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The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection

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THE MOST EFFECTIVE OR LEAST RESTRICTIVE ALTERNATIVE AS THE ONLY INTERMEDIATE AND ONLY MEANS-FOCUSED REVIEW IN DUE PROCESS AND EQUAL PROTECTION

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I. INTRODUCTION

THERE is only one "standard of review"[1] truly intermediate between the rational basis and compelling state interest tests:

1. The term "standard of review" will be used interchangeably with "test" and "rule." It is beyond the scope of this article to work out a comprehensive definition of "standard of review" or to fully discuss the purposes and attributes of standards of review. For a discussion of the purposes of standards of review, see Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281 (1978). It is also beyond the scope of this article to discuss standards of review and their relationship to the concepts of "rules," on the one hand, and broad "standards" or "principles," on the other hand. For two recent and provocative articles concerning the "rules" vs. "standards" issue, see Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985). *See also* Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977). Finally, it is beyond the scope of this article to defend the very notion of "rules," "principles," or "doctrine." *See, e.g.*, Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447 (1983); Alexander, *Modern Equal Protection Theories: A Meta-theoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 14, 66 (1981); Gray, *The Constitution as Scripture*, 337 STAN. L. REV. 1 (1985); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979); McArthur, *Abandoning the Constitution: A New Wave in Constitutional Theory*, 59 TUL. L. REV. 280 (1984); Nagel, *Rationalism in Constitutional Law*, 4 CONST. COM. 9 (1987); Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985); Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond*, Plyler v. Doe, 44 U. PITT. L. REV. 329,

the most effective or least restrictive alternative principle (which is traditionally more narrowly designated the least restrictive alternative principle).[2] Other standards of review may marginally differ from the rational basis or compelling state interest tests, but none differs significantly enough to serve as a functional alternative. The standard of review enunciated by the United States

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341 (1983); Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335 (1981); Tushnet, *Anti-Formalism in Recent Constitution Theory*, 83 MICH. L. REV. 1502 (1985); Tushnet, *Dia-Tribe* (Book Review), 78 MICH. L. REV. 694, 701 (1980); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Introduction: The Need for a Principled Constitutional Jurisprudence*, 62 CORNELL L. REV. 401 (1977). Many question the use of formulas or tests as the basis for judicial review under the equal protection clause of the fourteenth amendment and other provisions of the Constitution. Although answering such criticism is not the task here, I will quote Professor Nowak's well put observations in correspondence with me:

> Regardless of whether the formulas scholars and judges develop are ways of rationalizing certain types of judgments, the statement of a "test" is important when the Supreme Court is attempting to tell lower court judges how certain types of cases should be decided. Even if United States Supreme Court Justices are fairly free to make up "law" as they rule on the cases, a clearly stated . . . test . . . [is] of great value to all of us (students, lawyers, professors, and lower court judges) who have to try to decipher Supreme Court cases and to apply due process and equal protection principles to cases that have not been specifically resolved by the Supreme Court.

Letter from Professor John E. Nowak to Professor Roy G. Spece, Jr. As to the efficacy of doctrine beyond the constitutional context, see, e.g., Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985).

2. Courts and commentators commonly refer to "the least restrictive alternative" principle to capture the convincing idea that government should not gratuitously inflict harm or incur costs. If it can achieve its objectives in a way less restrictive of individual rights, failure to use that alternative violates the principle. Inherent in this root principle of eschewing gratuitous or unnecessary cost is the requirement that the state use the most effective alternative. If an alternative course of action will allow it to achieve more of its goals without inflicting any greater harm on individual rights, it is obliged to follow the alternative. For a discussion of this alternative principle, see *infra* text following note 7 and Section VIII.

In substantive due process and equal protection adjudication, at least, the least restrictive alternative principle has been considered simply a part of the compelling state interest test. *See* Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1052-53 (1979). Professor Singer has briefly mentioned that the least restrictive alternative principle could be separated from the compelling state interest test. He seemingly embraces a suggestion he correctly notes had been occasionally made by Justice Burger that the alternative principle replace the compelling state interest test because the latter is too strict. *See* Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 58-59 (1972). For a discussion of the alternative principle as an independent standard of review, see *infra* text accompanying notes 141-55.

Supreme Court for use in sex discrimination cases[3] (hereinafter

3. The first clear articulation of the intermediate test was in *Craig v. Boren*. 429 U.S. 190 (1976). The Court stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. The Court has applied this test fairly consistently in the context of sex discrimination cases. *See* Heckler v. Mathews, 465 U.S. 728, 736 (1984); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25, 730-31 (1982) (different formulation arguably incorporating alternative principle; the Court stated that state "must carry the burden of showing an 'exceedingly persuasive justification,' " including a "legitimate and important" "actual purpose" and a "direct and substantial" relationship between the purpose and the classification; the Court also observed that "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 MUN's educational goals"); Wengler v. Druggists Mut. Ins. Co.,, 446 U.S. 142, 150 (1980); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster, 430 U.S. 313, 316-17 (1977) (per curiam); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977). *But cf.* Rostker v. Goldberg, 453 U.S. 57, 79 (1981) (in discussing constitutionality of requiring women to register for draft Court stated that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality"); Michael M. v. Superior Court, 450 U.S. 464, 465 (1981) (A 17½ year old male charged with violating California's statutory rape law challenged statute, stating that it discriminated on basis of gender. The Court held that statute did not discriminate, stating that "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."). The Court has been both less consistent and less articulate about its use of an intermediate test in cases of discrimination against illegitimate children. *See* Kellett, *The Burger Decade: More Than Toothless Scrutiny for Laws Affecting Illegitimates*, 57 U. DET. J. URB. L. 791 (1980). For a good summary of the various articulations of the test used in illegitimacy cases, see Picket v. Brown, 462 U.S. 1, 8 (1983). *See also* United States v. Clark, 445 U.S. 23 (1980). In *Clark*, the Court stated: "[A] classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular . . . interests this statute is designed to serve.' " *Id.* at 27 (quoting Lalli v. Lalli, 439 U.S. 259, 268 (1978) (plurality opinion)); *see also* Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (restrictions on support suits by illegitimate children "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (plurality opinion) ("[C]lassifications based on illegitimacy are not subject to 'strict scrutiny,' [but] they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible states interests."). The Court has been even less consistent and less articulate about its use of intermediate scrutiny in miscellaneous contexts. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 224 (1982) (denying public education to undocumented children irrational as not shown to further "some substantial goal of the state"); Youngberg v. Romeo, 457 U.S. 307, 321 (1982) (whether rights of individual involuntarily committed to state institution for mentally retarded have been violated "must be determined by balancing his liberty interests against the relevant state interests"). For a further discussion, see *infra* notes 11 & 24. For a discussion of *Plyler*, see Recent Developments, *Constitutional Law—Equal Protection—A Texas Statute Which Withholds State Funds for the Education of Illegal Alien Children and Permits Local School Districts to Deny Enrollment to Such Children Does Not Further a Substantial State Interest and Therefore Violates the Equal Protection Clause of the Fourteenth Amendment*, 28 VILL. L. REV. 173 (1982). It is beyond the scope of this article to trace the use of intermediate scrutiny

the "(present) intermediate test") as well as the rational basis test "with bite"[4]—the most prominent of the so-called intermediate tests—fail to serve as viable intermediate scrutiny alternatives.

The recent history of standards of review adopted by the Court to adjudicate substantive due process and equal protection cases is well known. Originally, the Court applied two standards of review: the rational basis and compelling state interest tests. Many authorities criticized the Court for the rigidity of this two-tier analysis and argued for a more flexible approach involving some form(s) of review between the two tests. A desirable attribute for intermediate tests was said to be a focus on circumscribed scrutiny of state means as opposed to broad-ranging review of state ends.[5] The Court subsequently articulated an intermediate test for use in sex discrimination cases.[6]

Authorities continue to contend that the Court does and ought to apply some form of intermediate review in a broad range of cases. They also continue to endorse the virtues of means as

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outside the due process and equal protection contexts, but the observations here have obvious significance in that broader area.

4. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

5. *See, e.g.*, Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 128 (state objective must be "weighed in the balance when neither a constitutionally protected interest nor a suspect classification is involved"); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973) (government must balance its purposes and method of regulation against interests being regulated; "using the current terminology of judicial review, the scrutiny given legislation needs to be as strict as the case warrants: there are no automatic formulae."); Gunther, *supra* note 4, at 20-21 (rational basis test with bite is means-focused test; legislative means must substantially further legislative ends; "[t]he yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not 'constitutional' interests drawn from the value perceptions of the Justices"); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1081 (1974) ("demonstrable basis" standard "involves review of the asserted end of the legislation, as well as the means by which it furthers that end. Under this standard the Court would examine the evidence and uphold the classification only upon a showing of a demonstrated rational means of advancing an interest capable of withstanding analysis. When this relationship is not proved, the law must be invalidated."); Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462 (1977). For a discussion of theoretically possible forms of intermediate review, see *infra* text accompanying notes 26-35. Regarding the sliding scale theory, see *infra* note 7.

6. Craig v. Boren, 429 U.S. 190 (1976). For a discussion of other sex discrimination cases in which the Court has applied an intermediate test, see *supra* note 3.

opposed to ends scrutiny.[7] However, the logical parameters of means and ends scrutiny, and whether it is logically and pragmatically possible to construct *any* standard that is theoretically and functionally distinct from and complementary to both the rational basis and the compelling state interest tests, have not been adequately considered. That is the goal of this article. It will require consideration of: (1) the logical components of standards of review, generally; (2) the range of theoretically possible intermediate tests, generally; (3) the present intermediate test; (4) Professor Gunther's rational basis test with bite and (5) the most effective or least restrictive alternative principle (hereinafter "the alternative principle"), offered as an independent, intermediate standard of review.

I will show that the latter standard—which is most often considered simply a constituent part of other more encompassing tests—can be conceived as a separate constitutional test, and as so conceived is the only workable form of intermediate review. It will also be illustrated that the alternative principle is the only "means-focused" form of intermediate review. Although the test is means-focused, it will be shown to be broader than traditionally described. It encompasses a basic and ethically powerful notion that government ought not to inflict harm or costs gratuitously. This root notion encompasses not only a least restrictive alternative requirement but a corollary most effective alternative mandate. Moreover, it does not only require the use of effective alternatives vis-a-vis those persons the government chooses to regulate. It also directs that classifications of persons to be regulated be drawn as effectively as possible within the cost constraints the government has demonstrated a willingness to incur by classifying in the first instance. On the other hand, in its form *advanced here*, it is means-focused in that it eschews ends scrutiny at every point of analysis. It does not require the use of less effec-

7. The most notable of these is Justice Marshall, who for years has claimed that the Court sometimes does and generally ought to use a "sliding-scale" standard of review. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part, dissenting in part); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1601-10 (2d ed. 1988); Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier, and the Role of the Court*, 14 U.S.F. L. REV. 525 (1980). As noted in the text, it is beyond the scope of this article to consider whether and when the Court does or ought to apply intermediate review. The concern here is the prior question whether it is pragmatically possible to entertain such a notion. If the Court does choose to use either a multi-tier or a sliding-scale standard of review, it should do this correctly. The only correct way is to have *bona fide*, distinct tiers or actual, discrete points along a sliding scale.

tive or more costly alternatives, nor does it limit the state to actual or even asserted purposes. It allows the court to choose what it believes was the state's actual purpose, if, and only if, the state does not assert a purpose. If the state asserts a purpose then that will be taken as the state's goal to be tested by means scrutiny. It does not limit the nature of state ends to only those that are, say, "compelling" or "important." The state's ends only need be legitimate. It does not require a certain level of connection between state means and ends, but only requires use of less intrusive or more effective alternatives compared to the means/ends connection that does exist. Since the state usually has far superior access to data concerning alternatives and their effectiveness, it does apply the burden of proof to state. This burden, however, is to be applied in a sensitive manner so as not to make placement of the burden of proof the primary determinant of the outcome in most cases.

All the other theoretically possible intermediate tests will be shown to be too indistinct from the rational basis or compelling state interest test to complement them in a constitutional decision-making scheme. It will be demonstrated in particular that the presently-used "intermediate test" differs little, if at all, from the compelling state interest test and that it therefore is not a useful complement to constitutional adjudication when conceived as part of a set of tests comprising a comprehensive decisionmaking scheme. A similar analysis will be ventured concerning Professor Gunther's influential rational basis test with bite. It too incorporates so much ends scrutiny that it is not a useful complement to the compelling state interest test. Establishing the above propositions will require close analysis of the possible meaning of each constituent part of the various constitutional tests.

