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I. INTRODUCTION

This Article discusses means-end scrutiny, the most common form of analysis used by courts in enforcing constitutional limits on government action.[1] The discussion has three parts: (1) a description of the components, levels and types of means-end scrutiny; (2) a critical analysis of some problems presented by means-end scrutiny; and (3) several suggestions concerning modifications that might clarify means-end scrutiny and make it a more predictable and effective method for enforcing constitutional limits.

II. DISCUSSION

A. The Components, Levels and Types of Means-End Scrutiny

Means-end scrutiny is an analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes. When government action is subject to a constitutional limit, courts frequently evaluate the justification for that action. If a sufficient justification exists, the action may be permitted despite the applicability of the limit. If the courts find the justification insufficient, they hold that the action violates the limit and is unconstitutional. Means-end scrutiny is a systematic method for evaluating the sufficiency of the government's justification for its conduct.

Means-end scrutiny is not the only test used for enforcing constitutional limits,[2] but it is the most common and important form of constitu-

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1. See, e.g., G. GUNTHER, CONSTITUTIONAL LAW 93 (1985), which states, "judicial scrutiny of means-ends relationships . . . may well be the most frequently invoked technique in the judicial review of the validity of federal and state legislation." Means-end scrutiny is used, for example, in enforcing the requirements of substantive due process, equal protection, freedom of speech, free exercise of religion, the necessary and proper clause, the dormant commerce clause, the contract clause and the privileges and immunities clause.

2. Other constitutional tests include the clear and present danger test, the actual malice test, ad hoc multi-factor balancing tests, and many more.

tional analysis. To grasp how means-end scrutiny works, one must understand the components and levels of the process.

1. The three components of means-end scrutiny

Means-end scrutiny has three components: (1) scrutiny of government interests; (2) scrutiny of the effectiveness of the means chosen to further the government interests; and (3) scrutiny of alternatives to determine whether less restrictive methods are available for furthering the government interests. Some forms of means-end scrutiny involve all three components; others involve only the first two.

a. scrutiny of government interests

The first component of means-end scrutiny involves analysis of the interests served by the challenged government action. To justify a conclusion that the government action is constitutional, the court must find that the action is related to some permissible government interest or purpose and that such purpose is sufficiently substantial to satisfy the applicable level of scrutiny. This component is often called "end scrutiny."

b. scrutiny of the effectiveness of the means

The second component of means-end scrutiny involves analysis of the effectiveness of the means chosen by the government to further its interests. To justify a conclusion that the government action is constitutional, the court must find that the means are at least an arguably rational method for furthering the government's goals. Moreover, if intensified means-end scrutiny is applicable, the court must find the means demonstrably and substantially effective in furthering the government's interests.[3] This second component of means-end scrutiny is normally considered to be part of "means scrutiny," although strict scrutiny cases confusingly lump it with end scrutiny.[4]

c. scrutiny of alternatives

The third component of means-end scrutiny involves analysis of the availability of less restrictive alternatives for furthering the government's interests. This component, which clearly involves "means scrutiny," is only used in cases where intensified means-end scrutiny is applicable. In cases where "unintensified" means-end scrutiny—more commonly re-

3. This component is often not clearly articulated in the cases, but it definitely is a standard ingredient of intensified scrutiny.

4. *See infra* p. 463.

ferred to as rationality review—is applicable, only the first two components are used. If intensified means-end scrutiny is applicable, the court must find the government action unconstitutional unless the means chosen are "necessary" or "narrowly tailored" to achieve the government's goals, i.e., the means chosen must be the "least restrictive alternative" available for achieving those goals.

2. The levels of means-end scrutiny

a. rationality review

The least intense form of means-end scrutiny is rationality review. Often called the rational relation test or rational basis test, rationality review has two components. The first component deals with the end (interest, purpose) underlying the government action. The second component deals with the means (method) the government has adopted.[5] The first component concerns whether any valid interest in support of the government's conduct exists or can be conceived. The second component concerns whether the means chosen comprise a rational method for accomplishing any such valid purpose.[6] Rationality review has two forms, the deferential rational basis test and the nondeferential rational relation test.[7]

i. the deferential rational basis test

The least intense and most common form of means-end scrutiny is the deferential rational basis test.[8] When this test is applicable, the government action is constitutional if it has any conceivable valid purpose and if the means chosen are arguably rational. In such cases, a strong presumption of constitutionality applies, and the burden of proof is on the challenger to show either that the government has no conceivable valid purpose or that no rational government official could believe the means would be effective.[9]

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5. *E.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442 (1985) ("rational means to serve a legitimate end"); Nebbia v. New York, 291 U.S. 502, 537 (1934) ("reasonable relation to a proper legislative purpose").

6. The third component of means-end scrutiny (scrutiny of alternatives) is not applicable in rationality review.

7. The term "rational relation test" is commonly used to refer both to the deferential rational basis test and the nondeferential rational relation test.

8. This test is used, for example, in substantive due process and equal protection cases involving merely socio-economic issues and in defining the scope of Congress' delegated powers.

9. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Reduced to schematic outline, the deferential rational basis test is as follows:

Deferential rational basis test

1. End scrutiny: any conceivable valid interest and
2. Means scrutiny: arguably rational means

Strong presumption of constitutionality; challenger has burden of proof

The deferential rational basis test is so easily satisfied that it has been nicknamed the "hands off" approach.[10] The outcome of deferential rationality review is virtually a foregone conclusion. In nearly all cases, the government action is held constitutional.

ii. the nondeferential rational relation test

Sometimes, the United States Supreme Court uses a slightly more aggressive form of rationality review, which may be called the nondeferential rational relation test. This test requires the Court to find that the government action serves an actual valid interest, which means: (1) that the government actually has a valid purpose and (2) that the means chosen to serve that purpose are demonstrably rational (effective). In contrast to the deferential rational basis test, the nondeferential rational relation test requires the Court to seek proof that the government action serves some actual valid purpose effectively. The Court will not speculate about conceivable ends and arguably rational means in the absence of supporting evidence.[11] The allocation of the burden of proof is unclear. Most cases hold that the burden is on the challenger, but recent decisions suggest that the government may at times have the burden.[12]

Schematically, the nondeferential rational relation test is as follows:

Nondeferential rational relation test

1. End scrutiny: actual, valid interest and
2. Means scrutiny: demonstrably rational means

In most cases, presumption of constitutionality; challenger has burden of proof

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10. G. GUNTHER, *supra* note 1, at 472.

11. See Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972), which states:

> It [rationality review 'with bite'] would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

Id.

12. *E.g.*, *Cleburne*, 473 U.S. at 450.

The nondeferential rational relation test is rationality review with a bite.[13] The Court has found government action unconstitutional many times using this test.[14] Nevertheless, the test is a relatively mild form of means-end scrutiny, standing second from the bottom of the scale.[15]

b. intensified scrutiny

The term "intensified scrutiny," as used in this Article, includes those levels of means-end scrutiny not encompassed in the concept of rationality review. As the name suggests, intensified scrutiny is a heightened, more aggressive, less deferential type of judicial review than rationality review. Intensified scrutiny has several different levels or tiers, which vary somewhat, especially in their end-scrutiny components. All types of intensified scrutiny involve a presumption of unconstitutionality and put the burden on the government to satisfy all three components of means-end scrutiny.

i. strict scrutiny

The most intense form of means-end scrutiny is strict scrutiny.[16] According to the Court, strict scrutiny is a two-prong test which requires a holding of unconstitutionality unless the government action is necessary to serve a compelling interest. In other words, if strict scrutiny is applicable, the government action is unconstitutional unless: (1) it furthers an actual, compelling government interest and (2) the means chosen are necessary (narrowly tailored, the least restrictive alternative) for advancing that interest.[17]

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13. G. GUNTHER, *supra* note 1, at 604. For a discussion of the emergence of nondeferential rationality review in the early Burger era, see Gunther, *supra* note 11, at 18-20. Gunther labeled the event "a surprising new development." *Id.* at 12.

14. *E.g.*, *Cleburne*, 473 U.S. 432; Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Zobel v. Williams, 457 U.S. 55 (1982); USDA v. Moreno, 413 U.S. 528 (1973); Adkins v. Children's Hosp., 261 U.S. 525 (1923); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lochner v. New York, 198 U.S. 45 (1905).

15. The reasons why the Court, in some cases, applies the nondeferential rational relation test rather than the deferential rational basis test will be discussed below. *See infra* text accompanying notes 139-41.

16. Strict scrutiny is used in cases involving racial classifications disfavoring minorities, content-based infringements of free speech, restrictions on free exercise of religion, and several other kinds of infringements of fundamental constitutional rights.

17. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available."); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) ("Such [racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their

However, when the Court's opinions are read carefully, it is apparent that strict scrutiny is a three-prong test involving all three components of means-end scrutiny. This is because the first prong of strict scrutiny apparently has two sub-parts: (1) the government must have an actual, compelling purpose and (2) the means must be substantially effective for accomplishing such purpose. The substantial effectiveness requirement, which is rarely mentioned in the Court's formal descriptions of strict scrutiny, has been decisive in many cases,[18] and its existence is beyond serious debate.

When strict scrutiny applies, a strong presumption of unconstitutionality exists and the government must show: (1) that a compelling government interest is at stake; (2) that its action is a substantially effective means for furthering such interest; and (3) that its action is the least restrictive alternative available for furthering such interest.

In schematic outline, strict scrutiny involves the following components:

Strict scrutiny

1. Serves a compelling interest, i.e.
   a. Compelling interest and
   b. Substantially effective and
2. Necessary

Strong presumption of unconstitutionality; government has burden of proof

In most cases, strict scrutiny serves to invalidate the government action. In earlier days, this was almost invariably true, giving rise to the aphorism that strict scrutiny is " 'strict' in theory, and fatal in fact . . . ."[19] More recently, however, the Court has found strict scrutiny satisfied on many occasions,[20] and it is now clear that strict scrutiny is by

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legitimate purpose . . . ."); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("the least restrictive means of achieving some compelling state interest"); Storer v. Brown, 415 U.S. 724, 729 (1974) ("essential to serve a compelling state interest"); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 (1974) ("necessary to promote a *compelling* governmental interest" (emphasis in original)); Dunn v. Blumstein, 405 U.S. 330, 337 (1972) ("*necessary* to promote a *compelling* government interest" (emphasis in original)); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) ("necessary to promote a compelling state interest"); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("necessary to promote a *compelling* governmental interest" (emphasis in original)).

18. *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Shapiro v. Thompson, 394 U.S. 618 (1969).

19. Gunther, *supra* note 11, at 8. The aphorism was never entirely accurate, since one of the first cases applying the strict scrutiny test, Korematsu v. United States, 323 U.S. 214 (1944), found that strict scrutiny was met.

20. *E.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Buckley v. Valeo, 424 U.S. 1 (1976).

no means impossible to satisfy.

ii. intermediate scrutiny

At one time, many scholars believed that rationality review and strict scrutiny were the only levels of means-end scrutiny, at least in equal protection cases.[21] In the mid-1970's, however, a third level of means-end scrutiny emerged in sex discrimination cases,[22] and, after some initial resistance, the Court dubbed it intermediate scrutiny.

