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I. INTRODUCTION

Rights review in the United States is based on two distinct lines of authority: tier review and reasonableness balancing review. Under tier review—typically used under the Equal Protection Clause, Due Process Clause, or First Amendment freedom of speech—the Court focuses on whether to adopt strict scrutiny, intermediate review, or minimum rationality review.[1] The chosen standard of review is then applied to the facts. Under reasonableness balancing review—used, among other areas, for analysis of: the dormant Commerce Clause; the Contracts Clause; the Takings Clause; constitutionality of punitive damages in tort actions; less than substantial burdens on unenumerated fundamental rights, such as under the right to vote or right of access to courts; rights of government workers to speak on matters of public concern; congressional regulation under section five of the Fourteenth Amendment; reasonableness of search and seizures under the Fourth Amendment; cruel and unusual punishment consideration under the Eighth Amendment; and procedural due process—the Court balances the benefits of the government regulation against the burden on the individual, and then asks whether given the benefit the burden is

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1. *See infra* Part III.B.2.

"unreasonable," "clearly excessive," "grossly excessive," "grossly disproportionate," or in some other fashion goes "too far."[2]

In contrast, rights review in other constitutional courts around the world makes use of only one basic approach: proportionality.[3] Proportionality analysis has three basic steps: (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.[4] A preliminary "fourth step"—entitled "legitimacy"—is used by some courts.[5] 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.[6] 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 on its own.[7]

Despite surface differences between American tier and reasonableness review versus international proportionality review, each approach uses the same building blocks in developing the relevant standard of review.[8] Each is based on a means/end analysis, focusing both on the ends the government is seeking to advance, and the means by which those ends are advanced.[9] Each focuses on the extent to which the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate.[10] Each is concerned with whether the government's interests are strong enough to justify the burden on individual rights.[11]

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2. *See infra* Part III.B.3.

3. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008); *see also infra* Part III.A.

4. Stone Sweet & Mathews, *supra* note 3, at 75-76.

5. *Id.* at 75.

6. *Id*.

7. *See infra* notes 27-29 and accompanying text. It should be noted that nothing of importance turns on this question of whether proportionality review is phrased as a "three-step" or "four-step" analysis. *See* Stone Sweet & Mathews, *supra* note 3, at 75. As long as 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" analysis, as discussed herein. *See id.*

8. *See infra* Part II.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

By focusing on these three analytic points of commonalty, one can better understand the current doctrinal choices made by United States and international courts, and can better see that both are variations on a similar theme. It is also possible that, over time, the two approaches will move in the direction of more relative convergence, even if complete identity of an approach is not likely to be adopted, given basic differences in judicial temperament in common law and civil law countries.[12]

II. THE BUILDING BLOCKS OF INDIVIDUAL RIGHTS REVIEW

As noted in the Introduction, there are three building blocks to individual rights review in both the United States and international courts.[13] The first building block is adoption of a means/end analysis, focusing both on the ends the government is seeking to advance, and the means by which those ends are advanced.[14] The second building block focuses on the extent to which the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate.[15] The third building block is concerned with whether the government's interests are strong enough to justify the burden on individual rights.[16]

A. Means/End Reasoning

Under the first building block, one has to decide how strong the government end has to be to justify the regulation and how well the means have to be drafted to advance that end.[17] Under the American constitutional doctrines of strict scrutiny, intermediate review, and minimum rationality review, there are three different answers to these questions.[18] Under minimum rationality review, the government action—whether legislation, administrative regulation, or executive orders of the President—only has to be *rationally related* to advancing a *legitimate* government end.[19] Great deference is paid to government officials' judgments that such a legitimate

12. *See infra* notes 272-314 and accompanying text.
13. *See supra* notes 9-11 and accompanying text.
14. *See infra* Part II.A.
15. *See infra* Part II.B.
16. *See infra* Part II.C.
17. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 685-86 (4th ed. 2011).
18. *See infra* notes 19-24 and accompanying text.
19. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993) ("Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (citing Nordlinger v. Hahn, 505 U.S. 1, 11 (1992))).

government end and a rational relationship exist.[20] Under this deference, the court does not undertake an independent review of the ends and means, but rather only asks whether the government had a "rational basis" for thinking that the government action was rationally related to a legitimate end.[21] Indeed, under minimum rationality review, the Court presumes the statute is constitutional, and the challenger has the burden to prove the lack of a legitimate interest, or that the statute is not rationally related to advancing its end.[22] In contrast, under intermediate review, the government has the burden to justify its action, and the government action must be *substantially related* to advancing an *important or substantial* government interest.[23] At strict scrutiny, the government also has the burden to justify its actions, and *those* actions must be *directly related* to advancing a *compelling or overriding* governmental interest.[24]

Naturally, under any of these standards of review the governmental interest cannot be illegitimate.[25] An illegitimate government interest will not support the statute under any standard of review.[26] For example, in a sequence of cases, the Supreme Court of the United States has stated that prejudice against interracial marriage, prejudice against the mentally impaired, and animus against politically unpopular groups—such as hippies in communes or homosexuals—are illegitimate governmental interests.[27]

The international inquiry into suitability—the first stage of proportionality review—tracks a rational review approach to this first building block by asking whether "the means chosen **and** the ends pursued

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20. *See, e.g.*, CHEMERINSKY, *supra* note 17, at 695 ("The Supreme Court generally has been extremely deferential to the government when applying the rational basis test . . . . [I]t is very rare for the Supreme Court to find that a law fails the rational basis test.").

21. *See, e.g.*, *Heller*, 509 U.S. at 320 ("Instead, a classification 'must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993))).

22. *Id.* ("A statute is presumed constitutional, . . . and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))).

23. *See* CHEMERINSKY, *supra* note 17, at 687 ("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.").

24. *See id.* ("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.").

25. *See id.* at 695.

26. *See id.*

27. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) ("animus" against a politically unpopular group, in this case, sexual orientation, is an illegitimate governmental interest); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (prejudice against the mentally impaired is illegitimate); Palmore v. Sidoti, 466 U.S. 429, 430, 433 (1984) (prejudice against interracial marriage is illegitimate); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("congressional desire to harm a politically unpopular group," in this case "hippie communes," is not a legitimate interest).

is rational **and** appropriate, given a stated policy purpose."[28] As has been noted, explicit in some courts, and implicit in others, is an inquiry into "legitimacy"—whether the purpose of the government action reflects constitutionally legitimate action.[29] This analysis reflects the same concern American courts have with ensuring that the government is always advancing, at a minimum, legitimate government interests, and is not regulating only for illegitimate reasons.[30]

In applying this test, American courts will ask whether the regulation is conceivably advancing a legitimate interest, not whether the actual or plausible purpose of the government regulation is legitimate.[31] Thus, it is only when there is no conceivable legitimate interest to the government regulation that the court will rule the statute unconstitutional under a bare legitimacy analysis.[32] In contrast, under strict scrutiny, the Court will only consider actual governmental purposes to support the statute.[33] Under intermediate review, while the Court's decisions are not as clear, the Court typically uses actual or plausible governmental interests, and usually only considers those interests "put forward" in litigation by the government.[34] The Court has never had to decide if the Court could consider, on its own motion, a plausible purpose for the regulation not argued by the government.[35] The Court has stated, however, that at intermediate review

28. Jud Mathews & Alec Stone Sweet, *All Things In Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 802 (2011) (emphasis in original).

29. Stone Sweet & Mathews, *supra* note 3, at 75 & n.8. Even those courts which do not explicitly have "legitimacy" as a first step before looking to "suitability"—such as courts of the European Union, European Court of Human Rights, and the World Trade Organization—no doubt would, if faced with government action that did not advance any conceivable legitimate interests, say the action was not "suitable," as not being rationally related to a stated policy purpose. *Id.* At least one hopes they would, and they should as part of any defensible scheme of individual rights review.

30. *See supra* notes 25-27 and accompanying text.

31. *See, e.g.*, *Heller*, 509 U.S. at 320 ("Further, a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992))); *see also Lehnhausen*, 410 U.S. at 364 ("[A]nd 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940))).

32. *See* CHEMERINSKY, *supra* note 17, at 695.

33. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) (a law "cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature"; instead, "the State must show that the alleged objective was the legislature's 'actual purpose'" (citations omitted)).

34. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 768 (1993) ("Unlike rational basis review, the *Central Hudson* [intermediate review] standard does not permit us to supplant the precise interests put forward by the State with other suppositions. Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction." (citations omitted)); *see also* Craig v. Boren, 429 U.S. 190, 199 n.7 (1976) (the Court considered a purpose which could have plausibly motivated an impartial legislature, while acknowledging that whether this was an actual purpose of the legislature was not certain).

35. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

the Court will not consider hypothetical post hoc rationalizations for the act.[36]

In contrast to the American doctrine of minimum rationality review, international courts seem to do their own independent review of the government ends and the means by which they are advanced, rather than deferring to the government by only asking whether the government had a rational basis for its action.[37] As typically phrased, the court considers only "stated policy" by the government, similar to American intermediate review, and does not, on its own motion, come up with conceivable justifications for the Act.[38] The government has the burden under each of the three parts of proportionality review: suitability, necessity, and balancing.[39] Nevertheless, despite this higher review than under American minimum rationality review, it has been noted that in practice few laws are struck down under this "suitability" analysis, just as few laws are struck down under minimum rationality review.[40]

B. Narrow Tailoring

As with means/end reasoning, there are three different approaches under the American doctrines of strict scrutiny, intermediate review, and minimum rationality review to the second building block issue of whether the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate.[41] Under strict scrutiny, the government action must be the *least restrictive effective alternative* to advance the government's interest.[42] Under intermediate review, the government action must only be *not substantially more burdensome than necessary* to advance the government's interest, not the least burdensome alternative.[43] Under

36. *See, e.g.*, *id.* (justification used to support gender-based classifications "must be genuine, not hypothesized or invented *post hoc* in response to litigation." (emphasis in original)). This issue is discussed more fully in R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 7-9 (1995) [hereinafter Kelso, *Three Years Hence*] (suggesting that at intermediate review the Court should focus on interests "put forward" in litigation, similar to the international proportionality test of "stated policy" reasons by the government, discussed *infra* note 38 and accompanying text).

37. Stone Sweet & Mathews, *supra* note 3, at 75-76 nn.8-9.

38. *See id.* at 75.

39. *Id.* at 75-76 (noting that the judge "confirms" constitutionality for each inquiry).

40. Mathews & Stone Sweet, *supra* note 28, at 802.

41. *See infra* Part II.B.

42. *See, e.g.*, City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) ("A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it." (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000))).

43. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989) (clarifying that at intermediate review, the government does not have to use "least restrictive" or "least intrusive" means of

minimum rationality review, the government action must only *not impose an irrational burden* on individuals.[44]

The international inquiry into "necessity" tracks the strict scrutiny version of the narrow tailoring inquiry.[45] It asks specifically 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 necessary for the government to achieve its goals.[46] In practice, however, it has been noted that typically "judges do not invalidate a measure simply because they [the judges] can find one less restrictive alternative. Instead, most courts, explicitly or implicitly, insist that policymakers have a duty to consider reasonably available alternatives and to refrain from selecting the most restrictive among them."[47] This is slightly different than American strict scrutiny review, where government actions have been struck down because the judges could imagine a less restrictive effective alternative to the government action.[48] On the other hand, the Supreme Court of the United States does appear to be concerned with whether the government considered less burdensome alternatives, and, in this way, it mirrors international narrow tailoring analysis.[49] The principle that the government

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regulation, but the government must insure that "the means chosen are not substantially broader than necessary to achieve the government's interest . . . .").

44. *See, e.g.*, *Heller*, 509 U.S. at 324 ("A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978))).

45. Mathews & Stone Sweet, *supra* note 28, at 803.

46. *Id.*

47. *Id.*

48. *See, e.g.*, *Playboy*, 529 U.S. at 816. The Court invalidated a provision that required cable TV operators who provide channels primarily dedicated to sexually-oriented programming either to fully scramble or otherwise block those channels or limit transmission to hours when children are unlikely to be viewing, typically defined as between 10 p.m. to 6 a.m. *Id.* at 803. Because of signal bleed, "cable operators had 'no practical choice but to curtail [the targeted] programming during . . . sixteen hours'" a day. *Id.* at 809 (alteration in original) (quoting Playboy Entm't Grp. v. United States, 30 F.Supp.2d 702 (1998)). Justice Kennedy said the law failed strict scrutiny because a less restrictive alternative was available. *Id.* at 823. As he noted,

> The District Court concluded that a less restrictive alternative is available: [parental blocking of sexually explicit programming on cable channels, rather than a ban on showing such programming during times children are likely to be awake and watching television] . . . .
>
> When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.