I have written elsewhere[8] about the general functions of standards of review and will not repeat that discussion here. Suffice it to say that standards of review constitute constitutional law only if they are specific and clear enough to be made known to those to be protected and governed by the constitution. This includes potential litigants on both sides as well as the courts. If standards of review are too vague, amorphous and indeterminate, potential plaintiffs will not know what their "rights"[9] are, potential defend-

8. *See* Speece, *supra* note 1.

9. "Rights" is not used here as a precise term of art as in moral or ethical philosophy. It is used interchangeably with "claims" and "interests" that are recognized by the constitution. For a discussion of "rights" (in the more precise sense) that is very useful for lawyers, see RIGHTS (D. Lyons ed. 1979). Recall

ants will not know what their obligations are, and the courts will be able to decide as they please.

The rub is, of course: what is too vague, amorphous and indeterminate? I am not so naive as to embrace Justice Robert's infamous notion of placing constitutional provisions next to the facts and mechanically grinding out results.[10] I do contend, however, that, to serve as "law," standards of review must contain specific instructions regarding: (1) when each should apply;[11] and (2) how each addresses five steps of analysis which are potentially part of every standard of review and which together comprise all the logical components of standards of review.[12]

II. THE COURT'S CURRENT DOCTRINE

Let me begin support of my claims by briefly articulating the standards currently embraced by the Court: the rational basis, intermediate and compelling state interests tests. I will isolate five constituent elements of these tests which together constitute all the logical components of standards of review. I will next more closely examine each of those constituent elements insofar as it applies to each of the three tests.

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that I am assuming and not developing a defense of the efficacy of standards of review and of the very concept of rules or standards in the law generally. For a discussion of the limits of this article see *supra* note 1.

10. Justice Robert's infamous notion is stated in *United States v. Butler*. 297 U.S. 1 (1936). The Court stated that:

> [a]ll legislation must conform to the principles [the Constitution] lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, . . . is the power of judgment.

Id. at 62-63.

11. Once again, I will not discuss when various standards do or should apply. For a general discussion of the topic of justifying invigorated scrutiny, see Speece, *supra* note 2. I will venture a few speculations. The Court might decide that it is best to (1) replace the rational basis test and (2) use this replacement and the compelling state interest test in a two-tier system. It might also decide to simply replace the intermediate test with another one. If it were to do the latter, cases in which it *might* be appropriate to use intermediate scrutiny include cases where there are not very grave intrusions on fundamental rights, there are substantial intrusions on quasi-fundamental rights, there are intentional quasi-suspect classifications, there are suspect-classifications by impact only and without intent, there are benign discriminations or there are combinations of the preceding. But would the "rules" about when intermediate scrutiny should apply then be too complex and manipulable?

12. For a discussion of the components of standards of review, see *infra* text accompanying notes 26-27.

After this, it will be possible to examine the same five constituent elements insofar as they pertain to possible alternatives to the present intermediate test. This will include a general description of possible alternative intermediate tests and detailed analysis of two of those alternatives: (1) the rational basis test with bite; and (2) the alternative principle offered as an independent standard of review.

The most often used and presumptively applicable standard is the rational basis test.[13] A frequently cited articulation of the test is found in *McGowan v. Maryland*:[14]

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[15]

Perhaps the most often-cited exposition of the compelling state interest test is from *Shapiro v. Thompson*:[16] "[A]ny classification which serves to penalize the exercise of [a fundamental] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[17]

Although *Shapiro* and *McGowan* are equal protection cases, the Court applies substantially the same tests in due process

13. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 448-51 (2d ed. 1983).

14. 366 U.S. 420 (1961). Department store employees challenged the constitutionality of a Maryland law prohibiting the sale of certain items on Sundays. The employees alleged that there was no rational relationship between the legislative objectives and the statute. The Court held the statute valid on the grounds that it did meet the legislature's secular goal of prescribing a day of rest. *Id.* at 445.

15. *Id.* at 425-26 (citations omitted).

16. 394 U.S. 618 (1969). Welfare recipients challenged statutes in three districts which denied welfare assistance to residents who had not resided within the jurisdiction of the state or district for at least one year immediately prior to applications for assistance. The Court held the statutes unconstitutional because there was not a rational relationship between the statutes and the legislative objectives. "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause." *Id.* at 638 (footnote omitted) (emphasis in original).

17. *Id.* at 634 (citations omitted) (emphasis in original).

cases.[18] The first clear articulation of the Court's intermediate test[19] was in *Craig v. Boren*,[20] a sex discrimination case where it observed that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[21]

The Court, however, has sometimes employed several different techniques of intermediate review.[22] In addition, several commentators have tried to formulate various tests for intermediate review that, unfortunately, are similar to the "intermediate test."[23] The Court's articulation of a test in *Craig* may mark the adoption of an explicit intermediate standard that will be applied when review beyond the rational basis test, but short of the compelling state interest standard, is thought appropriate.[24] The use of a uniform third test, if truly distinct, would better serve as a rule of law since the use of several intermediate tests is too uncertain to provide any guidance or limitation of discretion. Moreover, if a specified form of intermediate review is thought appropriate in equal protection cases, it should and probably will be extended—just as the compelling state interest test has been—to the due process context.[25]

Here I will neither analyze each intermediate test that has been suggested by various authorities nor, separately, each intermediate test that is theoretically possible. That would be a tedi-

18. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 13.

19. For a discussion of the sex discrimination cases, see *supra* note 3.

20. 429 U.S. 190 (1976).

21. *Id.* at 197.

22. L. TRIBE, *supra* note 7, at 1601-10.

23. For a discussion of the various tests, see *supra* note 5.

24. It is beyond the scope of this article to discuss if and when an intermediate test should be used. For a discussion of the scope of this article see *supra* notes 7 and 11. Beyond the due process/equal protection context consider intermediate scrutiny of speech plus conduct, commercial speech and access to experimental (as opposed to established) therapies. *See e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (ban on promotional advertising by electrical utility struck under intermediate standard); United States v. O'Brien, 391 U.S. 367, 377 (1968) (penalty for draft card burning upheld under intermediate test); Speece, *supra* note 1. For a further discussion, see *supra* note 13 and *infra* note 44.

25. It might be suggested that the additional value of equality in equal protection cases and the tainted history of substantive due process review justify use of intermediate review only in the former context. True intermediate review, however, provides an opportunity for relaxation of scrutiny short of the compelling state interest test as well as an opportunity for invigoration of scrutiny beyond the rational basis test. Moreover, use of different standards in equal protection and due process cases would add confusion and ambiguity to the law rather than certainty and control of discretion.

ous, if not impossible, endeavor, and it is just as instructive to do a general meta analysis of what possible forms intermediate scrutiny might take and to scrutinize two specific alternatives to the "intermediate test:" the rational basis test with bite and the form of the alternative principle described above.

III. THE FIVE LOGICAL COMPONENTS OF STANDARDS OF REVIEW AND THE CATEGORIES OF ENDS AND MEANS SCRUTINY

A. *The Five Components, Continua of Each and the Range of Possible Tests*

Close examination of the rational basis, intermediate and compelling state interest tests reveals five levels of analysis or questions that capture the analytical structure of all forms of review: (1) what state interests are relevant as possible justifications for state action that interferes with an individual claim of right?[26] (2) what state interests are of a sufficient nature to count toward justifying such state action? (3) what degree of connection is required between the state's action and its interests? (4) what is the relevance, if any, of alternative actions by which the state could attain more of its interests at the same cost to the state or the same amount of its interests with less cost to individual rights? (5) what are the appropriate "burdens of proof" (the burdens of producing evidence or arguments and of persuading the decisionmaker of certain facts or normative claims) regarding each of the above four issues?

As will be more fully discussed in Section VI below, one can exhaust the range of possible standards of review by constructing continua of answers to each of the five questions set forth here. This process theoretically could yield an infinite number of standards of review.[27] In practice, however, the subtle differences in the various degrees of scrutiny within each of the five continua would not be sufficient to mark sharply separate standards of review capable of guiding and limiting those who are protected by, governed by, and apply the constitution. The same is true even of the differences among the five categories themselves (save the category of consideration of more effective or less restrictive alternatives).

26. "Action" includes action, means, and classifications.

27. This could be what Justice Marshall describes as a sliding-scale approach. For a discussion of Justice Marshall's sliding-scale approach, see *supra* note 7 and accompanying text.

B. *The Five Components Can Only Be Divided Into Two Sufficiently Distinct Categories: Means and Ends Scrutiny*

Close examination of the five levels of analysis reveals that there are really only two categories of distinct forms of analysis—means scrutiny and ends scrutiny—contained within them. Burden of proof acts as a separate analytical construct cutting across both. The import of these two categories is that they virtually exhaust the possibilities of significantly discrete forms of analysis that might serve as sufficiently distinct standards of review in a set of standards comprising a decision-making scheme. As will be illustrated, it is possible to distinguish between different forms of means scrutiny in the rational basis test and the alternative principle. However, this is not possible with ends scrutiny. Any standards that contain ends scrutiny will be too indistinct from each other to serve in the same decision-making scheme. Use of such indistinct standards—as with the Court's current use of the compelling state interest and "intermediate" tests in equal protection adjudication—does not provide guidance or restraint to potential litigants or the courts.

1. *Ends Scrutiny*

The first category I will consider is that of state ends. Ends scrutiny is the process of analyzing state action by determining whether it must be stricken because it is associated with either illegitimate or insufficiently valuable ends. The most stringent form of ends scrutiny is arguably the rare determination that an end is illegitimate. If so, it can never justify state action. Most ends scrutiny, however, occurs in the form of a determination that an end (a) is not valuable enough to justify state action whenever a certain test (e.g., the compelling state interest test) is to be applied, (b) is not valuable enough compared to the individual right at issue in a given case, or (c) is not valuable enough given the amount of it advanced by the state's means. A final form of ends scrutiny is limitation of what ends the Court will even consider relevant to justification of state ends. For example, will the Court consider any interest, asserted, or only actual state interests?

The category of ends scrutiny thus encompasses four strands: (1) what state ends will even be deemed relevant or subject to consideration by the Court,[28] (2) whether and what (illegitimate)

28. This includes the issue concerning which government entities will be allowed to assert particular interests. For example, the federal government has certain interests in regulating aliens but the Civil Service Commission is not the

ends will be fatal to the state,[29] (3) what level of import or value

proper body to invoke that interest. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (United States Civil Service Regulations excluding aliens from civil service positions violate due process). *A fortiori* the states have even more limited interests in regulation of aliens. *See In re* Griffiths, 413 U.S. 717 (1973) (striking Connecticut court rule restricting admission to bar to citizens).

The main concern in this strand of analysis, however, is whether "any," "ostensible," or only "actual" state interests will be considered.

29. It is beyond the scope of this article to discuss issues concerning the degree of generality with which the state will be allowed to articulate its ends and its means. This is a topic which deserves much more attention than it has received in the literature. *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

This article also will not discuss the complicated question of whether and what illegitimate ends will be fatal to state action. The Court has discussed this issue in the context of alleged racial discrimination. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). The Court observed:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing.

Id. at 270-71 n.21. The Court thus has made clear that, at least in the context of alleged racial discrimination, an improper motive or purpose standing alone is not fatal. A question remains, however, even in this context whether the saving purpose must meet the rational basis test or the compelling state interest standard. On this question, see Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 945 (1978) (racial motivation or purpose should be fatal to state action); Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Motivation*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1261-75, 1281-84 (1970) (proof of impermissible racial purpose should require only that government show some legitimate, rational basis for different treatment). Given the fairly lax effect of improper goals even in the context of racial discrimination, it would not appear that improper ends are *per se* fatal to state action even in the context of cases dealing with fundamental rights or suspect classifications other than racial classifications. When ordinary rights and classifications are at issue, perhaps there is even a lesser effect of an illegitimate purpose. Perhaps the Court will not even investigate for illegitimate purposes but will simply rely on any conceivable legitimate purpose. In other words, not all illegitimate purposes may be as constitutionally odious as an illegitimate purpose to discriminate on the basis of race or another suspect criterion. However, in a few recent cases, a divided Court has employed the illegitimate purpose doctrine to strike state actions even under the rational basis test. *See* Williams v. Vermont, 472 U.S. 14, 23 (1985) (Court, 5 to 3, struck motor vehicle use tax statute as there was "no legitimate purpose, . . . that is furthered by this discriminatory exemption."); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (striking Alabama domestic preference tax on gross premiums of foreign insurance companies; Court held, 5 to 4, that state could not meet rational basis test as its only purposes were illegitimate).

will be required of state ends, and (4) what probability and magnitude[30] of the state ends will be required to justify state action. The fourth and last strand is often categorized with means scrutiny, but that is erroneous. Examination of this strand necessarily involves a similar determination of the relative value of state ends entailed in the first three strands. Furthermore, it would be irrational to decide cases solely by considering the level of import or value of state ends while ignoring the probability and magnitude of those ends actually involved since these components invariably go together in any rational decision-making process.