The initial formulation of the test was as follows: "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[23] It soon became apparent that the phrase "important governmental objectives" meant something more than a valid government interest but something less than a compelling government interest. After some initial confusion and over continuing objection by several Justices, the Court decided that the phrase "substantially related" meant that the means chosen by the government must be both "substantially effective"[24] and "narrowly tailored."[25] Moreover, the Court has recently indicated that "narrowly tailored" means the same thing as "necessary."[26]

In short, intermediate scrutiny has the following structure:

Intermediate scrutiny

1. Important interest and
2. Substantial relation, i.e.,
   a. Substantially effective and
   b. Narrowly tailored

Intermediate presumption of unconstitutionality; government has burden of proof

21. *See, e.g., Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-77 (1969).

22. The seminal case was Craig v. Boren, 429 U.S. 190 (1976).

23. *Id.* at 197. The statement was inaccurate, since the Court had not previously enunciated this test in sex discrimination cases or indeed in any other context.

24. *E.g., id.* at 200, 202 n.14.

25. *E.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); *cf.* Supreme Court v. Piper, 470 U.S. 274 (1985) (privileges and immunities clause case).

26. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1850 n.6 (1986); *cf.* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (strict scrutiny case using "narrowly tailored" as a synonym for "necessary"). In the recent case of Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722, 1728 (1987), the Court confused the issue once again by stating, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* This incorrectly suggests that "necessary" means something other than "narrowly drawn." Hopefully the Court will retract this suggestion and be more careful in its use of language in future cases.

The Court has vacillated concerning whether intermediate scrutiny is more like strict scrutiny (quite intense) or more like rationality review (rather deferential). But the latest pronouncements indicate that, at least in sex discrimination cases, the test is a strongly intensified form of means-end scrutiny which requires a holding of unconstitutionality unless the government shows an "exceedingly persuasive justification" for its action.[27]

iii. sub-intermediate scrutiny?

In several areas of constitutional law, the Court has adopted means-end scrutiny tests requiring the government to show that its conduct is substantially related to a "significant" or "substantial" government interest. For example, in evaluating content-neutral time, place and manner regulations of speech, the Court requires that the government action serve a "significant" government interest.[28] In commercial speech cases, the Court requires a showing that government restrictions directly advance a "substantial" government interest and are necessary.[29] Similarly, in privileges and immunities clause cases, the Court requires the government to demonstrate a "substantial" government interest.[30]

It is unclear where the "significant" and "substantial" government interest tests fit in the scale of means-end scrutiny. Apparently more is required than the merely "valid" government interest required in rationality review. Whether the words are essentially synonymous with "important" government interest or whether they reflect a sub-intermediate intensity of end scrutiny is not clear. Indeed, it is not clear whether the terms "significant" and "substantial" are intended to be synonymous with each other or whether each represents a unique level of end scrutiny.[31]

In schematic form, sub-intermediate scrutiny involves the following structure:

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27. *Hogan*, 458 U.S. at 724; Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979).

28. *E.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

29. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980). A concurring opinion called this test "intermediate scrutiny." *Id.* at 573 (Blackmun, J., concurring in judgment).

30. *Piper*, 470 U.S. at 284; United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 222 (1984).

31. The term "sub-intermediate scrutiny" will be used in the rest of this Article to refer to tests requiring that government means be substantially related to a significant or substantial interest. The reader should keep in mind, however, that the Court has not used the term.

Sub-intermediate scrutiny

1. End: significant or substantial interest and
2. Means: substantial relation, i.e.,
   a. Substantially effective and
   b. Necessary

Presumption of unconstitutionality; government has burden of proof

iv. "somewhat heightened" scrutiny

Perhaps the least intense form of means-end scrutiny, other than rationality review, is the test used in equal protection cases involving classifications disfavoring illegitimate children. This test requires that the government action be "substantially related to a legitimate state interest."[32] This is a hybrid form of means-end scrutiny that combines relatively deferential end scrutiny comparable to nondeferential rationality review with intensified scrutiny of the effectiveness of the means and the availability of less onerous alternatives. The burden of proof is on the government to show that all three components are met. The Court has labeled this form of means-end scrutiny "somewhat heightened review."[33]

Schematically, this form of means-end scrutiny involves the following components:

Somewhat heightened scrutiny

1. Legitimate interest and
2. Substantial relation, i.e.,
   a. Substantially effective and
   b. Narrowly tailored

Presumption of unconstitutionality; government has burden of proof

In practice, this test is very close to the nondeferential rational relation test. Indeed, in cases like *City of Cleburne v. Cleburne Living Center, Inc.*[34] and *Plyler v. Doe*,[35] it is difficult to determine which of these two tests the Court used.

c. means-end scrutiny chart

The levels of means-end scrutiny described above are summarized in

32. Mills v. Habluetzel, 456 U.S. 91, 99 (1982); *cf.* Plyler v. Doe, 457 U.S. 202 (1982) (same test used in case involving exclusion of children of illegal aliens from public schools).

33. *Cleburne*, 473 U.S. at 441.

34. *Id.* at 432.

35. 457 U.S. 202 (1982).

the following chart, which starts with the most intense test at the top and moves downward to the least intense form.

Means-End Scrutiny Chart

	Components		
Test	Government Interest	Effectiveness of Means	Alternatives
Strict Scrutiny	Compelling	Substantially Effective	Necessary
Intermediate Scrutiny	Important	Substantially Effective	Narrowly Tailored
Sub-intermediate Scrutiny	Significant/ Substantial	Substantially Effective	Narrowly Tailored
Somewhat Heightened Scrutiny	Legitimate	Substantially Effective	Narrowly Tailored
Rationality Review, Nondeferential	Valid	Demonstrably Rational	N/A
Rationality Review, Deferential	Conceivable Valid	Arguably Rational	N/A

3. Other types of means-end scrutiny

a. hybrid means-end scrutiny

In some cases, the Court uses hybrid versions of means-end scrutiny involving components drawn from varying portions of the scale. An example already mentioned is the "somewhat heightened" scrutiny used in illegitimacy cases, which combines rationality review of the government interest with intensified scrutiny of the means.[36] Another example is the test used in contract clause cases involving impairments of government contracts. As the Court declared in the leading case of *United States Trust Co. v. New Jersey*,[37] "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[38] This test seems to involve intermediate end scrutiny ("important" interest), rationality review of the effectiveness of the means ("reasonable"),[39] and strict scrutiny of alternatives ("necessary").

36. *See supra* text accompanying notes 32-33.
37. 431 U.S. 1 (1977).
38. *Id.* at 25.
39. The Court suggested that the rationality review should be nondeferential: "complete

Contract clause scrutiny; public contracts

1. Important interest and
2. Means
   a. Reasonable and
   b. Necessary

Presumption of unconstitutionality; government has burden of proof

Justice Brennan labeled the *U.S. Trust* "reasonable and necessary" test "a most unusual hybrid which manages to merge the two polar extremes of judicial intervention . . . into one synthesis."[40]

b. specialized means-end scrutiny

In some areas of constitutional law, the Court uses specialized forms of means-end scrutiny adapted to the particular subject area covered by the relevant constitutional limit. The end scrutiny, for example, may be specially adapted to fit the limit, while the other components remain the same as in previously mentioned versions.

An example of specialized means-end scrutiny is the test used in cases involving the privileges and immunities clause of article IV, which consists of cases involving discrimination by states against nonresidents with regard to privileges basic to national unity. In such cases, the Court requires that the government action be substantially related to the solution of a problem created by nonresidents.[41] The end scrutiny is specially adapted to the evil the privileges and immunities clause was intended to correct: the question is not simply whether the interest is sufficiently important, but whether the purpose is to solve a particular kind of problem—one caused by nonresidents. If such a purpose is shown, then the rest of the test is the same as in intermediate and somewhat heightened scrutiny cases.

Means-end scrutiny: privileges and immunities clause

1. Purpose to solve problem created by nonresidents and
2. Substantial relation, i.e.,
   a. Substantially effective and
   b. Narrowly tailored

Presumption of unconstitutionality; government has burden of proof

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deference to a legislative assessment of reasonableness . . . is not appropriate because the State's self-interest is at stake." *Id.* at 26.

40. *Id.* at 55 n.17 (Brennan, J., dissenting).

41. *E.g.*, *Piper*, 470 U.S. 274; *City of Camden*, 465 U.S. at 222.

c. *means-end scrutiny plus*

Sometimes the Court uses tests that combine means-end scrutiny with other requirements. For example, the first amendment test for time, place and manner regulations requires the government to prove that its conduct: (1) is content-neutral; (2) satisfies sub-intermediate means-end scrutiny; and (3) leaves alternative channels open for the communication.[42] Similarly, regulations of electronic broadcasting are allowed if they enhance communications to the audience and satisfy the rational relation test.[43] In such cases, the government must satisfy both the applicable level of means-end scrutiny and whatever other requirements the Court imposes.

d. *sliding scales*

Sometimes the Court uses means-end scrutiny that slides up or down in intensity depending on the degree of harm caused by the government action. For example, if the harm is severe, the means-end scrutiny is intensified; if the harm is minor, the means-end scrutiny is more deferential.

Justice Marshall has repeatedly contended that means-end scrutiny is, in general, a sliding scale or a spectrum of intensities of review rather than a series of discrete tests or tiers.[44] The intensity of the Court's scrutiny, according to Marshall, slides up or down on the basis of at least three factors: (1) the seriousness of the harm inflicted; (2) the identity of the group harmed; and (3) the nature of the government interest asserted. Justice White agrees with Marshall's analysis,[45] and anyone who has

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42. *E.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981).

43. *E.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). If regulations of electronic broadcasting *restrict* communications, the government must satisfy sub-intermediate scrutiny. *E.g.*, FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) ("[T]he restriction . . . [must be] narrowly tailored to further a substantial government interest . . . .").

44. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In *Rodriguez*, the dissent stated:

> The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions . . . defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards . . . . This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications . . . .

Id. at 98-99 (Marshall, J., dissenting). Other statements of Marshall's sliding scale theory can be found in Plyler v. Doe, 457 U.S. 202, 230-31 (1973) (Marshall, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); and Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

45. Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring).

studied means-end scrutiny decisions by the Supreme Court would likely support the analysis—at least in part.

Clearly means-end scrutiny operates as a sliding scale in some contexts. An example of sliding-scale means-end scrutiny is the test used in evaluating impairments of private contracts under the contract clause.[46] Means-end scrutiny is used in such cases to evaluate the public need.[47] But the Court has also clearly indicated that the public need is to be balanced against the severity of the impairment. If the impairment is slight, the Court uses deferential means-end scrutiny and does not demand a very substantial justification. If the impairment is severe, a greater public need must be shown, and the Court's scrutiny of the government's ends and means will be stricter.[48]

e. balancing tests

Indeed, whenever the Court uses a balancing test that involves weighing the government's need against the harm to the claimant, the process involves sliding-scale means-end scrutiny. Evaluation of the need for government action should always involve means-end scrutiny, since the weight of the public need always depends on the importance of the government interest, the effectiveness of the means and the availability of less onerous alternatives. In balancing need against harm, the Court must determine the severity of the harm and then decide whether the need outweighs the harm. If the harm is small, the need does not have to be great to outweigh the harm. Relatively deferential means-end scrutiny suffices under these circumstances. If the harm is severe, the need must be great to outweigh the harm. Therefore, intensified means-end scrutiny is in order.