Id. at 816 (alteration added).

49. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) ("[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored . . . . First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." (citing United States v. Paradise, 480 U.S. 149, 171 (1987))).

should consider alternatives, and cannot use post hoc rationalizations to support agency action, is a principle of American administrative law, just as it is a principle of administrative law in international courts.[50]

Depending on how it is applied in practice, a proportionality analysis that focused on a duty to "refrain from selecting the most restrictive" alternative would appear to allow the government to adopt a more restrictive alternative than necessary, as long as it was not the most restrictive among available alternatives.[51] This follows since the analysis would only appear to require the government not to adopt the most restrictive from among available alternatives, but would permit adoption of an alternative that was not necessarily the least restrictive alternative to address the problem.[52]

In practice, this might be similar to merely requiring the government not to adopt an alternative substantially more burdensome than other effective alternatives, and thus track the American intermediate review standard of narrow tailoring.[53] It has been noted, however, that a majority of laws that are struck down under proportionality review are struck down because they fail to meet the narrow tailoring/necessity analysis.[54] Thus, perhaps it is closer to American strict scrutiny, where the least restrictive alternative analysis turns out to be fatal to much government regulation tested under strict scrutiny review, but not all government regulation.[55]

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50. *See generally* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1042 (2011) ("In its first decision in SEC v. Chenery Corp., [318 U.S. 80, 94 (1943)] the Supreme Court announced a fundamental principle of administrative law: agency action can be upheld, if at all, only on the rationale the agency itself articulated when taking action. The corollary of Chenery is that agencies may not employ 'post hoc rationalizations' offered during litigation to save an action whose original rationale is untenable." (citations omitted)). *See also* Stone Sweet & Mathews, *supra* note 3, at 97-112 (discussing the development of proportionality analysis in German administrative law, and its evolution to constitutional rights review in Germany, and then around the world).

51. *See* Mathews & Stone Sweet, *supra* note 28, at 803 and accompanying text.

52. *See id.*

53. *See supra* note 43 and accompanying text.

54. Mathews & Stone Sweet, *supra* note 28, at 803.

55. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003). "Strict scrutiny is not 'strict in theory, but fatal in fact.'" *Id.* at 326 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

> Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."

Id. at 326-27 (quoting *Adarand*, 515 U.S. at 229-30). "But that observation 'says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.'" *Id.* at 327 (quoting *Adarand*, 515 U.S. at 230). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Id.*

Another variation of this narrow tailoring analysis is used by American courts when applying reasonableness balancing.[56] Under this approach, the court considers less restrictive alternatives as part of an overall balancing test to determine whether the government action is reasonable or excessive.[57] For example, as indicated in *Pike v. Bruce Church, Inc.*,[58] the basic dormant Commerce Clause test provides, if a state statute has only indirect effects on interstate commerce and regulates evenhandedly, the dormant Commerce Clause is violated only if plaintiff shows that the burden on interstate commerce is clearly excessive in relation to local interests.[59] When making that determination, the Court considers the nature of the local interest and whether it could be promoted as well by laws having a lesser impact on interstate activities.[60] Since the existence of alternatives is not an independent consideration, but part of an overall balancing approach, this can be called a "weak less restrictive alternative test," as opposed to the stronger less restrictive alternative tests of intermediate review and strict scrutiny.[61]

C. Balancing Stricto Sensu

Under the international proportionality analysis, "the judge weighs, in light of the facts, the benefits of the act (already found to have been narrowly tailored) against the costs incurred by infringement of the right, in order to decide which side shall prevail."[62] If done with precise rigor, the analysis focuses on whether the marginal benefit of the government regulation to advance the legitimate public interest is greater than the marginal burden on the individual.[63] In practice, many courts are not that rigorous and approach the question more from the perspective of ensuring that "no factor of significance to either side has been overlooked"[64] or, from the perspective of whether given the benefits of the government action versus the costs, "which 'constitutional value' shall prevail, in light of the respective importance of the values in tension, given the facts."[65]

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56. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
57. *See id.*
58. 397 U.S. 137 (1970).
59. *Id.* at 142.
60. *Id.*
61. This terminology is used in R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 498-504 (1992); Kelso, *Three Years Hence*, *supra* note 36, at 4 n.14.
62. Mathews & Stone Sweet, *supra* note 28, at 803.
63. *See id.* at 805 ("If the government is to prevail . . . , the court must agree that the measure under review generates enough added benefit . . . to justify the harm . . . .").
64. *Id*. at 803.
65. Stone Sweet & Mathews, *supra* note 3, at 75-76.

Such an approach would appear to track in rigor the American reasonableness balancing approach, where the issue is whether in light of the government's interests and the burden on the individual, including consideration of less burdensome alternatives, the government regulation is "unreasonable," "clearly excessive," "grossly excessive," "grossly disproportionate," or in some other fashion goes "too far."[66] When applying reasonableness balancing, the courts do not defer to "rational basis" legislative judgment, as they do under minimum rationality review in tier analysis.[67] Instead, the courts undertake their own independent review of the strength of the government's ends, and the means by which the government is advancing its ends.[68] In this regard, reasonableness balancing in America is similar to proportionality review, where the courts undertake independent review of the government's action.[69]

With regard to the burden of proof on the validity of the law, the similarity of American reasonableness balancing and international proportionality review depends on the precise circumstances in which the reasonableness balancing is done.[70] Under international law, the burden always is on the government to justify its action.[71] Under American reasonableness balancing, the burden is sometimes on the government to justify its action. This is true for: cases of facial or purposive discrimination under the dormant Commerce Clause test of *Maine v. Taylor*;[72] cases of individuals singled out for regulation under the "rough proportionality" Takings Clause test of *Dolan v. City of Tigard*;[73] cases involving the free speech rights of government workers to speak on matters of public concern under *Pickering v. Board of Education of Township High School Dist. 205, Will County, Illinois.*;[74] congressional enforcement of the Civil War amendments under the "congruence and proportionality" analysis of *City of*

66. These various phrasings of "reasonableness balancing" are discussed *infra* Part III.B.

67. *See* Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662, 670-71 (1981).

68. *See, e.g., id.* (in a dormant Commerce Clause case, the Court noting, "[b]ut the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack . . . . Th[e] 'weighing' by a court requires . . . 'a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.'" (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441(1978))). This issue is discussed further at *infra* notes 245-246, 253-260 and accompanying text.

69. *See* Stone Sweet & Mathews, *supra* note 3, at 75-76; *see also supra* note 37 and accompanying text.

70. *See* Stone Sweet & Mathews, *supra* note 3, at 75-76.

71. *See id.*

72. 477 U.S. 131, 138 (1986).

73. 512 U.S. 374, 391 (1994).

74. 391 U.S. 563, 574-75 (1968).

Boerne v. Flores;[75] and reasonableness of search and seizures under the Fourth Amendment in *Terry v. Ohio*.[76]

In contrast, in a number of cases under American reasonableness balancing, the burden remains on the challenger to prove the "unreasonableness" of the government's action. This is true for: cases of non-facial or non-purposive discrimination under the dormant Commerce Clause test of *Pike v. Bruce Church*;[77] standard Takings Clause review of government action under the test in *Penn Central Transportation Co. v. City of New York*;[78] Contracts Clause review of government impairing its own contract obligations under *United States Trust Co. of New York v. New Jersey*[79] or impairing only a narrow range of contract actors in the state, as under *Allied Structural Steel Co. v. Spannaus*;[80] constitutionality of punitive damages under *BMW of North America, Inc. v. Gore*;[81] analysis of less than substantial burdens on unenumerated fundamental rights, as in *Crawford v. Marion County Election Board*;[82] and procedural due process analysis under *Mathews v. Eldridge*.[83]

Under tier analysis, the Court does not typically undertake a separate "reasonableness balancing" inquiry.[84] There is, however, an implicit balancing going on.[85] As noted earlier, under the means/end part of strict scrutiny analysis, the government needs to be advancing compelling or overriding interests for the government to prevail.[86] This requirement tends to ensure that the government has very strong reasons for its regulation, and thus would likely prevail in a reasonableness balancing of benefits versus burdens.[87] Even under intermediate review, the government needs important or substantial government interests to prevail.[88] This also tends to assure that if the government only had weak interests, which would be outweighed by the burden on the individual under a reasonableness balancing, then the government would fail the means/end part of intermediate review.[89] For example, under both intermediate review and

75. 521 U.S. 507, 519-20 (1997).
76. 392 U.S. 1, 19-20 (1968).
77. 397 U.S. 137, 142 (1970).
78. 438 U.S. 104, 124, 130-36 (1978).
79. 431 U.S. 1, 23-26 (1977).
80. 438 U.S. 234, 240-51 (1978).
81. 517 U.S. 559, 575-85 (1996).
82. 553 U.S. 181, 200-02 (2008).
83. 424 U.S. 319, 335, 348-49 (1976).
84. Mathews & Stone Sweet, *supra* note 28, at 804-05.
85. *See id.* at 805.
86. *See* CHEMERINSKY, *supra* note 20, at 687; *see also supra* note 24 and accompanying text.
87. *See* CHEMERINSKY, *supra* note 20, at 687.
88. *See id.*; *see also supra* note 23 and accompanying text.
89. *See* CHEMERINSKY, *supra* note 20, at 687.

strict scrutiny, the Court has indicated that "mere administrative convenience," such as saving governmental costs, cannot be an important or compelling interest.[90]

Furthermore, under versions of intermediate review used in First Amendment free speech cases, the Court explicitly considers under the "narrow tailoring" part of the analysis whether the individual is left, after the regulation, with reasonably available alternative means of communication.[91] This works as a check on the government to make sure the government is not burdening the individual too much by the regulation, even if the government is advancing substantial government interests.[92] Such consideration is implicitly a form of ensuring that the marginal burden on the individual in restricting speech, and reducing channels of communication, is not so great as to outweigh the benefits of the statute.[93] For cases of strict scrutiny under First Amendment free speech analysis, the Court is naturally even more concerned that the burden on free speech rights caused by the government action is minimal.[94]

III. ISSUES REGARDING THE EXISTING STANDARDS OF REVIEW IN THE UNITED STATES AND INTERNATIONAL CONSTITUTIONAL ADJUDICATION

A. International Proportionality Analysis

As classically stated, there is but one proportionality analysis ("PA") that the Court will use for consideration of every case involving review of government action. As has been noted, "embracing 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 . . . ."[95] On the other hand, "PA does not tell

90. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 205, 217 (1977) (simply "sav[ing] the Government time, money, and effort . . . do not suffice [under intermediate review] to justify a gender-based discrimination in the distribution of employment-related benefits.").

91. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

92. *See* CHEMERINSKY, *supra* note 20, at 687; *see also supra* note 23 and accompanying text.

93. *See, e.g.*, *Clark*, 469 U.S. at 295 ("Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.").

94. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 326, 334 (1988) (in a case involving regulation of picketing outside foreign embassies, the Court held that while prohibiting picketing undertaken to "intimidate, coerce, threaten, or harass" might be constitutional, prohibiting all negative picketing outside foreign embassies was too broad, and not narrowly tailored).

