Clarifying the Four Kinds of "Exacting Scrutiny" Used in Current Supreme Court Doctrine

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ABSTRACT

Over the last 50 years, the Supreme Court has used the term "exacting scrutiny" in a number of contexts. Sometimes "exacting scrutiny" appears to refer to strict scrutiny. Other times, it appears to resemble intermediate review. Other times "exacting scrutiny" appears to represent a standard of review between strict scrutiny and intermediate review. In addition, as least one commentator has compared the term "exacting scrutiny" to Justice Breyer's use in opinions of the term "proportionality" review. This Article intends to clarify the four kinds of "exacting scrutiny" used in Supreme Court majority opinions and discuss the alternative use by Justice Breyer of the term "proportionality" review. The conclusion of this Article is that the Court should drop the terms "exacting scrutiny" and "proportionality" review in favor of explicit adoption of whatever standard of review is intended to be used in the particular case. That would provide lower courts will better guidance on how to resolve each of the cases in which the term "exacting scrutiny" is currently used, particularly in cases involving campaign finance, freedom of association, and commercial speech.

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I. INTRODUCTION

Over the last 50 years, the Supreme Court has used the term "exacting scrutiny" in four distinct ways.[1] As used by the Court, sometimes "exacting scrutiny" appears to refer exactly to strict scrutiny review.[2] Other times, it appears to resemble intermediate review.[3] Occasionally, "exacting scrutiny" appears to represent a standard of its own, reflecting a standard of review between strict scrutiny and intermediate review.[4] In addition, some have argued that "exacting scrutiny" may reflect a form of heightened balancing, comparing it to

1. The most prominent early use was in *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) ("[T]he constitutionality . . . turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.").

2. *See infra* Section II.A; United States v. Alvarez, 567 U.S. 709, 724–29 (2012) (applying the compelling government interest, direct relationship, and least restrictive effective alternative test of strict scrutiny).

3. *See infra* Section II.D; Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383–84 (2021) (applying an intermediate "substantial relation" to "important" government interest test, and then adding a narrow tailoring requirement that is not strict scrutiny's "least restrictive effective alternative," but only intermediate review's "not substantially broader than necessary" test); Doe v. Reed, 561 U.S. 186, 196 (2010) (explaining that exacting scrutiny "'requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest[,]'" which reflects an intermediate standard of review (quoting Citizens United v. FEC, 558 U.S. 310, 366–67 (2010))).

4. *See infra* Section II.B.; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564, 566 (1980) (applying a heightened intermediate standard of review); *infra* Section II.C; Bush v. Vera, 517 U.S. 952, 977–79 (1996) (applying a loose strict scrutiny standard of review).

Supreme Court Justice Stephen Breyer's use of the term "proportionality" review in opinions.[5]

The intent of this Article is to clarify the four kinds of "exacting scrutiny" used in Supreme Court majority opinions and discuss Justice Breyer's alternative use of the term "proportionality" review. In pursuit of this objective, Part II discusses the various kinds of heightened scrutiny used by Supreme Court majority opinions.[6] Part III examines how the use of the term "exacting scrutiny" in majority opinions reflects four different heightened scrutiny tests.[7] Part IV then analyzes the particular problems with the use of "exacting scrutiny" in campaign finance cases,[8] freedom of association cases,[9] commercial speech cases,[10] and Justice Breyer's discussion of proportionality review.[11] The conclusion reflects that the Court should drop the term "exacting scrutiny" in favor of explicit adoption of whatever specific standard of review is intended to be used in the particular case. Doing so would provide lower courts with better guidance on how to resolve each case in which the term "exacting scrutiny" is used.[12]

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

A. Basic Standards of Review Under the Equal Protection Clause

Classic black letter law recognizes that the Supreme Court uses three distinct levels of review under the Equal Protection Clause: rational review, intermediate scrutiny, and strict scrutiny.[13] Under rational review, which is used to review social or economic legislation under the Equal Protection Clause, the government action need only (1) advance legitimate government interests, (2) be rationally related to advancing these interests (e.g., not be irrationally underinclusive or fail to advance any legitimate interest), and (3) not impose irrational burdens on

5. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 207–08, 215–22 (2016) ("[T]he Article . . . turns more particularly to the relationship between exacting scrutiny and the proportionalist, balancing-oriented, multi-faceted, and checklist-style jurisprudence often favored by, most prominently, Supreme Court Justice Stephen Breyer.").

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Section IV.A.

9. *See infra* Section IV.B.

10. *See infra* Section IV.C.

11. *See infra* Section IV.D.

12. *See infra* Part V.

13. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 699 (5th ed. 2015).

individuals (e.g., not be irrationally overinclusive or burden individuals for no benefit).[14] In contrast, under intermediate scrutiny 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.[15] Finally, under strict scrutiny, the statute must (1) advance compelling governmental ends, (2) be necessary to advancing these ends, and (3) be the least restrictive effective means to advance the ends.[16]

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14. *See* CHEMERINSKY, *supra* note 13, at 699 ("Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet."); R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review*, 45 U. SO. ILL. L.J. 415, 421–26 nn.41–66 (2021) (citing Heller v. Doe, 509 U.S. 312, 320–21 (1993) (discussing equal protection)). The same standard of review is applied for standard social or economic legislation under the Due Process Clause. *See* Kelso, *supra* note 14, at 426–28 nn.67–76 (citing Williamson v. Lee Optical Co. of Oklahoma, 348 U.S. 483, 487–89 (1955) (discussing due process)).

15. *See generally* CHEMERINSKY, *supra* note 13, at 699; R. Randall Kelso, *The Structure of Intermediate Review*, 25 LEWIS & CLARK L. REV. 691, 699–700 (2021). As part of intermediate review's "not substantially more burdensome than necessary" requirement, *id.* at 700, the government's regulation must also "leave open ample alternative channels of communication" for the individual, *id.* at 708 n.107 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989)).

16. *See generally* CHEMERINKSY, *supra* note 13, at 699; R. RANDALL KELSO, THE STRUCTURE OF STRICT SCRUTINY REVIEW 5–23 & nn.139–50 (2021), https://bit.ly/3rJ76fE (discussing the basic elements of strict scrutiny review). The Kelso article cited here discussed applications of strict scrutiny review in a number of contexts like (1) racial discrimination under the Equal Protection Clause, *see id.* at 23–34 & nn.151–208; (2) substantial burdens on fundamental rights under the Due Process Clause, *see id.* at 34–38 & nn.209–34; or (3) various kinds of cases under the First Amendment, *see id.* at 39–42 & nn.235–60.

For various phrasings of strict scrutiny review, see Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("When race-based action is necessary to further a compelling governmental interest, such action does not violate . . . equal protection so long as the narrow-tailoring requirement is also satisfied."); Austin v. Mich. Chamber of Com., 494 U.S. 652, 666 (1990) ("precisely tailored to serve [a] compelling state interest"); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("necessary"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) ("precisely tailored"). In the absence of more specific guidance from the Court, lower courts have used the "narrowly drawn" for strict scrutiny and "substantially related" for intermediate review, a practice consistent with cases like *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (finding that "[racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests") and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (finding that gender classifications are constitutional if they are "substantially related to the achievement of [important government] objectives"). *See also Hogan*, 458 U.S. at 725 (use of phrase "close relationship" for intermediate review). For representative lower court cases, see, e.g., *Proft v. Raoul*, 944 F.3d 686, 690–91 (7th Cir. 2019) (using "closely drawn" to describe intermediate standard of review); *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 957–60 (10th Cir. 2003) (using "narrow tailoring" language for strict scrutiny review); *Harrison & Burrows Bridge Constructors, Inc. v. Cuomo*, 743 F. Supp. 977, 997 (N.D.N.Y. 1990) (using "substantially related" to describe review in gender discrimination case).

The Court has noted that some interests, like administrative cost considerations, while legitimate, are typically not important or substantial, and thus cannot be used to justify a statute at intermediate scrutiny.[17] Other interests, like diversity in broadcast programming, may be substantial, but are not compelling.[18] Therefore, these interests can be used to justify a statute at intermediate scrutiny, but not at strict scrutiny. Finally, additional interests such as remedying one's own prior racial discrimination are compelling, and thus can be used to justify a statute at strict scrutiny.[19] The Court has recently underscored that whether an interest is compelling depends on that particular interest's strength in the specific case, not if the interest could be compelling in other circumstances.[20]

Because the regulation must be "necessary" to advance the government's ends at strict scrutiny, and thus have no "unnecessary" underinclusiveness, the regulation must adopt, to the extent possible, means that "directly advance" the government ends, not merely "substantially advance" those ends as at intermediate review. As noted in

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

18. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354–55 (D.C. Cir. 1998).