The first of the two categories to be considered here—ends scrutiny—thus involves four separate strands. At least two of those strands—the nature or import of state interests *and* the probability and magnitude thereof—are inextricably bound together. It makes no sense to consider either of the two alone, and each involves a normative judgment about state ends. Each is therefore ends, not means scrutiny. I will develop this point further in Section IV B below.

I will also establish, in Section VI, that the other two strands of ends scrutiny—determining what interests are relevant or even subject to consideration and determining the effect of "illegitimate state interests"—are either too indistinct from other forms of ends scrutiny or too insignificant to be considered discrete, intermediate standards of review.

2. *Means Scrutiny*

The second category of constitutional review is means scrutiny. In addition to the traditional rational basis test's requirement of any conceivable connection between state means and ends,[31] only the fourth of the five levels of analysis set forth above truly qualifies for inclusion in this category. Recall that this level

Although a full investigation of the effects of illegitimate purposes is beyond the scope of this article, I will venture into this area far enough to argue that giving different effects to illegitimate state purposes under various tests would not alone serve as an adequate distinction to sharply mark and constitute a distinct intermediate standard. I will also observe that future efforts to analyze the effects of illegitimate purposes should differentiate three issues: the effect of illegitimate purposes (1) in establishing a prima facie case; (2) in justifying some form of invigorated scrutiny; and (3) in determining whether the state's conduct is justified under the appropriate standard of review once that standard has been determined.

30. As discussed *infra* in the text accompanying note 54 any reasonable analysis must consider the product of the probability and magnitude of state ends.

31. As pointed out *infra* in the text at notes 53 and 54 the rational basis test

of analysis is the relevance of alternative actions by which the state could obtain more of its ends at the same cost or the same amount of its ends at less cost to individual rights. This form of means scrutiny collapses into ends scrutiny if it involves forcing the state to use less effective alternatives. Then a certain degree of some state end must be sacrificed based on a judgment that the probability and magnitude of the state end advanced by its chosen course of action does not justify the particular intrusion on individual rights at issue in the case. If, however, the alternative principle is construed to require use only of more or equally effective alternatives at the same cost, a sharply different process emerges. Although one determines the efficiency of alternatives by examining how each alternative or means advances state ends, there is no judgment about the relative value of state ends and individual rights. Rather there is a simple determination that gratuitous interferences with individual rights will not be tolerated; if state means can be less onerous with no sacrifice of state ends, the less onerous means must be employed. This is strictly means scrutiny.[32]

3. *Burden of Proof*

As already stated, "burden of proof" is a separate topic that cuts across the above two categories.[33] Burdens of proof involve placement of the risk of error in decisionmaking with either the individual or the state. Whenever the state is given this burden, its ends are threatened. In this sense, then, burden of proof could be placed within the ends scrutiny category. This is especially true if the burden is placed because of a determination that the state end at issue is, generally, less important than the threatened individual right. The similarity between burden of proof and ends scrutiny is also manifest when one considers that the state interest can be articulated so as to incorporate notions of risk of error in decisionmaking. Thus, the state might determine that an activity it decides to regulate poses only a small probability of a low magnitude of risk to a highly valued state in-

becomes ends scrutiny if it is interpreted to require more than a non-zero probability of a non-zero magnitude of the state interest.

32. This assumes that the state's interests will not be artificially discounted when costing out and assuring that it gets the biggest bang for its buck.

33. Burdens of proof technically apply only to factual as opposed to legal questions. It is, nevertheless, strictly accurate to refer to burdens of proof concerning factual questions underlying legal determinations and "rules of construction" (still burdens of production and persuasion) regarding legal issues.

terest.[34] Its interest, then, is to avert a small possibility of a low magnitude of risk to a highly valued state interest (*e.g.*, a five percent chance (probability) of losing one (magnitude) life (highly valued interest)). Placement of burden of proof in this case seems, intuitively, rather redundant or confusing. Must the state show, for example, that it is more likely than not that its regulation has a small probability of protecting a highly valued interest?

However, the state's interest is not often articulated to include probability and magnitude, and burden of proof can be assigned on bases other than the relative value of the state interest and individual rights at issue. It can also be assigned to the side that is attempting to change the status quo and disturb settled expectations. Additionally, such burdens can be placed on the side that has access to the evidence or data that bears on the question before the Court. When the state interest is explicitly stated as lying in a mere possibility of some limited amount of a goal or when burden of proof is assigned based on the relative value of the individual and state interests, burden of proof is clearly ends scrutiny as it involves the possible rejection of state action as its ends are not valuable enough. If not, burden of proof is appropriately conceived of as an issue cutting across means and ends scrutiny.

Even then, however, burden of proof is not sufficiently different from ends scrutiny to serve in itself as an independent form of intermediate review. One could argue, to be sure, that a promising form of intermediate scrutiny might be simply to place the burden of proof on the state at only one of the four levels of analysis discussed above (relevance; nature; means/ends connections; and alternatives). However, since burden of proof is so potentially entwined with ends scrutiny and since the first three of the four levels of analysis involve ends scrutiny, that does not appear to be an effective alternative. Only a sharply different mode of analysis can effectively provide guidance and limit discretion. As will be developed below,[35] that mode of analysis is the alternative principle based on either the actual *or* asserted state end(s) and with a limited burden of proof on the state.

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34. An example of this is in certain civil commitment statutes that require clear and convincing proof of only a small probability of risk to safety as a predicate to institutionalization. *See* Monahan and Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37 (1978).

35. For a discussion of the alternative principle, see *infra* notes 140-54 and accompanying text.

IV. THE THREE CONTEMPORARY TESTS AND THE CATEGORIES OF MEANS AND ENDS SCRUTINY

Let me turn to the rational basis, "intermediate," and the compelling state interest tests and examine their specific relationship to (1) the five levels of analysis listed above, and (2) the categories of means and ends scrutiny just discussed.

A. *What State Interests Are Relevant?*

Under the rational basis test *any* interest that might be furthered by state action is relevant and will be considered as a possible justification for the action whether the state actually considered or even asserts the interest at trial. The test accepts, in other words, positive effects as well as ostensible (foreseeable), actual (in fact motivating), and asserted purposes. The Court does not even require the state to assert its interests, let alone show that they were foreseeable or in fact embraced at the time the state action occurred. The Court will strain to conjure up interests that uphold the state action, while the individual bears the virtually impossible burden of presenting data sufficient to persuade the Court that no legitimate purpose is conceivable.[36] Under both the intermediate and compelling state interest tests, on the other hand, relevant interests include only *actual*, asserted purposes.[37]

36. *See* L. TRIBE, *supra* note 7, at 1439-43. But for a contrary point of view, see *supra* note 30.

Asserted, actual purposes are those that were actually substantial factors in causing the state to act (actual) and that it mentions and relies on in defending its action (asserted). Conceivably, a state action could be upheld on the basis of an actual purpose that the state no longer asserts. However, if a standard of actual purpose is employed, the Court should accept only *asserted* actual purposes. The goal of notifying constituencies of the goals sought by officials supports the requirement of both actual and asserted purposes. The additional goal of striking outdated laws supports the requirement of asserted purposes. *See infra* text accompanying notes 40-42 and 96. "Purpose" is treated here as encompassing, but not necessarily consisting of, motive. It is beyond the scope of the article to explore the possible distinctions between "purpose" and "motive," but for a discussion of the possible distinctions, see Ely, *supra* note 29, at 1217-21; Heyman, *The Chief Justice, Racial Segregation and the Friendly Cities*, 49 CALIF. L. REV. 104, 115-16 (1961); Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439, 440-44 (1961); MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 757 (1966); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1887 n.1 (1970).

37. In *Craig v. Boren* (state statute allowed females to consume "near beer" at age 18 but proscribed consumption by males under age 21), the Court implied that it might not accept anything except actual purposes under the intermediate test. 429 U.S. 190, 199 n.7. In *Califano v. Goldfarb* (state gender-based classification of old-age survivor benefits struck), the Court explicitly stated that it would accept only actual purposes. 430 U.S. 199, 212-13 (1977). The *Califano*

By considering all state interests relevant and placing heavy burdens on the individual, the rational basis test severely limits Court intrusion into the "political process."[38] The test provides predictability and restraint because seldom will the Court be unable to conceive of a legitimate purpose that might be served by the state action. Indeed, the test so severely limits intrusion into the political process that it does little to protect individual rights or improve that process.[39]

Court was not faced with the asserted-purposes question, but it is unlikely that it would require actual, but not asserted, purposes. Professor Tribe, moreover, argues that the Court has required purposes to be asserted as a technique of intermediate review. L. TRIBE, *supra* note 7, at 1604-08 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)). If the Court only accepts asserted, actual purposes when it applies intermediate scrutiny, *a fortiori*, it ought, and probably will, only accept such purposes under the compelling state interest test. Indeed, in one of the leading compelling state interest test cases—*Shapiro v. Thompson*, the Court surveyed several possible state interests and rejected them as justifications for residency requirements for welfare benefits because those interests were not actually pursued by the state. 394 U.S. 618, 627-39 (1969). However, in *Zablocki v. Redhail*, while indicating that a statute limiting the fundamental right to marry if one had dependent children did not actually evince a purpose to provide counseling prior to marriage, the Court observed that even if the state had considered the counseling purpose, that interest would not be sufficient. 434 U.S. 374, 388-89 (1978). This indicates that the Court *might* consider purposes other than actual purposes.

38. "Political process" here refers to the activities of government entities other than the courts, although the latter are, at least in certain senses, "political." *See* M. SHAPIRO, L. LEVY, JUDICIAL REVIEW, HISTORY, AND DEMOCRACY: AN INTRODUCTION, IN JUDICIAL REVIEW AND THE SUPREME COURT 1, 12 (L. Levy ed. 1967); FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 29-30 (1966); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 200-210 (1952).

39. *See* L. TRIBE, *supra* note 7, at 582. The reference here is to the Court's traditional or standard interpretation of the rational basis test. In rare instances the Court speaks the language of the rational basis test but in spirit applies a rational basis test with bite. When it does so, it is actually applying the intermediate form of review discussed by Professor Gunther and analyzed *infra* in the text accompanying notes 83-110. Indeed, it is just such cases that are the subject of Gunther's analysis.

It is beyond the scope of this article to discuss whether the Court should abolish its traditional or standard rational basis test analysis and replace it with another test. I do argue, however, that the rational basis test with bite is ends scrutiny and too similar to the compelling state interest test to mark or constitute a distinct test that would provide guidance and restraint. This is true whether the rational basis test with bite serves in place of the traditional rational basis test or as a test supposedly intermediate between the traditional rational basis test and the compelling state interest test.

Professor Gunther does not advocate replacing the traditional rational basis test. Rather, his suggestion is to keep that test for a specific range of cases. For a further discussion, see *infra* text accompanying notes 107-09. In most cases, however, he would replace the traditional rational basis test with the rational basis test with bite. He would not rely on the traditional property-liberty distinction to determine when the traditional rational basis test as opposed to a more

The "intermediate" and "compelling" state interest tests, on the other hand, favor individual rights and improvement of the political process at the cost of significantly less restraint of Court intervention into that process. Those tests apparently limit the state to actual, asserted purposes, while placing burdens of proof regarding those purposes on the state.[40] Illegitimate, actual purposes are either dispositive against the state or, more likely, require it to show that such purposes were not necessary causal elements of the state's action.[41] Requiring proof of legitimate, actual asserted purposes arguably discourages resort to illegitimate purposes and gives the state an incentive to build a record as to the purposes of its actions at the time they are taken.[42] Political accountability is, therefore, theoretically encouraged since the actual purposes of the state action are immediately exposed. Such a system tends to ensure that individual rights will only be sacrificed to legitimate interests and encourages legislators to design a particular action to achieve a specific purpose. Additionally, this system leads to invalidation of laws motivated by interests that are no longer embraced by the electorate and so are not asserted by the state in litigation.

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invigorated test should apply. Rather, his guidepost would be "institutional competence." The traditional rational basis test would be applied when the Court did not have the institutional capacity to properly resolve controversies.