An example of the use of means-end scrutiny in applying a balancing test is *New York v. Ferber*.[49] In that case the Court used a "definitional balancing test"[50] to determine whether child pornography is protected by the first amendment. First, the Court evaluated the public need, finding that the government interest in protecting the well-being of children is compelling and that the ban on sales of child pornography is necessary to dry up the market and eliminate the profit. Second, the Court evaluated the harm that a ban on child pornography would cause

46. U.S. CONST. art. I, § 10.

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

48. *Id.* at 245.

49. 458 U.S. 747 (1982).

50. G. GUNTHER, *supra* note 1, at 1097.

to freedom of expression, finding it "exceedingly modest."[51] Because the need substantially outweighed the harm, the Court upheld the ban.[52]

To summarize, means-end scrutiny is the analytical test used most frequently in constitutional cases. It has three components, including scrutiny of: (1) government interests; (2) effectiveness of means; and (3) less onerous alternatives. Means-end scrutiny has a variety of levels or intensities, running from strict scrutiny at the top to the deferential rational basis test at the bottom. Furthermore, it occurs not only in pure form but also in combination with other tests and in balancing tests.

The next section discusses problems associated with means-end scrutiny that deserve attention and possible correction.

B. Problems with Means-End Scrutiny

1. Confusion concerning conceptual structure, components and terminology

a. restructuring strict scrutiny

An obvious and easily correctable defect in current means-end scrutiny is inconsistency in the conceptual structure of the different levels of intensified scrutiny.[53] The gist of the problem is the treatment of the substantial effectiveness component of strict scrutiny.[54]

The United States Supreme Court has repeatedly stated that strict scrutiny is a *two*-prong test requiring the government to show: (1) a compelling interest and (2) necessity. Actually strict scrutiny is a *three*-prong test requiring: (1) a compelling interest; (2) substantial effectiveness; and (3) necessity. The Court rarely mentions the substantial effectiveness test, so one has to guess where to locate this prong in the Court's truncated two-prong formula. Since substantial effectiveness does not fit comfortably into the concept of necessity, it is more logically placed in the compelling interest prong.

Conceptually, this is easy. The Court frequently says strict scrutiny is a two-prong test requiring that the government action (1) *further* a

51. *Ferber*, 458 U.S. at 762.

52. *Id.* at 763-64. Another example of the use of means-end scrutiny in applying a balancing test is the so-called *Pike* balancing test used in dormant commerce clause cases. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

53. This problem is discussed first because it affects the underlying conceptual structure and vocabulary of means-end scrutiny. Once it is straightened out, analysis of other problems becomes easier to articulate.

54. Strict scrutiny clearly does have a substantial effectiveness component. *See supra* p. 450.

compelling interest and (2) be *necessary*.[55] This suggests that the compelling interest prong has two subparts: first, there must *be* a compelling interest; second, the government action must *further* that interest in a substantially effective manner. In short, the structure of strict scrutiny becomes:

Strict scrutiny

1. Further a compelling interest, i.e.
   a. Compelling interest and
   b. Substantially effective and
2. Necessary

At first glance, this seems to get the job done. This formulation recognizes the existence of the substantial effectiveness component of strict scrutiny and gives it a sensible location in the Court's two-prong test.

However, this solution causes a problem of terminology that casts a shadow on the vocabulary of means-end scrutiny at its most basic level. The problem results from locating the substantial effectiveness test in the first prong of strict scrutiny, which is the prong that seems to involve end scrutiny. This produces an inconsistency between the conceptual structures of strict scrutiny and the other forms of intensified scrutiny. Intermediate scrutiny, for example, locates the substantial effectiveness component in its second prong, which seems to deal with means. Schematically, the inconsistency is as follows:

Strict scrutiny	*Intermediate scrutiny*
1. Serves a compelling interest, i.e.	1. Important interest and
a. Compelling interest and	2. Substantial relation, i.e.
b. Substantially effective and	a. Substantially effective and
2. Necessary	b. Necessary

Simple aesthetics require that this inconsistency be corrected.

But more than elegance is involved. This particular inconsistency infects the vocabulary of means-end scrutiny by making it unclear whether the substantial effectiveness test is part of end scrutiny or means scrutiny. In strict scrutiny, it seems to be part of end scrutiny; in the other forms of intensified scrutiny, it is part of means scrutiny. Thus, it becomes difficult to talk unambiguously about "end scrutiny" and "means scrutiny." Each term has two different and overlapping meanings.

More than consistent conceptual structure and vocabulary is at stake here. The Court's treatment of the substantial effectiveness test in strict scrutiny has caused confusion in the legal profession. The failure

55. *See* cases cited *supra* note 17.

to acknowledge the existence of this separate test in formal statements of strict scrutiny tends to make judges and lawyers unaware of its existence and importance. Moreover, the equivocal treatment of the substantial effectiveness test obscures the conceptual structure of means-end scrutiny, leaving the impression of incoherence and confusion rather than coherence and clarity.

The solution is surprisingly simple. The Court should explicitly acknowledge the substantial effectiveness component of strict scrutiny and shift it to the second prong. This would require giving the second prong a new name, and the obvious candidate would be "substantial relation," borrowed from the other forms of intensified scrutiny.

After this cosmetic surgery, strict scrutiny would be articulated as follows: the government must show that its action is substantially related to a compelling interest. The substantial relation component would then have two subparts: (1) substantial effectiveness and (2) necessity. Schematically, the test would be as follows:

Strict scrutiny

1. Compelling interest and
2. Substantial relation, i.e.,
    a. Substantially effective and
    b. Necessary

Structurally, this would bring strict scrutiny into line with the other forms of intensified means-end scrutiny.

Another gain would be that "end scrutiny" and "means scrutiny" would become usable terms again, free from the ambiguity that has plagued them. End scrutiny would concern scrutiny of the legitimacy and importance of the government's interest or purpose. Means scrutiny would concern the effectiveness and necessity of the method chosen.[56] The following chart shows the main levels of means-end scrutiny and suggests the structural and terminological consistency that emerges from the change in strict scrutiny.

Strict scrutiny

1. End: compelling interest and
2. Means: substantial relation, i.e.,
    a. Substantially effective and
    b. Necessary

Intermediate scrutiny

1. End: important interest and
2. Means: substantial relation, i.e.,

56. This definition of "means scrutiny" will be used in the rest of this article.

a. Substantially effective and
b. Necessary

Sub-intermediate scrutiny
1. End: significant or substantial interest and
2. Means: substantial relation, i.e.,
   a. Substantially effective and
   b. Necessary

Somewhat heightened scrutiny
1. End: legitimate interest and
2. Means: substantial relation, i.e.,
   a. Substantially effective and
   b. Necessary

Rationality review
1. End: valid and
2. Means
   a. Rational
   [b. Not applicable]

b. the enigma of end scrutiny

The Court has clearly indicated that different levels or intensities of end scrutiny are required in different cases. Thus, strict scrutiny, as normally articulated, requires the government to show a "compelling" interest. Intermediate scrutiny typically requires an "important" interest. Some forms of intensified scrutiny require a "substantial" or "significant" interest. "Somewhat heightened" scrutiny requires a "legitimate" interest. Rationality review requires merely a "valid" or "legitimate" interest. Undoubtedly, in many cases, the Court has used these words—compelling, important, significant, legitimate, etc.—to suggest the appropriate intensity of end scrutiny.

The problem is that the Court has been inconsistent, almost cavalier, in its use of these words. Sometimes, in describing strict scrutiny, the Court has used the phrase "important interest" rather than "compelling interest," thus blurring strict and intermediate end scrutiny.[57] Sometimes the Court has used "compelling" and "substantial" interchangeably in strict scrutiny cases, thus blurring strict and sub-intermediate end scrutiny.[58] Sometimes the Court has found that an "important or substantial" interest is needed, thus blurring intermediate and sub-

57. *E.g.*, Marston v. Lewis, 410 U.S. 679, 681 (1973).
58. Palmore v. Sidoti, 466 U.S. 429, 433 (1984); *In re* Griffiths, 413 U.S. 717, 722 (1973).

intermediate scrutiny.[59] Sometimes the Court has even suggested that these terms are mere "variations in diction" and the words may be used almost interchangeably. As the Court stated in *In re Griffiths*,[60] "[t]he state interest required has been characterized as 'overriding,' . . . 'important,' . . . or 'substantial' . . . . We attribute no particular significance to these variations in diction."[61]

This inconsistent use of terminology has caused much confusion. Admittedly, the words used to describe the levels of end scrutiny are oversimplifications. Concededly, the levels of end scrutiny tend to be sliding scales that blend into a single spectrum, as Justice Marshall has argued.[62] Nevertheless, the Court has an obligation to use words in a consistent and principled way that allows as much certainty and predictability as possible. Continuous debauching of key phrases such as these leads to confusion and cynicism.

The Court should settle on a single system for determining the usage of these descriptive words and adhere to it. Strict end scrutiny should require a "compelling" or "very important" interest. Intermediate end scrutiny should require an "important" interest. Bottom tier intensified scrutiny ("somewhat heightened" scrutiny) should require a "legitimate" interest. The terms "substantial interest" and "significant interest" should be defined and assigned to the appropriate level of end scrutiny.

In other words, these differences in diction regarding end scrutiny *are* important. They guide the analysis of lower courts and attorneys. The vocabulary chosen may be somewhat arbitrary, but it should be used in a consistent manner to eliminate as much ambiguity as possible.

c. the mystery of intensified means scrutiny

A good deal of confusion has been caused by the Court's careless and inconsistent use of phrases such as "narrowly tailored," "close fit" and "substantial relation." To give just one example, the concurring opinion in *Wygant v. Jackson Board of Education*[63] mistakenly referred to " 'narrowly tailored,' or 'substantially related' "[64] as if these two phrases were synonymous. It would be helpful if the Court would clarify the meaning of these related but somewhat different concepts and would

59. United States v. O'Brien, 391 U.S. 367, 377 (1968).
60. 413 U.S. 717 (1973).
61. *Id.* at 722 n.9.
62. *See supra* p. 460.
63. 106 S. Ct. 1842 (1986).
64. *Id.* at 1853 (O'Connor, J., concurring).

then use the labels more consistently. The following discussion will explain their differences.

In order to eliminate the confusion, it is first necessary to have clear understandings of what these phrases mean. After much initial confusion, the Court appears to have settled the definition of the phrase "narrowly tailored." "Narrowly tailored" now means the same thing as "necessary." Means are narrowly tailored if they are the least onerous alternative for furthering the relevant government interest.[65]

At first glance, one might think that the phrase "close fit" would mean the same thing as "narrowly tailored." After all, if a suit of clothes is narrowly tailored it presumably boasts a close fit. But this is not entirely true. Upon careful examination, the phrase "close fit" seems to have two component meanings.[66] First, of course, "close fit" means that the government action is narrowly tailored.[67] Second, however, "close fit" means that the government action is substantially effective.[68] Means which are not substantially effective for furthering a government interest are certainly not "closely fitted" to their objective.