19. *See Adarand Constructors*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."). Examples of other interests that have been assumed to be compelling by judges while deciding cases are national security and military defense, *see* N.Y. Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *id*. at 728–29 (Stewart, J., joined by White, J., concurring); *id.* at 741–42 (Marshall, J., concurring), compliance with the Voting Rights Act, *see* Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring), improving the delivery of health-care services to communities currently underserved, *see Bakke*, 438 U.S. at 310, and achieving the educational benefits that flow from having a diverse student body, *see id.*

20. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881–82 (2021). In *Fulton*, the Court held that while an interest in combatting discrimination can be a compelling government interest in general, in this case the interest was related to "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children." *Id*. at 1881. These "asserted interests are insufficient" to justifying "denying an exception to CSS [Catholic Social Services]" for their refusal to place foster children in same-sex households when the City created "a system of exceptions" under the "sole discretion" of the government administrator of the program, but "den[ied] an exception to CSS." *Id*. at 1879, 1881–82. The Court noted other participants in the program did place children with same-sex households, and no same-sex household had asked CSS for a placement. *See id*. at 1875. Similarly, in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, the Court noted, "[T]he State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective." Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 120–21 (1991)

United States v. Alvarez, "[t]he First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented."[21] It is clear that this requirement of a "direct relationship" exists at strict scrutiny. The Court views regulations of commercial speech as involving a less rigorous form of scrutiny than strict scrutiny, [22] yet the Court has stated that for commercial speech regulation, under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, the regulation must "directly advance[] the governmental interest."[23] Since a "direct relationship" is required in commercial speech cases, *a fortiori* such a requirement exists at strict scrutiny.[24] Because strict scrutiny is a higher standard of review than intermediate scrutiny, the Court requires government action at strict scrutiny to also meet the intermediate criterion that the government action substantially advance the government interest.[25]

Under the current doctrine, the challenger bears the burden of proving unconstitutionality under minimum rationality review,[26] while under intermediate scrutiny or strict scrutiny, the government bears the burden of justifying its action.[27] While "any reasonably conceivable interest" can be used to justify a statute at minimum rationality review,[28]

21. United States v. Alvarez, 567 U.S. 709, 725 (2012) (plurality opinion) (citation omitted)*; see also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (California "cannot show a direct causal link between violent video games and harm to minors.").

22. *See* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing,* 8 ELON L. REV. 291, 370–73 (2016).

23. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

24. *See* KELSO, *supra* note 16, at 13 n.83.

25. *See id*. at 13 nn.85–86.

26. Regarding the burden of proof under minimum rationality review, see CHEMERINSKY, *supra* note 13, at 706–07 ("[T]he Court has been consistent that the challenger has the burden on proof when rational basis review is applied."). The use of the term "minimum rationality review" is used here to distinguish this level of review from the higher levels of reasonableness balancing discussed *infra* notes 31–41 and accompanying text. This is the level of review often referred to as just "rational review" and adopts that standard as described *supra* note 14 and accompanying text.

27. Under intermediate scrutiny, the government has the burden to justify its course of action. *See* CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW 1101 n.82 (2007), https://bit.ly/3CKrrrf (citing United States v. Virginia, 518 U.S. 515, 531 (1996) (requiring that "[p]arties who seek to defend gender-based government action must demonstrate" they satisfy intermediate review)). Similarly, under strict scrutiny, the government has the burden to justify its course of action. *See id*. (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (noting that because "the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of citizens on a racial basis violates the dictates of the Equal Protection Clause")).

28. *See* 2 CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK 870 n.26 (2022), https://bit.ly/3CLRo9G (quoting Heller v.

at intermediate review the government can only use "plausible" or "actual" government purposes to justify its action,[29] while at strict scrutiny the government can only use "actual" government purposes to meet its burden of proof.[30]

B. Additional Standards of Review Used Under Due Process, First Amendment, and Other Doctrines

In addition to minimum rationality review, the Court sometimes uses a higher level of legitimate government interest review. This level, which can be called "reasonableness balancing" or "second-order reasonableness review," balances the extent of the government's legitimate interests against the burden on the individual to determine whether the challenger can show the government regulation is "unreasonable" or "clearly excessive."[31] The classic example of such a level of review appears in cases involving less than substantial burdens on fundamental rights, such as in *Burdick v. Takushi*, where the Court stated:

> A court . . . must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights . . . ."

Doe, 509 U.S. 312, 320 (1993) ("'[T]he 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)))).

29. *See* Kelso, *supra* note 15, at 702 n.67 (citing KELSO & KELSO, *supra* note 27, at 1103–04 nn.92–99; KELSO & KELSO, *supra* note 28, at 1048–49 nn.31–36; Michael M. v. Superior Ct., 450 U.S. 464, 470 (1981) (concluding that the court was "satisfied" the stated interest "is at least one of the purposes of the statute" (internal quotation marks omitted))); Craig v. Boren, 429 U.S. 190, 199 n.7 (1976) (using a government purpose while acknowledging whether "this was the true purpose is not at all self-evident").

30. *See* KELSO & KELSO, *supra* note 27, at 1102 nn.85–86; Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose.'" (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982))). For discussion of what kinds of interests constitute compelling, substantial, or legitimate interests, see *supra* notes 16–20 and accompanying text. For discussion of illegitimate interests, see Kelso, *supra* note 14, at 423–24 nn.47–56.

31. Full discussion of the difference between minimum rationality review and reasonableness balancing appears at Kelso, *supra* note 14, at 428–32 nn.77–96. Regarding the burden of proof under "reasonableness balancing," see, e.g., Burdick v. Takushi, 504 U.S. 428, 434, 441–42, 437–38 (1992) (placing the burden of proof on the challenger, as the Court rejected "petitioner's challenge to Hawaii's ban on write-in ballots").

> "[R]easonable, nondiscriminatory restrictions . . . are generally sufficient to justify" the restrictions."[32]

This kind of balancing appears in many other kinds of cases, including cases involving Dormant Commerce Clause review, the Takings Clause, the Contract Clause, and Due Process review of punitive damages.[33] Such a "reasonable relation to a legitimate interest" analysis also appears in cases involving Free Speech Clause review in nonpublic forums.[34]

Sometimes, the Court shifts the burden to the government in these legitimate government interest cases to prove the government action is "reasonable."[35] Because requiring the government to justify the constitutionality of its action makes this standard of review more difficult

32. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)). *See also* Kelso, *supra* note 14, at 451–59 nn.215–62.

33. *See* Kelso, *supra* note 14, at 460–53 nn.263–80 (citing Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (Dormant Commerce Clause case using "clearly excessive" language); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–38 (1978) (finding no taking occurred because zoning law permitted "reasonably beneficial use" of the property); U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 22, 31 (1977) (balancing the following: (1) the state's "legitimate" interest; (2) whether the benefits of the statute would be served "equally well" by an "evident and more moderate course;" and (3) the "burden" on individual contract rights, in which the challenger has the burden to establish the regulation was not "reasonable and necessary" given the statute's benefit"); BMW v. Gore, 517 U.S. 559, 575–85 (1996) (balancing the following factors to determine constitutionality of a punitive damage award: (1) the degree of reprehensibility of the conduct; (2) the ratio between the punitive damage award and the compensatory damage award; and (3) sanctions for comparable misconduct in the law, to determine whether the challenger can show the punitive damage award is "grossly excessive")).

34. *See* Kelso, *supra* note 14, at 463–66 nn.281–300 (citing Greer v. Spock, 424 U.S. 828, 836–40 (1976) (holding that regulations banning on military bases speeches and demonstrations of a political nature and prohibiting distribution of literature without approval of post headquarters were reasonably related to the legitimate interest of maintaining "a politically neutral military establishment"); Beard v. Banks, 548 U.S. 521, 524–30 (2006) (holding that burdening a prisoner's access to newspapers, magazines, and photographs while in the prison's long-term segregation unit tested by whether the regulation was "'reasonably related to legitimate penological interests'" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))); Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1886, 1888 (2018) (holding that a prohibition of solicitation and display of political material within 100 feet of polling place was not "'reasonable in light of the purpose reserved by the forum'" because the regulation banned any *political* message, and the unmoored use of that term could extend to a "button or T-shirt merely imploring others to [v]ote" (internal quotation marks omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)))).