40. For a discussion of the tests' limitations to actual purposes, see *supra* note 37.

41. For a discussion of the effect of actual, illegitimate purposes, see *supra* note 29.

42. See L. TRIBE, *supra* note 7, at 1604-09. A more cynical view is that a requirement of proof of actual purpose will encourage legislative subterfuge and fabrication of purposes. Perhaps a related view is that the political/legislative process is not supposed to consist of instrumental attempts to achieve discrete social goods, but rather is to be an arena in which individuals and interest groups strike deals to further their own ends. Indeed, some attack the very notion of "social" choices, values or goods. For a good description of the "social good" or instrumental model assumed in the text and the bargaining (or "public choice") model alluded to in this footnote, see Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 17-21 (1980). It is beyond the scope of this article to elaborate on these models or to defend any version of the social good model. I assume the social good model and rest on the defense ventured by Bice and the authorities he cites. For a criticism of the theory of intentions that Bice's version of the social good model rests upon, see Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 348-52 (1985). Finally, for further arguments against the requirement of proof of actual purpose and a defense of that requirement, see Speece, *supra* note 1, at 1304-07.

B. *(i) The Nature or Import Required of Ends the State Uses to Justify Its Actions and (ii) the Connection Required Between Those Ends and the Means Used to Attain Them*

Examining the nature or import required of interests or ends the state uses to justify its actions is commonly thought of as the paradigm example of "ends scrutiny". This is because the concern most explicitly pertains to goals of state action. Examining the connection required between means and ends, on the other hand, is often described as means-focused scrutiny, as the concern is most explicitly with the means. As indicated above,[43] however, close examination of both processes reveals a striking similarity between the two and their ultimate common concern with normative judgments concerning the relative value of state ends and competing individual rights. This relationship is manifest in comparison between the processes entailed in the compelling state interest and "intermediate" tests of determining whether a state end is "compelling" or "important," on the one hand, and whether that end is "substantially advanced," on the other hand. As will be demonstrated, the propositional structure is basically the same in each of these processes. The differences are in degree, not kind.

The premise here, once again, is that individual standards of review must be sharply different to serve as genuine alternatives within one set of standards comprising a comprehensive decision-making scheme. Specifically, the relationship between investigating "compellingness," "importance," or any requirement that the state's interest be more than legitimate,[44] on the one hand, and

43. For a discussion of means and ends scrutiny, see *supra* text accompanying notes 26-33.

44. An illegitimate state interest is one that is beyond the power possessed by the government or one that is construed to be prohibited to it. The former limitation is of little more than theoretical importance. There do not seem to be any practical limits even on the power of the federal government although it theoretically has no general police power and the tenth amendment arguably indicates that the central government only possesses delegated powers. *See* L. TRIBE, *supra* note 7, at 386-97. Thus, only the concept of prohibited powers gives any practical content to "illegitimate purpose." Two recent cases construed certain ends to be prohibited to the states. Williams v. Vermont, 472 U.S. 14 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985). For a discussion of these cases, see *supra* note 29. *See also* L. TRIBE, *supra* note 7, at 386-97 (hybrid case of federal power being limited by recognizing assertion of states' rights in National League of Cities v. Usery, 426 U.S. 833 (1976), which was overruled in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

Of course, a cynical Court could *sub rosa* interpret "illegitimate" so as to simply disallow the state power to pursue ends the Court did not consider to be important enough. Thus far, the Court does not seem to have abused the doc-

considering the connection between state means and ends, on the other, is too close to mark distinct tests. In each process there is an empirical investigation regarding either the nature or extent of state interests. And in each process there is a normative judgment made about the value or worth of the nature or extent of state interests. Any standard of review that incorporates significant portions of either process: (1) cannot be described as means-focused; and (2) is so similar to any other standard that incorporates a significant portion of either process that it is too indistinct to serve as a useful complement to such other test in a comprehensive decision-making process.

To develop these points I will investigate in detail the rational basis, intermediate, and compelling state interest tests and how they relate to the issues of the nature and import of state ends and of state means/ends connections. Once again, only certain ends may be used by the state to justify its actions, and the most commonly recognized limitation in this respect is that the ends must be legitimate, i.e., within the broad power possessed by the government and not prohibited by the Constitution. This limitation, however, has been of little significance in constitutional litigation regarding individual rights because the power possessed by government (either federal or state) is so vast and because there are relatively few constitutional prohibitions of ends.[45]

Although it has had little practical impact, the rule that only legitimate ends can be sought is well established.[46] Moreover, under the rational basis test, this limitation is the sole requirement concerning the nature or import of state ends. The intermediate and compelling state interest tests, however, require not only that the ends be legitimate, but also "important" or "compelling," respectively.

Concerning the required connection between means and ends, the rational basis test requires only any "rational" or "conceivable" connection, while the intermediate and compelling state interest tests require a "substantial" or strong connection.

trine in this way. *But see Williams*, 472 U.S. at 23; *Metropolitan Life Ins. Co.*, 470 U.S. at 883.

45. For a discussion of the lack of any practical limits on the power possessed by the government and the resulting lack of constitutional prohibitions of ends see, *supra* note 44.

46. *See supra* note 44.

1. *State Ends: However Construed, "Compelling" and "Important" are Indistinguishable and Thus Cannot Differentiate the Compelling State Interest and Intermediate Tests*

Given the above description of the black letter rules, one must ask what the various possible interpretations of them might be? Looking first to state ends, the requirement of a legitimate interest is relatively straightforward,[47] but there are several possible interpretations of "important" and "compelling": they relate to (1) attributes required of the state interest (e.g., that the interest must be necessary to the survival of the state or encompass protection of fundamental rights); (2) how high the state interest must rank among all possible state interests; or (3) the relative value required of the state interest as compared to the competing individual right in each case. "Important" and "compelling" might also incorporate notions about the probability and/or magnitude of the state interest at issue. Thus, for example, saving life might be considered a compelling state interest in a particular case even if the state action only promises a small possibility of saving one life, while protecting against impairment of minor health interests might be considered compelling in another case if the state action promises a substantial probability of protecting many persons. This latter conception of the extent or degree of the state interest (i.e., the interest's probability and/or magnitude) is best considered when investigating state means/ends connections. Usually, however, the compelling state interest test is articulated so as to treat the extent of the state interest as part of the determination whether that interest is compelling.[48] This just underscores the point that investigation of the nature or import required of the state ends, on the one hand, and the degree

47. For a discussion of the rule requiring legitimate ends, see *supra* note 44. *But see supra* note 29 discussing fact that not all illegitimate purposes are necessarily fatal to state action.

48. Perhaps the most often cited exposition of the compelling state interest test is from *Shapiro v. Thompson*: "[A]ny classification which serves to penalize the exercise of [a fundamental] right, unless shown to be necessary to a *compelling* governmental interest, is unconstitutional." 394 U.S. 618, 634 (1969) (emphasis in original). This formulation makes no reference to a separate substantial relationship requirement. The requirement must therefore be part of "compellingness." It might be thought that the word "necessary" in these articulations of the test incorporates a substantial relationship requirement. However, "necessary" refers strictly to whether there are alternative means by which the state can achieve at least the rough equivalent of its goals. The distinction between the necessity and substantiality requirements is demonstrated by considering that a state action can be found necessary, even if it does not substantially advance the state's goals, if all potential alternatives are even less effective.

of connection required between those ends and state means, on the other hand, are virtually inseparable processes. In any event, the probability and magnitude of the state interest must be considered at one step of the analysis or the other if the decision-making process is to be rational. Otherwise, the state could prevail under invigorated scrutiny by, for example, invoking the right to life in a case in which its action had a non-zero probability of saving one life, even if the costs of the state action were massive invasion of liberty or an even greater threat to life.

To facilitate further discussion, "compellingness," "importance" and the nature or import required of state ends generally will be considered apart from investigation of the required probability and magnitude of the state interest that is advanced by its action. The latter will be considered as part of the requirement that the state action substantially advance its goals.[49]

The Court has never set forth specific attributes characterizing compelling or important state interests. I and others have tried to isolate factors relevant to the issue, including that the state interest must: (1) be more than economic, (2) involve state protection of a fundamental right, (3) be closely tied to representative democracy, (4) be necessary to survival of the state, (5) be important to the individual, (6) be specific, (7) bear a nexus to previously recognized compelling or important state interests, or (8) not concern paternalistic intervention.[50] The Court could explicitly develop such a list of attributes and then specify which (sets of) conditions would be considered necessary and sufficient to characterize an interest as either "compelling" or "important." Alternatively, such sets of criteria can be gleaned from a long line of precedents and argued to the Court. Without some such specification, characterization of a government interest as "compelling" or "important" is almost without limits. Indeed, it is my contention that the Court's present approach does nothing to distinguish between "compelling" state interests, on the one hand,

49. Once again, however, if the investigation of (1) the nature or import required of state ends directly includes consideration of (2) the probability and magnitude of those ends—as is at least sometimes the case—my point about the inseparability of the two processes ((1) and (2)) is even more potent. For a discussion of probability and magnitude of state ends, see *supra* note 48 and accompanying text.

50. I have suggested that an analysis of "compelling" should draw heavily on similar analysis of the attributes of fundamental rights. *See* Speece, *supra* note 1, at 1320 n.102. For a discussion concerning attributes of fundamental rights, see Speece, *supra* note 2, at 1062-75. *See also* Note, *supra* note 5, at 479-80.

and "important" state interests, on the other.[51] Specifying criteria to distinguish between "compelling" and "important" in a principled manner sufficient to distinguish them for purposes of sharply delineating two distinct but complementary tests is an impossible task, at least drawing solely on specific attributes. It is

51. The Court has not even adequately defined "compelling," as evidenced by the Court's unclear and inconsistent approach. In some cases, it seems clear that the Court is balancing the particular state and individual rights involved in the case. *E.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (Court held that government could not require parental consent for abortions under applicable compelling state interest test because "[a]ny independent interest the parent may have . . . is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."); *see also* Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam) ("[B]urdens on individual rights . . . must be weighed carefully against the interests which Congress has sought to promote by this legislation.").

In other cases, however, it appears that the Court is considering the state interest independent of the competing individual interests. (Even then, it is engaged in balancing the state's interest against other state interests, the latter interests often including, of course, protection of individual rights held by all or large segments of society.) *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972). The *Dunn* Court first observed that the state could justify durational residency requirements, which totally abrogated plaintiff's right to vote and abridged his right to travel interstate, only by showing a sufficiently important or compelling state interest. *Id.* at 342-43. The Court then observed that the state's goal of assuring *bona fide* residence would be considered sufficiently important or compelling because it "may be necessary to preserve the basic conception of a political community." *Id.* at 344. The Court did not compare this interest to the right to vote and travel although it did strike down the one-year residency requirement as not necessary to achieve the state's compelling goal. *Id.* at 345-46. *Dunn* might be interpreted as a case in which the Court balanced the state's interest against the entire range of potential state interests and found it to be sufficiently weighty to be considered "compelling." Alternatively, the Court might have found the state's interest "compelling" because it possessed a certain attribute: "necessary to preserve the basic conception of a political community." *Id.* at 344.

In still other cases it is not clear what approach the Court is following. For example, in *Roe v. Wade*, the Court held that the state's interest in maternal health became compelling at approximately the end of the first trimester because until then "mortality in abortion may be less than mortality in normal childbirth." 410 U.S. 113, 163 (1973). This might be saying that the nature of the state interest is compelling, irrespective of the competing right, as long as it is advanced to any degree. Yet, balancing is suggested by the Court's indication that maternal health would not justify prohibiting, as opposed to regulating, abortion. *Id.* at 163-64. Similarly, the Court found that the state interest in potential life became compelling at "viability" "because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. This suggests that the nature of the interest alone, as opposed to its importance vis-a-vis the individual's interest, is sufficient. If this were true, however, the interest in potential life, which the Court admitted might exist prior to viability, *id.* at 150, would allow the state to regulate any time after conception. The Court thus seemed to contemplate that only at viability did the interest become weighty enough when compared to the woman's interest. In the same vein, it summarized its holding as being "consistent with the relative weight of the respective interests involved." *Id.* at 165.

not principled, for example, to argue that an interest is compelling if it is *necessary* to the survival of the state but only important if it is *helpful* to the survival of the state. Similarly, it is not principled to argue that an interest is "compelling" if it is (1) more than economic, (2) specific, and (3) closely tied to representative democracy, but is only "important" if it shares any two of those three attributes.