In short, to borrow a figure of speech from equal protection analysis, close fit requires that the government means be neither substantially underinclusive nor substantially overinclusive. If they are seriously underinclusive, they are not substantially effective. If they are seriously overinclusive, they are not necessary or narrowly tailored. When the Court uses the phrase "close fit," it should be careful that it is referring to both effectiveness and necessity.

The phrase "substantial relationship" suffers from similar uncertainties. As previously stated,[69] it was initially unclear whether the phrase referred to both substantial effectiveness and necessity or only to substantial effectiveness. Later cases have indicated that the "substantial relationship" test includes both components. Therefore, the phrase has the same meaning as "close fit," and should not be used as a synonym for

65. See, e.g., *id.*, 106 S. Ct. at 1850 n.6 (1986), which states: "[t]he term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Id.*

But see *supra* note 26 regarding the Court's confusing language on this point in the recent *Ragland* case.

66. *See, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2977-78 (1986).

67. *Id.* (legislature did not prohibit advertising for all games of chance but restricted only casino gambling).

68. *Id.* at 2977 ("challenged restrictions on commercial speech 'directly advances' the government's asserted interest.").

69. *See supra* text accompanying notes 24-25.

"narrowly tailored," a phrase which refers only to the necessity component.

d. sorting out the substantial effectiveness test

Several problems exist with the substantial effectiveness component of intensified means-end scrutiny. Two problems have been discussed above: (1) the failure to articulate the test clearly, especially in strict scrutiny cases, and (2) the treatment of the substantial effectiveness test as part of the "end" component of strict scrutiny.[70] The purpose of this section is to point out some other problems that deserve solutions.

i. undue deference and sliding scales

Clearly the different levels of intensified scrutiny call for different intensities of end scrutiny: compelling, important, substantial, significant, legitimate, etc. It is far from clear, however, whether the other two components of intensified scrutiny are to be applied in a single consistent fashion or, like end scrutiny, are variable in their intensity. Clarification is needed on this point.

Past cases seem to suggest that the substantial effectiveness component of intensified scrutiny is the same for all levels of review from strict scrutiny down to somewhat heightened scrutiny. Thus, the "substantial relationship" test used in intermediate scrutiny cases involving gender-based classifications and in somewhat heightened scrutiny cases involving illegitimacy classifications apparently involves the same substantial effectiveness requirement that is the standard in strict scrutiny cases.

But are these tests really the same? In some cases, the Court has applied the substantial effectiveness test in a deferential, nonaggressive manner. In *Posadas de Puerto Rico Associates v. Tourism Co.*,[71] for example, the Court suggested that the "directly advances" test for commercial speech handed down in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[72] is satisfied whenever the legislative judgment regarding effectiveness is " 'not manifestly unreasonable.' "[73] Applying this deferential test, the Court concluded:

> Step three asks the question whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. In the instant case, the answer to this question

70. *See supra* text accompanying notes 53-56.

71. 106 S. Ct. 2968 (1986).

72. 447 U.S. 557, 564 (1980).

73. *Posadas*, 106 S. Ct. at 2977 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (White, J., plurality opinion)).

> is clearly "yes." The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . . .[74]

Similarly, the Court in *City of Renton v. Playtime Theatres, Inc.*,[75] evaluated a place regulation of adult theaters and applied the substantial effectiveness test as if it were rationality review. The Court stated:

> Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated . . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[76]

The deferential version of the substantial effectiveness test has been used mainly in cases involving sub-intermediate scrutiny. Does this mean that the substantial effectiveness test is to be applied in a more deferential manner in cases involving levels of intensified scrutiny lower than intermediate and strict scrutiny? The Court has not answered this question.

Examination of the Court's episodic lapses into deferential versions of intensified means scrutiny leads one to believe that the Court does, in fact, apply the substantial effectiveness test in a less demanding, more deferential manner in cases involving forms of intensified scrutiny lower on the scale than intermediate scrutiny. One would certainly hope, at a minimum, that the kinds of roll-over, casual means scrutiny that have characterized some recent intensified scrutiny cases will not be adopted in strict and intermediate scrutiny cases.

The Court should clarify this issue by explaining whether the substantial effectiveness test is the same in all cases or whether it is to be applied more deferentially in some cases. If the latter is true, the Court should establish guidelines for determining when greater deference is required.

ii. renaming the *Central Hudson* "directly advances" test

The Court has adopted a sub-intermediate version of intensified

74. *Id.*
75. 475 U.S. 41 (1986).
76. *Id.* at 52 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).

scrutiny for first amendment cases involving commercial speech. The *locus classicus* of the test is *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[77] in which the Court held that commercial speech may be regulated if the regulation "directly advances" a "substantial interest" and is the least onerous alternative available.[78] The Court's opinion makes it clear that the language "directly advances" means the same thing as the substantially effective means test used in other forms of intensified scrutiny. Indeed, *Central Hudson* contains some of the Court's clearest language on the meaning of the substantial effectiveness test.[79]

Several problems exist with the Court's use of the "directly advances" terminology to describe its commercial speech test. First, the Court does not explain that this test is the same as the substantial effectiveness test used in other versions of means-end scrutiny. This lack of explanation gives the false impression that the test is different in some way and casts doubt on what the substantial effectiveness test actually means. Second, the use of two different names for the same test creates confusion and prevents judges and lawyers from perceiving clearly that the tests are indeed the same.

Third, the linguistic focus on whether the means "directly" further the government interest misdirects the inquiry and carries undesirable historical baggage. The question should be whether the means are substantially effective, not whether the effect is direct or indirect. Pre-1937 commerce clause cases used a test that focused on whether the effect of a local activity on interstate commerce was direct or indirect.[80] This test proved to be unhelpful and unworkable, and it was discarded by the Court after the constitutional revolution of 1937.[81] The modern position in commerce clause cases has been that the logical structure of the causal chain—whether the effect is direct (immediate) or indirect (mediated through some intervening cause)—is *not* the key question. Rather the correct focus is on whether the actual, pragmatic effect is substantial. The same insight is applicable to the effectiveness prong of means-end scrutiny: the key question is not whether the means chosen advance the government interest *directly*; it is whether the means chosen are *substan-*

77. 447 U.S. 557 (1980).

78. *Id.* at 564.

79. For example, the Court stated, "[f]irst, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.*

80. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

81. *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

tially effective, regardless of whether that effectiveness is achieved directly or indirectly.

In short, the Court should declare that the *Central Hudson* "directly advances" test is identical with the substantial effectiveness test used in other means-end scrutiny cases and rename it accordingly. This declaration would clear up the confusion resulting from the use of inconsistent names for the test. It would focus the lower courts' attention on the proper reasoning in commercial speech cases. In addition, since *Central Hudson* ironically provides the Court's clearest explanation of what the substantial effectiveness test means, it would help to clarify the existence and operation of that test for other cases.

Of course, if the Court intends the *Central Hudson* "directly advances" test to mean something different from the substantial effectiveness test, then it should say so and eliminate the confusion.

e. nailing down the necessity requirement

The Court has caused confusion by applying the necessity (narrowly tailored, least onerous alternative) component of intensified scrutiny in an inconsistent manner. The inconsistency concerns at least two components of the test.

i. must alternatives be "equally effective"?

Early versions of the least onerous alternative test suggested that, where the test is applicable, the government must prove the nonexistence of less restrictive alternatives that would advance the government's interests in a substantially effective manner.[82] The Court did not require that less restrictive alternatives be *equally* effective in order to qualify for consideration. Recent cases, in contrast, suggest that less restrictive alternatives need not be used by the government unless they are equally effective.[83] The Court should clarify this ambiguity. The better approach would be to continue the old rule requiring the government to use substantially effective less restrictive alternatives even if they are not 100% as effective. The "equally effective alternatives" version would result in too great an erosion of the necessity requirement.

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82. *E.g.*, Schneider v. State (Town of Irvington), 308 U.S. 147 (1939).

83. *Posadas*, 106 S. Ct. at 2978 ("as effective in reducing the demand for casino gambling as a restriction on advertising"); United States v. Albertini, 472 U.S. 675, 689 (1985) ("[A]n incidental burden on speech is no greater than is essential . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.").

ii. the role of deference

Traditionally, it was understood that courts should exercise independent judgment concerning whether less restrictive alternatives are available for advancing the government's interests. The government had the burden of proof and was required to persuade the court that no less restrictive alternative existed. Some recent cases, in contrast, indicate that courts should defer to the judgment of other branches of government on the issue whether less restrictive alternatives would suffice.[84] In other words, if the government rejects an allegedly less restrictive alternative because it would not accomplish the desired task, courts should accept that decision and uphold the government action.[85]

If this new deferential version of the least onerous alternative test were widely adopted, the result would be a dangerous weakening of intensified means scrutiny. This would be especially true if the Court were to adopt both the "equally effective" and "deferential" versions of the necessity requirement. If only equally effective alternatives need be considered and if courts are required to defer to the government's conclusions that alternatives are not equally effective, then the least onerous alternative test will lose its bite and cease to function as a meaningful restraint on government infringements of constitutional rights.[86]

The least onerous alternative test has been perhaps the most important and restrictive ingredient of intensified means-end scrutiny. The test has probably been decisive in striking down unconstitutional government action more often than the other two components of intensified scrutiny

84. *Albertini*, 472 U.S. at 689 ("The validity of such regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests."); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). In *Clark*, the Court stated:

> We do not believe, however, that either *United States* v. *O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Id. at 299.

85. As the Court put it in *Posadas*:

> Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling . . . not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.

106 S. Ct. at 2978 (emphasis in original).

86. *E.g.*, *Playtime Theatres*, 475 U.S. 41.

combined. It is crucial that courts be authorized to exercise independent judgment regarding alternatives and that the Court eliminate the new deferential version of the test or at least rigidly confine the test to limited classes of cases.[87]

f. pro forma means-end scrutiny

Taken to its extreme, the deferential kind of "intensified" means-end scrutiny that has emerged in recent years can degenerate into mere incantations or ritualistic verbal formulas recited by the courts while presiding over the burial of constitutional liberties. A classic example is *Playtime Theatres.*[88] The Renton ordinance at issue confined theaters showing constitutionally protected, non-obscene, adult films to a small industrial area of the city. This triggered the intermediate presumption of unconstitutionality applicable to content-neutral time, place and manner regulations of expression.[89] Thus, the burden was on the city to show that its ordinance was a substantially effective and necessary means to serve a substantial government interest. Justice Rehnquist's majority opinion upholding the ordinance made a mockery of the concept of intensified scrutiny. According to Justice Rehnquist, "[i]t is clear that the ordinance meets such a standard."[90] In marching to this foregone conclusion, Justice Rehnquist ran roughshod over each of the three prongs of intensified scrutiny.

The substantial government interest, according to Justice Rehnquist, was the " 'interest in attempting to preserve the quality of urban

87. To date, the Court has not explained in a systematic manner when judges should and should not defer to other branches. The Court has suggested that judicial review should be more deferential, for example, in cases involving military, tax and zoning matters, but additional and much more specific guidelines are needed.

88. 475 U.S. 41.