95. Mathews & Sweet Stone, *supra* note 28, at 808.

judges what weight to give constitutional values that are in tension."[96] For this reason, PA gives judges great flexibility to decide on the proper balancing of interests involved in the case.[97]

Despite this flexibility, which might be used vigorously against the government or deferentially toward the government, depending on the judge, it has been noted, "[w]herever it has been adopted, PA replaced more deferential standards."[98] How stringent, however, may depend on whether the judge uses in any case the more vigorous least restrictive alternative analysis similar to American strict scrutiny, the less vigorous narrowly drawn analysis similar to American intermediate review,[99] the more stringent *strictu senso* balancing focused on marginal benefits and burdens, or a less stringent generic reasonableness balancing.[100] Unlike American levels of review, where some cases are given more searching scrutiny than others, PA does not explicitly adopt such differing levels of review.[101] It may be, however, that for certain cases judges do adopt a more rigorous analysis, while in other cases they use the less vigorous kind of PA review.[102] Or it may be that in some courts the judges always adopt the more rigorous kind of PA review, while in other courts the judges always adopt the less rigorous kind of PA review.[103] Individuals more knowledgeable about international constitutional decision making would be better positioned to canvass PA decision making around the world and analyze these possible variations in PA review. In this Article, the focus is on the "most appropriate" approach if one single PA standard were to become universal.[104]

B. American Standards of Review

1. Sliding Scale versus Levels of Review

American judges have sometimes considered whether they should scrap the existing levels of review, and adopt "one level" of review—similar to the international proportionality single standard of review—but then apply

96. *Id.* at 810.
97. *See id.*
98. *Id.* at 809.
99. *See supra* notes 46-55 and accompanying text (discussing whether in practice the proportionality narrowly drawn analysis is closer to American strict scrutiny or intermediate review).
100. *See supra* notes 62-68 and accompanying text (discussing more and less vigorous forms of *stricto sensu* balancing).
101. *See* Mathews & Sweet Stone, *supra* note 28, at 864.
102. *See id.* at 810.
103. *See id.*
104. *See infra* text following note 339.

the test according to a "sliding scale" approach.[105] As typically defined, a sliding scale approach considers such factors as "the constitutional and social importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification [was] drawn."[106] Those who favor a sliding scale believe that it would lead to more candid discussion of the competing interests and therefore provide overall better decision making.[107]

On the other hand, the sliding scale approach has been criticized as not providing the judge with sufficient objective standards to minimize judicial activist decision making.[108] Further, a sliding scale approach may well provide lower courts with too much discretion in applying the sliding scale standard.[109] This is particularly true given the growth in the dockets of the lower federal courts, which makes it "essentially impossible for the [Supreme] Court to engage in meaningful 'error correction.'"[110]

2. Tier Analysis

Under tier analysis, the Supreme Court of the United States has explicitly adopted three levels of review. As discussed earlier, under minimum rational review, the legislation has to (1) advance legitimate government ends, (2) be rationally related to advancing these ends, and (3) not impose irrational burdens on individuals.[111] Under intermediate review, the legislation 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.[112] Under strict scrutiny, the statute must (1) advance compelling governmental

105. *See, e.g.*, Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and* Bush v. Gore, 4 U. PA. J. CONST. L. 372, 381-88 (2002) (discussing with approval the "sliding scale" approach touted by Justice Marshall in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 70-72 (1973) (Marshall, J., joined by Douglas, J., dissenting) and Justice Stevens in *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring))).

106. *Rodriguez*, 411 U.S. at 99.

107. *See id.*

108. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (in criticizing Justice Breyer for an interest-balancing approach to the Second Amendment right to bear arms, Justice Scalia noted, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach . . . . A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

109. *See* Goldstein, *supra* note 105, at 387-88.

110. 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).

111. *See supra* notes 19-22 and accompanying text.

112. *See* CHEMERINSKY, *supra* note 17, at 687; *see also supra* note 23 and accompanying text.

ends, (2) be directly related to advancing these ends, and (3) be the least restrictive effective means to advance these interests.[113]

The first inquiry under each of these three tests is what governmental ends support the statute's constitutionality.[114] Depending on the standard of review, the governmental interests must be: legitimate or permissible; important, substantial, or significant; or compelling or overriding.[115]

Of course, the governmental interest to support a statute may be illegitimate, and thus not support the statute under any standard of review.[116] For example, as noted earlier, in a sequence of cases, the Court has stated that prejudice against interracial marriage, prejudice against the mentally impaired, and animus against politically unpopular groups—such as hippies in communes, or homosexuals—are illegitimate governmental interests.[117]

The second inquiry under each of these three balancing tests concerns the relationship between the statute's means and how it advances those governmental ends.[118] Depending on the standard of review, the statute must have a rational relationship to its ends, a substantial relationship, or a substantial and direct relationship.[119] This relationship inquiry has two parts: (1) "the extent to which the statute fails to regulate all individuals who are part of some problem (the underinclusiveness inquiry); and (2) the way in which the statute serves to achieve its benefits [for] those whom the statute does regulate (the service inquiry)."[120] Although under a pristine analysis the Court probably should consider only the underinclusiveness inquiry under the Equal Protection Clause analysis, and reserve the service inquiry for Due Process Clause analysis, the Court has not typically disciplined its analysis in this way.[121]

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113. *See* CHEMERINSKY, *supra* note 17, at 687; *see also supra* note 20 and accompanying text.

114. *See* R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden*, 28 U. RICH. L. REV. 1279, 1286 (1994) [Kelso, *Considerations of Legislative Fit*].

115. The following discussion is based on *id*. at 1286-88 (1994) and sources cited therein. To reflect the most common terminology used by the Court, the terms legitimate governmental interests, important or substantial governmental interests, and compelling governmental interests are used in the remainder of this Article.

116. *See* Kelso, *Considerations of Legislative Fit*, *supra* note 114, at 1287.

117. *See Romer*, 517 U.S. at 632-35 ("animus" against a politically unpopular group, in this case, sexual orientation, an illegitimate governmental interest); *Cleburne Living Center*, 473 U.S. at 448 (prejudice against the mentally impaired illegitimate); *Palmore*, 466 U.S. at 433 (prejudice against interracial marriage illegitimate); *Moreno*, 413 U.S. at 534 ("congressional desire to harm a politically unpopular group," in this case "hippie communes," not a legitimate interest) (discussed *supra* note 27 and accompanying text).

118. Kelso, *Considerations of Legislative Fit*, *supra* note 114, at 1310.

119. *See id.* at 1288-97.

120. *Id.* at 1281.

121. *Id.* at 1293.

The third inquiry focuses on the burdens imposed by the statute's means.[122] Depending on the standard of review, the statute's burden must be rational, not substantially more burdensome than necessary, or the least restrictive burden that would be effective in advancing the governmental interests.[123] This burden inquiry also has two parts: "(1) the extent to which the statute imposes burdens on individuals who are not [part of the problem that is being] regulated (the overinclusiveness inquiry); and (2) the amount of the burden on individuals who are properly regulated by the statute (the oppressiveness or restrictiveness inquiry)."[124] Again, although under a pristine analysis the Court probably should consider only the overinclusiveness inquiry under Equal Protection Clause analysis, and reserve the restrictiveness inquiry for Due Process Clause analysis, the Court has not disciplined its analysis in this way either.[125]

> In theory, a statute which is neither underinclusive nor overinclusive, but which only minimally serves the government's interest[s], or greatly burdens individuals, does not deny a citizen equal protection of the laws, because the law is equally applied to all similarly situated parties. It may, however, deny the citizen substantive due process if the burden . . . is sufficiently great compared to the minimal benefit that is achieved.[126]

Therefore, under a complete review of the constitutionality of rights under both the Equal Protection and Due Process Clauses of the Constitution, both considerations should be considered in every case.

In applying the rational review test, the Court grants substantial deference to legislative judgment regarding the rationality of the legislative classification because, as the Court has often observed, the judiciary does not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."[127] Thus, it has been noted, "[t]he traditional deference *both* to legislative purpose [i.e., legislative interests or ends] *and* to legislative selections among means continues, on the whole, to make the rationality requirement largely

122. *See id.* at 1281.
123. Kelso, *Considerations of Legislative Fit*, *supra* note 114, at 1298-1305.
124. *Id*. at 1281.
125. *See id.* at 1282-83.
126. *See id.* at 1293 n.52.
127. *See, e.g.*, *Heller*, 509 U.S. at 319 (citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (*per curiam*)).

equivalent to a strong presumption of constitutionality."[128] For this reason, this standard of review is often called minimum rational review, because the government action only need be minimally rational to be upheld.[129]

Under the Court's Equal Protection Clause doctrine, this "rational relationship" inquiry has two parts.[130] The first aspect focuses on the statute's "underinclusiveness"—that is, to what extent does the statute fail to regulate all individuals who are part of some problem.[131] A statute may be held to be "irrationally underinclusive" if that statute fails to regulate certain individuals who are an equal part, or perhaps even a greater part, of creating some problem as are those individuals whom the statute does regulate, unless there is some rational explanation for why the persons who are equally or a greater part of some problem are not being equally regulated.[132] Such an explanation might be that the administrative costs of that regulation would be too expensive, but the government can get some benefit at low cost from regulating a lesser part of the problem first.[133] A statute that regulates the greater part of the problem first will be held to be "rational" because, as the Court has consistently noted, equal protection does not require that all evils of the same genus be eliminated or none at all.[134] The legislature can adopt a step-by-step approach, as long as each step is rational in terms of which part of the problem is regulated first.[135]

A classic example of the Court's "underinclusiveness" analysis occurred in *Railway Express Agency, Inc. v. New York*.[136] In this case, involving a ban on advertising on vehicles, the Court upheld an exemption for vehicles engaged in the usual business of the owner and not used mainly for advertising.[137] The legislature's legitimate interest in the case was a concern that advertisements on the sides of trucks would be a distraction to other drivers and pedestrians, and that distraction would cause a traffic safety problem.[138] Such distraction would be caused both by ads for other businesses on the side of a truck, which was prohibited under the statute,

128. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1442-43 (2d ed. 1988) (emphasis in original); *see also* CHEMERINSKY, *supra* note 17, at 695 ("The Supreme Court generally has been extremely deferential to the government when applying the rational basis test . . . . [I]t is very rare for the Supreme Court to find that a law fails the rational basis test.").

129. CHEMERINSKY, *supra* note 17, at 694-95.

130. *See* Kelso, *Considerations of Legislative Fit*, *supra* note 114, at 1281.

131. *See id.*

132. *See, e.g.*, Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 77 (2007).

133. *See, e.g.*, *id.* at 95.

134. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).

135. *See e.g.*, Redish, *supra* note 132, at 94.

136. 336 U.S. 106 (1949).

137. *See id.* at 108, 110-11.

138. *See id.* at 109.

and by ads for the truck owner's own business, which was permitted.[139] Despite this underinclusiveness in the statute, Justice Douglas wrote for the Court that the underinclusiveness was rational because the local authorities "may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."[140] Thus, the legislature was attacking the greater part of the problem first.[141]

Presumably, in reaching this conclusion, Justice Douglas had in mind that the legislature might have concluded that the nature of the ads for other businesses were more likely to be eye-catching, since the company was paying for the advertising space, and thus their nature was more likely to be distracting.[142] In addition, the legislature may well have concluded that the extent of such advertising was likely to be greater than the number of owners placing ads for their own business on the side of their trucks.[143] It is important to note the way in which the Court's deference to the legislature influenced the outcome of this case. The Court did not say in *Railway Express* that the Court was convinced that the nature and extent of the advertising on the side of trucks was different between ads for hire and ads for one's own business.[144] Nor did the government have the burden of introducing evidence into the case record.[145] The statute was held to be constitutional once the Court decided that the legislature "may well have concluded" the nature and extent of the advertising was different, and that such a conclusion was not shown by the challenger to be "irrational."[146]

The second part of the "rationally furthers" or "rational relationship" inquiry focuses on the statute's "overinclusiveness"—that is, the extent to which the statute imposes burdens on individuals who are not the focus of the statute's regulation.[147] Ideally, of course, a statute should only regulate those persons who are part of creating some problem, and not regulate innocent persons.[148] However, as the Court has noted, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

139. *See id.* at 110.
140. *Id.*
141. *See Ry. Express Agency*, 336 U.S. at 110.
142. *Id.* at 109-110.
143. *See id.* at 110.
144. *See id.* at 115-16 (Jackson, J., concurring)
145. *See id.* at 109-10 (majority opinion).
146. *See Ry. Express Agency*, 336 U.S. at 110.
147. Kelso, *Considerations of Legislative Fit*, *supra* note 114, at 1298.
148. *See id.* at 1298-99.

mathematical nicety or because in practice it results in some inequality.'"[149] On the other hand, a statute that burdens innocent persons for no rational reason will be held to be irrationally overinclusive.[150] As the Court has noted, the "question is whether Congress achieved its purpose in a patently arbitrary or irrational way."[151]

The case of *New York City Transit Authority v. Beazer*[152] provides a good example of the Court's overinclusiveness analysis.[153] *Beazer* involved a New York City Transit Authority policy not to employ persons who use methadone.[154] At the time, methadone was used in New York as a treatment program to help individuals cure their addiction to heroin.[155] Because of traffic safety concerns, the Transit Authority did not want persons on heroin working for the Transit Authority, and there was evidence that some individuals in the methadone treatment program, perhaps as many as twenty to thirty percent, would relapse and start taking heroin again.[156]

Although the complete ban on employment was overinclusive, in that perhaps seventy percent of the methadone users would have no ongoing drug problem with heroin, the Court held that the ban was not "irrationally" overinclusive.[157] Absent proof that the "offending [thirty percent] could be excluded as cheaply and effectively in the absence of the rule,"[158] the Court held that "the degree of rationality" was sufficient to make the ban constitutional.[159] The Court acknowledged that the Transit Authority's rule was likely "broader than necessary to exclude those methadone users who are not actually qualified to work" and that it may be "unwise for a large employer like [the Transit Authority] to rely on a general rule instead of individualized consideration of every job applicant," but that "represents a policy choice . . . made by that branch of Government vested with the power to make such choices."[160]

In its phrasing of intermediate review, the Court has used the term "narrowly tailored" to reflect both the substantial relationship and not substantially more burdensome than necessary elements of intermediate

149. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)).
150. *See id.* at 178-79.
151. *Id.* at 177.
152. 440 U.S. 568 (1979).
153. *See id.* at 590-94.
154. *Id.* at 570.
155. *Id.* at 574.
156. *See id.* at 571-72, 576.
157. *See Beazer*, 440 U.S. at 593-94.
158. *Id.* at 590 n.33.
159. *Id.* at 593.
160. *Id.* at 592 (citations omitted).

scrutiny.[161] In its phrasing of strict scrutiny, the Court has used the terms "precisely tailored" or "necessary" to reflect the fact that at strict scrutiny the statute must directly advance its ends and be the least restrictive effective means of doing so.[162] Unfortunately, sometimes the Supreme Court of the United States has used the phrase "narrowly tailored" under strict scrutiny.[163] To reflect the rigor of strict scrutiny analysis, and to separate this approach from the more flexible "substantially" narrowly-tailored analysis of intermediate review, the terms "precisely tailored" or "necessary" are better terms to use than "narrowly tailored" for the strict scrutiny "least restrictive alternative" test.

