed in greater depth [in THE PATH OF CONSTITUTIONAL LAW] at §§ 15.4.1, 16.1–16.2.” KELSO & KELSO, *supra* note 26, at 156–159 (2007).

451. *Id.* at 58–62 nn.93–106, 89 nn.87–89.

452. On “reasoned elaboration” of the law, see generally Kelso, *Natural Law Tradition*, *supra* note 449, at 1080–85, discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

The majority and dissenting opinions in *Bostock v. Clayton County*⁴⁵³ illustrate the distinction between concepts and conceptions.⁴⁵⁴ In *Bostock*, the majority interpreted the term “sex” in Title VII of the Civil Rights Act 1964’s ban on employment discrimination as including discrimination based upon “homosexuality or transgender status.”⁴⁵⁵ The majority admitted those “who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result,” but application of the “ordinary public meaning” of the *concept* of “sex discrimination” logically applies when discrimination is based on such status.⁴⁵⁶ One dissent focused on defining “original public meaning” by looking to how “reasonable people *at the time*” understood the specific applications of the statute, an approach focused on *conceptions* of sex discrimination in 1964.⁴⁵⁷ A second dissent focused more on the *concept* of the ordinary public meaning, but limited it to that concept in 1964 and its consistent meaning for the next four decades.⁴⁵⁸ The majority applied the concept of sex discrimination as it is understood today, consistent with a focus on an evolved understanding of the concepts of equality in *Brown v. Board of Education*⁴⁵⁹ and separation of church and state in *Lee v. Weisman*, or modern views regarding gender discrimination.⁴⁶⁰

453. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

454. *Id.*

455. *See id.* at 1737 (“An employer who fires an individual for being homosexual or transgender fires [the] person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”).

456. *See id.* at 1735, 1738, 1747, 1750 (“An employee violates Title VII when it intentionally fires an individual employee based in part on sex[.]” relying in part on evolving understanding of sex discrimination in Supreme Court cases after 1964 and rejecting an “expected applications” limit on interpretation).

457. *See id.* at 1755, 1767 (Alito, J., dissenting) (“[I]t is imperative to consider how Americans in 1964 would have understood Title VII’s prohibition of discrimination because of sex Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?”).

458. *See id.* at 1824–34 (Kavanaugh, J., dissenting) (focusing on the concept of sex discrimination in the context of rejecting a “literal” dictionary definition approach).

459. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

460. *See supra* text accompanying notes 437–52 (discussing such an evolved understanding of concepts). It is thus inaccurate to characterize the majority opinion in *Bostock* as adopting a literal approach to interpretation. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1824–25 (2020) (Kavanaugh, J., dissenting) (“Time and again, this Court has rejected literalism in favor of ordinary meaning.”). Instead, a more accurate observation is that the majority adopted the ordinary public meaning of the concept of sex discrimination as it has evolved from 1964 to today, rather than sticking with the concept of sex discrimination in 1964 and for the next four decades thereafter. For a discussion such an evolving approach to concepts is consistent with the original intent of how the framers and ratifiers would have expected interpretation to involve, see *infra* text accompanying notes 461–66.

B. *Original Intent Versus Four Other Approaches*

A focus on the contemporary meaning of a concept in interpretation is consistent with an original intent approach to interpretation.⁴⁶¹ “Two main approaches appear in the popular literature on constitutional interpretation: originalism and non-originalism.”⁴⁶² An originalist approach asks how the framers and ratifiers themselves anticipated interpretation of the Constitution.⁴⁶³ “A non-originalist approach bases the goal of constitutional interpretation [on] some justification independent of the framers’ and ratifiers’ intent or action.”⁴⁶⁴ Many judges and commentators who claim to follow an “original intent” approach assume the same would adopt a “fixed” or “static” model of interpretation, where the original public meaning of the provision at the time of ratification is determinative of constitutional meaning.⁴⁶⁵ What this approach misses is the emerging complication if one concludes the framing and ratifying generation believed in the model of a “living” Constitution. Where the evolving understanding of a concept placed into the Constitution, or later legislative, executive, or social practice, or judicial precedents could change the meaning of a constitutional provision. In such a case, it would be faithful to the framers’ and ratifiers’ original theory of interpreting the Constitution differently

461. The discussion in this section is a summarized version of Kelso, *supra* note 132.

462. *Id.* at 114. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241 (2009) (“For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as ‘originalists’ and those who do not.”).

463. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 703 (2009) (“By this they meant the sense intended by the people who wrote and ratified it.”); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) (“Although the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it.”).

464. Kelso, *supra* note 132, at 114; Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1238–39 (2015) (noting interpretation theories of purposivists, living constitutionalists, textualists, legislative intentionalists, and originalists); Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 194 (2015) (“[N]oting approaches called ‘democracy–reinforcement,’ ‘moral readings,’ minimalism, or broad deference to political processes’ in addition to originalism” (footnotes omitted) (quoting Kelso, *supra* note 132, at 114 n.3)). “For a classic discussion of non-originalist approaches or, in his terminology, ‘non-interpretivist’ approaches, see Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 263–65 (1981).” Kelso, *supra* note 132, at 114 n.3.

465. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013) (discussing how “originalism” or “original intent” has two primary ideas, where a provision is fixed at the time of framing and how people should be constrained by the provisions original meaning).

today than they would have interpreted it years ago. Overwhelming evidence suggests the framers and ratifiers expected such a natural law theory of interpretation to guide interpretation, and the framers and ratifiers were not “positivists” who expected their fixed understandings to determine constitutional meaning.⁴⁶⁶

Given this conclusion, some justification for a fixed or static approach to interpretation must be given other than original intent. There are at least four kinds of non-originalist arguments regarding constitutional interpretation, including:

(1) consequentialist approach, which looks to the jurist’s own view as to the best theory to yield the best consequences for society; (2) “a ‘current consensus’ or ‘current majority’ or ‘Dworkian’ approach, which looks to what theory of interpretation is best reflected in existing doctrine; (3) a ‘progressive historicist’ approach, which looks to what theory of interpretation is most likely to be reflected in the future, or what the ‘community eventually will hold,’ if that can be determined; [or] (4) a ‘pluralist’ model of interpretation reflecting some unspecified combination of original intent, consequentialist, current majority, and progressive historicist reasoning.”⁴⁶⁷

As indicated, a consequentialist approach to interpretation decides what is the best theory of interpretation to adopt. In the literature, at least four reasons are used to support static constitutional interpretation. They are the “(1) anti-evolutionary nature of a constitution; (2) judicial restraint; (3) consistency with a written constitution; and (4) predictability.”⁴⁶⁸ At the end of the day, each of these justifications fail in convincing that a fixed, static interpretation is superior to following the original intent of the framers and ratifiers in following a natural law theory of interpretation.⁴⁶⁹ Indeed,

466. See Kelso, *supra* note 132, at 129–56 (discussing this eighteenth century natural law approach to interpretation and why a clear majority of the framers and ratifiers rejected any fixed, static, positivist model of interpretation); see also Kelso, *Natural Law Tradition*, *supra* note 449, at 1053–64, 1068–69, 1074–79 (providing an “overview of the two traditions” and describing the “framers and ratifiers as embodying the Enlightenment tradition.” (capitalization altered)).

467. Kelso, *supra* note 132, at 156–57.

468. *Id.* at 157–58.

469. See *id.* (discussing the “anti-evolutionary [n]ature” of a Constitution “versus [the] anti-majoritarian nature of a Constitution” (capitalization altered); *id.* at 160–61 (discussing “[j]udicial restraint versus [the] judicial role in protecting individual rights”) (capitalization altered); *id.* at 161–63 (discussing the “Constitution as a contract versus [the] Constitution as a Constitution”) (capitalization altered); *id.* at 164–65 (discussing “static versus living original meaning in terms of predictability”) (capitalization altered)).

the only certain conclusion one can reach is that a static, fixed model of interpretation in the context of the United States Constitution would tend to support locking in the traditional straight, white, affluent, male, patriarchal values (what I call the SWAMP) of early generations of the American power elite.⁴⁷⁰

The three other non-originalist approaches to interpretation have problems of their own. For example, the “current consensus” or “current majority” approach, which looks to what theory of interpretation is best reflected in existing doctrine, “cannot . . . criticize the interpret[ation] approach of another era” or “explain why the interpretative approach should ever change.”⁴⁷¹ “A ‘progressive historicist’ approach, which looks to what theory of interpretation is most likely to be reflected in the future,” will, in any event, end up supporting the natural law theory of interpretation.⁴⁷² “[A] ‘pluralist’ model of interpretation reflecting some unspecified combination of original intent, consequentialist, current majority, and progressive historicist reasoning” provides no real basis for decision making except the judge’s own sense.⁴⁷³ In sum, the natural law

470. *Id.* at 165–70.