35. *See* Kelso, *supra* note 14, at 467–72 nn. 303–34. *See also* Dolan v. Tigard, 512 U.S. 374, 395 (1994) (Takings Clause case requiring the city to "meet its burden"); Maine v. Taylor, 477 U.S. 131, 138 (1986) (Dormant Commerce Clause case where the "burden falls on the State"); Pickering v. Bd. of Educ., 391 U.S. 563, 568, 572 n.4 (1968) (discussing the right of government workers to speak on matters of public concern).

to meet, it can be called "heightened reasonableness balancing" or "third-order reasonableness review."[36]

Both of these reasonableness balancing tests are less rigorous than intermediate review for three reasons: (1) legitimate interests can be used to make the government action constitutional under reasonableness balancing, but not under the intermediate requirement of important or substantial interests;[37] (2) under reasonableness balancing, there are no independent requirements that the government action be "substantially related" to advancing the interests and be "not substantially too burdensome" as under intermediate review, but only a balancing of benefits and burdens to determine if the action is "reasonable";[38] and (3) under reasonableness balancing, while any reasonably conceivable government interest "put forward by the government in the litigation" can be used to support a finding of reasonableness, [39] the government can only use "plausible" or "actual" government purposes to justify its action under intermediate scrutiny.[40] Moreover, the "second-order reasonableness balancing" is less rigorous than intermediate review for a fourth reason: the burden is on the challenger to prove unconstitutionality, whereas the burden falls on the government to justify the action under intermediate review.[41]

There is also a heightened intermediate review standard used in cases involving commercial speech under free speech doctrine. Under commercial speech doctrine, while adopting the same intermediate tests for prongs (1) and (3), under prong (2) the doctrine requires the government means to be "directly related" to advancing the government's interests—the strict scrutiny standard of review—and not merely "substantially related."[42]

There is also a "loose" strict scrutiny approach, which adopts prongs (1) and (2) of strict scrutiny, but prong (3) of intermediate

36. Kelso, *supra* note 14, at 432 nn.97–100, 467–72 nn.303–34.

37. *See supra* notes 14–15 and accompanying text.

38. *Compare supra* note 15 and accompanying text (intermediate scrutiny), *with supra* notes 31–36 and accompanying text (reasonableness balancing review).

39. *See* Kelso, *supra* note 14, at 429–30 nn. 81–85 (citing Burdick v. Takushi, 504 U.S. 440, 434 (1992) (explaining that the court "must weigh 'the character and magnitude of the asserted injury' . . . against 'the precise interests put forward by the State as justifications'" (quoting Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)))).

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

41. *See supra* note 27 and accompanying text (intermediate scrutiny); *supra* note 31 (reasonableness balancing).

42. *See* Kelso, *supra* note 15, at 700–01; *see also id.* at 724–29 nn. 207–46, (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)); *supra* notes 21–25 and accompanying text (strict scrutiny standard of review).

review.[43] For example, in *Bush v. Vera*, although generally applying a strict scrutiny compelling governmental interest analysis to the case of racial redistricting, Justice Sandra Day O'Connor decided to "reject, 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'" and instead adopted the intermediate analysis that the racial redistricting only not be "substantially more [burdensome] than is reasonably necessary."[44]

III. EXACTING SCRUTINY

In addition to these levels of scrutiny, the Court has sometimes used the phrase "exacting scrutiny" to describe the appropriate level of review.[45] Court majority opinions have used the phrase in four ways, reflecting the four different kinds of heightened scrutiny approaches beyond any form of rational basis or reasonableness review: (1) strict scrutiny, (2) loose strict scrutiny, (3) heightened intermediate review, and (4) basic intermediate review.[46]

A. Exacting Scrutiny as Strict Scrutiny

A classic example of the Court using the phrase "exacting scrutiny" as strict scrutiny appears in *United States v. Alvarez*.[47] In this case, which analyzed the Stolen Valor Act's criminalization of false speech to a person who claimed to have earned a military medal, the plurality applied "exacting scrutiny" to the "content-based restrictions on protected speech."[48] After reciting the "compelling interests" in

43. *See* KELSO, *supra* note 16, at 50–51 nn. 301–08 (citing Bush v. Vera, 517 U.S. 952, 956–59 (1996) (addressing racial redistricting challenges under the Equal Protection Clause)).

44. *Bush*, 517 U.S. at 977 (quoting Vera v. Richards, 861 F. Supp. 1304, 1343 (S.D. Tex. 1994)); *see also* KELSO, *supra* note 16, at 51–53 (explaining that because this kind of scrutiny "waters down" the third prong of traditional strict scrutiny review, in previous publications I have called this level of scrutiny "loose strict scrutiny"); KELSO & KELSO, *supra* note 27, at § 7.2.1 nn.38–42 & Table 7.2.

45. *See supra* notes 1–4 and accompanying text.

46. Strict scrutiny is summarized at *supra* notes 16, 19–25, 27, 30 and accompanying text. "Loose" strict scrutiny is summarized at *supra* notes 43–44 and accompanying text. Heightened intermediate review is summarized at *supra* note 42 and accompanying text. Intermediate review is summarized at *supra* notes 15, 18, 27, 29 and accompanying text. Rational basis and reasonableness review is summarized at *supra* notes 14, 28 and accompanying text (rational basis review); *supra* notes 31–34, 37–39, 41 and accompanying text (second-order reasonableness review); *supra* notes 35–39 and accompanying text (third-order reasonableness review).

47. *See* United States v. Alvarez, 567 U.S. 709, 724 (2012) (plurality opinion) ("most exacting scrutiny" used to describe the standard of review applied in the case).

48. *Id.*

"protecting the integrity of the Medal of Honor,"[49] the plurality continued, "[t]he First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented."[50] The plurality also noted that the speech restriction must be the "'least restrictive means among available, effective alternatives.'"[51] This is the standard strict scrutiny analysis used for content-based restrictions on speech in a public forum.[52]

Another example of using "exacting scrutiny" to mean strict scrutiny is found in the Court's approach to speech regarding campaign financing. In such cases, the Court has focused on four situations: (1) regulations of expenditures, (2) regulations of contributions, (3) disclosure requirements, and (4) regulating the process of electing judicial candidates.[53] Fundamental First Amendment interests are implicated in each area, and thus, the government has the burden of justifying its restrictions. However, as discussed below, beginning with the 1976 foundational modern case *Buckley v. Valeo*[54], the Court has not resorted to explicit strict scrutiny or intermediate review language in every case, and use of phrases like "exacting scrutiny" has muddied the waters in terms of the exact standard of review to apply.

In 2010, in *Citizens United v. Federal Election Commission*, the Court considered a statute barring corporations from making independent expenditures that referred to a clearly identified candidate within 30 days of a primary election or within 60 days of a general election for public office.[55] In his opinion for a 5-4 Court, Justice Anthony Kennedy held that the law was unconstitutional and overruled *Austin v. Michigan Chamber of Commerce*.[56] In *Citizens United*, Justice Kennedy said that

49. *Id*. at 725.

50. *Id*. (citation omitted) (quoting Brown v. Entm't Merchs. Assn., 564 U.S. 786, 799 (2011)).

51. *Id*. at 729. (quoting Ashcroft v. ACLU, 542 U.S. 656, 666 (2004)).

52. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (adopting a strict scrutiny approach for content-based regulations of speech, the Court required the state to "'show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end'" (quoting Ark. Writers' Project v. Ragland, 481 U.S. 221, 231 (1987))).

53. *See* 3 CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK 507–48 (2022), https://bit.ly/3einvED (discussing these four kinds of campaign finance cases).

54. *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976) (adopting "the exacting scrutiny required by the First Amendment").

55. *See* Citizens United v. FEC, 558 U.S. 310, 320–21 (2010).

56. *See id*. at 365 (overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990)).

regular strict scrutiny should apply in this case involving expenditures.[57] He then concluded that no compelling interests justified the government's regulation, as there is no compelling interest to limit speech to prevent distortion of the political process caused by large expenditures of money.[58] Additionally, he stated that independent expenditures do not give rise to corruption or the appearance of corruption,[59] and that any concern with shareholder protection can be protected "'through the procedures of corporate democracy.'"[60] In *Williams-Yulee v. Florida Bar*, the Court also held that a rule prohibiting judicial candidates from personally soliciting campaign funds triggered strict scrutiny.[61] On the other hand, cases involving campaign contributions to candidates and disclosure requirements have not triggered strict scrutiny, but rather intermediate review, as discussed in Part III.D.[62]

B. Exacting Scrutiny as Loose Strict Scrutiny

There is a version of strict scrutiny that adopts the requirements of a compelling government interest and a direct relationship between means and ends, but rejects the least restrictive effective alternative requirement in favor of the intermediate requirement that the regulation not be substantially more burdensome than necessary.[63] Because this version adopts two of the three levels of strict scrutiny, but waters down prong three to an intermediate level of inquiry, this additional level can be called "loose" strict scrutiny.[64]

The Supreme Court used this standard of review in the equal protection racial redistricting case of *Bush v. Vera*.[65] There, although generally applying a strict scrutiny compelling governmental interest analysis, the majority, per Justice O'Connor, rejected the strict scrutiny requirement of a least burdensome effective alternative approach, as

57. *See id*. at 349–56.

58. *See id*. at 356–60.

59. *See id*. at 360–61.

60. *Id*. at 361–62 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)). Justice Kennedy also said that the Court was not reaching the question of whether the Government has a compelling interest in preventing foreign corporations from influencing our Nation's political process. *See id*. at 362.

61. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 442–44 (2015) (Robert, C.J., opinion, joined unreservedly by Sotomayor & Kagan, JJ.); *id*. at 462–68 (Scalia, J., joined by Thomas, J., dissenting); *id*. at 474–76 (Kennedy, J., dissenting); *id*. at 479 (Alito, J., dissenting).