Rather than relying on attributes such as "necessary to survival of the state," "compellingness" and "importance" could be determined by more directly placing the state interests among a normative rank ordering of all state interests. Those toward the very top of the list (e.g., life?) could be considered "compelling," while those just below that (e.g., health?) could be considered "important." Once again, however, there would not seem to be any principled or predictable way to distinguish the "compelling" from the merely "important."

Another possibility would be to judge "compellingness" and "importance" by comparing the state interest to the individual right involved in each specific case. An interest could qualify if it were "just as," "more," or "much more" important than the individual right. Frank balancing has sometimes been attacked as usurpation of judicial power.[52] It does not seem, however, to be any more amorphous or subject to manipulation than rank ordering a state interest among all possible state interests. Indeed, the processes are almost identical because the rank ordering of a state interest among all state interests would not take place until the individual rights or interests at stake were ranked as fundamental or quasi-fundamental or as involving suspect or quasi-suspect classifications. Whether interests are ranked among all state interests or in comparison to competing individual rights in each case, therefore, there is examination of both the individual and state interests. In any event, if the state interest is compared to the individual right case-by-case, there is really no difference con-

52. *See, e.g.*, Lee, *Mr. Herbert Spencer and the Bachelor Stockholder:* Kramer v. Union Free School District No. 15, 15 ARIZ. L. REV. 457, 472-74 (1973). Regarding the converse point that *ad hoc* balancing insufficiently protects individual rights, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963). For an argument against balancing as the predominant form of constitutional adjudication, see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). Aleinikoff's article asserts that the development of a third-tier in equal protection and due process doctrine evidences the Court's move to balancing there as in numerous other contexts. *Id.* at 966-71. I agree that the third-tier or intermediate test consists of balancing individual and state interests and thus is ends scrutiny. The alternative principle espoused here does not allow such balancing or ends scrutiny.

ceptually between "compelling" and "important"—each is determined by the same process of comparison to the competing individual right. One could separate the two by stipulating, for example, that "compelling" means "*much more* important" than the competing individual right, while "important" means just "*more* important" than the competing right. A slight distinction between "much more" and "more" does not constitute the sharp difference that must exist to offer predictability and restraint. Note too that, whatever the required relationship between the state interest and individual right is, it seems most artificial to make any such comparison without considering the probability and magnitude of each.

To summarize, there are three ways to conceive of "compelling" and "important," none of which seems to enable a predictable or principled distinction between the two. For this reason, if the "intermediate test" is to serve as an alternative and complement to the compelling state interest test in a comprehensive set of standards, it must be justified as such on some basis other than a supposed difference between "compelling" and "important."

2. *Means/Ends Connections: Their Determination Usually Constitutes Ends Scrutiny*

a. The Rational Basis Test's Requirement of a Rational Connection

The rational basis test requires a conceivable or rational connection, while the "compelling" and "intermediate" tests require a strong or substantial connection. If the rational basis test is interpreted just to require that there be a non-zero probability of advancing a non-zero magnitude of the state interest, then it is sharply different from the compelling state interest and intermediate tests on the issue of the required state means/ends connection. As so construed, it is a sufficiently distinct test to provide guidance and restraint. And this is the way the test is usually construed by the Court.[53] If, however, the rational basis test is interpreted[54]—as is sometimes done by the Court—to require some normative judgment case-by-case about what degree of probability and/or magnitude of the state interest must be advanced, it is in essence the same as the other two tests. The logi-

53. For a discussion of the ways the Court construes the rational basis test, see *supra* note 39 and accompanying text.

54. For a discussion of the rational basis test, see *supra* note 39 and accompanying text.

cal structure is the same and the same judicial tasks are demanded. The only difference then is a theoretical one in the degree of the required fit rather than in the kind thereof. Specifying different required degrees of fit seems to be an unmanageable task. Nothing seems to be added by saying the degree of fit is sufficient if any "rational," "reasonable" or "non-arbitrary" person would accept it. Giving content to terms such as "arbitrary" depends on the subjective interpretation of each judge. Those subjective interpretations can be so varied that if the rational basis test is interpreted to require some unspecified degree of fit beyond a non-zero probability of a non-zero magnitude of a state interest, it can be manipulated to not even differ in degree from the substantial or strong connection required under the "compelling" and "intermediate" tests.

I have argued that if one moves beyond a requirement of a non-zero probability of advancing a non-zero magnitude of a state interest to a more stringent interpretation of "rational" requiring that there be a connection sufficient to convince a rational person, there is no principled or practical way to distinguish the means/ends connections required under the rational basis test from the relationship demanded under the compelling state interest and intermediate standards. But are there other ways one could calibrate or distinguish among various levels of required connections between state means and ends? I realize as I go through the many possibilities here that they are strained and tedious, but we must labor over these possibilities to come to the realization that the only viable meaning of "substantial connection" (or any means/ends connection that requires something more than a non-zero probability of a non-zero magnitude of state interest) is one that incorporates normative comparisons involving state ends. The only way to question the authorities' repeated glib references to "in fact" or "substantial" connections is to vigorously explore the logically possible meanings of such concepts.

A first step is distinguishing more closely between the probability and magnitude of advancement of the state end. "Magnitude" means how many "units" of the state end will be advanced, e.g., one, ten, or more lives, if the end is saving life. "Probability" speaks to the percentage of likelihood of advancing any given number of units of the state end. Thus there can be a .01, .50 or .99 chance of saving one, ten or more lives. Although I realize that practically it would be absurd to do so, one theoreti-

cally could stipulate that a specified degree of either probability or magnitude is required. More likely, one could stipulate that a specified degree of the product of the probability and magnitude is required. The product of probability and magnitude (the "expectancy value") is the most logical as it seems patently irrational to consider either probability or magnitude alone. For example, is a 99% probability of saving a half a life "substantial" or "more substantial" than a 1% probability of saving many lives?

If one were to work from "expectancy value," there would still be an infinite number of possibilities to require of that value: that it be a high degree, a low degree, a medium degree, medium-low degree, etc. But how can one give content to "high," "low," "medium," etc. without some yardstick? One could use the yardstick of persons' perceptions based on their instincts about the quality of interests and the numbers involved. People might always consider any probability of saving even one *life* to be "high," while they might consider a *90% probability* of protecting a few persons' health to be "high." Or one could require that what will be acceptable is what "any reasonable person," "any reasonable minority," "most people," or a "consensus" would perceive to be a high, medium or low degree of advancement.

The foregoing possibilities all seem totally undisciplined as most persons would logically answer: I cannot state whether a certain probability of advancing a certain number of units of a certain interest is relevant without considering the *costs* of that action. Once the requirement is something more than a non-zero probability of advancing anything more than zero units of a state interest, there has to be a normative choice made case-by-case. Even if one accepts costs as a yardstick, there are still an infinite number of levels of the required relationship between the cost of state action and its benefits. Since the required connections are imposed by the courts, something less than a parity between court perceived benefits and costs might be sufficient to justify the state action. But what should be the specific required connection—benefits as at least one, 10, 50, 75 or 100 percent of the costs?

In addition to or as an alternative to specifying the required proportional relationship between costs and benefits, one could specify the degree of agreement about the acceptability of the relationship between the costs and benefits, e.g., the law is permissible if "any reasonable person," "any substantial minority," "most people," or a "consensus" would agree about the acceptability of the level of relationship between its benefits and costs. The latter

could be done prospectively or case-by-case. Thus it could be asked: Would any reasonable person consider acceptable a rule that state action is always justified if a reviewing court determines its benefits are at least 25% of its costs? Or one could simply ask in each case whether any reasonable person would consider the law justifiable if its benefits were at least 25% of its costs and another law were justifiable if its benefits were at least 30% of its costs. Another approach is that we could speak to the degree of confidence in our probability and magnitude assessments, e.g., we are 90% certain that there is an 85% probability of advancing X units of the state interest. We could then characterize the 90% as "substantial."

We do not seem willing to adopt any of the above possibilities as each is admittedly very arbitrary. What seems more acceptable is a direct question: Is the law substantially justified by benefits that are proportionate to its costs? This analysis obviously entails nonquantifiable normative judgments. But it is the contention here that all analysis of means/ends connections that goes beyond the traditional rational basis test's requirement of a conceivable non-zero probability of advancement of a non-zero magnitude of state interest requires this sort of normative investigation. All such forms of investigation are the same in kind although there *might* be slight differences in degree. Such slight differences in degree cannot be the stuff out of which one can construct distinct constitutional standards of review.

A case that illustrates the point that rational basis scrutiny with bite cannot usefully be distinguished from compelling state interest or "intermediate" scrutiny is *City of Cleburne v. Cleburne Living Center, Inc.*[55] There the city of Cleburne, Texas required certain mentally retarded individuals who wished to live together in a group home to obtain a special use permit to operate a group home in an area zoned as an "Apartment House District."[56] No similar requirement was applied to apartment houses, multiple dwellings, boarding and lodging houses, fraternities or sororities, dorms, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane, feeble minded, alcoholics or drug addicts), private clubs, fraternal orders and other specified uses.[57] The Court correctly stated that

55. 473 U.S. 432 (1985); *see also* Plyler v. Doe, 457 U.S. 202 (1982). For a discussion of *Plyler*, see *supra* note 3.

56. 473 U.S. at 436.

57. *Id.* at 447.

this difference in treatment would be constitutionally irrelevant if there were a rational basis for it within the meaning of the rational basis test.[58]

One could certainly conceive of legitimate state interests that would apply more strongly to the mentally retarded as opposed to the non-regulated groups. For example, the city cited the fear of legal liability.[59] The Court answered that all the other uses would present just as much chance of liability.[60] It is *conceivable*, however, that the mentally retarded could be more likely to wander into traffic and then precipitate a lawsuit for improper maintenance of safety features in roads. The Court had no empirical proof that this was not the case. It observed, however, that the city had not proved that there was a difference.[61] Of course, this was an inappropriate placement of the burden of proof on the government since the Court stated that it was using the rational basis test.

The Court disavowed using invigorated scrutiny because it held that the mentally retarded do not constitute a full or even a quasi discrete and insular minority.[62] It also refused to find that there was any fundamental right involved.[63] What the Court did in fact, however, was to decide that there was not *enough* of a possible difference between the mentally retarded and other groups to justify the limitations on the rights of the mentally retarded. This was a normative judgment just as there was in *Roe v. Wade*. I agree with the judgment, but not as a legitimate product of the rational basis test.

The same analysis is true as to other interests invoked by the state and rejected by the *City of Cleburne* Court as not sufficiently advanced: problems presented by a high number of people residing in one home, protecting the mentally retarded from flood hazards, congestion of streets and the neighborhood, limiting fire hazards, adducing serenity, and protecting other residents.[64] It is conceivable that the mentally retarded could present unique problems in each of these areas. As Justice Marshall concurring in the judgment in part and dissenting in part observed:

58. *Id.* at 446.
59. *Id.* at 449.
60. *Id.*
61. *Id.* at 450.
62. *Id.* at 442-47.
63. *Id.* at 446.
64. *Id.* at 448-50.

> The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate in at least two respects. The suggestion that the traditional rational basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational basis review—a small and regrettable step back toward the days of *Lochner v. New York*. Moreover, by failing to articulate the factors that justify today's "second order" rational basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.[65]

It has been hinted in the literature that the unwieldy process of analyzing means/ends connections can be tamed by merely requiring that there "in fact" be a connection between the state means and ends.[66] However, this step adds nothing to the above analyses unless it is conceived simply as a requirement that the state actually establish a non-zero probability of a non-zero magnitude of its goal being advanced by its means rather than rest on the *conceivable* chance of such a relationship. This amounts to a burden of proof requirement. As noted above,[67] change of burden of proof alone is not a good way to construct discrete constitutional tests. Paradoxically, such a requirement might be both too weak and too strong to serve as the sharp distinguishing characteristic that must mark tests if they are to be discrete enough to provide guidance and restraint. The requirement that there be a non-zero probability of a non-zero magnitude of the state interest is most likely to be insignificant in most cases. However, in some cases it would constitute much more ends scrutiny than would be

65. *Id.* at 459-60 (Marshall, J., concurring in part and dissenting in part) (footnote and citations omitted).

66. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976) (taking position that rational basis test requires *in fact* means/ends connections).

67. For a discussion of the burden of proof, see *supra* text following note 32.

desirable in a context not thought to justify the strictest scrutiny. It has been explained above how burden of proof often entails a significant degree of ends scrutiny. If it is applied in the context of controversial normative or technical/factual disputes, it might be dispositive. This is so because it is often impossible to meet any traditional burden[68] regarding certain normative disputes and regarding certain factual questions.