While these three standards of review are clearly identified in modern Supreme Court doctrine, two other standards of review have been used in modern doctrine.[164] These standards reflect variations on the three inquiries of governmental interests, relationship to benefits, and burdens.[165] As noted, under intermediate review, the legislation must: (1) advance important or substantial government interests; (2) be substantially related to advancing those interests; and (3) not be substantially more burdensome than necessary to advance these interests.[166] Strict scrutiny requires an increased level of scrutiny for each of these three questions.[167] Under strict scrutiny, the statute must: (1) advance compelling governmental interests; (2) be directly related, as well as substantially related, to advancing those interests; and (3) be the least restrictive effective means of doing so.[168]

The first additional level of review continues the intermediate level of scrutiny for elements one and three of the balancing test, but increases the level of scrutiny under the second prong from the intermediate level of substantial relationship to the strict scrutiny level of direct relationship.[169] This is the test used to determine the constitutionality of commercial speech regulations.[170] As the Court stated in *Central Hudson Gas & Electric Corp.*

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161. *See, e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) ("narrowly tailored " phrase used).

162. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990) ("narrowly tailored to serve [a] compelling governmental interest"); *Palmore*, 466 U.S. at 432-33 ("necessary" used); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J., announcing the judgment of the Court) ("precisely tailored" used).

163. For examples of cases that use the phrase "narrowly tailored," see *Adarand*, 515 U.S. at 235; *Boos*, 485 U.S. at 324, 329; United States v. Grace, 461 U.S. 171, 177 (1983).

164. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566-67 (1980); *see also* Bush v. Vera, 517 U.S. 952, 977-78 (1996).

165. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 566; *see also Bush*, 517 U.S. at 977-78.

166. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 566; CHEMERINSKY, *supra* note 17, at 687.

167. *See Austin*, 494 U.S. at 666.

168. *See* CHEMERINSKY, *supra* note 17, at 687; *see also Adarand*, 515 U.S. at 227.

169. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 566.

170. *Id.*

v. Public Service Commission,[171] "we ask whether the asserted governmental interest is substantial . . . . [Next] we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[172] Because it adds one strict scrutiny component (direct relationship) to an otherwise intermediate test, this level of review can be called intermediate review with bite.[173] Use of the terminology "with bite" to reflect a heightened version of a level of review is common in modern American constitutional terminology.[174]

A second additional level of review adopts the strict scrutiny requirement for both elements one and two, but continues the intermediate level of scrutiny for element three.[175] Because this level adopts two of the three levels of strict scrutiny, but waters down element three to an intermediate level of inquiry, this additional level can be called "loose" strict scrutiny.[176] Use of this standard of review occurred in the equal protection case of *Bush v. Vera*.[177] In that case, although generally applying strict scrutiny to a case of race discrimination in drawing congressional districts, the controlling plurality "reject[ed], as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'"[178] Instead, the Court adopted the intermediate element three requirement that the racial redistricting only not be "substantially more [burdensome] than is 'reasonably necessary. . . .'"[179]

Two earlier Supreme Court of the United States cases implicitly adopted such a loose strict scrutiny option in the context of race-based affirmative action in the employment context.[180] In *United States v. Paradise*,[181] a four-Justice plurality stated that despite a strict scrutiny approach the affirmative action remedial plan was not required to satisfy the

171. 447 U.S. 557 (1980).

172. *Id.* The Court clarified in *Fox*, 492 U.S. at 476-77, that the final prong of this test is the intermediate "narrowly drawn" analysis, and not the "least restrictive means" of strict scrutiny.

173. *See* CHEMERINSKY, *supra* note 17, at 689.

174. *See id.* (discussing rational review test with "bite").

175. *See Bush*, 517 U.S. at 977.

176. *See id.*

177. 517 U.S. 952, 952-80 (1996).

178. *Id.* at 977 (O'Connor, J., joined by Rehnquist, C.J., & Kennedy, J., announced the judgment of the Court) (quoting Vera v. Richards, 861 F.Supp. 1304, 1343 (S.D. Tex. 1994)).

179. *Id.* at 979.

180. *See generally Paradise*, 480 U.S. 149; Fullilove v. Klutznick, 448 U.S. 448 (1980).

181. 480 U.S. 149 (1987).

least restrictive alternative test.[182] In *Fullilove v. Klutznick*,[183] three Justices did not apply a least restrictive alternative analysis in a case they said was consistent with a strict scrutiny approach.[184] However, in an opinion by Justice O'Connor, the Court adopted traditional strict scrutiny for race-based affirmative action in the context of employment of construction workers in *Adarand Constructors, Inc. v. Pena*,[185] following Justice O'Connor's dissent in *Paradise,* where she criticized the *Paradise* plurality for not adopting traditional strict scrutiny.[186] Despite this criticism of loose strict scrutiny in *Paradise* and *Adarand*, the adoption by Justice O'Connor of loose strict scrutiny in her plurality opinion in *Bush v. Vera* suggests that this standard of review has become part of modern Supreme Court doctrine, at least for racial redistricting cases.[187]

The addition of intermediate review with bite and loose strict scrutiny creates four clearly defined levels of heightened scrutiny, each one more rigorous than the preceding standard of review on only one element of the three-pronged standard of review balancing test.[188] Thus, there is basic intermediate review (with all three elements of the standard of review reflecting an intermediate approach toward the governmental interests, benefits, and burden inquiries),[189] intermediate review with bite (two elements intermediate, the benefit element strict scrutiny),[190] loose strict scrutiny (two elements strict scrutiny, with only the burden inquiry intermediate),[191] and traditional strict scrutiny (all three elements strict).[192] These levels of scrutiny provide a stepladder approach toward standards of review, with each higher level of scrutiny clearly more rigorous than the preceding level.

Each of these levels of scrutiny is also clearly defined in terms of doctrinal inquiries that have been discussed in prior cases.[193] These levels thus provide predictability, along with flexibility, which are useful goals in

182. *Id.* at 150, 184 (plurality opinion of Brennan, J., joined by Marshall, Blackmun, & Powell, JJ.).

183. 448 U.S. 448 (1980).

184. *Id.* at 449, 473 (Burger, C.J., joined by White & Powell, JJ., concurring).

185. 515 U.S. 200 (1995).

186. *Id.* at 235-39 (O'Connor, J., joined by Rehnquist, C.J., & Scalia, J., concurring) (citing, *inter alia*, *Paradise*, 480 U.S. at 196-97).

187. *Bush*, 517 U.S. at 977-78.

188. *See Paradise*, 480 U.S. at 166; *Fullilove*, 448 U.S. at 473; *Cent. Hudson Gas & Elec.*, 447 U.S. at 566.

189. *Cent. Hudson Gas & Elec.*, 447 U.S. at 573 (Blackmun, J., joined by Brennan, J., concurring).

190. *See id.* at 566 (majority opinion).

191. *See Paradise*, 480 U.S. at 166-67; *Fullilove*, 448 U.S. at 473.

192. *See* CHEMERINSKY, *supra* note 17, at 687.

193. *See supra* Part.III.B.

developing an approach toward standards of review. Furthermore, because each level is composed of elements, which are used in many cases, there are plenty of precedents available on how to apply the standard, even if few cases have used that precise standard.[194] For example, although few cases have applied loose strict scrutiny, there are plenty of strict scrutiny cases on "compelling" governmental interests and "directly related" advancement of benefits, and plenty of intermediate review cases applying the "not substantially more burdensome than necessary" test.[195]

3. Reasonableness Balancing

Under the Supreme Court of the United States reasonableness balancing analysis, the Court looks at governmental ends, benefits, and burdens, which are then considered together and weighed one against the other.[196] Although the Supreme Court of the United States uses this approach in many doctrinal areas, each with its own precise test, the Court has never acknowledged that they all represent the same kind of analysis. However, in each case the Court considers the government's ends, how the government's action beneficially advances the ends, and how the government's action burdens individuals who are being regulated.[197] Professor Alexander Aleinikoff has noted that the procedural due process cases and the dormant Commerce Clause cases are classic examples of balancing tests.[198] Under the procedural due process test of *Mathews v. Eldridge*, the Court considers: (1) "the [g]overnment's interest" or ends in the case; (2) the means by which existing procedures achieve the government's ends, including "the risk of an erroneous deprivation . . . through [present] procedures . . . and the probable value, if any, of additional or substitute procedur[es] . . . ."; and (3) "the private interest" that will be burdened.[199] Under dormant Commerce Clause analysis, as phrased in *Pike v. Bruce Church*, 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,

194. *See supra* Part.III.B.
195. *See supra* Part.III.B.
196. *See* CHEMERINSKY, *supra* note 17, at 689; Mathews & Stone Sweet, *supra* note 28, at 803.
197. *See* CHEMERINSKY, *supra* note 17, at 694.
198. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 947-48 (1987).
199. 424 U.S. at 335.

whether the "burden" on interstate commerce is "clearly excessive" given the statute's benefits.[200]

In applying this kind of balancing test, there is an issue of whether the challenger has the burden of establishing that the governmental action is unconstitutional, or whether the government has the burden of establishing that the action is constitutional. Sometimes, as in each of the two cases cited above, the burden is on the challenger to establish the unconstitutionality of the governmental action.[201] Cases under the Contracts Clause that involve the government substantially impairing the contract obligations of their own contracts have a similar structure.[202] For example, in *United States Trust Co. of New York*, the challenger has the burden of showing—given the 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 benefits.[203]

The burden is also on the challenger under standard Takings Clause review of regulations.[204] The challenger thus has to show the regulation goes "too far" in the language of *Pennsylvania Coal Co. v. Mahon*,[205] or was "unreasonable" in the modern phrasing in *Penn Central Transportation Co. v. City of New York*.[206] 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.[207] The challenger also must show that a punitive damage award is "grossly excessive" under the reasonableness balancing test in *BMW of North America, Inc. v. Gore*.[208]

However, sometimes the burden shifts to the government. For example, in dormant Commerce Clause cases where the state regulation facially discriminates against interstate commerce, such as *Maine v. Taylor*, the Court balances (1) the state's legitimate interest in the regulation; (2)

200. 397 U.S. at 142.
201. *See Mathews*, 424 U.S. at 336; *Pike*, 397 U.S. at 142-43.
202. *See U.S. Trust Co. of N.Y.*, 431 U.S. at 25-26.
203. *Id.* at 25, 31.
204. *See Penn. Cent. Transp.*, 438 U.S. at 138; Penn. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).
205. 260 U.S. at 415.
206. 438 U.S. at 138 (no taking because zoning law permitted "reasonably beneficial use" of the property).
207. *Id.* at 130-38.
208. 517 U.S. at 575, 585.

whether the benefits could be achieved as well by available non-discriminatory alternatives; and (3) the burden on interstate commerce, but the burden shifts to the government to establish the constitutionality of its regulation.[209] In First Amendment jurisprudence, when considering the right of government workers to speak on matters of public concern, the government has the burden to establish in cases like *Pickering v. Board of Education of Township High School District 205, Will County, Illinois* that: (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 teacher" in free speech, (3) including whether the government could act with more "narrowly drawn grievance procedures."[210] The Fifth Amendment Takings Clause test in *Dolan v. City of Tigard* requires the government to establish a "rough proportionality" between the government's burden on the individual and the individual's burden on society.[211] As the Court noted in *Dolan*, this test is similar to the kind of balancing done in search and seizure cases under the Fourth Amendment, where the government has the burden to show that any search and seizure is "reasonable" under the circumstances.[212]

The Supreme Court of the United States also will apply reasonableness balancing to less-than-substantial burdens on unenumerated fundamental rights. For example, in *Harper v. Virginia State Board of Elections*,[213] Justice Douglas applied strict scrutiny to hold in 1966 that Virginia's poll tax was unconstitutional because the right to vote in a free and unimpaired manner is "fundamental."[214] The Court applied a similar strict scrutiny approach in *Kramer v. Union Free School District No. 15.*[215] *Kramer* involved a challenge to a New York law that limited who could vote in a school district election to property owners and parents of children in the public schools.[216] However, despite application of strict scrutiny in *Harper* and *Kramer*, the Court applies only reasonableness balancing scrutiny for

209. 477 U.S. at 138.