89. The conclusion that the restriction was content-neutral was extremely dubious, since the ordinance was explicitly limited to theaters showing adult films and, therefore, seemed to be facially subject-matter based. Justice Rehnquist managed to avoid the strong presumption of unconstitutionality applicable to content-based infringements of free expression by invoking a highly questionable "secondary effects" test, which converts content-based infringements into content-neutral infringements when the government's purpose is to deal with the secondary effects of speech rather than to suppress the speech because of its content. *Id.* at 48-50. This unprecedented use of secondary effects analysis to circumvent strict scrutiny is one of the most radical and dangerous developments in first amendment analysis in several decades, one which, if taken to its logical conclusion, could eliminate so-called "track one" first amendment analysis and reduce the usual first amendment test from strict to sub-intermediate scrutiny. It is critical that the Court confine the *Playtime Theatres* secondary effects test to disfavored speech cases such as *Playtime Theatres* and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the case in which the test originated.

90. 475 U.S. at 50.

life,' "[91] an interest so diffuse as to cover virtually anything a city might choose to require. Moreover, the interest was sufficient even though Renton had absolutely no experience with adult theaters and was relying entirely on evidence concerning other cities. By declaring such a nebulous government interest "substantial" without any specific evidence, Justice Rehnquist virtually nullified the end scrutiny component of sub-intermediate scrutiny. But that was only the start.

Turning to means scrutiny, Justice Rehnquist decimated the substantial effectiveness test by declaring, " '[i]t is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be . . . concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' "[92] This is the language of rationality review rather than intensified scrutiny, and this language makes a sham of the notion that sub-intermediate scrutiny requires heightened scrutiny of the effectiveness of the means.

Finally, Justice Rehnquist brushed aside the least onerous alternative requirement with the following single, conclusory sentence: "[m]oreover, the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . . ."[93] This is mere pronouncement, not analysis.

Such *pro forma* means-end scrutiny can only have a demoralizing effect on American constitutional law. Intensified means-end scrutiny is supposed to be a serious, stringent, searching form of analysis designed to test whether, in fact, the government can show a weighty countervailing justification sufficient to outweigh the infringement of constitutional rights and overcome the presumption of unconstitutionality. The Court should *never* hold that intensified scrutiny is met unless it can articulate a persuasive argument, based on evidence of record, that the action is a substantially effective and necessary method for furthering a serious interest. Formalistic, ritualized means-end scrutiny that merely recites conclusions along the way to a pre-ordained result degrades the entire process of constitutional analysis and encourages lower court judges to treat means-end scrutiny as a mere verbal formula that provides rationalizations for results reached on other unexpressed grounds.

91. *Id.* (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).
92. *Id.* at 52 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).
93. *Id.*

2. Trouble in the tiers[94]

a. slippery slopes at the top: the softening of strict scrutiny

At one time, strict scrutiny was roughly synonymous with "you can't do it." Strict scrutiny was " 'strict' in theory and fatal in fact . . . ."[95] In recent years, however, the Court has softened the strict scrutiny test considerably. To the Burger Court, strict scrutiny often seemed to mean, "You can do it if you're careful."

This is a dangerous development. Strict scrutiny is the test used by the Court to enforce some of the most basic constitutional limits such as the presumption against racial classifications disfavoring minorities and the presumption against content-based restrictions and prior restraints on publication. The erosion of strict scrutiny threatens to weaken these fundamental constitutional protections.

The recent softening of strict scrutiny has affected each of the three components of that test, as the following sections will explain.

i. proliferation of compelling interests

Until the Burger era, the Supreme Court was extremely reluctant to find government interests sufficiently compelling to satisfy strict scrutiny. To be sure, a few exceptions existed. The Court recognized the interest in avoiding major military disasters as compelling.[96] Similarly, the interest in protecting the nation from communist subversion was considered sufficient to satisfy strict scrutiny.[97] But the list was short.

In recent years, however, the Court has been surprisingly willing to characterize government interests as compelling. Government purposes which are admittedly legitimate and even substantial but seem far less urgent than avoiding major military catastrophes have been labeled compelling. Increasingly, the Justices add new interests to the list in a casual, off-hand manner suggesting that they believe that almost any significant government interest is sufficiently compelling to satisfy strict scrutiny.

Here are some examples. Having a uniform day of rest has been identified as a sufficient interest to satisfy strict scrutiny.[98] The fact that,

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94. The discussion now turns from problems regarding means-end scrutiny generally to problems regarding specific "levels" of means-end scrutiny from strict scrutiny down to rationality review.

95. Gunther, *supra* note 11, at 8.

96. Korematsu v. United States, 323 U.S. 214 (1944); Near v. Minnesota, 283 U.S. 697 (1931) (dictum).

97. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); *cf.* Dennis v. United States, 341 U.S. 494 (1951).

98. Sherbert v. Verner, 374 U.S. 398, 408 (1963) (dictum).

after roughly the end of the first trimester of pregnancy, abortion is somewhat more life-threatening than childbirth has been held to provide a compelling interest sufficient to support restrictions on the constitutional right to an abortion.[99] In one case, the Court suggested, "[t]he State's interest in fair and effective utility regulation may be compelling."[100] In another, the Court indicated generally that protecting the interests of minor children is a compelling interest.[101] The purpose "to limit the actuality and appearance of corruption" has been found sufficiently compelling to justify limits on contributions to federal candidates.[102] Remedying prior discrimination is a sufficiently compelling interest to justify explicit racial preferences.[103] In several cases, the Court has actually given laundry lists of new compelling interests. In one instance, for example, the Court listed "extirpating the traffic in illegal drugs," "preventing the community from being disrupted by violent disorders" and "forestalling assassination attempts" as compelling interests.[104]

Several Justices have played leading roles in watering down the concept of compelling interests. Justice Powell has contributed substantially to the softening of the compelling interest test, especially by repeatedly using the words compelling, important, substantial and significant as if they were virtually synonymous.[105] Justice O'Connor uses the label very loosely. For example, she holds the opinion that preventing almost any serious crime is a compelling interest.[106]

The Burger Court's eagerness to expand the list of compelling interests has resulted in a serious debasement of the compelling interest test, severely eroding the strictness of strict scrutiny.

ii. erosion of the substantial effectiveness test

The erosion of traditional strict scrutiny is also apparent when one considers the Court's enforcement of the substantial effectiveness require-

99. Roe v. Wade, 410 U.S. 113 (1973).

100. Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 19 (1986).

101. *Palmore*, 466 U.S. at 433.

102. Buckley v. Valeo, 424 U.S. 1, 26 (1976).

103. *Wygant*, 106 S. Ct. 1842; Fullilove v. Klutznick, 448 U.S. 448 (1980).

104. Branzburg v. Hayes, 408 U.S. 665, 700-01 (1972).

105. *Griffiths*, 413 U.S. at 722 n.9.

106. Garrett v. United States, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring) ("the compelling public interest in punishing crimes"); Tennessee v. Garner, 471 U.S. 1, 27 (1985) (O'Connor, J., dissenting) ("Because burglary is a serious crime and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance.").

ment. Increasingly, the Court has adopted a deferential posture on this issue that belies its claim that it is using strict scrutiny.

An example is *Roe v. Wade*,[107] the landmark abortion case. After discovering the noninterpretive constitutional right to have an abortion and declaring that restrictions on the right must be narrowly drawn to further a compelling interest, the Court proceeded to apply strict scrutiny to the regulations at issue. The Court posited that the interest in protecting the mother's health becomes compelling at the end of the first trimester of pregnancy. Then, in a classic non sequitur, it asserted, "[i]t follows that, from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[108]

Of course, it did not follow from prior cases that strict scrutiny can be satisfied by "reasonable" regulations. To the contrary, strict scrutiny requires that the means be substantially and demonstrably effective in furthering the interest in maternal health. The surprising and unexplained lapse from strict scrutiny into rationality review illustrates the Burger Court's tendency to apply the substantial effectiveness component of strict scrutiny in a softened manner.

Buckley v. Valeo[109] is another example. Among the many claims plaintiffs brought, they challenged a Federal Election Campaign Act provision requiring disclosure of the names of persons contributing $10 or more to federal candidates. The asserted government interest was to prevent actual or apparent corruption. Chief Justice Burger's dissent pointed out, "[t]o argue that a 1976 contribution of $10 . . . entails a risk of corruption . . . is simply too extravagant to be maintained. . . . There is, in short, no relation whatever between the means used and the legitimate goal of ventilating possible undue influence."[110] Nevertheless, the Court upheld the disclosure requirement, adopting a posture far more deferential than normally characteristic of strict scrutiny.

Another case suggesting a relaxed, lenient approach to the substantial effectiveness requirement is *Snepp v. United States*,[111] in which the Court upheld a pre-publication clearance requirement as a "reasonable" means to further the compelling interest in preserving secrecy of CIA activities.[112]

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107. 410 U.S. 113.
108. *Id.* at 163.
109. 424 U.S. 1.
110. *Id.* at 239.
111. 444 U.S. 507 (1980).
112. *Id.* at 511-12.

iii. least onerous alternative test

Finally, the Court has adopted an increasingly deferential posture with regard to the "least onerous alternative" requirement. The *Buckley v. Valeo* ruling concerning disclosure of $10 campaign contributions is illustrative. Clearly a less onerous alternative for preventing actual and apparent corruption was available there, namely use of a higher threshold for required disclosure.

As stated above, the government traditionally had the burden to prove the nonexistence of less restrictive alternatives that would allow it to achieve its goal in a reasonably effective manner. Recently, the Court has begun to modify this requirement in two crucial ways.[113] First, it has indicated that the government need not consider or use less restrictive alternatives unless they are "equally effective." Second, the Court has instructed lower courts that they must defer to the judgment of the other branches of government regarding whether alternatives are equally effective. If these modifications are applied in strict scrutiny cases, the necessity requirement will all but disappear.[114]

The erosion of the necessity requirement is extremely dangerous. The least onerous alternative test has been the component of strict scrutiny with the most bite. The requirement that the government use the alternative that has the least adverse impact on constitutional rights has arguably been the courts' strongest weapon in the enforcement of civil liberties. The Court's new deferential version of alternatives analysis threatens to eliminate this prong of strict scrutiny almost entirely.

If courts are bound by the findings of other government agencies that less restrictive alternatives are not equally effective, those agencies will be able to insulate their infringements of constitutional rights from judicial review by merely finding that alternatives will not work as well. It is crucial that the burden be kept on the government to prove the nonexistence of less restrictive alternatives and that the courts continue to make independent judgments regarding the effectiveness of such alternatives.

iv. "strict" scrutiny in free exercise cases

The softened version of strict scrutiny that has emerged in recent years has been especially evident in cases involving the free exercise of

113. *See supra* pp. 471-73.