471. *Id.*

For example, the Supreme Court’s approach to race discrimination changed from 1896, when the Court focused on existing customs and traditions to determine the reasonableness of legislation requiring whites and non-whites to ride in separate railway cars in *Plessy v. Ferguson*, [163 U.S. 537 (1896)], to 1954, when the Court focused more on the reasoned demands of human dignity and not treating any individual as a second-class citizen in *Brown v. Board of Education*, [347 U.S. 483 (1954)]. From a current majority theory of justification, the Court could say after 1954 that race discrimination cases should follow *Brown*, but would have no grounds to reject *Plessy* as inappropriate for 1896 if the *Plessy* doctrine was consistent with legal doctrine then.

See generally Kelso, *supra* note 132, at 171–72.

472. *Id.* at 156.

Under a progressive historicist theory of interpretation, the focus of legal justification is on what theory of interpretation is most likely to be reflected in the future. An approach based on cognitive and moral developmental psychology suggests the views an enlightened community “eventually will hold” will reflect a modern version of natural law. See generally KELSO & KELSO, *supra* note 26, at 483–88 nn.71–81. The growing convergence among Western industrialized democracies for judicial review based upon a modern version of natural law is consistent with this view of progressive historicist reasoning.

See Kelso, *supra* note 132, at 172–73.

473. *Id.* at 156–57. For example, “Professor James Fallon has argued for his interpretation theory on pluralist grounds.” *Id.* at 173. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99, 1243–46, 1252–68 (1987).

theory of interpretation best comports with original intent or any other theory of interpretation one would adopt.⁴⁷⁴

VIII. CONCLUSION

Three recent related articles have discussed a predictable and principled structure to make the rational basis, intermediate review, and strict scrutiny tiers of review “more scientific.”⁴⁷⁵ This Article has focused on a concern about the manipulability of which standard to apply by discussing: (1) a principled approach to when the Court should apply a rational basis, intermediate review, or strict scrutiny kind of review; and (2) why the Court’s current approach is better than other competing alternatives.⁴⁷⁶

In pursuit of objective (1), Part II of this Article summarized the existing standards of review. Part III then discussed the various factors the Supreme Court uses to determine whether to apply a particular standard of review. Part IV provided an analysis of why the Court’s current decision making regarding what standard of review to apply is generally sound and defensible as reflecting reasoned decision making.⁴⁷⁷

In pursuit of objective (2), Part V generally discussed why in the American constitutional context the current standards of review approach is better than other competing alternatives, such as a sliding scale approach or a single-standard proportionality approach. Part VI then discussed how a more explicit acknowledgment of a background commitment to reasoned decision making would improve the Court’s current approach. Part VII discussed why that commitment to reasoned decision making supports interpretation based on the original meaning of the concepts used in the

While such an approach has the strength of being able to pick and choose among all the other kinds of interpretation approaches how much emphasis to give each in various circumstances, it has the weakness of not providing the judge with any guidance other than the judge’s own internal balance. As John Hart Ely famously remarked, it is likely to be adopted by a person who is “envisioning a Court staffed by Justices who think as they do.”

See Kelso, *supra* note 132, at 173.

474. *See* Kelso, *supra* note 132, at 174 (“[T]here are reasons to believe [] the natural law theory described herein also represents the best moral theory from a consequentialist perspective, a current consensus or Dworkian perspective, a progressive historicist perspective, and thus from a pluralist perspective (since it reflects a combination of all the other perspectives).”).

475. *See generally supra* notes 3–5 and accompanying text.

476. This Article also suggested the current approach is consistent with the framers’ and ratifiers’ original intent in terms of how the Constitution should be interpreted. *See supra* text accompanying note 466.

477. *See generally supra* text accompanying notes 15–274.

Constitution, and such interpretation reflects the original intent of the framers and ratifiers.⁴⁷⁸ Part VIII provided a brief conclusion. Appendix A, which follows, provides a summary of the seven basic standards of review discussed in this Article. Appendix B provides a summary of where those seven standards of review are used in the Court's constitutional doctrine.

478. See generally *supra* text accompanying notes 275–474.

APPENDICES

Appendix A

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Appendix B

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APPENDIX A

SUMMARY OF THE ELEMENTS OF THE STANDARDS OF REVIEW

Rational Review: Under rationality review, the regulation must be “rationally related to legitimate government interests.” Substantial deference is given to government, as in *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (“[A] classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’”).