210. 391 U.S. at 568, 572 n.4. For additional discussion of the applicable test for government workers speaking on matters of public concern, see Garcetti v. Ceballos, 547 U.S. 410, 417-21 (2006); Rankin v. McPherson, 483 U.S. 378, 383-89 (1987).

211. 512 U.S. at 390-91 (city required easement to property in exchange for granting the individual a zoning permit to build an extension on a business).

212. *See id. See generally* Aleinikoff, *supra* note 198, at 965 (describing cases in modern doctrine that use balancing under Fourth Amendment search and seizure doctrine).

213. 383 U.S. 663 (1966).

214. *Id.* at 666-68.

215. 395 U.S. 621, 630-33(1969).

216. *Id.* at 622.

less serious burdens on the right to vote.[217] The Court noted in *Burdick v. Takushi*:[218]

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."
>
> . . . A court considering a challenge to a state election law 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."[219]

For example, in *Ball v. James*,[220] voting rights for an Arizona water reclamation district were weighted depending on how many acres of land each voter had.[221] This weighting would normally have violated the principle of "one person, one vote" recognized in *Reynolds v. Sims*[222] and many other cases.[223] Under that doctrine, only variations from equal voting that can satisfy a strict scrutiny, least restrictive alternative analysis are permissible.[224] However, since the district in *Ball* had relatively limited authority, because its primary purpose was to provide water management for the Salt River District, the Court refused to apply *Reynolds*, and instead applied only reasonableness analysis, upholding the law because "Arizona could rationally make the weight of their vote dependent upon the number

217. Burdick v. Takushi, 504 U.S. 428, 433-34 (1992).
218. 504 U.S. 428 (1992).
219. *Id.* (citations omitted).
220. 451 U.S. 355 (1981).
221. *Id.* at 357.
222. 377 U.S. 533 (1964).
223. *See, e.g.*, *id.* at 558.
224. *Id.* at 568-69, 577-80 ("one person/one vote" standard). In practice, this has meant population variations of less than one percent for congressional districts, or less than ten percent for state house and senate districts, as long as those variations are justified based on drawing district lines consistent with traditional political boundaries; geographic barriers, such as rivers or mountains; or district shape compactness. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 731-34 (1983) (variation of less than .7% still unconstitutional if no justified reason).

of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and burdens of the District's water operations."[225]

The Court has applied the same kind of analysis in cases involving the right of access to the ballot.[226] For example, in *Timmons v. Twin Cities Area New Party*,[227] the Court dealt with Minnesota's ban on fusion tickets appearing together on the ballot.[228] The majority opinion and the two dissenting opinions agreed that for "severe" burdens strict scrutiny would be appropriate.[229] For less severe burdens, the majority applied the *Ball* and *Burdick* kind of reasonableness analysis.[230] A dissent would have applied intermediate review.[231]

The Court does something similar in terms of the right of access to courts. For severe burdens on access to courts, such as cases involving burdens on fundamental rights—for example, an attempt to terminate a parent's parental rights—the Court applies strict scrutiny.[232] For less than severe burdens, such as filing fee in a voluntary bankruptcy case, the Court applies a reasonableness balancing approach.[233] Similarly, the Court applies strict scrutiny to severe burdens on the right to travel, such as limiting new residents' access to welfare or health care for the indigent under the Medicaid program.[234] However, for less than severe burdens, such as requiring a new resident to wait one year before bringing a divorce action in the state, where the person could bring the divorce action in the state where they were married, the Court applies a reasonableness balancing approach.[235]

The Court has also applied such a reasonableness analysis when dealing with limitations on the rights of prisoners to vote, as in *O'Brien v. Skinner*.[236] Because prisoners give up many rights that persons not incarcerated take for granted, burdens on prisoners' right to vote are not

225. Ball v. James, 451 U.S. at 370-71.

226. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369-70 (1997).

227. 520 U.S. 351 (1997).

228. *Id.* at 353-54.

229. *Id.* at 358, 374 (Stevens, J., joined by Ginsburg & Souter, JJ., as to Parts I & II, dissenting), 383 (Souter, J., joined by Stevens, J., as to Part II, dissenting).

230. *Id.* at 358-59; *see also* Burdick v. Takushi, 504 U.S. at 441; *Ball*, 451 U.S. at 371.

231. *Timmons*, 520 U.S. at 383 n.2 (Souter, J., dissenting) (comparing the appropriate standard in *Timmons* to "midlevel" [i.e., intermediate] review (quoting Edenfield v. Fane, 507 U.S. 761, 768 (1993))).

232. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 114-17 (1996).

233. *See, e.g.*, United States v. Kras, 409 U.S. 434, 445, 448 (1973).

234. *See, e.g.*, Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 254, 258 (1974) (Medicaid program); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (welfare program).

235. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 406-07 (1975).

236. 414 U.S. 524, 531 (1974).

viewed as severe or substantial burdens.[237] The Court similarly applies a reasonableness balancing test to limitations on the rights of prisoners to marry,[238] although typically burdens on the fundamental right to marry trigger strict scrutiny.[239]

Under the Eighth Amendment, the challenger can prevent the state from imposing cruel and unusual punishment, which involves an analysis of whether the punishment is "grossly disproportionate" to the crime.[240] A similar proportionality analysis applies with respect to the prohibition of excessive fines clause of the Eighth Amendment.[241]

"Undue burden" analysis in right of access to abortion cases can be viewed similarly. Although the Supreme Court of the United States has not explicitly adopted this approach, the best understanding of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[242] is that it held that undue burdens, defined as "substantial obstacles" to obtaining an abortion, trigger strict scrutiny, the standard of review applied in *Roe v. Wade*,[243] while less than undue burdens trigger only a reasonableness balancing approach.[244]

In applying any of these reasonableness balancing tests, the Court does not substantially defer to the legislature's rational basis judgment, but rather exercises independent review.[245] Nonetheless, some deference is given even in this context.[246]

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237. *See generally* John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157 (2004).

238. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989).

239. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

240. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 424 (2008) (Kennedy, J., majority opinion); Harmelin v. Michigan, 501 U.S. 957, 997-98 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring in part and concurring in the judgment).

241. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 324 (1998).

242. 505 U.S. 833 (1992).

243. 410 U.S. 113 (1973).

244. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 866-67, 877-79 (joint opinion of O'Connor, Kennedy, & Souter, JJ.); Roe v. Wade, 410 U.S. at 155, 159. On this aspect of *Casey*, see Charles D. Kelso & R. Randall Kelso, *Judicial Decision-Making and Judicial Review: The State of the Debate, Circa 2009*, 112 W. VA. L. REV. 351, 375-76 (2010) [hereinafter Kelso & Kelso, *Judicial Decision-Making*].

245. *See, e.g.*, *Heller*, 554 U.S. at 690 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting) ("[A] court, not a legislature, must make the ultimate constitutional conclusion, exercising its 'independent judicial judgment' in light of the whole record to determine whether a law exceeds constitutional boundaries." (citing Randall v. Sorrell, 548 U.S. 230, 249 (2006))).

246. *See, e.g.*, *id.* at 690 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting) ("In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity." (citing Nixon v. Shrink Mo Gov't PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180 (1997))); *Thornburgh*, 490 U.S. at 413-14 (noting that while the "reasonableness" standard for determining marriage rights of prisoners "'is not toothless,'" "[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . .

4. Seven Ultimate Levels of Review

Taken together, this discussion has suggested there are seven different balancing tests used by the Supreme Court of the United States in various cases.[247] These seven tests can be organized in terms of the level of rigor required for the governmental action to be constitutional.[248] At one extreme is the minimum rational review balancing test.[249] Under this test, the governmental action is constitutional unless the challenger can establish that the action is not supported by any legitimate governmental end, or is not rationally related to advancing a legitimate governmental end, or imposes an irrational burden on individuals.[250] In applying this test, the Court gives "substantial deference" to the government's judgment concerning the legitimacy of the ends and the rationality of the means.[251] The Court permits "any conceivable" legitimate end to be used to make the action constitutional.[252] Slightly more rigorous than this test are the two factor-balancing constitutional tests. These tests are more burdensome on the government than minimum rational review, because even if the governmental action is rationally related to advancing a legitimate governmental end and does not impose an irrational burden on individuals, if the burden is too great and the benefit is too small, the governmental action will still fail the factor balancing test because the burden will be: "clearly excessive," as under dormant Commerce Clause review; or not "reasonable and necessary," as under Contracts Clause review; or not "roughly proportionate," as under Takings Clause review; or some other phrasing of not "reasonable," as under Fourth Amendment search and seizure doctrine.[253]

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disorder."); *Mathews*, 424 U.S. at 349 ("substantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs.").

247. *See supra* notes 19-22, 127-128 and accompanying text. The discussion in this section of the seven kinds of balancing tests (minimum rational review, plus six levels of higher scrutiny), is generally based upon 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 (2002) [hereinafter Kelso, *Standards of Review*].

248. *See* Kelso, *Standards of Review*, *supra* note 247, at 258-59.

249. *Id.* at 258.

250. *Id.*

251. *Id.*

252. *Id.* at 247-48 n.107. *See also supra* notes 19-22, 127-128 and accompanying text (the discussion in this section of the seven kinds of balancing tests (minimum rational review, plus six levels of higher scrutiny), is based upon *See* Kelso, *Standards of Review*, *supra* note 247, at 227-37, 258-59).

253. For these various phrasings, *see supra* notes 200-203, 211-212 and accompanying text. Justice Breyer discussed these kinds of heightened rational review interest-balancing tests in his dissent in *Heller*, where he noted, "[c]ontrary to the majority's unsupported suggestion that this sort of 'proportionality' approach is unprecedented, . . . the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases." *Heller*, 554 U.S. at 690 (Breyer, J.,

The Court does not give the same kind of "substantial deference" to the government's judgment regarding either the ends advanced or the means employed when applying these factor-balancing tests.[254] Nevertheless, despite the Court determining for itself whether the underlying policies are actually supported by fact, some deference to governmental judgment is still given.[255] For example, the Court stated in *City of Boerne v. Flores* that Congress's "conclusions are entitled to much deference."[256] In *Mathews v. Eldridge*, the Court stated that under procedural due process analysis, "substantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs."[257] In *Thornburgh v. Abbott*,[258] the Court stated that while the *Turner v. Safley*[259] "reasonableness" standard for determining marriage rights of prisoners "'is not toothless,'" "[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder."[260] However, these tests are less burdensome on the government than intermediate review or strict scrutiny, since both of the factor-balancing tests permit the governmental action to be justified using legitimate government interests, rather than the important or substantial governmental interests of intermediate review, or the compelling governmental interests of strict scrutiny.[261]

Because the two factor-balancing tests permit resorting to legitimate governmental interests, they are best understood as versions of rational review.[262] To give these tests names that reflect that aspect of their approach, the first factor-balancing test, where the burden is still on the challenger to prove the unconstitutionality of the governmental action, similar to the burden under minimum rational review, can be called "second-order" rational review.[263] It is "second-order" because it is the least rigorous of the balancing tests that are more rigorous than minimum rational review.[264] The second factor-balancing test, where the burden shifts

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joined by Stevens, Souter, & Ginsburg, JJ., dissenting) (citing, *inter alia*, *Burdick*, 504 U.S. at 433 (election regulation); *Mathews* , 424 U.S. at 347-49 (procedural due process); *Pickering*, 391 U.S. at 568 (government employee speech)).