62. *See infra* notes 88–92 and accompanying text (discussing campaign contributions); *infra* notes 93–102 (discussing disclosure requirements).

63. *See* KELSO & KELSO, *supra* note 27, at 183–84 nn.38–42, 186.

64. *See supra* notes 43–44 and accompanying text.

65. Bush v. Vera, 517 U.S. 952, 977, 979 (1996).

noted above.[66] Instead, the Court adopted the intermediate requirement that racial redistricting not be "substantially more [burdensome] than is 'reasonably necessary.'"[67] Loose strict scrutiny has also been used in dissent by justices in race-based affirmative action cases, such as *Parents Involved in Comm. Schools v. Seattle School District No. 1*.[68]

The loose strict scrutiny approach also seems to track the plurality's approach in *Denver Area Educational Telecommunications Consortium v. FCC*.[69] In *Denver Area*, while Justices Kennedy and Ginsburg opted for strict scrutiny for the content-based regulations applicable in the case,[70] the plurality of Justices Stevens, O'Connor, Souter, and Breyer explicitly rejected articulating any fixed standard of review, refusing to adopt either standard intermediate review or standard strict scrutiny.[71] However, the plurality did track the first two prongs of strict scrutiny, suggesting a "loose" strict scrutiny approach. The plurality noted that the interests involved in the case of protecting children from exposure to patently offensive sex-related material were "compelling."[72] The Court also noted that the "government may directly regulate speech to address extraordinary problems."[73]

Where the plurality parted company with Justices Kennedy and Ginsburg's strict scrutiny approach was in its refusal to apply the "least

66. *See supra* note 44 and accompanying text.

67. Bush v. Vera, 517 U.S. at 979. In *Wis. Legis. v. Wis. Elections Comm'n*, the Court restated the usual requirement that racial redistricting cases trigger "strict scrutiny" and "narrow[] tailor[ing]." Wis. Legis. v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022). The Court did not specifically address which should be applied: the narrow tailoring requirement as applied in *Bush*, or the more vigorous requirement of "least burdensome effective alternative" approach which is typical for a strict scrutiny approach. The Court merely restated the standard language that a "strong basis in evidence" is required "to conclude that § 2 [of the Voting Rights Act] demands . . . race-based steps." *Id*. at 1249–50 (citing Cooper v. Harris, 137 S. Ct. 1455, 1471 (2017)). Absent any clearer guidance, the *Bush* "loose" strict scrutiny approach still appears to remain good law.

68. *See* Parents Involved in Cmnty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 836–37 (2007) (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) (stating that regular strict scrutiny should be used for regulations using race to keep races apart, while more flexible strict scrutiny should be used when race is used to bring the races together).

69. *See generally* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996).

70. *See id*. at 784–87 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

71. *See id*. at 737–44 (Breyer, J., joined by Stevens, O'Connor, and Souter, JJ., with respect to Parts I, II, and V).

72. *Id*. at 743 (citing Sable Commc'n, Inc. v. FCC, 492 U.S. 115, 126 (1989); Ginsberg v. New York, 360 U.S. 629, 639–40 (1968); New York v. Ferber, 458 U.S. 747, 756–57 (1982)).

73. *Id*. at 741. The plurality referred, in passing, to "heightened scrutiny," *id*., and "close[] scrutin[y]," *id*. at 743, to describe the relevant level of review.

restrictive effective alternative" test of strict scrutiny in favor of a "considerably 'more extensive than necessary'" test.[74] The Court analyzed that test as similar to the "'no greater than . . . essential'" language of *United States v. O'Brien*, which was viewed in *Ward v. Rock Against Racism* as an intermediate review narrowly tailoring requirement.[75]

C. Exacting Scrutiny as Intermediate Review with Bite

The Court has also used the terms "exacting scrutiny" or "heightened scrutiny" to reflect the standard of review used in content-based regulations of commercial speech.[76] As summarized by Justice Powell in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission*:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the

74. *Id*. at 755–56.

75. *Id*. at 755 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968) (interpreting *Ward v. Rock Against Racism*, 491 U.S. 781, 797–98 (1989), which involved the intermediate review standard of not burdening "substantially more speech than is necessary" to further the government's interests). With regard to review of cable television regulations, some members of the Court may continue to think that strict scrutiny review, applicable to newspapers, books, and the Internet, *see* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (newspapers and books); Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 868–70 (1997) (the Internet), is too rigorous, *see Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 739–41 (plurality opinion); *id*. at 777–78 (Souter, J., concurring). Other members of the Court understandably feel that intermediate review, applicable to over-the-air radio and television, *see* FCC v. League of Women Voters, 468 U.S. 364, 374–80 (1984), is simply not rigorous enough to protect free speech of cable television operators, *see Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 784–87 (Kennedy, J., dissenting) (noting strict scrutiny is the proper standard to use for content-based regulations of public forum public access channels); *id*. at 820–23 (Thomas, J., dissenting) (criticizing adoption of an intermediate standard of review for cable television regulation, rather than strict scrutiny). Perhaps a majority of five Justices might be able to reach a compromise to command a majority for loose strict scrutiny review. Or perhaps there are now five votes on the Court for traditional strict scrutiny for content-based regulations of cable or satellite television and radio. A clearer standard of review would be helpful.

76. *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464–65 (2019):

> Even though commercial speech has been thought to enjoy a lesser degree of protection, prior precedent in that area . . . had applied what we characterized as "exacting" scrutiny, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."

Id. (citations omitted) (quoting Knox v. SEIU, Local 1000, 567 U.S. 298, 310 (2012)). *See also* Sorrell v. IMS Health Inc., 564 U.S. 552, 570–72 (2011) (commercial speech case applying "heightened scrutiny").

> provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[77]

Four aspects of the *Central Hudson* test are important to note. First, under its approach, minimum rational review would be applied to regulations of unlawful, false, or misleading ads, because without any special First Amendment protection, they would be viewed as standard economic regulations subject to rational review under the Equal Protection and Due Process Clauses.[78]

Second, as previously stated, the test for commercial speech is more stringent than regular intermediate scrutiny because the test requires that the regulation "directly advance" the government's interest, not merely "substantially advance" the interest. This is a strict scrutiny kind of standard, rather than intermediate review's standard that the regulation merely "substantially advance" the government's interest.[79] This increase in review is what makes the *Central Hudson* test an example of heightened intermediate review.[80]

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77. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

78. *See id*. at 566–67. For regulations of speech that might possibly be misleading or create confusion among consumer, the Court decided in *Zauderer v. Office of Disciplinary Counsel.* that where the government could show that consumer confusion or deception was possible, even though the commercial speech could not be proven to be unlawful, false, or misleading, then the government could require uncontroversial, factual disclosures as long as they were "reasonably related to the state's interest in preventing deception of consumers" because "disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech[.]" Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 650–51 (1985). These cases thus involve some form of a reasonableness balancing test. Historically this was a reasonableness balancing test like that used for nonpublic forum cases because the Court phrased the issue as whether the challenger could show the government regulation was unreasonable, *see id*. at 653 n.15. Without formal consideration or acknowledgement, however, in *NIFLA v. Becerra*, the Court placed the burden on the government not only to show the "possibility of consumer confusion" to trigger the *Zauderer* test, but also to prove the disclosure requirement was "reasonable." NIFLA v. Becerra, 138 S. Ct. 2361, 2377–78 (2018) This is also discussed in R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 421–23 (2019).

79. *See supra* notes 21–25 and accompanying text. This requirement of a "direct relationship" in *Central Hudson*, 447 U.S. at 566, is higher than the language suggested in *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), which merely suggested standard intermediate review of *United States v. O'Brien* should be applied to commercial speech.

80. *See* KELSO & KELSO, *supra* note 27, at 183 nn.36–37. For use of the "direct relationship" requirement, see, e.g., *Sorrell*, 564 U.S. at 576–77; Rubin v. Coors Brewing Co., 514 U.S. 476, 486–91 (1995).

Third, commercial speech cases involve a less rigorous form of scrutiny than traditional First Amendment doctrine for content-based regulations of speech, which ordinarily triggers strict scrutiny.[81] In *Board of Trustees of the State University of New York v. Fox*,[82] the Court clarified that the "no more extensive than reasonably necessary" language in *Central Hudson* should be interpreted to mean not the "least restrictive means" analysis of strict scrutiny, but rather the not substantially too burdensome test of intermediate review.[83]

Fourth, the *Central Hudson* test should lower First Amendment protection only for content-based, subject-matter regulations of commercial speech. Content-neutral time, place, and manner restrictions of commercial speech, like content-neutral regulations of fully protected speech, still should be tested under basic intermediate review, which requires only that they substantially serve a significant public interest and leave open ample alternative channels for communication, with no requirement of direct advancement.[84] Similarly, viewpoint discrimination in regulations of commercial speech should trigger strict scrutiny applicable even to viewpoint discrimination in cases otherwise not protected by free speech doctrine, such as advocating illegal conduct, fighting words, or obscene speech.[85]

The Court has made clear that in commercial speech cases, the First Amendment doctrine of "substantial overbreadth" does not apply because commercial speech is more "hardy" than other kinds of speech.