2nd-Order Reasonableness Review: As phrased in *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (addressing an “individual’s right to vote and his right to associate with others . . .”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)):

A court . . . must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights. . . . “[R]easonable, nondiscriminatory restrictions . . . are generally sufficient to justify” the restrictions. *Burdick*, 504 U.S. at 428.

This test is different from rational review in a number of ways. First, in *Burdick* the Court is limited to the “precise interests put forward by the State,” not “any reasonably conceivable interest.” *Id.* at 428. Second, *Burdick* represents a “reasonableness balancing” concerned with the extent of the statute’s benefits versus the amount of the burden placed on the individual. Part of this balance, as stated in *Burdick*, involves the Court considering less burdensome alternatives to determine “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* at 428. The only issue under rational review is whether the burden on the individual is rational. Third, as stated in *Burdick*, the court does the balancing of benefit and burdens to determine the reasonableness of the government action, not substantial deference to government. Fourth, despite the Court determining for itself the extent to which the alleged governmental interests are actually supported by fact, some deference to governmental judgment is still given under “reasonableness balancing.” See *Thornburgh v. Abbott*, 490 U.S. 401,

413–14 (1989) (review “is not toothless” but prison officials must “be given broad discretion to prevent . . . disorder); *see also* Mathews v. Eldridge, 424 U.S. 319, 439 (1976) (under procedural due process balancing “substantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with . . . administration . . .”).

Additional Matters: The challenger bears the burden of proving unconstitutionality under rational review and 2nd-order reasonableness balancing. In contrast, under strict scrutiny, intermediate review, or 3rd-order reasonableness balancing, the government bears the burden of justifying its action. *See* Shaw v. Hunt, 517 U.S. 899, 908 (1996) (strict scrutiny); United States v. Virginia, 518 U.S. 515, 529 (1996) (intermediate review); Pickering v. Bd. of Educ. of Will Cnty., Ill., 391 U.S. 563, 568, 572 n.4 (1968) (3rd-order reasonableness balancing). At strict scrutiny only “actual” governmental purposes can be used. *See* Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) (“actual purpose.”). At intermediate review “actual” or “plausible” interests may be considered to justify the statute. *See generally* KELSO & KELSO, *supra* note 26 at 1103–04 nn.92–99. Under reasonableness balancing, conceivable, but implausible, reasons can be used if “put forward by the government in litigation”; at rational review “any reasonably conceivable” government interest can be used, even one made up by the Court during litigation. *See id.* For more in-depth discussion of rational review and reasonableness balancing, see Kelso, *supra* note 2.

3rd-Order Reasonableness Review: The test under 3rd-order reasonableness review is the same as under 2nd-order reasonableness review. The difference is the government bears the burden of proving the reasonableness of the government action. *See Pickering*, 391 U.S. at 568, 572 n.4 (free speech of government workers on matters of public concern).

Intermediate Review: Under intermediate review, government action must be “substantially related to advancing substantial government interests.” *See* Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989). As discussed in Kelso, *supra* note 4, six questions are asked at intermediate review:

Regarding Ends: (1) Is government advancing substantial (important or significant) ends?

Means to Achieve Ends: (2)(a) Is the government action “substantially underinclusive” in failing to regulate individuals who are part of some problem (the *under inclusiveness* inquiry); and (2)(b) Does the government action “substantially serve” to achieve its benefits on those whom the statute does regulate (the *service* inquiry);

Burdens Imposed by Government: (3)(a) Is the government action “substantially more burdensome than necessary” in imposing burdens on individuals who are not part of the problem (the *over inclusiveness* inquiry); (3)(b)(i) Is the government action “substantially more burdensome than necessary” on individuals who are properly regulated (*restrictiveness* inquiry); (3)(b)(ii) Even if not, does the government action leave open ample alternative channels of expression (*oppressiveness* inquiry)?

Intermediate Review with Bite: Intermediate Review for Ends, Burdens; Strict Scrutiny Means. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

Loose Strict Scrutiny Review: Strict Scrutiny for Ends, Means; Intermediate Review Burdens. See *Bush v. Vera*, 517 U.S. 952, 977 (1996).

Strict Scrutiny Review: Under strict scrutiny review, government action must be “necessary to advance compelling governmental interests” and must be “narrowly drawn.” See *Simon & Shuster, Inc.*, 502 U.S. 105, 119–20 (1991). As discussed in *Kelso*, *supra* note 5, six questions are asked at strict scrutiny:

Regarding Ends: (1) Is government advancing compelling (or overriding) ends?