254. *See* City of Boerne v. Flores, 521 U.S. at 536; *Mathews*, 424 U.S. at 349.
255. *See Flores*, 521 U.S. at 536; *Mathews*, 424 U.S. at 349.
256. 521 U.S. at 536.
257. 424 U.S. at 349.
258. 490 U.S. 401 (1989).
259. 482 U.S. 78 (1987).
260. Thornburgh v. Abbott, 490 U.S. at 413-14.
261. *See* Kelso, *Standards of Review*, *supra* note 247, at 259.
262. *See id.* at 239.
263. *Id.* at 231.
264. *Id.*

to the government to justify constitutionality, can be called "third-order" rational review, since all the linguistic variations of this balancing test place the burden on the government, and thus are the most rigorous kind of rational review.[265]

The four kinds of heightened scrutiny tests of intermediate review, intermediate review with bite, loose strict scrutiny, and strict scrutiny all involve cases where the government has the burden of proving the constitutionality of its action.[266] They all require more than mere legitimate interests to support the governmental action.[267] Thus, they are all more rigorous than any of the three versions of rational review: minimum rational review, second-order rational review, and third-order rational review.[268] In sum, there are thus seven different balancing tests that the Court applies in various cases.[269]

Levels of Review of the Constitutionality of Government Action:[270]			
The "Base Plus Six" Model of Review			
Level of Scrutiny	**Government Ends or Interest to be Advanced**	**Statutory Means to Ends**	
		Relationship to Benefits	**Relationship to Burdens**
"Base" Minimum 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 (no substantial deference to government)

265. *Id.* at 233.
266. Kelso, *Standards of Review*, *supra* note 247, at 238.
267. *See id.* at 259.
268. *See id.* at 258-59.
269. *See id.*
270. *Id.* at 258.

The "Plus Six" Standards of Increased Scrutiny *Heightened Rational Review (Factor Balancing of Means and Ends, Not Separate Elements)*			
Basic Rational Means or Second-Order Review: Burden on challenger to prove unconstitutionality	Legitimate Ends (no substantial deference to government)	"Reasonable/Not Excessive" (no substantial deference to government)	Given Means (no substantial deference to government)
Rational Review with Bite or Third-Order Review	Same as Second-Order Review, except the burden shifts to the government to prove the statute is constitutional. The burden remains on the government for all versions of higher scrutiny.		
Intermediate Review Standards (Three Requirements are Separate Elements to Meet)			
Intermediate Review	Substantial/ Important	Substantially Related	Not Substantially More Burdensome that Necessary
Intermediate Review with Bite	Substantial/ Important	Directly Related	Not Substantially More Burdensome that Necessary
Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)			
Loose Strict Scrutiny	Compelling	Directly Related	Not Substantially More Burdensome that Necessary
Strict Scrutiny Review	Compelling	Directly Related	Least Restrictive Effective Alternative

IV. COMPARISON OF AMERICAN STANDARDS OF REVIEW VERSUS INTERNATIONAL PROPORTIONALITY REVIEW

A. Civil Law versus Common Law Styles of Reasoning and the Levels of Review

Judicial reasoning in constitutional, statutory, or common-law cases can adopt either an inductive or a deductive mode of reasoning. The difference between deductive and inductive modes of analysis was discussed in 1975 by Columbia Law School Professor Harry Jones.[271] In his article, *Our Uncommon Common Law*, he stated:

> The story of law in the Western World is a tale of two cities, Rome, where the continental European legal tradition had its rise, and London, to which our own legal system traces its pedigree. The nations of Europe and the Americas, and such Asian and African nations as have followed European legal patterns, are divided into two great law families: the civil-law countries and the common-law countries. A civil-law country is one whose legal system reflects, however remotely, the structural concepts, principles, and decisional methods of classical Roman law, the law of the Roman Empire as compiled and promulgated at Constantinople in the sixth century as the *Corpus Juris Civilis* of the Emperor Justinian.
>
> . . . .
>
> [T]he story of the common law has to begin in London . . . with the royal courts at Westminster.[272]

Professor Jones noted about the civil-law system:

> A lawyer, judge or legal scholar schooled in the civil-law tradition approaches legal problems and legal sources with certain philosophical presuppositions quite different from those of the common-law lawyer. . . . [I]n the civil-law universe of discourse, nothing is *law*, in the full sense, that has not been written down in exclusive textual form and enacted by the state's sovereign power. In civil-law countries, the codes in which private law is cast are formulated in broad general terms and are thought of as completely comprehensive, that is, as the all-inclusive source of authority to

271. *See generally* Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443 (1975).
272. *Id.* at 447-48, 450.

> which every disputed case must be referred for decision. The civil-law lawyer or judge, faced with a particular problem or controversy, must locate his answer somewhere within the four corners of the authoritative code. Learned commentary on the code may help him discover the code's true meaning for the case at hand, but his decision must ultimately be justified, at least in form, by deduction from some principle in the code itself—and most certainly not by reliance on the authority of past judicial decisions.[273]

Professor Jones contrasted this with the mode of reasoning of the common-law system:

> The common-law lawyer works in quite another *metier* and brings different jurisprudential presuppositions to his tasks. Although a great deal of contemporary American and English law is legislative in origin, the law inferred from judicial precedents is fully as important with us as the law set down by statutory enactments. . . . [O]ur codes are not the all-inclusive, systematic statements found in civil-law countries. In any event, our modes of thought are less deductive, far less confident that the final answer to every contemporary problem can be found within the confines of any enactment, however comprehensive. An eminent Italian jurist, impatient with my incorrigibly common-law habits of reasoning, once put the difference to me in these terms:
>
> > "Give the same problem to a civil lawyer and a common lawyer. What do we do? We find the governing principle in the text of the code. What do you do? You look for a *case*. We reason from principle. You stumble along by analogy. I wonder how you ever get anything decided at all."
>
> My friend's charge is overstated, but he is quite right in a way. We common-law lawyers . . . do exhibit a Pavlovian stimulus and response effect: give us a problem, we try to think of a case, a judicial precedent, and if we cannot think of one, we go off to the library and start looking for it. We are uneasy with doctrinal generalizations, more comfortable with the facts of cases than with general concepts, and we never feel quite secure about our professional predictions until we have located a "case in point," that

273. *Id.* at 448-49 (emphasis in original).

> is, a past court adjudication in a controversy that was factually alike, or something like, the problem now presented to us.[274]

Professor Jones cautioned in his article that we should be wary about exaggerating these differences.[275] Professor Steve Nickles similarly noted in an article about the civil law:

> "[A civilian lawyer] looks at the articles of a Code not as mere rulings, but as particular expressions of more general ideas. Therefore, if no express answer to a certain problem is found in the Code, it is not improper to consider various articles in order to induce from them a more general rule and to apply this rule if it can give a solution. It has sometimes been said that articles of a code are not only law, but sources of law. This is true, not only in the sense that the courts may, by deduction, decide on the implications of a certain article, but also in the sense that the courts may, if necessary, use induction to discover the general rules implied in the provisions of a code and then, reverting to deduction, develop the full potential of these rules in the solution of the problem at hand."[276]

On the other hand, differences do remain. The common law's inductive process embraces:

> [a] frame of mind which habitually looks at things in the concrete, not in the abstract: . . . which prefers to go forward cautiously on the basis of experience from this case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals; . . . [it is] the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.[277]

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274. *Id.* at 449.

275. *Id.* at 448.

276. Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code–Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1, 37 n.91 (1977) (quoting André Tunc, *The Grand Outlines of the Code*, *in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 19, 31 (Bernard Schwartz ed., 1956)).

277. *Id.* at 37-38 n.91 (citing Tunc, *supra* note 276, at 30-31 (quoting Roscoe Pound, *What is the Common Law*, *in* THE FUTURE OF THE COMMON LAW 3, 18-19 (1937))).

This difference is reflected in the development of rights jurisprudence in American and in international courts.[278] It is no surprise that international courts would be more predisposed to adopt a three-step deductive model of review—proportionality review, with its suitability, necessity, and balancing components—and apply that model to all cases in deductive fashion.[279] Historically, the doctrine developed in Germany after 1945,[280] and then spread to other countries based on the status of the German court and post-1945 constitutions which adopt similar basic principles of "human dignity" and a listing of "individual rights" as done in the German constitution.[281] It reflects the job given to constitutional courts under these new constitutions to serve as an independent judicial bulwark in favor of individual rights against the state.[282]

In contrast, in the United States, the various "tiers" and versions of "reasonableness" analysis were developed in a case-by-case fashion, with the Court starting with an initial "reasonableness" analysis in the late nineteenth century in dormant commerce clause cases, which then morphed at the end of the nineteenth century through a less restrictive means analysis into something more akin to strict scrutiny.[283] The Court then developed new standards to deal with new problems as they arose. [284]

The first change occurred with the rejection, in 1937, of less restrictive means analysis in economic rights cases, whether under the dormant Commerce Clause or *Lochner v. New York*[285] liberty of contract due process analysis, and its replacement in 1938 by the minimum rationality review of *United States v. Carolene Products Co.*[286] In *Carolene Products*, the Court began the process of developing higher tiers of scrutiny for fundamental rights cases, or cases involving suspect classes, like racial or ethnic minority groups.[287] The Court also was simultaneously developing stricter forms of scrutiny for freedom of speech cases under the First Amendment.[288]

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278. *See* Stone Sweet & Mathews, *supra* note 3, at 97, 103-07.

279. *See id.*

280. *See id.*

281. *See id.* at 106, 133.

282. *Id.* at 104, 106, 112.

283. *See* Mathews & Stone Sweet, *supra* note 28, at 818-20 (citing, *inter alia*, Schollenberger v. Pennsylvania, 171 U.S. 1 (1898)). A State "cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome." *Schollenberger*, 171 U.S. at 25.

284. *See* Mathews & Sweet, *supra* note 28, at 847.

285. 198 U.S. 45 (1905).

286. 304 U.S. 144, 152 (1938); CHEMERINSKY, *supra* note 17, at 639-45 (citing, *inter alia*, W. Coast Hotel v. Parrish, 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hosp. of the D.C., 261 U.S. 525 (1923), *which cited with approval* Lochner v. New York, 198 U.S. 45).

287. *See* CHEMERINSKY, *supra* note 17, at 640-41. This was done particularly by footnote 4 in *Carolene Products*, discussed *infra* notes 284-302 and accompanying text. United States v. Carolene

As new cases presented themselves, however, these two levels of scrutiny—minimum rationality review and strict scrutiny—proved to be inadequate to resolve concrete fact patterns.[289] The Court invented intermediate review in 1976 in the gender discrimination case of *Craig v. Boren*[290]; applied it to cases of illegitimacy discrimination the following year in *Trimble v. Gordon*[291]; and applied it again in 1982 to cases of discrimination against the children of illegal immigrants in *Plyler v. Doe*.[292] Earlier, in 1968, the Court had adopted a similar form of intermediate review as the way to not apply strict scrutiny to content-neutral regulations of speech in *United States v. O'Brien*.[293] After 1976, the Court explicitly recast the *O'Brien* test as a form of intermediate review.[294] Again, focusing on specific fact situations, and without any clear acknowledgment, the Court adopted a slightly more rigorous form of review than intermediate review for commercial speech in *Central Hudson Gas*.[295] And the Court has adopted a slightly less rigorous form of strict scrutiny review for testing racial discrimination in redistricting decisions in *Bush v. Vera*.[296]

The determination of what level of review to apply seems to be based on a number of factors that relate to whether the Court feels comfortable trusting the government's action, in which case minimum rationality review is likely to be applied, or how much the Court is suspicious about the government's action. One factor that the Supreme Court of the United States has used to make this determination involves: (1) whether arguments of text, context, and history suggest that the classification is one the Framers and ratifiers would have thought deserves heightened scrutiny.[297] As the Court has noted, "[t]he 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."[298] With regard to the text and history of the Equal Protection Clause, which

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Prods., Inc., 304 U.S. at 152 n.4. On *Carolene Products*, see generally Charles D. Kelso & Randall Kelso, *Our Nine Tribunes: A Review of Professor Lusky's Call for Judicial Restraint*, 5 SETON HALL CONST. L.J. 1289, 1294-97 (1995).

288. This development is discussed in Mathews & Stone Sweet, *supra* note 28, at 826-33.

289. *See id.* at 853-54 (discussing *Roe*, 410 U.S. 113 from this perspective).

290. 429 U.S. 190, 197-98 (1976).

291. 430 U.S. 762, 769-73 (1977).

292. 457 U.S. 202, 239-40 (1982) (Powell, J., concurring).

293. 391 U.S. 367, 377 (1968).

294. *See, e.g.*, Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984).

295. *See supra* notes 172-173 and accompanying text (quoting *Cent. Hudson Gas & Elec.*, 447 U.S. at 566).

296. *See supra* notes 175-179 and accompanying text (quoting *Bush*, 517 U.S. at 977-79).

297. *See* Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986).