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81. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 426 (1983) ("The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

82. *See generally* Bd. Of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).

83. *Id*. at 477–80.

84. For discussion of basic intermediate review, see Kelso, *supra* note 22, at 296–303 (citing Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989)). Although the Court has not had a case directly on point, since regulation of commercial speech is thought to involve less vigorous regulation than ordinary free speech review, *see supra* note 81 and accompanying text, content-neutral regulations should trigger at most intermediate review, not *Central Hudson* review. Otherwise, commercial speech regulation would be higher than normal free speech review.

85. This follows from noting that commercial speech regulations should not be given lesser review than speech not otherwise protected by free speech doctrine, such as advocating illegal conduct, fighting words, and obscene speech cases. Since viewpoint discrimination in those areas trigger strict scrutiny, *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 384–92 (1992), viewpoint discrimination in commercial speech cases should trigger strict scrutiny. The Supreme Court reserved resolution of this issue in a related area of trademark protection in *Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017) (plurality opinion) (noting four Justices applied *Central Hudson* review to viewpoint discrimination in trademark case); *id*. at. 1767 (Kennedy, J., concurring) (noting four Justices said viewpoint discrimination should trigger strict scrutiny); *id*. at 1765 (noting Justice Gorsuch took no part in the consideration or decision).

This is because individuals have an economic incentive to advertise.[86] Thus, overbreadth doctrine is unnecessary to ensure that speech is not "chilled."[87]

D. Exacting Scrutiny as Intermediate Review

In 2003, a five-justice majority of the Court, in *McConnell v. Federal Election Commission*,[88] held that some version of intermediate scrutiny should be used for limitations on contributions, while strict scrutiny is appropriate for limitations on expenditures. In addition to justifying the lower level of scrutiny by stating that the contribution limitations at issue in the case "have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech[,]"[89] the Court also noted that contribution regulations are valid if they are "closely drawn" to match a "sufficiently important interest,"[90] an intermediate level of scrutiny. Despite the Court's more vigorous review of campaign financing regulations since 2006, following Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O'Connor,[91] the Court has not yet overruled *McConnell*. However, the Court has substantially limited *McConnell* to its facts, and it has vigorously scrutinized contribution limits under intermediate review.[92]

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86. *Cent. Hudson*, 447 U.S. at 564 n.6 ("[C]ommercial speech . . . is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977))).

87. *See Bates*, 433 U.S. at 380–81 (stating the "substantial overbreadth" doctrine does not apply in commercial speech cases).

88. *See* McConnell v. FEC, 540 U.S. 93, 113–14, 134–42 (2003) (Justice Stevens and O'Connor delivered the opinion of the Court with respect to the Bipartisan Campaign Reform Act of 2002, Titles I & II, joined by Souter, Ginsburg & Breyer, JJ.).

89. *Id.* at 138.

90. *Id.* at 136 (quoting FEC v. Beaumont, 539 U.S. 146, 162 (2003)).

91. For the start of the 2005 Term in October 2005, Chief Justice John G. Roberts, Jr. replaced Chief Justice William H. Rehnquist. On January 31, 2006, Justice Samuel A. Alito Jr. replaced Justice Sandra Day O'Connor. *See* KELSO & KELSO, *supra* note 30, at 1619–27. Note that both Chief Justice Rehnquist and Justice O'Connor were in the majority in *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377 (2000) (declining to adopt a clear strict scrutiny approach), and Justice O'Connor was the fifth vote for intermediate review in *McConnell*, 540 U.S. 93 (2003).

92. *See generally, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 199–203 (2014) (The 5-4 Court held that aggregate contribution limits that are placed on an individual donor's political contributions during an election cycle fail even *Buckley*'s less than strict scrutiny review, because they limit the number of separate candidates an individual can support, although a similar overall limit had been upheld in *Buckley*.); *id*. at 232–33 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, J., dissenting) (arguing that the court should uphold limitations based on *Buckley*'s less than strict scrutiny review); *Randall v. Sorrell*, 548 U.S. 230, 236–38 (2006) (holding that Vermont's contribution limits on the amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" are unconstitutional; those limits were: "governor,

Disclosure requirements were dealt with in *Buckley v. Valeo* under an "exacting scrutiny" approach.[93] The Court found the disclosure requirements to be constitutional under this standard.[94] The level of review for disclosure requirements has not been a matter of much debate, as disclosure requirements involving campaign financing tend to survive vigorous scrutiny. For example, in *Citizens United*, the statute included a disclaimer requirement mandating disclosure of who is responsible for the content of any advertisement, and the statute prescribed a disclosure requirement for any person spending more than $10,000 on electioneering communications within a calendar year.[95] Justice Kennedy found no constitutional impediment to the application of these requirements to a movie broadcasted via video-on-demand because there had been no showing that these requirements would chill speech or expression.[96]

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lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200"). In *Sorrell*, Justices Scalia, Kennedy, and Thomas concurred only in the judgment, with each indicating a continuing willingness to depart from *McConnell*'s less than strict scrutiny review for contribution limitations, and apply strict scrutiny instead. *See id*. at 264–65 (Kennedy, J., concurring in the judgment); *id*. at 265–66 (Thomas, J., joined by Scalia, J., concurring in the judgment). A three-Justice dissent would have upheld the contribution limitations under *McConnell*'s intermediate review. *See id*. at 281–84 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting). For recent cases involving contribution limitations to political campaigns, see generally *Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684, 691–99 (9th Cir. 2010) (holding a municipal cap on acceptance of contributions by any person that makes independent expenditures supporting or opposing a candidate unconstitutional as applied to local chamber of commerce's PAC); *Dallman v. Ritter*, 225 P.3d 610, 626–27 (Colo. 2010) (finding a prohibition of political contributions from holders of no-bid contracts with state entities unconstitutional). *But see generally* Preston v. Leake, 660 F.3d 726, 735–38 (4th Cir. 2011) (finding a North Carolina statute prohibiting lobbyists from making campaign contributions to candidates for certain state positions constitutional under *Buckley*); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 877–80 (8th Cir. 2012) (finding a state limitation on corporations contributing directly to candidates constitutional); United States v. Danielczyk, 683 F.3d 611, 615–19 (4th Cir. 2012) (finding a century-old federal ban on direct corporate contributions to federal candidates constitutional).

93. Buckley v. Valeo, 424 U.S. 1, 64–66 (1976).

94. *See id.* at 66–68.

95. *See* Citizens United v. FEC, 558 U.S. 310, 366 (2010).

96. *See id.* at 366–72; *id*. at 395–96 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part). Only Justice Thomas dissented. Justice Thomas pointed to several examples wherein persons whose names and addresses were disclosed, as required by law, were subjected to attacks and were left subject to retaliation from elected officials. *See id*. at 480–85 (Thomas, J., concurring in part and dissenting in part). While Court majorities have been willing to consider those risks to freedom of association as grounds for not requiring disclosure in specific cases, as in *NAACP v. Alabama*, 357 U.S. 449 (1958), for Justice Thomas the possibility of bringing such an as-applied action would require litigation over an extended time during which there would be a risk of chilling speech. *See* Citizens United, 558 U.S. at 480–85 (Thomas, J., concurring in part and dissenting in part).

Under the reasoning of the five-Justice majority in *McConnell*, because disclosure requirements typically only have a "marginal impact" on the ability of parties to engage "in effective political speech,"[97] an argument can be made that they should trigger the intermediate scrutiny used for contribution limitations. This is the standard seemingly adopted in the Court's 2010 case *John Doe No. 1 v. Reed*.[98] There, while the majority cited, in passing, precedents using the term "exacting scrutiny"—which is typically used to suggest "strict scrutiny"—the majority's official test in *Reed* only required the intermediate scrutiny approach of a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.[99] The majority's intermediate review is perhaps also justified by viewing most disclosure requirements not as content-based regulations of speech, but as content-neutral concerns aimed at "combating fraud, detecting invalid signatures, and fostering government transparency and accountability."[100]

In contrast to the majority, Justice Thomas's dissent in *Reed* applied a strict scrutiny, least restrictive alternative analysis.[101] It remains to be seen whether: (1) the intermediate review used in *Reed* will continue to be applied in later cases, (2) the Court will adopt Justice Thomas's view that strict scrutiny should be applied in *Reed*, or (3) the Court will adopt the suggestion by Justices O'Connor and Breyer that strict scrutiny should be used for disclosure requirements which are substantial burdens on First Amendment rights, while second-order reasonableness should be used for less than substantial burdens.[102]

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97. *See supra* notes 88–90 and accompanying text.