For example, if the state goal is to promote happiness and it must "in fact" demonstrate that it does so to just any extent, it might well lose because of a failure to establish just what happiness is in the case at issue. Similarly, if the state wishes to demonstrate that its action will "in fact" further safety—even just any amount—sometimes it will not be possible to do so even though one might easily *conceive* that such is the case. What if the state feels, for example, that certain controls on pornography will protect against sex crimes? Some social scientists might argue that such controls might actually exacerbate the possibility of sex crimes. If the studies are in conflict and all subject to methodological critique, the state may well lose simply because the trend or weight of the studies is not in its favor and the trier of fact finds this means there is no sufficient showing of an "in-fact" connection.[69] A similar analysis may well be what was fatal to the government in *City of Cleburne*.[70]

Conversely, if the burden of proof is placed on the individual, he might win simply because the trend or weight of ambiguous studies is in his favor. For this very reason it is my argument that the rational basis test is useful as a deferential and distinct test only if it is interpreted as requiring the individual to show that it is not even *conceivable* within common sense that there is a non-zero possibility of a non-zero magnitude of the state interest being advanced by its action. Anything beyond this leads to substantial ends scrutiny and tends to merge the rational basis test with the "intermediate" and compelling state interest tests. More specifically, it becomes the rational basis test with bite analyzed and criticized below as too indistinct from the compelling state

68. By "traditional burden" I mean a requirement that the plaintiff establish disputed propositions to a 50% plus probability, i.e., "more likely than not."

69. For a discussion concerning the empirical uncertainty regarding a supposed connection between pornography and sex crimes, see, e.g., GOLDSTEIN, A BEHAVIORAL SCIENTIST LOOKS AT OBSCENITY, IN THE CRIMINAL JUSTICE SYSTEM 1 (1977). Of course, the debate on this topic rages today with discussion of the "Meese Report." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986).

70. 473 U.S. 432.

interest and intermediate tests.[71]

Recall that I am not addressing whether the traditional rational basis or any other test should be used as part of a multi-tiered decision-making process. It can be argued that, as construed here, the test has no functional significance. It will simply announce the state's victory in every case. A counterargument is, however, that the traditional rational basis test is a useful one that allows the Court to defer to the state in appropriate circumstances and to strike state action when it is obviously non- or counter-productive. *If* one accepts the position that the rational basis test is no test at all, the possibility remains of using the alternative principle and the compelling state interest test in a two-tier decision-making process.

b. The Compelling State Interest and Intermediate Tests' Requirement of a Strong or Substantial Connection

An analysis of the logical meaning of the requirement of a strong or substantial connection under the "intermediate" and compelling state interest tests is virtually identical to that ventured above with respect to a rational connection requirement under the rational basis test. "Strong" or "substantial" connection could mean: (1) a substantial probability of advancing any magnitude of the state interest; (2) any probability of advancing a substantial magnitude of the state interest; (3) a substantial expectancy value of the state interest; (4) the expectancy value of the state interest *and* that value being of a certain importance by some explicit normative measure. Each of the foregoing could be supplemented by comparing advancement of the state interest with the nature and/or degree of intrusion on the individual right(s) in the particular case. It is neither more acceptable to nor more restrictive on the Court to adopt any of the first three possibilities above. Each would simply require or allow the Court to arbitrarily pick numbers and characterize them as "strong" or "substantial." Thus, a 60% probability of saving one life, any non-zero probability of saving ten lives, or a 50% probability of saving eight lives might be considered substantial. These judgments might be argued to be based on the intuitive grasp of the numbers involved, but they would in fact be normative judgments.

Explicitly recognizing some normative yardstick—the last op-

71. *See infra* text accompanying notes 106-39.

tion listed above—would not seem to add any insight, as the normative value of the state interest standing alone and without comparison to the individual right should have been taken into account when determining whether the interest was "compelling" or "important."[72] Moreover, even if one were to explicitly recognize the extreme value of an interest such as "life," for example, it would not seem proper in the context of analyzing tests more vigorous than the rational basis test to generally substantially justify state action if there is any probability of saving only one life. If you doubt this, consider that the state action itself might threaten *greater* amounts of human life. For example, a prohibition against certain risky experiments might risk lives of numerous persons who might benefit from the results of the research.

The only way to reasonably limit the Court's discretion and rationalize the process of determining "substantiality" seems to be by normatively comparing the expectancy value of the state interest to the expected probability and magnitude of harm to the individual right at issue. It might be illogical and immoral, for example, to consider a 55% chance of saving ten lives "substantial" if the threat of the government's action is to massively limit the freedom of all persons of a certain race, as we did with Japanese citizens in World War II.[73] In another context, however, a 55% chance of saving ten lives might well be justifiably considered "substantial". The normative composition should, when relevant, take into account generalized threats to state interests (e.g., the "sanctity of life" concept being altenuated) and individual rights (e.g., the ideals of "privacy" or free communication being denigrated).

Whatever approach one takes, however, it is clear that determining "substantiality" requires explicitly making value choices or leaving the Court free to reject state action by arbitrarily drawing statistical lines, which would involve nonconscious or furtive normative determinations. Either approach should be admitted to entail a great deal of ends scrutiny.

Thus, it should be apparent that all conceptions of required state means/ends connections that go beyond the requirement

72. For a discussion of the difference between a "compelling" and an "important" interest, see *supra* text accompanying notes 47-52.

73. *See* Korematsu v. United States, 323 U.S. 214 (1944) (Court upheld wartime conviction for violation of military order excluding Americans of Japanese ancestry from certain designated military areas on west coast); Hirabayashi v. United States, 320 U.S. 81 (1943) (wartime curfew for Japanese Americans upheld).

that there conceivably be a non-zero connection essentially partake of ends scrutiny. Moreover, these conceptions of "substantial connection" are inextricably bound with evaluation of the state interest or end if the decision-making process is to be rational. Since the compelling state interest test, intermediate test, and rational basis test with bite all incorporate this type of ends analysis and, since ends analysis cannot be cabined in any practical or principled way, the three tests are much the same. Certainly none of them can be characterized as means-focused. Conversely, the traditional rational basis test and the alternative principle are in fact solely means scrutiny. They do not entail a normative judgment about state means/ends connections. They only entail empirical judgments whether there is a non-zero probability of a non-zero amount of state end (the rational basis test) or whether there is a less intrusive or more effective alternative (the alternative principle). Thus, it should once again be apparent that only the alternative principle is sufficiently distinguishable from other forms of review to serve as an intermediate standard that can complement the rational basis and compelling state interest tests. To further develop this thesis, I will next turn to examination of the alternative principle insofar as it is a part of the compelling state interest test.

V. THE RATIONAL BASIS, "INTERMEDIATE" AND COMPELLING STATE INTEREST TESTS AND THEIR RELATIONSHIP TO THE ALTERNATIVE PRINCIPLE

A state action with the purpose and effect of substantially advancing a compelling state interest might nevertheless be struck under the principle that only state actions that constitute the most effective or least restrictive alternative will justify interferences with individual rights. This principle is traditionally stated as solely a "least restrictive alternative" requirement.[74] Properly understood, however, it also encompasses a requirement that the

74. Regarding the least restrictive alternative principle, see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1109-11, 1137-51 (1972); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1049-51, 1082-93 (1968); Speece, *supra* note 2, at 1052-59; Speece, *supra* note 1, at 1340-50; Struve, *The Less-Restrictive Alternative in Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Warmuth & Merkin, *The Doctrine of Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974) [hereinafter cited as *Less Restrictive Alternative*]; Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

state use any alternatives that are more effective yet no more costly to the state. The principle is based on the basic and ethically powerful notion that the government should not gratuitously or unnecessarily inflict harm or costs. If there is a more effective but no more costly alternative, failure to use the alternative makes the intrusion on individual rights more costly vis-a-vis the net benefits to the state. The effect is the same unnecessary infliction of harm that results when the state fails to employ an equally effective but less intrusive alternative. The core notion is that the state should maximize the benefits and minimize the costs of its actions. It must get the most "bang for its buck possible;" if not, it is squandering scarce societal resources while impinging individual rights.

The alternative principle is also usually thought of as focusing on use of alternatives that minimize intrusions on individuals touched by the state's action. It contains, however, another component: a requirement that the state not draw over- or under-inclusive classifications.[75] In the context of equal protection, concern with such classifications is usually considered under the rubric of the substantial connection requirement. Under the latter requirement, under- or over-inclusive classifications are tolerated as long as there is a "substantial fit" between the classification and its purpose.

The significance of the alternative principle has been overlooked in contemporary equal protection analysis. If the state can, without incurring additional cost or sacrificing any of its goals, draw more precise classifications and thereby (1) advance

75. For a discussion of the case law concerning the over- and under-inclusive categories, see *Less Restrictive Alternative, supra* note 74, at 1003-06. The Supreme Court has attacked certain over-inclusive classifications as based on improper, irrebuttable presumptions. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441 (1973) (invalidating Connecticut law which gave Connecticut residents reduced tuition rates but which excluded certain individuals under irrebuttable presumption of non-residence). The *Vlandis* Court has indicated in these cases that individuals should not be subjected to broad laws but instead given a chance case by case to present evidence to show that they do not fit within the rationale of the government's action. *Id.* at 453. It is beyond the scope of this article to discuss the status of irrebuttable presumption or the doctrinal interrelationships among equal protection, the alternative principle and the irrebuttable presumption doctrine. Regarding the irrebuttable presumption doctrine's relationship to due process (both substantive and procedural) and equal protection, see G. GUNTHER, CONSTITUTIONAL LAW 853-54 (11th ed. 1985); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). It will be noted that the additional costs of procedures to determine the applicability of various state purposes to specific individuals would be the sort of more costly alternative not required by the alternative principle discussed here.

more of its interest by applying its rationale to more persons or (2) minimize the cost to individual rights by not regulating persons to whom its purposes do not apply, it must do so.[76] This is true even though looser classifications might be "substantially related" to their purposes. Otherwise there is a gratuitous infliction of harm or a needless squandering of resources.

The rational basis test does not require that state actions constitute the most effective or least restrictive alternative.[77] The compelling state interest test, on the other hand, has been explicitly articulated to include such a rule.[78] The intermediate test usually has not been formulated to require use of alternatives.[79]

When applied in practice, the rule that the state must use alternatives is ambiguous in the following respects: (1) it is unclear whether the state must use alternatives only if they are equally effective or even if they are somewhat less effective; and (2) it is unclear what consideration should be given to pecuniary costs.[80]

1. *Equally or Less Effective Alternatives*

The Court has at times required the use of only equally effective alternatives and at other times, especially in first amendment

76. Vlandis v. Kline, 412 U.S. 441, 453-54 (1973).

77. For a discussion of the rational basis test, see *supra* notes 13-15 and accompanying text.

78. For a discussion of the compelling state interest test, see *supra* notes 16-17 and accompanying text.

79. For a discussion of the so-called "intermediate test," see *supra* notes 19-21 and accompanying text. *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that state-supported school of nursing cannot exclude males from its program and that such exclusion cannot be justified by state's goal of compensating for discrimination against women).

80. Two additional ambiguities are: (1) the Court might not require the use of the *most* effective or the *least* restrictive alternative but just certain substantially more effective or less restrictive alternatives, and (2) the Court might apply different burdens of proof on the question of alternatives. For a discussion of these issues, see Speece *supra* note 1, at 1340-50, *see infra* note 152 and accompanying text. As to *most* or *more* effective and *least* or *less* restrictive alternatives, there does not seem to be any principled reason why the state should not be forced to use the *most* effective or *least* restrictive alternative as long as it is no more costly and equally effective. The principle would nevertheless arguably remain a viable alternative test even if the test was not as stipulated here, i.e., the state was not required to use the *most* effective or *least* restrictive alternative but only *substantially more effective or less restrictive* alternatives. This is because it—as opposed to the rational basis test with bite and the intermediate test—would arguably still be distinct from the compelling state interest test. Normative judgments that would inform determination of "substantially more effective or less restrictive" would arguably be distinct from the more direct evaluation of state ends entailed in examination of "substantial" means/ends connections under the rational basis test with bite and the intermediate test.

cases involving "pure speech," required the use of obviously less effective alternatives.[81] Commentators have touted the alternative principle as limiting intervention into the political process.[82] In theory, the concept does not deny any goals to the state; it only requires that the state achieve its ends in a particular manner. But this is true only insofar as the principle is interpreted to require only those alternatives that are equally effective.