114. Admittedly, the modifications have emerged in sub-intermediate scrutiny cases rather than strict scrutiny cases, so the possibility is open that the Court will not apply its modified test in cases involving strict scrutiny.

religion clause.[115] Early cases interpreting the clause suggested that the government may not punish or seek to compel religious *belief* but that the government's power to regulate religiously motivated or proscribed *action* was much greater.[116] Indeed, it appeared that the government need only survive rationality review to satisfy the clause in cases involving action rather than belief. This changed dramatically in *Sherbert v. Verner*,[117] which held that government restrictions on religiously motivated conduct are subject to strict scrutiny.[118]

The *Sherbert* strict scrutiny test has been applied in many later free exercise cases and is still theoretically controlling today. But systematic reading of the cases suggests that the scrutiny used in free exercise cases is far less strict than in cases involving issues such as race discrimination and prior restraints on publications. Indeed, the "strict" scrutiny used in free exercise cases is rather easy to satisfy. For example, the Court has indicated that society's interest in a uniform day of rest is sufficiently compelling to justify requiring orthodox Jews to close their stores on Sundays.[119] The Court has also rejected a free exercise challenge by the Amish to mandatory participation in the Social Security program because "mandatory participation is indispensable to the fiscal vitality of the social security system."[120] Similarly, the Court has rejected a claim that the free exercise clause permits a religious college to discriminate on the basis of race, holding that the interest in eradicating discrimination in education is sufficient to satisfy strict scrutiny.[121]

Cases such as these suggest that free exercise scrutiny is actually more akin to intermediate scrutiny than to strict scrutiny. Apparently the Court went too far in *Sherbert*, leaping all the way from rationality review to strict scrutiny. To allow exemptions from general laws whenever an individual objects to a legal prohibition or requirement on religious grounds simply creates an unacceptably large loophole in the law. Recognizing this, the Court has continued in many cases to allow government regulation of religiously motivated action.

The problem with this approach is that it undermines the concept of strict scrutiny. By applying a watered down, "intermediate" version of strict scrutiny in free exercise cases, the Court gives the impression that strict scrutiny is a test that is easy to satisfy. By failing to indicate that

115. U.S. CONST. amend. I.
116. *E.g.*, Reynolds v. United States, 98 U.S. 145 (1878).
117. 374 U.S. 398.
118. *Id.* at 406.
119. *Id.* at 408; *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
120. United States v. Lee, 455 U.S. 252, 258 (1982).
121. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

strict scrutiny in free exercise cases is different from strict scrutiny in other areas, the Court encourages judges to use a similarly watered-down version of strict scrutiny in other areas as well.

The solution is rather simple. The Supreme Court should change the test in free exercise cases from strict to intermediate scrutiny.[122] That would allow courts to uphold government restrictions on religiously motivated conduct without impairing strict scrutiny as a means for controlling government infringements of other constitutional rights that the Court is more serious about enforcing. The Court should reserve the strict scrutiny test for constitutional limits that are intended to function as nearly absolute bans, not cheapen the test by using it in areas where the Court intends to allow substantial government regulation.

The erosion of the three prongs of strict scrutiny is an unfortunate development. Strict scrutiny was initially adopted as a substitute for absolute constitutional bans. Most Justices accepted Frankfurter's conclusion that constitutional limits are not absolute and that constitutional interests must be accommodated when they conflict. Strict scrutiny is a method for determining when a constitutional interest is outweighed by a countervailing interest that is entitled to prevail in a particular case. But strict scrutiny, in its initial formulations, was clearly intended to function almost as a ban: exceptions were to be allowed only on rare occasions where the countervailing interest was truly overwhelming. By watering down strict scrutiny, the Court reduces fundamental constitutional limits to mere admonitions which can be ignored whenever the government offers any substantial justification. Going back to treating constitutional limits as absolutes would be better than allowing them to be discarded so easily.

In short, strict scrutiny should be toughened up considerably, and the Court should put a stop to the progressive erosion that has occurred during the last two decades.

b. muddle in the middle: confusion concerning intermediate scrutiny

The intermediate tier of means-end scrutiny has been surrounded by confusion ever since it was first introduced in the 1976 case of *Craig v. Boren*.[123] This confusion has concerned the meaning of the terms the

122. The retreat from strict scrutiny in free exercise cases may have begun already in cases such as Bowen v. Roy, 476 U.S. 693 (1986) (strict scrutiny not applicable to government action uniformly denying benefits); Goldman v. Weinberger, 475 U.S. 693 (1986) (strict scrutiny not applicable in the context of military discipline).

123. 429 U.S. 190 (1976); *see* Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MO. L. REV. 587 (1983).

Court used to describe the test, the precise components of the test, the intensity of the means-end scrutiny mandated by the test, and whether intermediate scrutiny is one test or several related tests. Clarification is needed in order to enable judges and attorneys to understand and apply intermediate scrutiny in a consistent manner.

i. meaning of terms and components of the test

As initially formulated and later reconfirmed, intermediate scrutiny requires that the government action be "substantially related" to an "important government interest."[124] Both these terms need clarification.

What is an "important government interest?" The general consensus is that the phrase means something less than the kind of compelling government interest required to satisfy strict scrutiny.[125] Beyond that, however, confusion exists. This confusion arises from the Court's refusal to adopt a consistent vocabulary for end scrutiny. At times, the Court has indicated that, to qualify as "important," the interest must be more weighty than the kind of "substantial" or "significant" interest required by lesser versions of intensified scrutiny. At other times, however, the Court has used "important," "substantial" and "significant" as if they were synonyms.

The more important source of confusion concerns the meaning of "substantial relation."[126] In the early cases, the meaning of the term seemed identical with "substantially effective." Under this definition, means would be substantially related to an end if they were substantially effective in achieving that end. Later cases suggested, however, that the substantial relation test also has a "least onerous alternative" requirement.[127]

The Justices appear to be divided on this point. One group, led by Justice O'Connor, has asserted that intermediate scrutiny does contain a least onerous alternative component and has struck down laws on that basis.[128] The other group, led by Chief Justice Rehnquist, has taken the position that intermediate scrutiny does not involve a least onerous alternative requirement.[129] The former is certainly the better view, and the

124. *See supra* p. 455-56.

125. This consensus exists in spite of the Court's occasional statements implying that "compelling" and "important" interests are synonymous.

126. *See supra* text accompanying notes 24-25.

127. *See* cases cited *supra* note 25.

128. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) ("In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.").

129. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) ("It is argued that

Court should clearly indicate in future cases that intermediate scrutiny does include a least onerous alternative component.

ii. intensity of the test

The Justices also appear to be divided about the nature of intermediate scrutiny. Is it an intense, aggressive form of means-end scrutiny like strict scrutiny, or a mild, deferential form of scrutiny more like rationality review?[130]

The prevailing view at present seems to be that intermediate scrutiny is a demanding type of means-end scrutiny comparable to strict scrutiny, at least in sex discrimination cases. Thus, for example, a recent majority opinion written by Justice O'Connor in *Mississippi University for Women v. Hogan*[131] states that intermediate scrutiny requires the government to show an "exceedingly persuasive justification."[132] The opinion, however, only mustered five votes.

The remaining Justices, led by Chief Justice Rehnquist, are more inclined to view intermediate scrutiny as a relaxed, deferential form of means-end scrutiny. This posture was evident in several sex discrimination cases decided in the years before the *Hogan* case.[133] Moreover, it has been strongly reinforced by the Court's recent opinion in *Playtime Theatres*.[134]

If the type of scrutiny exemplified by the *Playtime Theatres* case becomes normative, intermediate scrutiny will cease to be a major restraint on government action. Of course, *Playtime Theatres* involved a place restriction on speech rather than a gender-based classification, so perhaps Rehnquist's "roll over and belly up" version of means-end scrutiny will be restricted to sub-intermediate scrutiny cases. Certainly, clarification is needed regarding whether the *Hogan* or *Playtime Theatres* form of intermediate scrutiny is to be used in future cases.

iii. one test or several?

The foregoing discussion suggests another ambiguity regarding intermediate scrutiny: is it one test, or does it have several different versions in different contexts? Intermediate scrutiny originated in equal

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this statute is not *necessary* to deter teenage pregnancy because a gender-neutral statute . . . would serve that goal equally well. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been . . . ." (emphasis in original)).

130. *See* Seeburger, *supra* note 123.

131. 458 U.S. 718.

132. *Id.* at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

133. Rostker v. Goldberg, 453 U.S. 57 (1981); *Michael M.*, 450 U.S. 464.

134. 475 U.S. 41 (1986).

protection cases involving sex discrimination, but similar tests have subsequently been adopted in other areas of law including free speech (time, place and manner regulations; commercial speech; restrictions on communications by electronic broadcasting media; etc.), dormant commerce clause (discriminatory burdens on interstate commerce), privileges and immunities clause, and others. In all of these cases, the Court has used language suggesting that the government must show that its action is substantially related to an important or significant government interest.

But are these forms of intensified scrutiny really identical, or does the Court intend that they be different in their intensity and/or components? The answer is unknown at this time and must await further clarification by the Court—clarification that is needed to restore certainty to these important areas of constitutional law.

In short, fundamental uncertainties exist with regard to the structure and intensity of intermediate scrutiny. One can only hope that the Court will provide further guidelines in future cases.

c. bite at the bottom: problems with nondeferential rationality review

Rationality review, which occupies the bottom of the scale of means-end scrutiny, has had a checkered historical career that remains very unsettled today. The structure of rationality review was already settled in the 1800's: (1) a valid government interest (end scrutiny), plus (2) a rational method for furthering the interest (means scrutiny). In the pre-1937 period, the Court conducted rationality review in an aggressive, nondeferential manner, nullifying many economic reform laws that struck the Justices as irrational.[135] After the constitutional revolution of 1937, the Court backed off, adopting the deferential rational basis test, a hands-off version that resulted in virtually automatic rejections of due process and equal protection claims in socio-economic cases.[136] The deference was so extreme during the Warren era that a leading scholar labeled rationality review "minimal scrutiny in theory and virtually none in fact."[137]

Since 1970, however, the Court has reactivated the nondeferential version of rationality review. Instead of simply asking whether a rational person could conclude that the government action serves some conceivable government interest, the Court began, in some cases, to demand proof that the government action is a demonstrably effective method for fur-

135. *E.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

136. *E.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

137. Gunther, *supra* note 11, at 8.

thering an actual, valid government interest. The merits of this "rationality review with a bite" have been debated at length.[138] Perhaps it is a good idea. But the Court's use of nondeferential rationality review has created some problems.

i. unpredictability and uncertainty

Although reactivated in the 1970's, nondeferential rationality review remains the exception rather than the general rule. In most cases involving rationality review, the Court uses the deferential rational basis test and upholds the government action without difficulty. Occasionally, however, the Justices use intensified rationality review and strike down the government action, finding that the government has no actual valid interest or that the means are not demonstrably effective. The problem is that the Court has not formulated any clear guidelines for predicting when the activist, nondeferential version of rationality review will be used. That leaves lower court judges and attorneys guessing. One never knows whether rationality review should be performed deferentially or nondeferentially.

The Court should help dispel this confusion by identifying the factors that justify the use of nondeferential rationality review. Past decisions in which the Court has used rationality review to strike down government action suggest that three factors play a role in heightening the scrutiny. First, the nature of the harm inflicted is important: when the harm is severe—even though not an infringement of a fundamental right—the Court is more inclined to use nondeferential rationality review.[139] Second, the identity of the persons harmed has been a major factor in several cases.[140] Third, judicial displeasure with the government's purpose may result in heightened rationality review.[141] Past cases suggest that these factors need not all be present to trigger nondeferential rationality review; each, if present, nudges the Court away from its normal hands-off posture.

ii. confusion concerning burden of proof

The emergence of nondeferential rationality review has created fur-

138. *Id.*

139. *E.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (exclusion from public education); USDA v. Moreno, 413 U.S. 528 (1973) (denial of food stamps).