98. *See* Doe v. Reed, 561 U.S. 186, 194–96 (2010) (finding compelled disclosure of signatory information on referendum petitions constitutional); *id*. at 228 (Thomas, J., dissenting).

99. *Id*. at 196 (quoting *Citizens United*, 558 U.S. at 366–67).

100. *Id.* at 197. For content-neutral regulations of speech, standard Free Speech Doctrine does apply intermediate review. *See* Kelso, *supra* note 22, at 296–303 (citing Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989)). For additional cases involving disclosure regulations, see generally, e.g., *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 535-42 (9th Cir. 2014) (finding a requirement that names of official proponents appear on text of proposition used by circulators to solicit voter signatures constitutional under the less than strict scrutiny approach); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 311–14 (8th Cir. 2011) (finding a statute requiring corporations to funnel campaign contributions through "political funds" likely constitutional).

101. *See Reed*, 561 U.S. at 228 (Thomas, J., dissenting).

102. On Justices O'Connor's and Breyer's approach, see *Buckley v. Am. Const. L. Found.* 525 U.S. 182, 215–18 (1999) (O'Connor, J., joined by Breyer, J., concurring in the judgment in part, and dissenting in part) (arguing that strict scrutiny should be used for disclosure requirements which are substantial burdens on free speech, but only reasonableness balancing for less than substantial burdens, which is the test used in the ballot access cases involving the fundamental right to vote in *Burdick v. Takashi*, 504 U.S. 428, 434 (1992)).

The Court underscored the intermediate scrutiny approach for disclosure requirements in *Americans for Prosperity Foundation v. Bonta*.[103] In *Bonta*, the Court extended *Reed*'s analysis of disclosure requirements in campaign financing cases, applying it to a disclosure requirement that charitable organizations disclose the names of major donors (those giving more than $5,000 in a given year or giving more than 2% of total contributions) under a freedom of association analysis.[104] Although the Court used *Buckley*'s language of "exacting scrutiny,"[105] the majority underscored that *Reed* is a version of intermediate review requiring not only a "substantial relation" to an "important" interest, but a "narrowly tailor[ing]" requirement that requires considering how burdensome the disclosure regulation is "in light of any less intrusive alternatives," not the strict scrutiny requirement of having to adopt the least burdensome effective alternative.[106] Nevertheless, Justice Thomas continued to argue for strict scrutiny,[107] while Justices Alito and Gorsuch noted that a decision between *Reed* and strict scrutiny was unnecessary as both *Reed* and strict scrutiny led to the same result—that the regulation was not constitutional.[108]

IV. ANOMALIES IN CURRENT USE

A. Disclosure Under Campaign Finance

Most constitutional law relating to limits on campaign contributions and expenditures have grown from *Buckley v. Valeo*.[109] The Court's 1976 per curiam opinion began by pointing out that the federal statutory limits on contributions have not been shown to prevent political candidates and committees from amassing the resources needed for effective advocacy. Thus, the limitation on contributions could be regarded as a less severe restriction on freedom of expression than limits on expenditures.[110] The Court then noted that "[e]ven a '"significant interference" with protected

103. *See generally* Ams. for Prosp. Found. v. Bonta, 141 S. Ct. 2373 (2021).

104. *See id.* at 2382–83.

105. *Id.* at 2385.

106. *Id.* at 2383, 2386.

107. *See id*. at 2390 (Thomas, J., concurring in Parts I, II-A, II-B-2, and III-A, and concurring in the judgment).

108. *See id.* at 2391–92 (Alito, J., joined by Gorsuch, J., concurring in Parts I, II-A, II-B-2, and III, and concurring in the judgment). In dissent, Justice Sotomayor, joined by Breyer & Kagan, JJ., argued for the O'Connor/ Breyer approach noted *supra* note 102. *See id*. at 2394–98 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)). This approach reflects more the freedom of association doctrine involved in cases like *Burdick*, as discussed *infra* notes 120–21 and accompanying text.

109. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

110. *See id*. at 19–23.

rights of political association' may be sustained if the State demonstrates [1] a sufficiently important interest and [2] employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[111] This sentence has been the source of much confusion. Each of the freedom of association cases cited by the Court as an example of the kind of scrutiny appropriate for a "significant" interference with protected rights is typically regarded as a strict scrutiny case.[112] Yet, because each case was decided before the Court's explicit development of intermediate review, which started in the 1976 case of *Craig v. Boren*,[113] some language in earlier cases occasionally talked of "significant" government interests, not "compelling interests," and of "closely drawn" statutes, not "narrow tailoring," i.e., language more often associated today with intermediate scrutiny, not strict scrutiny.[114]

Despite this loose language, in cases subsequent to *Buckley*, the Court eventually clarified what standards of review to adopt in various cases, but that process took decades to achieve.[115] Because limitations on expenditures are the most burdensome regulations of campaign speech, regulation of campaign expenditures since *Buckley* have always triggered strict scrutiny review.[116] The Court reduced the level of scrutiny for limitations on contributions to political campaigns to standard

111. *Id.* at 25 (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

112. *Cousins* involved a burden on the freedom of association rights of the Democratic Party, with the Court stating that the "interest of the State must be compelling" to justify the regulation. Cousins v. Wigoda, 419 U.S. 477, 489 (1975). *Button* involved a case burdening the freedom of association of the NAACP, with the Court stating that the government must regulate with "narrow specificity" and "precision of regulation." NAACP v. Button, 371 U.S. 415, 433, 438 (1963). *Shelton* involved the associational rights of teachers, with the Court applying a least restrictive alternative approach to hold the regulation unconstitutional because "the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488–89 (1960).

113. For historical development of intermediate review, see Kelso, *supra* note 15, at 694–99 nn.21–56.

114. On use in some cases of terms like "narrow tailoring," "closely drawn," and "substantially related," which have led to some confusion, see *supra* note 16.

115. The discussion *infra* notes 116–19 and accompanying text summarizes the current development, but that does not mean that further changes in the law might not be adopted by the Court in the future.

116. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 251–65 (1986) (finding a statute requiring corporations to make political expenditures only through special segregated funds unconstitutional under strict scrutiny, as applied to a small nonprofit corporation that would face organizational and financial hurdles in establishing a segregated political fund); Missourians for Fiscal Accountability v. Klahr, 892 F.3d 944, 948–49 (8th Cir. 2018) (finding a law requiring groups to support or oppose ballot measure to form at least 30 days before election invalid under strict scrutiny, as the law bans expenditures).

intermediate review in *McConnell v. Federal Election Commission.*[117] This reduction was based on the observation that contribution limitations "have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech,"[118] and thus are valid if they are "closely drawn to match a 'sufficiently important interest,'" which is an intermediate level of scrutiny.[119]

Under the reasoning of the five-justice majority in *McConnell*, disclosure requirements typically have only a "marginal impact" on parties' ability to engage "in effective political speech."[120] Thus, they should trigger the same kind of intermediate scrutiny now used for contribution limitations. This is the standard seemingly adopted in 2010 in *John Doe No. 1 v. Reed*,[121] where the majority—while citing in passing the term "exacting scrutiny," which typically suggests "strict scrutiny"—officially adopted a test requiring only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest[,]" which suggests intermediate scrutiny.[122]

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117. *See* McConnell v. FEC, 540 U.S. 93, 137–41 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). For a discussion of *McConnell*, see *supra* notes 88–92 and accompanying text.

118. *Id.* at 138.

119. *Id.* at 136 (stating that intermediate scrutiny should be used for limitations on contributions, while strict scrutiny should be used for limitations on expenditures). For discussion of campaign finance regulation under this intermediate review standard since *McConnell*, see KELSO & KELSO, *supra* note 53, at 517–42. This is an area where the current Supreme Court may wish to change the doctrine to make contribution limitations also subject to strict scrutiny, although since few meaningful contribution limitations exists which cannot be struck down under intermediate review, this may not be a high priority for the court. *See generally supra* note 92 and cases cited therein. *But see* Lair v. Motl, 189 F. Supp. 3d 1024, 1029–36 (D. Mont. 2016) (finding an individual donor contribution limit of $650 for governor or lieutenant governor, $320 for other statewide offices, and $170 for other public offices unconstitutional under intermediate review), *rev'd*, 873 F.3d 1170, 1178–86 (9th Cir. 2017) (provision constitutional under intermediate review); Zimmerman v. City of Austin, 881 F.3d 378, 384–88 (5th Cir. 2018) (finding an individual limit of $350 to candidate for major or city council of Austin constitutional under intermediate review); 1A Auto, Inc. v. Dir. of Off. of Campaign and Pol. Fin., 105 N.E.3d 1178, 1181–90 (Mass. 2018) (finding a long-standing Massachusetts law banning business corporations from making political contributions to campaigns constitutional under *Buckley* and distinguishing *Citizens United* because it involved expenditures, not contributions); Ill. Liberty PAC v. Madigan, 904 F.3d 463, 470–75 (7th Cir. 2018) (finding all challenged provisions of Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act constitutional, including lower contribution limits for individuals than corporations).