298. *Id.* at 194.

was ratified in 1868,[299] the Court noted as long ago as 1886 that its provisions "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[300] Thus, cases involving race, ethnicity, or national origin traditionally trigger the highest kind of Equal Protection Clause review—strict scrutiny in today's terminology.[301]

Three additional factors, stated in footnote four in the famous case of *Carolene Products*, that are used to help determine the proper level of review are: (2) whether a fundamental right is involved, particularly a right that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments"; (3) whether a deficiency exists in the "political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; or (4) whether the statute is "directed at particular religious, . . . or 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.[302] Three additional factors, discussed in *Frontiero v. Richardson*,[303] are: (5) whether the classification burdens an immutable characteristic, like race or gender[304]; (6) whether the classification burdens an individual for something not the product of the individual's choice, like status as an illegitimate child or being the child of parents who are illegally in the United States;[305] or (7) whether the classification is viewed by the judge as a product of false stereotypes about individuals, particularly if part of an historical pattern of such discrimination.[306] An additional set of two factors, discussed in *City of Cleburne, Tex. v. Cleburne Living Center*,[307] are: (8) to what extent the judges are competent to make the substantive decisions required at heightened scrutiny which involve second-guessing legislative judgment as to whether the ends are sufficiently important or compelling, the means are

299. Peter Michael Jung, *Validity of a State's Rescission of Its Ratification of a Federal Constitutional Amendment*, 2 HARV. J.L. & PUB. POL'Y 233, 249 & n.69 (1979).

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

301. *See Yick Wo*, 118 U.S. at 369.

302. *See Carolene Prods.*, 304 U.S. at 152 n.4.

303. 411 U.S. 677 (1973).

304. *See id.* at 686 ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . .")

305. *See id.* at 686-87; *see also Plyler*, 457 U.S. at 220 (quoting 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 or wrongdoing.").

306. *See Frontiero*, 411 U.S. at 685 ("[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . .").

307. 473 U.S. 432 (1985).

sufficiently narrowly tailored or necessary, and whether any alternatives to the legislation would be effective or not;[308] or (9) would a Pandora's Box be opened up where heightened scrutiny in the case would lead to demands for heightened scrutiny in other similarly situated cases, creating unpredictability in the law.[309]

With regard to the reasonableness analysis of the late nineteenth century, the Court continued that approach, post-1937, in the dormant Commerce Clause cases, culminating in the *Pike v. Bruce Church* and *Maine v. Taylor* tests under the dormant Commerce Clause.[310] In each of these areas, the Court has refrained from applying minimum rationality review, perhaps based on a tenth factor: (10) distrust of state legislatures that may have parochial interests in mind.[311] That reasonableness approach was extended to other economic rights cases where greater than minimum rationality review was thought appropriate, such as the Takings Clause analysis of *Penn Central* and *Dolan v. City of Tigard*; the Contracts Clause analysis in *United States Trust Co. of New York*, and the Due Process analysis in *BMW of North America, Inc. v. Gore* regarding punitive damages.[312] From the other end, over the last thirty years, the Court has begun reducing the standard of review in some unenumerated fundamental rights cases away from strict scrutiny to reasonableness balancing.[313] Consideration of some of the ten factors of judicial review may have suggested to the Court that only modest infringements on unenumerated fundamental rights deserve a lower level of scrutiny, but still higher than minimum rationality review.[314]

308. *See id.* at 443 ("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.").

309. *See id.* at 445-46 ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups . . . . One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.").

310. These tests are discussed *supra* note 200 and accompanying text (*Pike v. Bruce Church* test), note 209 and accompanying text (*Maine v. Taylor* test).

311. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1094-98 (1986).

312. *See supra* notes 203-212 and accompanying text.

313. *See supra* notes 214-239 and accompanying text.

314. The Court has never explicitly addressed this issue other than stating in some cases strict scrutiny would improperly "tie the hands" of government too much, as the Court stated in *Burdick v. Takushi*, as discussed in *supra* note 219 and accompanying text.

B. Benefits and Drawbacks of Each

1. Benefits of Proportionality Review over American Standards of Review

A number of benefits exist with international proportionality analysis ("PA").[315] As has been noted, "PA offers judges the possibility of building trans-substantive coherence, since it can be applied across the board, to virtually all disputes involving rights."[316] "[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 . . . ."[317] To use it, 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 scrutiny[318] based on consideration of ten factors to determine the level of review.[319]

Further, because PA applies to every case, it provides more stringent review of ordinary social and economic regulation than under American minimum rationality review.[320] For persons supportive of court review of individual rights, this is a benefit. For example, in *Williamson v. Lee Optical of Oklahoma*,[321] the Court upheld a regulation requiring a prescription from an optometrist before getting an optician to make a new lens.[322] Under American minimum rationality review, this was upheld as being rationally related to a legitimate interest in ensuring regular eye exams, even if unneeded in many cases.[323] Under international proportionality review, this regulation would not likely survive the narrow tailoring analysis' requirement that the government use the least restrictive means to advance its goal.[324] It might not even survive *strictu senso* balancing, as the minimal benefit of the regulation might not be greater than the burden on opticians and their customers.[325]

315. *See* Mathews & Sweet Stone, *supra* note 28, at 806-07.
316. *Id.* at 807.
317. *Id.* at 808.
318. *See supra* Part III.B.4.
319. *See supra* notes 293-311 and accompanying text.
320. *See* Mathews & Sweet Stone, *supra* note 28, at 807.
321. 348 U.S. 483 (1955).
322. *Id.* at 486, 491.
323. *Id.* at 487-88.
324. *See* Mathews & Sweet Stone, *supra* note 28, at 838-41 (discussing *Williamson v. Lee Optical* from this perspective).
325. *See id.* at 842-43.

2. Benefits of American Standards of Review over Proportionality Review

While PA analysis has a number of benefits, the single standard of proportionality would provide little guidance for American lower courts faced with resolving constitutional disputes in a variety of settings, which may call for greater or less deference to government in various contexts. This is particularly true, as noted earlier, given growth in lower federal courts' dockets, which makes it "essentially impossible for the [Supreme] Court to engage in meaningful 'error correction.'"[326]

In addition, for fundamental rights, American strict scrutiny does provide a higher level of review than proportionality review.[327] For persons supportive of court review of individual rights, American review may be more protective than international proportionality review.[328] For example, First Amendment freedom of speech, even in the context of hate speech, is very vigorous in America, more so than hate speech regulation in Europe.[329]

3. Considerations Regarding Convergence of the American and International Approaches

Under American constitutional doctrine, for reasonableness balancing analysis, it would be analytically appropriate if the Supreme Court of the United States were to more clearly phrase all the reasonableness balancing tests as the same kind of review, with only the variation, discussed herein, that sometimes the burden is on the challenger to prove unreasonableness and sometimes the burden is on the State to prove reasonableness.[330] That would reduce to two standards of review (second-order and third-order rational review) the twenty-four plus standards of review that are currently stated for: dormant Commerce Clause analysis; the Contracts Clause; the Takings Clause; constitutionality of punitive damages in tort actions; less than substantial burdens on unenumerated fundamental rights, such as under the right to vote or right of access to courts; rights of government workers to speak on matters of public concern; congressional regulation under section five of the Fourteenth Amendment; reasonableness of search and seizures under the Fourth Amendment; cruel and unusual punishment or excessive fines consideration under the Eighth Amendment; and procedural due

326. Bhagwat, *supra* note 110, at 996.

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

328. *See supra* Part III.B. (discussing the American standards of review), Part III.A. (discussing international proportionality review).

329. *See generally* Knechtle, *supra* note 327.

330. *See supra* Part III.B.3.

process.[331] A more deductive, analytic approach to the standard applied in these cases would better track the logical, deductive approach of civil law countries.

In addition, there appears to be some movement in America to get rid of the tests denominated in this Article as "intermediate with bite" and "loose strict scrutiny," and to rephrase the commercial speech doctrine, currently *Central Hudson Gas*, and racial redistricting cases, currently *Bush v. Vera*, as strict scrutiny cases.[332] That would get the American system down to the three basic tiers of review (minimum rationality review, intermediate review, and strict scrutiny) and two reasonableness tests (burden on challenger in one; burden on the State in the other).[333] On the other hand, there is some benefit in having "intermediate with bite" and "loose strict scrutiny," as they are logically consistent stepping stones in the level of review between intermediate review and strict scrutiny, and one can agree with the current approach that because commercial speech is "heartier" it does not need strict scrutiny protection,[334] and that state governments should be given greater than strict scrutiny flexibility in making their political redistricting decisions.[335]

For proportionality analysis, there are four possible alternatives, given the two kinds of narrow tailoring and two kinds of *stricto sensu* balancing discussed earlier.[336] The four approaches are: (1) loose narrow tailoring and loose balancing; (2) loose narrow tailoring and strict balancing; (3) strict narrow tailoring and loose balancing; (4) strict narrow tailoring and strict balancing.[337] To modify PA to reflect these four approaches would require developing a theory to justify when looser or stricter narrow tailoring and

331. *See supra* notes 111-186 and accompanying text.

332. *See supra* notes 172-174 and accompanying text (discussing *Central Hudson Gas and Electric* and intermediate review "with bite"); *see also supra* notes 174-179 and accompanying text (discussing *Bush* and "loose" strict scrutiny). *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 523 (1996) (Thomas, J., concurring in part and concurring in the judgment) (*Central Hudson* test should not be used, and thus regular content-based strict scrutiny analysis would apply)); *Bush*, 517 U.S. at 999-1003 (Thomas, J., joined by Scalia, J., concurring in the judgment) (reaffirming the principle that all racial classifications should be governed by strict scrutiny, even in *Bush*); *Cent. Hudson Gas & Elec.*, 447 U.S. 557.

333. *See supra* Part III.B (discussing the American standards of review); *supra* notes 330-331 and accompanying text (discussing reducing the number of standards of review and the number of "tests").

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

335. *See, e.g.*, *Bush*, 517 U.S. at 956, 977 (O'Connor, J., joined by Rehnquist, C.J., & Kennedy, J., announced the judgment of the Court) ("state actors should not be 'trapped between the competing hazards of liability' by the imposition of unattainable requirements under the rubric of strict scrutiny" (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986))).

336. *See supra* notes 46-55, 62-65, 99-104 and accompanying text.

337. *See supra* Part II.B (narrow tailoring), Part II.C (balancing *stricto sensu*).

stricto sensu balancing should be used.[338] In addition, many countries with Constitutions written since 1945 have similar kinds of economic and social rights, and thus do not have the same split as in American doctrine between economic and social rights.[339] This suggests even less of a reason for international courts to adopt different versions of PA analysis.

Given the seven levels of review in American doctrine, perhaps the best approach for one consistent PA analysis would be to adopt an approach in the middle of the American standards of review.[340] 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.[341] A rigorous strict scrutiny kind of least restrictive alternative test is perhaps too restrictive on needed government discretion in many cases. Is it really true that it makes sense for courts to second-guess government decision making in every case by requiring the government to prove the government used the absolutely least burdensome alternative in every case?[342] In contrast, requiring the government not to adopt an approach substantially more burdensome then necessary, and thus not on the end of being the most burdensome kind of regulation, seems a more appropriate of a standard if one is going to have one uniform standard for every case.[343] On the other hand, once the government has done this, the government should have the burden to show that the benefits of the regulation truly outweigh the burdens. This kind of PA would thus be more rigorous than third-order American rationality review (since 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 advancing not merely legitimate, but important or substantial interests).[344]

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338. *See supra* notes 4, 46-55, 62-65, 99-104 and accompanying text (defining *stricto sensu* and then discussing the narrow tailoring and *stricto sensu* balancing).

339. *See generally* 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* doctrine (citing Ferguson v. Skrupa, 372 U.S. 726 (1963))); *see also Lee Optical*, 348 U.S. at 488-91.

340. *See supra* Part III.B (discussing the American standards of review and concluding in Part III.B.4 that there are seven levels of review).

341. *See supra* notes 4, 46-55, 62-65, 99-104 and accompanying text (defining *stricto sensu* and then discussing the narrow tailoring and *stricto sensu* balancing).

342. *See supra* notes 41-46 and accompanying text.

343. *See infra* note 344 and accompanying text.

344. 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.