To the extent that less effective alternatives are required, certain goals are denied to the state. Once the Court moves beyond requiring only equally effective alternatives, it exceeds the empirical question of effectiveness and moves into the realm of balancing and considering the moral question whether the savings of individual rights worked by various less effective alternatives are worth the sacrifice of state interests that the alternatives would entail. Such ends scrutiny gives the Court additional discretion, thereby further limiting the predictability of the Court's decisionmaking.

Nevertheless, in the context of applying the compelling state interest test, it might be appropriate for the Court to do such balancing. After all, it already engages in the same process when determining whether the state action substantially advances a compelling state interest. As an intermediate, means-focused test, however, the alternative principle could not require use of less effective alternatives.

2. *The Pecuniary Expense of Alternatives*

Even requiring only the use of equally effective alternatives might deny the state one goal—pecuniary savings. If an alternative is equally or more effective but also more expensive, the state might have explicitly or implicitly rejected it because of fiscal considerations. The monetary costs of alternatives have not been stressed in prior cases, although the Court has on occasion explicitly pointed out that alternatives would be required even though they entail additional expense.[83]

81. For a discussion of the "pure speech" cases, see Chambers, *supra* note 74, at 1146-49 (citing Butler v. Michigan, 352 U.S. 380, 383-84 (1957); Martin v. Struthers, 319 U.S. 141, 147-49 (1943); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); Schneider v. State (Town of Irvington), 308 U.S. 147, 162 (1939)).

82. *See, e.g., Less Restrictive Alternative, supra* note 74, at 1018-28.

83. Bullock v. Carter, 405 U.S. 134 (1972). In *Bullock*, the Court invalidated a Texas law authorizing a filing system requiring candidates to pay a fee (sometimes as high as $8,900) before they could run for public office. *Id.* at 135. In striking down the law on equal protection grounds, the Court observed that the state's goal of limiting the size of the primary ballot was just as easily accom-

This interpretation is consistent with the Court's application of the compelling state interest test, which generally will not accept monetary savings as an excuse for infringement of fundamental rights.[84] Monetary interests are generally not considered "compelling."[85] Similarly, monetary interests should not be considered sufficient to excuse the state from being required to use a more effective or less intrusive alternative that would effectively achieve the state's compelling interests. It is only compelling interests and not pecuniary interests that should justify state action subject to scrutiny under the compelling state interest test. This would not be the case, however, under the alternative principle as a means-focused intermediate test.

3. *Alternatives and the Present Intermediate Test*

Earlier I argued that the intermediate test differs little from the compelling state interest test.[86] One could answer that the intermediate test is easily distinguishable from the compelling state interest test, as in most formulations only the latter incorporates the alternative principle. That appears to be *technically* true.[87] This difference, however, does not seem well-conceived. Since the intermediate test requires a significant amount of ends scrutiny when determining "importance" and "substantial connection," why should a more limited form of the same process be denied by deleting the alternative principle interpreted—as it is in the compelling state interest test—to sometimes require use of a less effective or more costly alternative.

It is my premise that a limited form of the alternative principle which does not require use of less effective or more costly alternatives is the only workable intermediate standard of review since it can be sharply and sufficiently distinguished from the de-

plished by limiting the ballot to those parties who achieved a certain percentage of the popular vote in a previous election. *Id.* at 149.

84. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969) (rejecting administrative convenience as justification for residency requirement for welfare). The Court has even indicated that administrative convenience—which boils down to saving money—is not important enough to justify state actions under the intermediate test. *See Craig*, 429 U.S. at 198.

85. *See Shapiro*, 394 U.S. at 638. Of course, at some point monetary interests would have to be considered compelling. Consider, for example, problems raised by allocation of medical technologies that might cost hundreds of thousands of dollars for each individual application.

86. For comparison of the intermediate and compelling state interest tests, see *supra* notes 72-85 and accompanying text.

87. *But see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). For a discussion of this case, see supra note 79.

termination entailed in the compelling state interest and "intermediate" tests' requirements that there be a "compelling" or "important" state interest and a "substantial advancement" of that interest. It makes sense, therefore, to *independently keep* the limited version of the principle. It does not make sense, however, to *delete* the principle from the "intermediate test" in an attempt to distinguish between it and the compelling state interest test. If the intermediate and compelling state interests tests are to be kept, both should include the alternative principle, not *vice versa*. Deleting means scrutiny—in the form of the limited version of the alternative principle—from the intermediate test in an attempt to fashion a test complementary to the rational basis and compelling state interest standards is deletion in the wrong direction. Solely ends scrutiny in the form of investigation of "actual purpose," and "important" or "substantial connection" should be deleted.

Other than its non-inclusion of the alternative principle, the intermediate test is virtually identical to the compelling state interest test.[88] As demonstrated above, the only meaningful difference one can find between the two is the use of the words "compelling" and "important." By interpreting these words, one might distinguish by either (1) limiting the "compelling" part of the compelling state interest test to the very top interests in a general rank ordering of all state interests and limiting the "important" part of the intermediate test to those interests in a rung just below compelling state interests; or (2) requiring compelling state interests to compare more favorably to competing individual rights than do important state interests (say, "much more weighty than" than just "more weighty than"). Unfortunately, such differences are not translatable into a predictable and principled decision-making process. This is especially true given that the determinations of "compelling" and "important" must both be supplemented by some complementary requirements that the state interest be "strongly" or "substantially" advanced by its action.

The intermediate test seems to add little other than the semantic notion that interests less important than compelling interests will justify intrusions upon relatively less important individual "interests" (quasi-fundamental rights or the rights to

88. Both the compelling state interest and intermediate tests require at a minimum that there be a substantial connection. That requirement is very similar to the alternative principle *if* the principle is interpreted to force the use of more costly or less effective alternatives. For a discussion of this principle as it relates to "pure speech" cases, see *supra* note 81 and accompanying text.

equality of those burdened by quasi-suspect classifications, as opposed to fundamental rights or rights to equality of those burdened by suspect classifications).[89] Unfortunately, neither test provides the Court with any significantly distinct focus of investigation.

VI. THE RANGE OF POSSIBLE INTERMEDIATE TESTS

Since the intermediate test is inadequate as a complement to the rational basis and compelling state interest tests, it is important to consider other possible alternatives. Though a survey of the many proposed alternative tests[90] is too broad for this article, it is important nonetheless to discuss generally the range of possible tests, and to examine in detail the most prominent of the suggested alternatives: the rational basis test with bite (means-focused approach) first identified by Professor Gunther.[91] This discussion will provide the context for a comparative analysis which will establish the superiority of the alternative principle as a form of intermediate review.

One could create an intermediate test by adding requirements to the rational basis test or subtracting requirements from the compelling state interest test at any one of the five levels of analysis involved in standards of review.[92] One could change the rational basis test by adding: (1) a restriction of relevant state interests to something less than any goal of which the Court or litigants can conceive; (2) a requirement that the state interest be something more than simply legitimate;[93] (3) a requirement of more than a conceivable connection between the state's means and ends; (4) a requirement of use of more effective or less re-

89. Thus, the Court's use of the "intermediate test" in sex discrimination cases has been described as based on gender as a "quasi-suspect" classification. G. GUNTHER, *supra* note 75, at 642-64. The Supreme Court has not yet applied a quasi-fundamental rights analysis, but at least one state Supreme Court has. *See* Ravin v. State, 537 P.2d 494 (Alaska 1975) (quasi-fundamental right to use of marijuana in privacy of one's home); *see also* Plyler v. Doe, 457 U.S. 202 (1981) (children in United States illegally are nonetheless entitled to state education funds under Equal Protection Clause); Gunther, *supra* note 4, at 20-48 (proposing an intensified means scrutiny to "close the gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old").

90. For a discussion of the various critical proposals for an alternative test, see *supra* note 5 and accompanying text.

91. Gunther, *supra* note 4, at 20-48.

92. For a discussion of the five levels of analysis implicated in the standards of review, see *supra* note 26 and accompanying text.

93. For a discussion of "state interest" and possible different standards, see *supra* note 29 and accompanying text.

strictive alternatives; or (5) placement of the burden of proof on the state for any single part of the test.

As pointed out above, one can exhaust the range of possible standards of review by constructing continua of degrees of scrutiny for each of the five issues or levels of analysis.[94] For example, as to the nature or import of state ends, the range of possibilities could go from a mere requirement of any legitimate state interest to a requirement of a compelling state interest. Having done this, one can then create different standards of review by placing different interests along distinct points of each of the five continua. Either process could yield a multitude of different standards of review.

In practice, however, the subtle differences in the various degrees of scrutiny within each of the five continua would not be sufficient to sharply mark separate standards of review capable of guiding and limiting those who are protected and governed by the Constitution. The same is true even of the differences among the five categories themselves (save the category of consideration of more effective or less restrictive alternatives). The remainder of this paper will focus on the superiority of the alternative principle over any of the possible standards discussed above.

Focusing on the first of the five levels of analysis, adding to the conceivable interest requirement would do little if the interest were merely required to be asserted at trial. This point will be considered below in the discussion of Professor Gunther's means-focused approach, which also requires statement of interest at trial.[95]

If the additional requirement were that only actual interests be considered, as is true in the compelling state interest and "intermediate" tests, there might be a significant encouragement of political accountability and rationality.[96] Legislators would be forced to think in terms of purpose—increasing the likelihood of rational legislation. By forcing disclosure of purposes when laws are considered, accountability would also be encouraged. Thus a reasonable intermediate test might be a simple alteration of the rational basis test requiring proof of actual purpose. This alteration would, however, require ends scrutiny, as the Court would

94. For a discussion of the five logical components of standards of review, see *supra* notes 26-35 and accompanying text.

95. For a discussion of Professor Gunther's means-focused approach, see *infra* notes 132-35 and accompanying text.

96. For a discussion of possible advantages to adopting an actual interest standard, see *supra* notes 41-42 and accompanying text.

focus on the ends relied upon by the state and force the state to prove actual use of these ends. Courts might also tend to abuse power under this test by being too strict on the state regarding proof of actual purpose. The Court has apparently already rejected ends it does not consider weighty enough by finding such ends not actual state interests.[97] Thus, in *Eisenstadt v. Baird*,[98] the Court rejected what it said were the state's legitimate interests in health and in discouraging premarital sex by claiming these were not the state's actual goals.[99] The Court purported to apply a rational basis analysis, but seemed rather to make the same sort of normative judgment it made by recognizing the right to privacy in *Griswold v. Connecticut*.[100]

Even if the Court did not so abuse the actual purpose requirement, it seems unlikely that this requirement would have any significant impact on political accountability. Although the legislature would need to consider its goals under this test, it could be very lax indeed when structuring its means to obtain those goals. The political accountability factor is simply not significant enough to form the basis of a viable intermediate test. It might also be argued that an actual purpose requirement would be justified by exposing illegitimate purposes that might be fatal to the state. The scope of government power is so vast, however, that the Court has found very few government purposes to be illegitimate. Given that reality, forcing revelation of illegitimate purposes is not significant enough to form the foundation of a viable intermediate test. On the other hand, if the Court decided to start expanding the scope of illegitimate purposes, that would constitute ends scrutiny far beyond even that countenanced now under the compelling state interest test. One could hardly call such a process an intermediate form of review.

One might also try to fashion a viable intermediate test by

97. Gunther, *supra* note 4, at 35-37.

98. 405 U.S. 438 (1972).

99. *Id.* at 447 n.7, 448, 450.

100. 381 U.S. 479 (1965). *Griswold* invalidated a Connecticut statute which prohibited use of contraceptives. Writing for the majority, Justice Douglas concluded:

> [T]he right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.

Id. at 485.

focusing upon possible different effects that could be given to illegitimate state purposes. To consider this possibility, one must distinguish between (1) the effect of illegitimate purposes in triggering the choice of a test from (2) the effect of illegitimate purposes within tests once chosen. I will not consider the first aspect since the purpose of this article is to investigate the content of tests, not the circumstances that justify their use.[101] As part of tests once applied, illegitimate purposes could be treated in several different ways, including: (1) switching to the state the burden of proving its action would have been taken to achieve a legitimate state interest; (2) switching to the state the burden of proving that its action would have been taken to achieve a *compelling* state interest disregarding the illegitimate purpose; and (3) making the illegitimate purpose dispositive against the state.[102] Since the goal here is to fashion a test that can be complementary to the compelling state interest test, and since the Court has indicated that even under that test improper purposes are not dispositive against the state,[103] only possibilities (1) and (2) are viable alternatives. To fashion an intermediate test between the compelling state interest and rational basis tests, one would probably want to assume that the compelling state interest test incorporates the more stringent requirement of switching to the state the burden of proving that its action is necessary to achieve a compelling state interest, disregarding the illegitimate purpose. Then the less stringent or intermediate test would also switch the burden of proof to the state, but in this test the burden would be to prove only a legitimate as opposed to a compelling interest. One problem with this scenario is that the Court might adopt the less stringent burden within the compelling state interest test. That is, the compelling state interest might already incorporate the supposed intermediate form of review. Another problem with an attempt to fashion an intermediate test by supposing different effects of illegitimate purposes within different tests is that the attempt is arguably based on a subtle distinction between forms of ends scrutiny. Either form is subject to manipu-

101. Theoretically one could construct a multi-tiered decision-making process by supposing tiers of justification for application of the (same) compelling state interest test.