140. *E.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (developmentally disabled persons); *Plyer*, 457 U.S. 202 (children of undocumented aliens); Zobel v. Williams, 457 U.S. 55 (1982) (short-term state citizens).

141. *E.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (purpose to protect local businesses); *Moreno*, 413 U.S. 528 (purpose to harm "hippies").

ther confusion concerning allocation of the burden of proof. Earlier cases applied a simple, clear rule for allocating the burden of proof: if intensified scrutiny was applicable, the government had the burden of proof on the issue of justification; if rationality review was applicable, the challenger had the burden of proof. Unfortunately, as a result of recent cases, this clarity has vanished.

City of Cleburne v. Cleburne Living Center, Inc.[142] illustrates the new state of confusion. At issue was a government classification disfavoring developmentally disabled (mentally retarded) persons. The Court rejected a spirited contention that the classification should be declared suspect and held that rationality review was applicable.[143] Surprisingly, the Court then struck down the classification, holding that rationality review was not satisfied since the record did not contain evidence showing that the differential treatment of developmentally disabled persons was rational.[144]

The notion that government action should be declared unconstitutional under the rational relation test unless the record contains evidence justifying the use of the classification effectively puts the burden of proof on the government. Certainly the challenger is not going to introduce the required evidence into the record; if the government does not go forward with evidence justifying its action, it will lose. This de facto shift of the burden of proof to the government is contrary to prior cases which placed the burden on the challenger. In the aftermath of the *Cleburne* case, it is unclear where the burden of proof lies, and clarification is needed.

iii. blurring the line between rationality review and intensified scrutiny

The new confusion concerning allocation of the burden of proof is symptomatic of a more general confusion that now exists regarding the boundary between rationality review and intensified scrutiny. What is the difference between the nondeferential rational relation test and the "somewhat heightened scrutiny" at the bottom of the intensified scrutiny scale? Is the *Cleburne* version of rationality review—which Justice Marshall labeled " 'second order' rational basis review"[145]—different from

142. 473 U.S. 432.

143. *Id.* at 442.

144. In *Cleburne*, the Court stated: "[b]ecause in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid . . . ." *Id.* at 448.

145. *Id.* at 471 (Marshall, J., dissenting).

the low level intensified scrutiny involved in illegitimacy cases such as *Mills v. Habluetzel*?[146] At present, the answer is unclear.

The blurring of the boundary between rationality review and intensified scrutiny is epitomized by *Plyler v. Doe*,[147] which invoked a "furthering a substantial interest" test,[148] dubbed it " 'intermediate' scrutiny,"[149] and cited in support *Craig v. Boren*,[150] an intermediate scrutiny case, and *Lalli v. Lalli*,[151] a "somewhat heightened" scrutiny case. By citing *Craig* and *Lalli* as authorities for a single standard of review, the Court blurred the demarcation that separated what were thought to be two different types of intensified means-end scrutiny. The Court further confused the issue by stating that the challenged law "can hardly be considered *rational* unless it furthers some substantial goal of the State,"[152] thus merging intensified scrutiny and rationality review.

Perhaps the Court is saying that there *is* no meaningful difference between the most intense forms of rationality review and the least intense forms of intensified scrutiny and that, indeed, a sliding scale or gradual spectrum exists at the bottom of the means-end scrutiny scale. If so, judges and lawyers can adjust accordingly. But the Court should give some clear signals on this point to avoid a state of total confusion about the structure, intensity and burden of proof in cases of this nature.

iv. encouraging judicial activism

The point of the deferential rational basis test was to prevent judges from substituting their own views of what is rational for those of the legislators and administrators who make the rules. A danger involved in resurrecting the activist, nondeferential rational relation test is that judges will once again begin enjoining the government from governing in the socio-economic arena when they disagree with what the government is doing. This problem will be discussed further below.[153]

v. stirring up litigation

Moreover, unless the Court backs off from its use of nondeferential rationality review, attorneys could be forced to raise rationality challenges and load up the courts with nonmeritorious constitutional issues.

146. 456 U.S. 91 (1982).
147. 457 U.S. 202.
148. *Id.* at 217-18, 224, 230.
149. *Id.* at 218 n.16.
150. 429 U.S. 190 (1976).
151. 439 U.S. 259 (1978).
152. *Plyler*, 457 U.S. at 224 (emphasis added).
153. *See infra* pp. 487-89.

Attorneys, after all, have a duty of zealous representation; the rules of professional responsibility require attorneys to advance all nonfrivolous arguments that support their clients' interests. Thus, if the Court continues to use rationality review to strike down government action from time to time, the Court will be inviting and encouraging attorneys to raise rationality challenges. This will burden the government with litigation and could substantially interfere with expeditious government action.

3. The vice of vagueness: dangers of judicial bias

One of the main problems with contemporary means-end scrutiny is that the analytical structures are so flexible and the tests so vague that judges are left at large to decide cases on the basis of personal bias. In other words, means-end scrutiny too often degenerates into mere after-the-fact rationalization for decisions made on the basis of economic and political prejudice. The same problem existed and generated much criticism in the pre-1937 period, when reactionary Justices such as the four horsemen—Van Devanter, McReynolds, Sutherland and Butler—intervened on an ad hoc basis, nullifying government action that struck them as unreasonable.

The post-1937 period produced two principles restricting the ad hoc, free-wheeling quality of means-end scrutiny. First, the intensity of rationality review was reduced to the vanishing point, thus preventing judges from using that test as an activist, interventionist tool. Second, strict scrutiny was applied so strictly that it led almost automatically to invalidation of government action, preventing judges from putting a stamp of approval on invasions of constitutional rights. In other words, the tests virtually compelled the judges to reach predictable results regardless of their personal biases.

Developments in means-end scrutiny during the Burger era destroyed this predictability and reintroduced serious problems of judicial bias. First, the softening of strict scrutiny made it possible for judges to ratify serious infringements of fundamental constitutional rights. Strict scrutiny is no longer fatal in fact, so judges are free to uphold invasions of constitutional rights when they believe a sufficient countervailing justification is present. The watered-down version of strict scrutiny now in use focuses on standards so nebulous that judges are once again free to make virtually ad hoc decisions based on personal bias regarding the importance of government interests, the effectiveness of means, and the availability of equally effective alternatives.

Second, the emergence of rationality review with a bite has made it possible for judges to resume constitutional censorship of government ac-

tion that concerns merely socio-economic relationships rather than fundamental constitutional liberties. Rather than being required to keep "hands off," judges are once again being encouraged to intervene piecemeal and nullify government action that strikes them as unreasonable. Like softened strict scrutiny, the nondeferential rational relation test is so nebulous that judges are free to write their personal biases into constitutional law just like the four horsemen did before the 1937 constitutional revolution.

Third, the emergence of an array of intermediate levels of scrutiny has made matters still more ambiguous. The standards involved in intermediate scrutiny are so vague as to provide virtually no guidance for judges and lawyers.[154] With no strong presumption of either constitutionality or unconstitutionality to guide them, judges are free to act on the basis of their own economic and political biases.[155]

This development is not desirable.[156] The Supreme Court should attempt to resurrect some neutral principles in the area of means-end scrutiny and reduce the potential for biased, ad hoc constitutional decision-making by tightening up on strict scrutiny and easing up on rationality review.[157] It is better, at least at the top and bottom ends of the means-end scrutiny scale, to have rules that control the bias of judges

154. Contending that middle-tier scrutiny imposes "no check on policy preferences," one commentator asserts, "[t]he temper of the language in the various opinions suggests that the judgments reflect the justices' hidden agendas." Seeburger, *supra* note 123, at 615.

155. As Justice Rehnquist put it,

> How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective . . . ? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . .

Craig, 429 U.S. at 221 (Rehnquist, J., dissenting).

156. The danger of bias on the part of judges has been made far worse by the Reagan administration's method of selecting federal judges. Using an ideological litmus test, the administration has been packing the federal courts with reactionaries. By the end of the Reagan years, Reagan appointees will fill more than half the seats on federal courts. The Reagan judges—perhaps they should be called "Meese's pieces"—will be likely to use the latitude provided by the current version of means-end scrutiny to write their reactionary views into constitutional law. They will water down fundamental constitutional rights by finding countervailing justifications sufficient to satisfy softened strict scrutiny. They will be tempted to intervene in the socio-economic arena and strike down economic reform legislation that seems ineffective when viewed through the lenses of the Chicago School economic analysis or some other conservative ideology.

157. Admittedly, nondeferential rationality review has produced some good results in the hands of liberal judges. *E.g.*, *Cleburne*, 473 U.S. 432; *Plyler*, 457 U.S. 202; *Moreno*, 413 U.S. 528. However, the danger of abuse by reactionary judges probably outweighs the potential for good at this point. Thus, it would seem better to go back to the deferential rational basis test in cases where intensified review cannot be justified.

and lead to predictable outcomes.[158]

4. Encroachment of means-end scrutiny into new areas

The Court has become so accustomed to means-end scrutiny that it is tempted to extend it into new areas of constitutional law in a manner that may seriously erode fundamental constitutional protections. As mentioned before, the Justices have, for the most part, adopted the view that constitutional rights are not absolute, but that they must at times yield to other compelling needs. Means-end scrutiny is the most common method for determining whether a countervailing need exists that outweighs a constitutional right in a particular case. Thus, it is a short jump for the Justices to convert constitutional limits intended to be absolute or virtually absolute bans into mere admonitions that can be set aside whenever necessary to serve a sufficiently important interest. If strict scrutiny were really strict, this would perhaps not be a major problem. But, given the Court's pronounced softening of strict scrutiny,[159] the danger of erosion of important constitutional rights becomes serious.

Perhaps the best example of this process and its attendant dangers is Justice O'Connor's opinion in *Garrett v. United States*,[160] a double jeopardy case. The double jeopardy prohibition has been viewed traditionally as an absolute bar where applicable. In her *Garrett* concurrence, however, Justice O'Connor suggested that a strict scrutiny test be adopted. Asserting that the double jeopardy clause is not absolute, Justice O'Connor argued that the clause must yield when clearly outweighed by countervailing interests:

> [T]he finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law. . . . [A]bsent "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," . . . the compelling public interest in punishing crimes can outweigh the interest of the defendant in having his culpability conclusively resolved in one proceeding.[161]

In Justice O'Connor's judgment, the double jeopardy interest was out-

158. Predictability and control may not be as possible in the middle tiers of means-end scrutiny.

159. *See supra* pp. 475-80.

160. 471 U.S. 773 (1985).

161. *Id.* at 796 (O'Connor, J., concurring) (citations omitted) (quoting United States v. Scott, 437 U.S. 82, 91 (1978)).

weighed in *Garrett* by the interest in punishing crime, and the double jeopardy clause must therefore yield.

In other words, Justice O'Connor would convert the double jeopardy clause from an absolute bar into a presumption that could be overcome if strict scrutiny is satisfied. The danger is obvious. In *Garrett* and other recent cases, Justices have suggested that crime prevention is a compelling interest. If this is true, strict scrutiny could be easily satisfied whenever multiple prosecutions are a substantially effective way to punish crime and no less onerous alternative exists. The loophole is especially great in light of the Court's tendency to apply strict means scrutiny in a casual, deferential manner. Given the diaphanous nature of even the most intense forms of intensified scrutiny, the Court should be very reluctant to allow means-end scrutiny to encroach into new areas of constitutional law.