Means to Achieve Ends: (2)(a) Is the government action “unnecessarily underinclusive” in failing to “directly regulate” individuals who are part of some problem (the *under inclusiveness* inquiry); and (2)(b) Does the government action “substantially serve” to achieve its benefits on those whom the statute does regulate (the *service* inquiry);

Burdens Imposed by Government: (3)(a) Is the government action “the least burdensome effective alternative” in imposing burdens on

individuals who are not part of the problem (the *over inclusiveness* inquiry); (3)(b)(i) Is the government action the “least burdensome effective alternative” on individuals who are properly regulated (*restrictiveness* inquiry); (3)(b)(ii) Even if the “least burdensome effective alternative” does the government action leave open ample alternative channels of expression (*oppressiveness* inquiry).

The Supreme Court also uses the phrase “least restrictive . . . effective alternatives” to describe this “least burdensome effective alternative” requirement. *See, e.g., United States v. Alvarez*, 567 U.S. 709, 729 (2012).

APPENDIX B

TABLE 1: LEVELS OF REVIEW OF GOVERNMENT ACTION:
THE “BASE PLUS SIX” MODEL OF REVIEW*

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends		Typical Areas Where Used
		Relationship to Benefits	Relationship to Burdens	
I. “Base” or “Standard” Rational Review (Three Requirements are Separate Elements to Meet)				
Standard Rational Review: Burden on challenger to prove unconstitutionality	Legitimate (substantial deference to government)	Rational (substantial deference to government)	Not Irrational (substantial deference to government)	Standard Social or Economic Regulation: <i>Williamson v. Lee Optical</i> ; <i>Heller v. Doe</i>
				Aliens: Illegal; Job Part of Democracy; Federal Regulation
[Does government have “rational basis” to act]				Contract Clause: <i>Energy Reserves</i>
II. The “Plus Six” Standards of Increased Scrutiny				
A. Heightened Rational Review (Reasonableness Balancing of Means & Ends, Not Separate Elements)				
“Second-Order Reasonableness Review”: Burden on challenger to prove unconstitutionality	Legitimate Ends “Reasonable” Given Means			Dormant Commerce Clause: <i>Pike</i>
	(no substantial deference to government)	(no substantial deference to government)	(no substantial deference to government)	Contract Clause: <i>U.S. Trust / Spannaus</i>
[Balance government interests & availability of less burdensome alternatives v. burdens on persons] [some deference to government]				Takings Clause: <i>Penn Central</i>
				Punitive Damages: <i>BMW v. Gore</i>
				Less than Substantial Burdens on Unenumerated Fundamental Rights
				Proc. Due Process: <i>Mathews</i> test

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends		Typical Areas Where Used
		Relationship to Benefits	Relationship to Burdens	
II. The "Plus Six" Standards of Increased Scrutiny				
A. Heightened Rational Review (Reasonableness Balancing of Means & Ends, Not Separate Elements)				
"Third-Order Reasonableness Review": Burden on Government	Legitimate Ends "Reasonable" Given Means			Dormant Commerce Clause: <i>Maine v. Taylor</i> Takings Clause: <i>Dolan v. Tigard</i>
	(no substantial deference to government)	(no substantial deference to government)	(no substantial deference to government)	
	[Same as Second-Order Review, except the burden shifts to the government to justify its action: Burden remains on government for all higher levels of review]			
B. Intermediate Review Standards (Three Requirements are Separate Elements to Meet)				
Intermediate Review	Substantial/ Important/ Significant	Substantially Related	Not Substantially More Burdensome Than Necessary & Ample Alternatives	Gender Discrimination Illegitimacy Alien Children: <i>Plyler v. Doe</i> Art. IV, sec. 2 Priv. & Imm. Clause
Intermediate Review with Bite	Substantial/ Important/ Significant	Directly and Substantially Related	Not Substantially More Burdensome Than Necessary & Ample Alternatives	Commercial Speech: <i>Central Hudson</i>

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends		Typical Areas Where Used
		Relationship to Benefits	Relationship to Burdens	
II. The "Plus Six" Standards of Increased Scrutiny				
C. Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)				
Loose Strict Scrutiny	Compelling/Overriding	Directly and Substantially Related	Not Substantially More Burdensome Than Necessary & Ample Alternatives	Racial Redistricting: <i>Bush v. Vera</i>
Strict Scrutiny Review	Compelling/Overriding	Directly and Substantially Related	Least Restrictive Effective Alternative & Ample Alternatives	Race, Ethnicity, National Origin Aliens: State Regulation of Lawful Aliens Not Involving Democracy Substantial Burden on Unenumerated Fundamental Right

* For a discussion of each of the elements of these standards of review, see **Appendix A**.