120. *McConnell*, 540 U.S. at 138.

121. *See generally* Doe v. Reed, 561 U.S. 186 (2010) (finding "compelled disclosure of signatory information on referendum petitions" constitutional).

122. *Id.* at 196 (citing *Citizens United*, 558 U.S. at 366–67 (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)). Justice Thomas's dissent in *Reed* applied a strict scrutiny, least restrictive effective alternative analysis. *See id*. at 228–29 (Thomas, J., dissenting).

The Court underscored this intermediate scrutiny approach to disclosure requirements in campaign financing cases in *Americans for Prosperity Foundation v. Bonta*.[123] Unfortunately, cases involving disclosure requirements that allegedly burden freedom of association, even if related to election law issues, traditionally have a different structure. For freedom of association cases involving disclosure requirements regarding election law, including cases involving access to ballots, the doctrine applied is strict scrutiny for substantial or severe burdens on associational rights,[124] but only the reasonableness balancing test of *Burdick v. Takushi* is applied to less severe burdens on associational rights.[125]

Given the *Burdick* line of cases, *Americans for Prosperity Foundation v. Bonta* is now an anomaly since it conflated the two kinds of disclosure cases and applied the intermediate review standard of *John Doe No. 1 v. Reed*, a campaign finance case, to analyze a disclosure case involving the freedom of association.[126] Because merely requiring disclosure of a contribution, but not limiting the amount of a contribution, would seem typically to involve even less of a burden on

123. *See generally* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021). For a discussion on *Bonta*, see *supra* notes 103–08 and accompanying text.

124. For cases involving these kind of disclosure regulations, see KELSO & KELSO, *supra* note 53, at 542, 569 (citing Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (2000) (noting state law switching state's primary election from a closed primary to a blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation severs the burden triggering strict scrutiny)); Libertarian Party of Va. v. Judd, 718 F.3d 308, 316–19 (4th Cir. 2013) (finding that a Virginia law requiring witnesses to verify each signature gathered for a petition to nominate a candidate for the ballot in statewide elections is not narrowly tailored and fails strict scrutiny).

125. *See* KELSO & KELSO, *supra* note 53, at 575 (citing Pisano v. Strach, 743 F.3d 927, 934–37 (4th Cir. 2014) (finding a requirement for new political parties to have petition signed by 2% of total number of voters who voted in the most recent election for Governor by June 1 in advance of November election is not a severe burden and applying reasonableness review)); Ohio Council 8 AFSCME v. Husted, 814 F.3d 329, 335–40 (6th Cir. 2016) (finding an Ohio law precluding candidates for judicial office from listing political affiliation on ballot constitutional); Marcellus v. Va. State Bd. of Elections, 849 F.3d 169, 174–78 (4th Cir. 2017) (finding it reasonable for Virginia to prohibit political party identification for local offices in order to minimize partisanship for local government, promote impartial governance, and maximize number of citizens eligible to hold office). For these lesser burdens on associational rights:

> A court . . . must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

126. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2382–83.

individuals than contribution limitations, this lesser burden raises the question of whether *McConnell*'s intermediate review standard should apply, as in *Reed* and *Bonta*, rather than *Burdick*'s traditional reasonableness balancing approach. On the other hand, if one believes disclosure requirements always involve significant burdens based on concerns with harassment of individuals if their contributions to groups must be disclosed, as Justice Thomas has repeatedly argued,[127] then perhaps the strict scrutiny for severe burdens should be adopted and not the intermediate review of *Reed*.

Given the possible difference in severity of disclosure requirements in various cases, perhaps the traditional freedom of association doctrine approach to disclosure requirements might be better applied to disclosure requirements in campaign finance cases.[128] Or, one could say that all disclosure requirement cases should involve the intermediate review of *Reed*, and have that be an exception to regular freedom of association doctrine.[129] One would then take the differences in severity into account in applying the intermediate review test, particularly whether the disclosure requirements are substantially more burdensome than necessary and leave open ample alternative channels of communication.[130] Some clarification by the Supreme Court of this anomaly after *Bonta* would be helpful.

B. Freedom of Association

The Court often applies strict scrutiny review in cases involving the freedom of expressive association of social or economic organizations. For example, in cases like *Roberts v. United States Jaycees*[131] and *Board of Directors of Rotary International v. Rotary Club of Duarte*,[132] the Court found gender antidiscrimination laws requiring large, nationwide social groups to admit women satisfied strict scrutiny as being directly

127. *See id.* at 2390 (Thomas, J., concurring in Parts I, II-A, II-B-2, and III-A, and concurring in the judgment); *see also supra* note 96 and accompanying text.

128. This would be consistent with the suggestion by Justices O'Connor and Breyer in *Buckley v. Am. Const. L. Found. See supra* note 102 and accompanying text. This would also help make unenumerated fundamental right to vote cases, which adopt the *Burdick* test, and unenumerated freedom of association, also have the same structure, which would be beneficial, as discussed *infra* notes 131–39 and accompanying text.

129. This is what the Court seemingly did in *Bonta*, but without any explicit recognition of the anomaly between traditional disclosure cases involving freedom of association issues, which follow the structure of *Burdick*, and the disclosure cases involving campaign financing involved in *Reed*.

130. On this aspect of intermediate review, see *supra* note 15 and accompanying text.

131. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623–29 (1984).

132. *See* Bd. Of Dirs. of Rotary Club Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544–50 (1987).

related to advancing compelling government interests and adopting the least restrictive effective alternative. In contrast, the Court held that an antidiscrimination law concerned with sexual orientation failed strict scrutiny in *Boy Scouts of America v. Dale*.[133]

One way to explain the difference in these results is that even if the regulation is "the least restrictive effective alternative" to advance the government's interests, the regulation is unconstitutional under strict scrutiny if it is too burdensome. The argument would be that while the burden in *Roberts* and *Rotary Club* was not that severe, the burden on the Boy Scouts' expressive associational rights was too severe.[134]

On the other hand, another way to explain the different results in these three cases is to note that while in each case the laws were directly and substantially related to ending discrimination and used the least burdensome effective alternative, the burden imposed by the antidiscrimination law on the Jaycees and Rotary Club's freedom of expressive association did not "materially interfere with the ideas [of] the organization" and thus was not a "serious" burden,[135] while the burden of the antidiscrimination law was viewed to "significantly affect" the Boy Scout's freedom of expressive association in *Dale*.[136] Under the *Burdick* doctrine used in freedom of association cases involving election laws,[137] the Court could say the more severe burden triggered strict scrutiny in *Dale*, but the less-than-severe burden in *Roberts* and *Rotary Club* triggered only the second-order reasonableness balancing of *Burdick*. This explanation would reflect the *Burdick* doctrine used in freedom of association cases involving election law, and could be based on the view that the freedom of association is not an enumerated right under the First Amendment, but rather an unenumerated right connected to the freedom

133. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–59 (2000).

134. This argument is developed in KELSO, *supra* note 16, at 14 nn.89–94. Another similar case is *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579–80 (1995) (forcing parade organizers to permit a gay pride float was too substantially burdensome on the rights of organizers to promote their own message of Irish-American pride in the parade). It is important to note that in *Dale*, the Court did not say that preventing discrimination based on sexual orientation was not a compelling interest. That would have been difficult given that preventing discrimination based on gender was viewed as a compelling interest in *Jaycees*, 468 U.S. at 623, and *Rotary Club*, 481 U.S. at 549. In addition, just as the antidiscrimination law was the least burdensome effective alternative to prevent discrimination substantially and directly in *Jaycees*, 468 U.S. at 625–29, and *Rotary Club*, 481 U.S. at 549, it would be the least burdensome effective alternative in *Dale*, since the only way effectively to prevent discrimination is to prevent the discrimination. Only being too oppressive explains the difference in result.

135. *Dale*, 530 U.S at 657–58.

136. *Id.* at 656.

137. On the *Burdick* doctrine, see *supra* notes 124–25 and accompanying text.

of assembly.[138] In sum, like other unenumerated fundamental rights under a Due Process Clause analysis, the doctrine should apply strict scrutiny to substantial burdens but utilize only second-order reasonableness balancing for less-than-substantial burdens.[139]

C. Commercial Speech Cases

Regarding commercial speech cases, the *Central Hudson Gas* test should be restricted to subject-matter regulations of commercial speech, the most common regulation of commercial speech. It should be uncontroversial to assert that content-neutral restrictions of commercial speech, like content-neutral regulations of fully protected speech, should still be tested under intermediate review. Otherwise, commercial speech would be given greater protection than fully protected speech, which the Court has said should not occur.[140] It should be equally uncontroversial that viewpoint discrimination in commercial speech cases should trigger strict scrutiny, as viewpoint discrimination does for public forum, nonpublic forum, or speech with limited free speech protection.[141]

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138. *See* CHEMERINSKY, *supra* note 13, at 1221 ("'[A]ssociation' is not listed among those freedoms enumerated in the [First] Amendment." (citing NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (holding that freedom of association is nonetheless protected by Due Process Clause))).