C. Suggestions for Improving Means-End Scrutiny

The purpose of this section is to set forth an agenda of reforms designed to make means-end scrutiny a more understandable, consistent and effective analytical process for enforcing constitutional limits. The proposals are derived from the discussion in earlier sections and, in many cases, they track points already mentioned. This section is designed to present these proposals in a more succinct and systematic manner. The proposals fall into two main categories: (1) clarifications of terminological ambiguities and inconsistencies and (2) resolutions of problems with specific tiers of means-end scrutiny.

1. Clarification of conceptual structure, terminology, components and intensity of means-end scrutiny

a. restructuring strict scrutiny

The Court should revise the structure of strict scrutiny to make it consistent with other forms of intensified scrutiny. This can be achieved without any change in the operation of the test. The proposed new definition is that strict scrutiny requires the government to prove that its action is "substantially related to a compelling interest."

Revised strict scrutiny

1. End: compelling interest and
2. Means: substantial relation, i.e.,
   a. Substantially effective and
   b. Necessary

Strong presumption of constitutionality; government has burden of proof

This change would: (1) provide a consistent analytical structure for the different levels of means-end scrutiny; (2) allow the terms "end scrutiny" and "means scrutiny" to take on a single, consistent definition; and (3) highlight the existence of the substantial effectiveness prong of strict scrutiny.[162]

b. clarifying the terms "end scrutiny" and "means scrutiny"

Having relocated the substantial effectiveness test from the end scrutiny (compelling interest) component to the means scrutiny component of strict scrutiny, the Court should establish clear and consistent definitions of the terms "end scrutiny" and "means scrutiny." "End scrutiny" should refer to analysis of the permissibility and weight of the government's interests (purposes). "Means scrutiny" should be defined as having two components: (1) analysis of the effectiveness of the methods adopted by the government to advance its interests and (2) analysis of the availability of less restrictive alternatives.

c. clarifying the levels of "end scrutiny"

The Court should settle on a consistent vocabulary for describing the levels of end scrutiny. Strict scrutiny should require a "compelling" or "very important" interest. Intermediate scrutiny should require an "important" interest. The terms "substantial interest" and "significant interest" should be defined. If they mean something different from "important," that should be explicitly stated, and a new level of intensified scrutiny should be identified to account for this difference. Somewhat heightened scrutiny should require a "legitimate" interest. Rationality review should require a "legitimate" or "valid" interest. The terms used to describe end scrutiny should not be used interchangeably. Vague though they may be, they can be of some use in describing the level of end scrutiny if they are kept separate and used in a consistent manner.

d. clarifying the existence, meaning and terminology of the substantial effectiveness component of means-end scrutiny

The Court should declare that the various levels of intensified scrutiny do have a "substantial effectiveness" component. Ironically, this basic and often-invoked test has so often been buried in the Court's discussions that it remains nebulous and even unrecognized by many

162. Points two and three will be discussed further in ensuing sections.

judges and lawyers. This is especially true in strict scrutiny cases, but it is also true in the lower levels of intensified scrutiny, where the Court's unclear and inconsistent terminology has obscured the test. The Court should select a single, unequivocal term for the test and define the term clearly. "Substantial effectiveness" is one possible term. Others might do as well. The Court should explain that the test requires the government to prove that the method chosen by the government is actually effective in furthering its interest. The Court should then discard other confusing and misleading names for the test, or at least declare that they are synonymous. For example, the Court should rename the *Central Hudson* [163] "directly advances" test and clarify that the "substantial relation" test includes both substantial effectiveness and necessity requirements.

e. eliminating or at least clarifying the "deferential" version of the substantial effectiveness test

The Court should reinforce the traditional concept that the substantial effectiveness test is an *intensified* form of means scrutiny that is to be applied in a nondeferential manner. This means that the burden is on the government to prove that its means are actually effective, and courts are required to make an independent judgment on the issue rather than deferring to the judgment of the branch of government whose conduct is being challenged. In short, the deferential version of the test that has emerged in cases like *City of Renton v. Playtime Theatres, Inc.* [164] should be eliminated.[165]

If the Court rejects this suggestion, then it should at least explain clearly when the deferential version of the test is to be used and when not. More specifically, the Court should clearly indicate that deference is not to be granted in strict and intermediate scrutiny cases. If deference is to be required at all, it should only be in "somewhat heightened" and "sub-intermediate" scrutiny cases. In other words, if the substantial effectiveness test is to vary in intensity in different classes of cases, it is crucial that the Court clearly define when the deferential version does not apply. Otherwise strict and intermediate effectiveness scrutiny will be watered down to glorified versions of rationality review.

163. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

164. 475 U.S. 41 (1986).

165. Deferential effectiveness scrutiny is appropriate in applying minimum rationality review, but *not* in applying intensified scrutiny.

f. clarifying the necessity test

Similarly, the Court should take steps to prevent the erosion of the necessity (narrowly tailored; least onerous alternative) test. Two steps are needed. First, the Court should make it clear that, to qualify for consideration, less onerous alternatives need not be "equally effective." It is enough, as the older cases hold, that an alternative is substantially effective, i.e., that it would get the job done. Second, and equally important, the Court should eliminate the novel "deferential" version of alternatives analysis that has emerged in the last few years. The Court should clearly explain that judges are required to exercise independent judgment concerning the existence of effective and less onerous alternatives. Otherwise this crucial test will disappear and be replaced by another variation of rationality review. Again, if the Court does not adopt this suggestion, it should at least take steps to define when deferential necessity analysis applies in order to prevent encroachment of this eroded test in intermediate and strict scrutiny cases.

To summarize the last two sections, the Court should explain whether the substantial effectiveness and the necessity prongs of means scrutiny are sliding scales that vary with the particular type of intensified scrutiny being used. If these tests are meant to have a single meaning in all cases, that should be explained. If the tests are meant to vary in intensity, that should be clarified. It is especially important that the Court clarify when means scrutiny is to be applied in a deferential manner. Otherwise the danger exists that the deferential versions of means scrutiny that have emerged in recent years will be adopted throughout the range of intensified scrutiny reducing even strict means scrutiny to little more than rationality review.

g. clarifying the terminology of means scrutiny

The Court should define more carefully the terms commonly used to describe means scrutiny. "Substantially related" should include both "substantially effective" and "necessary." "Close fit" should be synonymous with "substantially related." "Narrowly tailored" should be synonymous with "necessary." By clarifying these terms, the Court can avoid confusion on the part of its readers concerning the precise test being articulated and applied in intensified scrutiny cases.

h. eliminating pro forma intensified scrutiny

It follows from prior suggestions that the Court should studiously avoid lapsing into the kind of roll over and belly up "intensified" scrutiny

that took place in *Playtime Theatres*. Such scrutiny is intensified in name only, and it utterly degrades the concept of intensified means-end scrutiny. If the Court intends to authorize this kind of deferential means-end scrutiny, it should forthrightly declare that rationality review is applicable rather than undermining the integrity of intensified scrutiny. Otherwise lower courts will conclude that intensified scrutiny can be satisfied with a wink and a nod, and basic constitutional limits will erode to the vanishing point.

2. Resolving problems in the tiers of means-end scrutiny

a. strict scrutiny

The Court should tighten up considerably on strict scrutiny. The list of compelling interests should not be expanded except for extremely important needs. Scrutiny of the effectiveness of means should be truly strict: no lapse into undue deference or rationality review should be allowed. Scrutiny of alternatives should also be intensified: courts should be required to search diligently for substantially effective and less onerous alternatives. If, in a particular line of cases—such as free exercise cases—scrutiny is not to be truly strict, the Court should explicitly adopt a lower level of scrutiny such as intermediate or sub-intermediate scrutiny. In this way, strict scrutiny can be preserved as almost an absolute ban, and high priority constitutional limits can be saved from serious erosion.

b. middle-tier scrutiny

The Court should try to clear up the muddle that has developed in the intermediate and lower tiers of intensified scrutiny. Given the huge discrepancy between the *Mississippi University for Women v. Hogan*[166] version of intermediate scrutiny, with its requirement of an "exceedingly persuasive justification,"[167] and the *Playtime Theatres* version of abjectly deferential "intensified" scrutiny,[168] the Court should declare whether intensified but not strict scrutiny is indeed several tests or a sliding scale and what factors control the degree of scrutiny required. Thus, for example, the Court should clarify whether a difference exists between the "important" interest required in *Hogan* and the "significant" interest required in *Playtime Theatres*. Similarly, as stated several times before, the Court should define when, if ever, deferential means scrutiny, i.e., effec-

166. 458 U.S. 718 (1982).
167. *Id.* at 724.
168. *Playtime Theatres*, 475 U.S. 41.

tiveness and/or alternatives scrutiny, is appropriate. Furthermore, the Court should define more clearly the "substantial relation" test that controls in most forms of intensified scrutiny. It is especially important that the Court clearly indicate that the "narrowly tailored" requirement is a standard ingredient of the substantial relation test.

c. rationality review

In contrast, the Court should probably soften rationality review. If nondeferential scrutiny is appropriate, the Court should invoke intensified scrutiny and clearly explain why it made this choice. If intensified scrutiny is not justifiable, the deferential rational basis test should probably be used. Otherwise, lower court judges will be encouraged to engage in ad hoc constitutional censorship like that of the pre-1937 Court. Perhaps in the hands of Platonic guardians like Brennan and Stevens, nondeferential rationality review can produce good results,[169] but, in the hands of reactionaries such as McReynolds and Manion, the process may produce less palatable results. Moreover, the beneficial results can be achieved equally well by explicit use of intensified scrutiny.

If the Court rejects this suggestion and continues to invoke nondeferential, "second order" rationality review, the Court should at least define the factors that justify the abandonment of the deference that is the general rule in rationality review cases. Justice Marshall's list is probably the best bet to date with its focus on: (1) the harm done; (2) the characteristics of the persons harmed; and (3) the nature of the government's need.

Finally, if the Court chooses to continue using nondeferential rationality review, the Court should clarify who has the burden of proof in cases such as *City of Cleburne v. Cleburne Living Center, Inc.* [170] and *Plyler v. Doe* [171] that are close to the line between nondeferential rationality review and bottom-level intensified scrutiny.

III. CONCLUSION

Means-end scrutiny, the form of judicial analysis used most frequently in constitutional cases, is in need of restructuring and reform. Like any conceptual structure that grows piecemeal, means-end scrutiny is infected with conceptual and terminological inconsistencies that need to be corrected. Moreover, the process of gradual judicial inclusion and

169. *See* cases cited *supra* note 157.
170. 473 U.S. 432 (1985).
171. 457 U.S. 202 (1982).

exclusion that has given rise to the various levels and types of means-end scrutiny has led the Court into some danger zones that invite modifications and improvements. If the suggested modifications are made, means-end scrutiny will hopefully be easier to understand and apply, and both judges and lawyers will be better able to carry out their proper functions in constitutional analysis.