TABLE 2: LEVELS OF REVIEW UNDER THE FIRST AMENDMENT:
THE "BASE PLUS SIX" MODEL OF REVIEW

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends		Typical Areas Where Used
		Relationship to Benefits	Relationship to Burdens	
I. "Base" or "Standard" Rational Review (Three Requirements are Separate Elements to Meet)				
"Minimum Rational Review": Burden on challenger to prove unconstitutionality	Legitimate (substantial deference to government)	Rational (substantial deference to government)	Not Irrational (substantial deference to government)	If No Free Speech Review (see <i>supra</i> note 256), then only <i>Williamson v. Lee Optical</i> review under Due Process or <i>Heller v. Doe</i> review under the Equal Protection Clause
	[Does government have "rational basis" to act]			
II. The "Plus Six" Standards of Increased Scrutiny				
A. Heightened Rational Review (Reasonableness Balancing of Means & Ends, Not Separate Elements)				
"Second-Order Reasonableness Review": Burden on challenger to prove unconstitutionality	Legitimate Ends "Reasonable" Given Means			Non-Public Forum: Subject-Matter or Content-Neutral Regulations Gov't Grants, Subsidies, Trademark Defamation and Related Torts Less than Substantial Burdens on Freedom of Assembly/ Association
	(no substantial deference to government)	(no substantial deference to government)	(no substantial deference to government)	
[Balance government interests & availability of less burdensome alternatives v. burdens on persons]				

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends		Typical Areas Where Used
		Relationship to Benefits	Relationship to Burdens	
II. The "Plus Six" Standards of Increased Scrutiny				
A. Heightened Rational Review (Reasonableness Balancing of Means & Ends, Not Separate Elements)				
"Third-Order Reasonableness Review": Burden on Government	Legitimate Ends "Reasonable" Given Means			Government Employees on Matters of Public Concern: <i>Pickering</i> Commercial Speech: <i>Zanderer</i>
	(no substantial deference to government)	(no substantial deference to government)	(no substantial deference to government)	
[Same as Second-Order Review, except the burden shifts to the government to justify its action: Burden remains on government for all higher levels of review]				
B. Intermediate Review Standards (Three Requirements are Separate Elements to Meet)				
Intermediate Review	Substantial/ Important/ Significant	Substantially Related	Not Substantially More Burdensome Than Necessary & Ample Alternatives	Public Forum: Content-Neutral Regulations of Speech: <i>O'Brien</i> Broadcast TV and Radio: <i>Red Lion</i> Campaign Contributions: <i>McConnell</i> Campaign Disclosure Regs.: <i>Reed</i>
Intermediate Review with Bite	Substantial/ Important/ Significant	Directly and Substantially Related	Not Substantially More Burdensome Than Necessary & Ample Alternatives	Commercial Speech: <i>Central Hudson</i>

Level of Scrutiny	Gov't Ends or Interests to be Advanced	Statutory Means to Ends		Typical Areas Where Used
		Relationship to Benefits	Relationship to Burdens	
II. The "Plus Six" Standards of Increased Scrutiny				
C. Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)				
Loose Strict Scrutiny	Compelling/Overriding	Directly and Substantially Related	Not Substantially More Burdensome Than Necessary & Ample Alternatives	Content-Based Regulations of Cable/Satellite TV and Radio: <i>Denver Area Educ. Telecomm.</i> (Breyer, J., plurality opinion)
Strict Scrutiny Review	Compelling/Overriding	Directly and Substantially Related	Least Restrictive Effective Alternative & Ample Alternatives	Public Forum: Content-Based Regulations of Speech All Viewpoint Discrimination
Free Exercise: <i>Employment Division v. Smith</i> : Strict Scrutiny for discrimination against religion, hybrid cases, or precise facts of <i>Sherbert v. Verner</i> ; otherwise, Rational Review				Campaign Finance Expenditures: <i>Citizens United</i> (2010)
Establishment Clause: Categorically barred if fail test for violation of Clause				Substantial Burdens on Freedom of Assembly/Association