V. POSITIVISM VERSUS NATURAL RIGHTS JURISPRUDENCE IN AMERICA AND INTERNATIONAL COURTS

One question any judge must ask before deciding how to resolve a legal dispute is whether judicial decision making should be separable from moral or social values, i.e., should judges view law solely as a body of rules and principles from which legal conclusions are derived—the positivist assumption—or should judges view law as a body of rules and principles testable by reference to some external standard of rightness, some moral or social value—law as normative or prescriptive, not descriptive.[345]

Concerning this issue of the nature of the judicial task, a judge could aim at producing decisions and opinions that are "good law" in the narrow sense of being clear, certain, predictable, and unquestionably within the legitimate power of the court: a "positivist" approach to judicial decision making.[346] As noted in an article entitled *Constitutional Positivism*:

> If one has a positivist view of legal identification, pursuant to which items of law can be "recognized" without satisfying a moral standard, . . . then one whose job partly involves law application *could* do that part of the job without having to engage in any moral reasoning whatsoever. . . . As a result, positivist judges, were they so inclined, could in some systems get away with an amoral conception of their task . . . .[347]

In contrast, a judge could aim at producing law and applications of law that accord with certain moral principles embedded in the society's legal and moral culture.[348] Judges adopting this more "normative" perspective tend to view the judge's role as requiring the judge to give some weight to the moral insights and traditions that lie behind legal rules and that may develop over time.[349] As Professor Ronald Dworkin has noted, "what an

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See generally Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 LAW & ETHICS HUM. RTS. 243, 248-49 (2010) (citing BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE paras. 289 ff. (24th ed. 2008) (arguing that *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)).

345. *See, e.g.*, EDGAR BODENHEIMER, JURISPRUDENCE THE PHILOSOPHY AND METHOD OF THE LAW 91-109 (positivism), 134-68 (normative) (rev. ed. 1974); LORD LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 170-98 (positivism), 79-106 (normative) (4th ed. 1979).

346. *See* BODENHEIMER, *supra* note 345, at 91-109.

347. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 802 (1993) (emphasis in original).

348. *See* BODENHEIMER, *supra* note 345, at 134-68.

349. *See id.*

individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions."[350]

In determining questions of justice, Professor Dworkin noted that from this perspective judges should only make such decisions as they can justify within a theory "that also justifies the other decisions they propose to make."[351] That is, a judge adopting such a "normative" perspective should ensure that each decision is consistent with society's background legal and moral culture and society's "norms."[352] As Professor Dworkin has noted, such an approach "condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right."[353]

The material of the judicial task for positivist judges is existing common law, statutes, and constitutional text.[354] With regard to the form or definition of what constitutes law, the positivist view is that judges may only discover, declare, and apply the law as it already exists.[355] The fundamental purpose or end of the judicial task for positivists is whether the law is traceable to an authoritative source.[356] Any departure from this view represents for positivists a form of illegitimate lawmaking—what Professor H.L.A. Hart called "The Nightmare" in his article entitled *American Jurisprudence Through English Eyes: The Nightmare and The Noble Dream*. According to Hart:

> The Nightmare is this. Litigants in law cases consider themselves entitled to have from judges an application of the existing law to their disputes, not to have new law made for them. Of course it is accepted that what the existing law *is* need not be and very often is not obvious, and the trained expertise of the lawyer may be needed to extract it from the appropriate sources. But for conventional thought, the image of the judge, to use the phrase of an eminent English Judge, Lord Radcliffe, is that of the "objective, impartial, erudite, and experienced declarer of the law," not to be confused with the very different image of the legislator. The Nightmare is that this image of the judge, distinguishing him

350. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1063 (1975).
351. *Id.* at 1064.
352. *See id.*
353. *Id.*
354. *See* BODENHEIMER, *supra* note 345, at 99.
355. *See id.* at 102-03.
356. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). *See also* Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527-942 (1999).

> from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment—on an extreme view, always, and on a moderate view, very frequently.[357]

In contrast to the positivist view, the material of the judicial task for judges who adopt the normative view includes background norms that infuse existing common-law, statutory, and constitutional enactments.[358] The normative view is that judges have the power to make law based on these background norms, and regularly do so, covertly as well as overtly.[359] For normativists, changes in law rest in part on the substance of these background considerations, not merely on the logic or purpose of existing concepts.[360] The fundamental purpose or end of the judicial task for normative theorists is whether the law has a defensible substantive content.[361]

Professor Hart called this normative view of the judicial task, "The Noble Dream."[362] As Hart described it:

> [A] legal system was too narrowly conceived if it was represented as containing only rules attaching closely defined legal consequences to closely defined, detailed factual situations and enabling decisions to be reached and justified by simple subsumption of particular cases under such rules. Besides rules of this kind, legal systems contain large-scale general principles; some of these are explicitly acknowledged or even enacted, whereas others have to be inferred as the most plausible hypotheses explaining the existence of the clearly established rules. Such principles do not serve merely to explain rules in which they are manifested but constitute general guidelines for decision when particular rules appear indeterminate or ambiguous or where no relevant authoritative, explicitly formulated rule seems available . . . .
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357. H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 972 (1977) (emphasis in original).

358. R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 166 (1994) [hereinafter Kelso, *Styles of Constitutional Interpretation*].

359. *See* BODENHEIMER, *supra* note 345, at 149.

360. *See id.* at 166.

361. *See* Kelso & Kelso, *Judicial Decision-Making*, *supra* note 244, at 352-53.

362. *See* Hart, *supra* note 357, at 978.

> [I]n the end [this is] the message preached by Karl Llewellyn in his rich and turbulent advocacy of what he termed the grand style of judicial decision.
>
> Professor Ronald Dworkin[] . . . is, if he and Shakespeare will allow me to say so, the noblest dreamer of them all . . . .[363]

The famous case of *Riggs v. Palmer*[364] provides a good example of the difference between a positivist and normative perspective on the nature of the judicial task.[365] The *Riggs* case involved the issue of whether an heir who murdered the testator to ensure the will would not be changed could collect under the will.[366] The dissent in *Riggs* took the positivist view that since the existing legal statutes did not provide that the heir could not collect, then the heir could collect even if that led to an inequitable result.[367] The majority in *Riggs* acknowledged that the relevant statutes did not expressly provide that the murderous heir could not collect.[368] However, the majority based its decision on background "general principles of natural law and justice" embedded in the views of "many generations" of "philosophers and statesmen" and "fundamental maxims of the common law" that no one should be able to "profit" from "his own wrong."[369] The Court gave the relevant statutes on wills an "equitable construction" that denied the heir an ability to profit from his own wrong.[370]

International judges who embrace PA analysis, and American judges who embrace all the various forms of heightened scrutiny, tend to adopt a natural law approach to the judicial task. Law for them tends to be about protecting individual natural rights which existed prior to the government, and which are independent of any positive statements of rights in a Constitution.[371] An alternative approach, however, is to be a committed positivist judge. Such a judge would start with a presumption of only granting individual rights clearly stated in positive constitutional

363. *Id.* at 979-80, 982.
364. 22 N.E. 188 (1889).
365. *See generally id.*
366. *Id.* at 188-89.
367. *Id.* at 191-92 (Gray, J., dissenting).
368. *Id.* at 191 (majority opinion).
369. *Riggs*, 22 N.E. at 190.
370. *Id.* at 189-90.
371. *See supra* notes 348-350 and accompanying text (describing the "normative" or natural approach).

documents.[372] Most positivists would go slightly further to protect individuals if the government action violated existing customs and traditions of society, as existing customs and traditions are "positive" aspects of shared social understandings, even if not written down in constitutional text.[373] A slightly more flexible judge might also adopt a catchall requirement that the government action be minimally rational. This is reflected in Professor Thayer's famous statement, adopted by Justice Holmes in the first half of the twentieth century, that courts should defer to the other branches of government unless the unconstitutionality of the government action is "so clear that it is not open to rational question."[374]

In the American context, one can see such a positivist approach reflected in the jurisprudence of Chief Justice Roberts of the Supreme Court of the United States, and Justices Scalia, Thomas, and Alito. The focus of their individual rights jurisprudence is on specifically stated constitutional rights, customs and traditions, and embracing of Thayerian/Holmesian deference to government absent irrational government decision making.[375] In contrast to this approach, Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan adopt more a natural law approach to decision making.[376] These Justices may do this, however, because of a belief that

372. *See supra* notes 358-361 and accompanying text (describing the "positivist" approach); *infra* note 375 and accompanying text (discussing the "positivist focus of Justices Scalia and Thomas on literal text and historical customs and traditions").

373. *See, e.g.*, *Planned Parenthood*, 505 U.S. at 979-80 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting) (stating that the United States Constitution does not protect a fundamental liberty interest regarding abortion rights because: "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.").

374. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). On Thayer's views, see generally Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1-468 (1993). This was the approach adopted by Justice Oliver Wendell Holmes, Justice Frankfurter, and other such deference to government judges in the first half of the twentieth century. On the relationship among Professor Thayer and Justices Holmes and Frankfurter, see generally JAMES BRADLEY THAYER ET AL., JOHN MARSHALL (1967).

375. *See* Kelso, *Styles of Constitutional Interpretation*, *supra* note 358, at 184-95 (discussing the formalist, positivist focus of Justices Scalia and Thomas on literal text and historical customs and traditions), 195-213 (discussing the addition of Thayerian/Holmesian deference to government in the decisions of Chief Justice Rehnquist and Justice White); *see also* Bradley W. Joondeph, *Law, Politics, and the Appointments Process*, 46 SANTA CLARA L. REV. 737, 763 & n.125 (2006) (reviewing LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005)) ("Alito had a lengthy public record as a consistent conservative judge on the Third Circuit . . . . Indeed, some referred to him as 'Scalito' for the affinity between his views and those of Justice Scalia."); Kelso & Kelso, *Judicial Decision-Making*, *supra* note 244, at 368-69, 372-73 (discussing the Holmesian approach of Chief Justice Roberts, as well as Chief Justice Rehnquist and Justice White).

376. *See generally* Kelso, *Styles of Constitutional Interpretation*, *supra* note 358, at 150-84 (discussing the natural law approach of Justices O'Connor, Kennedy, and Souter); Kelso & Kelso, *Judicial Decision-Making*, *supra* note 244, at 354-55 (discussing the "pragmatism" or "instrumentalism" of

such an approach is what the positive United States Constitution requires. After all, the United States Constitution was adopted against the backdrop of the 1776 Declaration of Independence, which specially stated that individuals are "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."[377] Similarly, for many post-1945 constitutions around the world, the positive documents set out a number of specific individual rights, as well as general right to "human dignity," which it is understood the courts have the obligation to protect.[378] For these judges, then, both on natural law and positivist grounds, the more vigorous kind of PA or heightened scrutiny is appropriate. Such review should go beyond clear textually specific rights, customs and traditions, and Thayerian/Holmesian deference.[379]

VI. CONCLUSION

Part I of this Article notes that rights review in the United States is based on two distinct lines of authority: tier review and reasonableness balancing review. Under tier review, courts focus on whether to adopt strict scrutiny, intermediate review, or minimum rationality review. Under reasonableness balancing review, courts balance the benefits of the government regulation against the burden on the individual, and then ask whether given the benefit the burden is "unreasonable," "clearly excessive," "grossly excessive," "grossly disproportionate," or in some other fashion goes "too far." Rights review in constitutional courts around the world use one approach: proportionality. Proportionality analysis has three basic steps: suitability, necessity, and balancing *stricto sensu*.

Despite these surface differences, each approach uses the same building blocks in developing the relevant standard of review. As discussed in Part II, each is based on a means/end analysis, focusing on the ends the

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Justices Stevens, Ginsburg, Breyer, and Sotomayor). Pragmatism, or instrumentalism, is related to natural law decision-making, in that it calls for the judge to go beyond positive text and positive customs and traditions in interpreting constitutional text. Such an approach is likely to be slightly more judicially activist than natural law, in that it calls for the judge to engage in some explicit consideration of sound social policy to resolve constitutional issues if text, context, history, legislative and executive practice, and judicial precedents leave the case result still in doubt. On this point, see generally Kelso, *Styles of Constitutional Interpretation*, *supra* note 358, at 213-25.

377. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

378. *See generally* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUMAN RTS. L. REV. 65 (2011).

379. For further discussion of modern natural right analysis, including proportionality analysis (PA), 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 (2011).

government is seeking to advance and the means by which those ends are advanced. Each focuses on the extent to which the government action is narrowly tailored to not burden individual rights more than is viewed as appropriate. Each is concerned with whether the government's interests are strong enough to justify the burden on individual rights. Given this backdrop, Part III discusses the international proportionality analysis and American tier and reasonableness review in greater depth. Part IV considers these standards of review against a backdrop of civil law and common law decision-making styles.

Finally, in Part V, the standards of review are related to the philosophic divide between positivist and natural law theories of justice. As discussed in Part V, both the current majority on the Supreme Court of the United States and international constitutional rights decision making reject review based on a limited positivist vision of protecting only clearly identified specific rights in the Constitution, consistency with customs and traditions of society, and limited review to ensure the government action is not irrational. Instead, the current majority of the Supreme Court of the United States and international constitutional decision making reflect a commitment to protecting human dignity against government infringement.