139. Under this view, *Roberts* and *Rotary Club* would be second-order reasonableness cases, while *Dale* and *Hurley* would be strict scrutiny cases. For discussion of unenumerated rights doctrine under due process analysis generally, adopting the doctrine of strict scrutiny for substantial or severe burdens, but second-order reasonableness balancing for less than substantial burdens, see Kelso, *supra* note 14, at 451–59 nn.215–62.

140. On commercial speech being given less scrutiny than fully protected speech, see *supra* note 81 and accompanying text. This intermediate standard for content-neutral regulations of speech was stated in *Ward v. Rock Against Racism*, where Justice Kennedy said for the Court, "Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). For a discussion of how this standard follows standard intermediate review, see Kelso, *supra* note 22, at 296–98.

141. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor & Kagan, JJ., concurring). The plurality opinion in *Matal* said that such a decision did not have to be made because even under *Central Hudson Gas* review the law was unconstitutional in any event. *See Matal*, 137 S. Ct. at 1749 (plurality opinion of Alito, J., joined by Roberts, C.J., and Thomas & Breyer, JJ.).

D. Justice Breyer's Use of Proportionality Review and Aspects of Exacting Scrutiny

1. Proportionality Review Under American Doctrine

In several cases, Justice Breyer pushed for what he called "proportionality" review for circumstances that do not involve rationality review or strict scrutiny. As he noted in *United States v. Alvarez*:

> Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as "strict scrutiny" implies) nor near-automatic approval (as is implicit in "rational basis" review).[142]

He added, "I have used the term 'proportionality' to describe this approach."[143] In discussing this approach, which at least one author has compared to "exacting scrutiny,"[144] Justice Breyer noted that in deciding a number of such cases:

> [T]his Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.[145]

As discussed in this Section, however, in the cases that Justice Breyer cited as indicative of this approach, the Court has explicitly adopted different tests to determine what is required to satisfy the appropriate standard of review. To assume that all the cases involved the same analysis is erroneous. The cases Justice Breyer cited as evidence of this "proportionality" review involve levels of scrutiny from the second-

142. United States v. Alvarez, 567 U.S. 709, 731 (2012) (Breyer, J., joined by Kagan, J., concurring in the judgment).

143. *Id.* (citing Bartnicki v. Vopper, 532 U.S. 514, 536–37 (2001) (Breyer, J., joined by O'Connor, J., concurring)); *see also* Nixon v. Shrink Mo. Gov't Pac, 528 U.S. 377, 402–03 (2000) (Breyer, J., joined by Ginsburg, J., concurring).

144. For discussion by one author comparing this approach to "exacting scrutiny," see *supra* note 5 and accompanying text.

145. *Alvarez*, 567 U.S. at 730 (Breyer, J., joined by Kagan, J., concurring in the judgment) (citations omitted).

order reasonableness of *Burdick v. Takushi* [146]; to third-order reasonableness of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*[147]; to standard intermediate review found in *United States v. O'Brien*[148]; to the heightened intermediate review of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*[149]; to possible "loose strict scrutiny" from *Denver Area Educational Telecommunications Consortium v. FCC.*[150] It is not useful to pretend each of these different standards of review all involve the same "proportionality" level of analysis.

2. Proportionality Review Under International Law

It is perhaps helpful to note that Justice Breyer's use of the term "proportionality" review is reflective of rights review in constitutional courts around the world, which tend to use one basic approach to reviewing the constitutionality of legislation: proportionality.[151] In those courts, Proportionality Analysis ("PA") 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 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.[152] A preliminary fourth step—entitled "legitimacy"—is used by some courts.[153] Under this step, the "judge confirms that the government is constitutionally-authorized to

146. *See generally* Burdick v. Takushi, 504 U.S. 428 (1992); *see also* Kelso, *supra* note 14, at 429–32 nn.79–96.

147. *See generally* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (government employee speech). For a discussion of *Pickering*, see Kelso, *supra* note 14, at 468–69 nn.307–14.

148. *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (content-neutral regulations of speech in a public forum). For a discussion of *O'Brien*, see Kelso, *supra* note 15, at 719–22 nn.183–98.

149. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (commercial speech case). For a discussion of *Central Hudson*, see *supra* notes 76–87 and accompanying text.

150. *See generally* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996). For a discussion of *Denver Area Educ. Telecomms. Consortium*, see *supra* notes 69–75 and accompanying text.

151. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008). The material in this subsection is a summary of the discussion in R. Randall Kelso, *United States Standards of Review Versus the International Standard of Proportionality: Convergence and Symmetry*, 39 OHIO N.U.L. REV. 455, 456–57, 496–97 (2013).

152. *See* Sweet & Mathews, *supra* note 151, at 75–76.

153. *Id.* at 75.

take such a measure" before continuing to apply the suitability, necessity, and balancing steps of the analysis.[154] 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 an independent inquiry.[155]

A more detailed discussion of proportionality analysis would note that, at a minimum, there are two kinds of narrow tailoring analysis[156] and two kinds of *stricto sensu* balancing.[157] This gives four possible proportionality approaches: (1) loose narrow tailoring and loose balancing; (2) loose narrow tailoring and strict balancing; (3) strict narrow tailoring and loose balancing; (4) strict narrow tailoring and strict balancing.

Perhaps the best approach for one consistent PA would be to adopt an approach in the middle of the American standards of review. This would utilize the looser or intermediate review form of narrow tailoring analysis but also the stricter "marginal benefit is greater than marginal burden" approach for *stricto sensu* balancing. A strict scrutiny kind of least restrictive alternative test is perhaps too restrictive on needed government discretion in many cases. One can ask whether it makes sense for courts to second-guess government decision-making in every case by requiring the government to prove that it always used the absolutely least burdensome alternative. In contrast, requiring the government not to adopt an approach substantially more burdensome than necessary seems a more appropriate standard if there is to be one uniform standard for every case. On the other hand, if the government has done this, then it should have the responsibility to show that the benefits of the regulation truly outweigh the burdens. This kind of PA would thus be slightly more rigorous than third-order American reasonableness review (as it would have an intermediate narrow tailoring component), but less vigorous than American intermediate review (as it would have third-order reasonableness balancing, not a requirement that

154. *Id.*

155. It should be noted that 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 inquiry. *See generally id.* at 75 n.8 (noting that numerous international courts do not bother with the "legitimacy" inquiry and focus only on the other three inquiries, thus confirming that "legitimacy" is not a critical separate step after all).

156. *See* Kelso, *supra* note 151, at 461–62 (discussing *strict "*narrow tailoring" similar to strict scrutiny's "least restrictive alternative" approach versus *loose* intermediate review's "not substantially more burdensome than necessary" approach).

157. *Id.* at 463–64 (discussing *strict* "*stricto sensu"* balancing to ensure the "marginal benefit of the government regulation . . . is greater than the marginal burden on the individual" versus *loose* balancing that seeks to ensure "'no factor of significance to either side has been overlooked.'" (quoting Sweet & Mathews, *supra* note 151, at 803)).

the government be substantially advancing not merely legitimate, but important or substantial interests).[158]

V. CONCLUSION

This Article clarifies the four kinds of "exacting scrutiny" used in Supreme Court majority opinions and discussed the alternative use by Justice Breyer related to his use of the term "proportionality" review. Part II discussed the various kinds of heightened scrutiny used by the Supreme Court in majority opinions. Part III discussed how the use of term "exacting scrutiny" in majority opinion reflects four different heightened scrutiny tests. Part IV discussed the particular problems with the use of "exacting scrutiny" in campaign finance cases, freedom of association cases, commercial speech cases, and Justice Breyer's discussion of proportionality review. The conclusion of this Article is that the Court should drop the term "exacting scrutiny" in favor of explicit adoption of whatever standard of review is intended to be used in the particular case. That would provide lower courts with better guidance on how to resolve each of the cases in which the term "exacting scrutiny" is currently used. Use of the term "exacting scrutiny" to mean different things in different cases is confusing and does not help lower courts in their consideration of how precisely to resolve the various cases in which the Court has used that term interchangeably.

158. This approach is discussed at *id*. at 496–97. Such an approach would provide greater structure to current international proportionality analysis, which would be beneficial. *See* Stefan Sottiaux & Gerhard van der Schyff, *Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights*, 31 HASTINGS INT'L & COMP. L. REV. 115, 115–17 (2008). But this approach rejects any view that *stricto sensu* balancing should not be part of the proportionality test. *See* Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 LAW & ETHICS HUM. RTS. 243, 248–49 (2010) (arguing that *stricto sensu* balancing should not be part of proportionality analysis because it places the judge more in the role of a legislator balancing public policy considerations, rather than in the role of a judge).