102. For a discussion of various government interests found legitimate and illegitimate, see *supra* note 28 and accompanying text.

103. For a discussion distinguishing among (a) stating a prima facie case, (b) justifying invigorated scrutiny, and (c) applying invigorated scrutiny, see *supra* note 28 and accompanying text.

lation as in either case the Court can simply refuse to find that there is any interest other than the illegitimate one.

One might answer *some* of the above objections by noting that the intermediate test would be constituted solely of examination of illegitimate purposes. Illegitimate purposes could have the same effects within the compelling state interest test and this form of an intermediate test. The intermediate test would simply not incorporate any of the other aspects of the compelling state interest test such as the search for substantial means/ends connections or alternatives.

A telling objection remains. Focus on illegitimate purposes applies to an extremely narrow range of cases. The government's power is so vast that the Court has found few ends to be illegitimate. If the Court were to reverse itself and find more ends to be illegitimate, it would be implementing ends scrutiny far beyond that countenanced even under the compelling state interest test. On the other hand, if it continues in its present cautious course, a test that focuses on illegitimate purposes will apply to a very narrow range of cases and thus have a very limited effect. A final objection is that there is no general theory or value that justifies fashioning a test by supposing different effects of or focusing solely on illegitimate purposes. Compare this to the alternative principle and its grounding in the powerful notion of avoidance of unnecessary infliction of harm or squandering of scarce resources.

Moving to the second of the five levels of analysis—the nature or import of the state interests—addition of a requirement that the state interest be something more than legitimate would obviously partake of ends scrutiny. This would be true even if the requirement were that the state interest be simply quasi-important or quasi-compelling. Just as the difference between "compelling" and "important" cannot sufficiently distinguish the compelling state interest from the "intermediate" test, so too something just beyond (*e.g.*, quasi-compelling) or short of "important" (*e.g.*, quasi-important) would be inadequate to mark a separate test that could provide guidance and restraint in a set of tests including the compelling state interest standard.[104]

Moving to the third level of analysis, addition to the "any conceivable connection requirement" would also fail to provide a useful intermediate test. Requiring more than a conceivable con-

104. For a discussion of the terms "quasi-important" and "quasi-compelling," see *supra* note 89 and accompanying text.

nection either results in (1) comparison of the state means/ends connection to some standard of importance—either the individual rights at issue or the entire range of possible state interests; (2) addition of the often trivial requirement that there be proof in fact of a non-zero probability of a non-zero magnitude of the state interest; or (3) disqualification of state action because there is no way the state or either party can meet a burden of establishing in fact any positive connection because of normative indeterminacy or lack of any manageable empirical studies or data.[105] A test based on an "in fact" connection requirement would sometimes be too potent a form of ends scrutiny to distinguish it from the compelling state interest test. Most often, however, it would simply be a trivial formality for the state to meet.

To address a fourth level of analysis, formal change in the burden of proof regarding any of the three foregoing issues—what interests are relevant, what nature or import is required of state ends, and what means/ends connections are required—would also constitute ends scrutiny as burden of proof speaks to placement of the risk of error in decisionmaking. If the risk of error is placed on the state as to issues that place its ends at risk, there is by definition ends evaluation. Of course, any such ends scrutiny might be worth the cost if individual rights are protected or other goals are furthered. Simple change of the burden of proof, however, would alone be insignificant as an intermediate test since the state could almost always meet the burden of proving some conceivable goal, some legitimate interest, and some *conceivable* connection between its means and ends.

A fifth and final change from the minimum scrutiny of the rational basis test to simply additionally require that the state use more effective or less restrictive (but not less effective or more costly) alternatives is the form of intermediate review espoused here. Its merits will be described below,[106] after consideration of Professor Gunther's means-focused or rational basis test with bite.

VII. PROFESSOR GUNTHER'S RATIONAL BASIS TEST WITH BITE OR MEANS-FOCUSED APPROACH

Professor Gunther has criticized wide use of the traditional

105. For a discussion of alternatives to the "any conceivable connection" requirement, see text at *supra* notes 54-71.

106. For a discussion of the merits of the more effective and less restrictive alternative, see *infra* notes 140-55 and accompanying text.

rational basis test as abdication of judicial responsibility and too general an application of the compelling state interest test as akin to the free wheeling substantive due process roundly condemned in the 1930's.[107] Yet, he still urges that the deferential rational basis test ought to be applied in the relatively few cases "[w]hen the Court cannot confidently assess whether the means contribute to the end because the data are exceedingly technical and complex; or when a 'myriad' of claimants upon the legislature permits a wide range of responses, with any one as 'reasonable' an allocation decision as another."[108] He also points out that use of his proposed "rational basis test with bite" or "means focused approach . . . would not mean the end of strict scrutiny . . . [i]n the context of fundamental interests or suspect classifications."[109]

What Gunther proposes is an intermediate review that can incorporate some of the deferential attributes of the rational basis test and the aggressive virtues of the compelling state interest test: limited intervention, protection of individual rights, and improvement of the political process.[110] His test would: (1) accept as relevant or worthy of consideration any state ends asserted at trial; (2) accept as sufficiently important any legitimate state interests; (3) require a substantial connection between state means and ends; (4) deem less restrictive or more effective alternatives irrelevant; and (5) place a limited burden of producing evidence on the state.[111] Gunther's test is especially important to examine as it not only attempts to explain the form of review the Court has employed in several cases, but also has probably influenced other courts' use of a similar or identical means-focused review.[112]

Gunther commends his test for avoiding the interventionist vices of a wide application of the compelling state interest test while still encouraging some improvement of the political process. Concerning the first point, he argues that the test "would

107. Gunther, *supra* note 4, at 3-4, 8-21.

108. *Id.* at 24.

109. *Id.* Where such interests are involved, Gunther accepts that the Court ought to "continue to demand that the means be more than reasonable—e.g., that they be 'necessary,' or the 'least restrictive' ones." *Id.*

110. *Id.* at 24-25.

111. *Id.* at 20-21, 44.

112. Through May of 1987, Gunther's article had been cited in 146 federal and 110 state cases. *See, e.g.*, Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973) (mandatory maternity leave policy struck down under rational basis test with bite); Gay Students Org. of the Univ. of N.H. v. Bonner, 367 F. Supp. 1088, 1097 (D.N.H. 1973), *aff'd on other grounds*, 509 F.2d 652 (1st Cir. 1974) (gay student organization found to have right to participate in "social functions" on campus under rational basis test with bite).

concern itself solely with means, not with ends."[113] The extent to which Gunther's test concerns itself solely with means depends on the intended meaning of the test's "substantial connection" requirement. Moreover, whatever the intended meaning of the test, it does allow or invite the Court to work a significant effect on state ends. Gunther's seemingly sharp dichotomy between means and ends scrutiny simply does not hold up in the context of his proposed test. The test also does not seem to hold much promise for improving the political process in a way distinct from the compelling state interest test. Indeed, upon close analytical investigation, it appears that Gunther's test cannot fulfill his aspirations for it.

Let me begin analysis of Gunther's test by examining the ways he suggests the "means-focused" test would work. His point is that by forcing the state to assert both a purpose at trial and evidence of a "real and substantial" connection between its action and its interest, public consideration of the benefits of state action will be directly encouraged, public consideration of the costs of state action will be indirectly encouraged, and false purposes of state action will less often be advanced or will be easily subject to exposure as false purpose.[114] Although Gunther does not develop these points, he seems to be concerned with political accountability. Because the test would make legislators advance their true purpose, voters could more easily monitor their representatives' actions and demand greater compliance with the popular will.

Beyond mere accountability, one might argue that Gunther's test encourages better laws by focusing the legislature's attention on the "substantial connection" requirement and encouraging legislation in line with this requirement. Moreover, since costs will be exposed, the legislators will try to minimize costs to appeal to their constituents. All this will serve to minimize the sacrifice of individual rights for illusory reasons by allowing infringement only when benefits are substantial and there is some attempt to make state action cost effective.

Gunther argues that his test is consistent with the protection of the political process rationale supposedly so popular in consti-

113. Gunther, *supra* note 4, at 21. For a discussion of Gunther's observation that his test does involve "narrow" value judgments, see *infra* note 140 and accompanying text.

114. *Gunther, supra* note 4, at 44-46.

tutional doctrine.[115] The test does not disallow state ends but merely insists that the state use rational means to pursue its ends. He analogizes the difference between means and ends scrutiny to the difference Justice Jackson perceived between due process and equal protection.[116] Justice Jackson contended that a successful due process challenge prohibits a state goal as pursued in a certain way, while an equal protection challenge does not prohibit any state goal from being pursued in a certain way as long as the government applies its rationale equally to all relevant persons.[117] Similarly, Gunther argues that his means focused test does not deny ends to the state but simply states that ends must only be pursued by means that substantially advance these ends.[118] Citing Justice Holmes' dissent in *Lochner v. New York*,[119]

115. *Id.* at 44; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

116. Gunther, *supra* note 4, at 22-23. In his analysis, Gunther illustrates Justice Jackson's views by quoting Jackson's concurrence in *Railway Express Agency v. New York*. 336 U.S. 106 (1949):

> My philosophy as to the relative readiness with which we should resort to [due process and equal protection] . . . is almost diametrically opposed to the philosophy which prevails on this Court. . . .
>
> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 111-13 (Jackson, J., concurring).

117. For a discussion of Justice Jackson's analysis, see *supra* note 116 and accompanying text.

118. Gunther, *supra* note 41, at 22-23.

119. 198 U.S. 45 (1905). In *Lochner* the Court invalidated a New York statute which would have restricted bakery employees to sixty hour work weeks and ten hour days. *Id.* at 52. The majority found that the statute violated "the free-

he argues that the primary vice of the early substantive due process cases was invalidating state attempts to further legitimate ends.[120]

Although Gunther's article is innovative and (even a decade after its appearance) influential, all the above arguments, rationales, and justifications cannot withstand close investigation. I have pointed out above that investigation of the nature or import of state ends, on the one hand, and scrutiny of state means/ends relationships, on the other, are inextricably bound together and fall within the ends scrutiny category.[121] Indeed, it has been argued in the literature that the chief vice of *Lochner*[122] and its form of substantive due process was not completely denying ends to the state but finding state means/ends connections to be inadequate. It has been argued that contemporary privacy analysis as ventured in *Roe v. Wade*[123] is even more intrusive because it does find certain ends to be completely inaccessible to the state.[124]

Whether the latter claim about the vice of *Lochner* is true or not, it appears that ends scrutiny in the form of analysis of state means/ends connections is at least as intrusive as focus on ends alone. Focus on ends alone is most intrusive under one conception of the requirement that state actions are allowed only if they advance compelling ends. Specifically, if "compelling" speaks to attributes of state goals that apply equally in all cases without consideration of the relative value of the individual rights at issue in each case, then once a state end is said to be non-compelling, its pursuit is denied in all future cases in which the compelling requirement is applied. If, however, "compellingness" depends on a case-by-case comparison between the state end and the individ-

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dom of master and employee to contract with each other," exceeded the state's police power, and thus violated the Constitution. *Id.* at 64.

Justice Holmes, in a now famous dissent, concluded: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* 76.

120. Gunther, *supra* note 4, at 42-43.

121. For a discussion of ends scrutiny, see *supra* notes 26-33, 43-44 and accompanying texts.

122. For a discussion of the *Lochner* case, see *supra* note 119 and accompanying text.

123. 410 U.S. 113 (1973). For a discussion of the *Roe* case and its privacy analysis, see *supra* note 51.

124. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 940-43 (1973). *But see* Henkin, *Privacy and Automony*, 74 COLUM. L. REV. 1410, 1416 (1974).

ual right at issue, then there is never such a *per se* denial of certain goals to the state. The extent of the denial will depend on how the Court generalizes from the first case and its finding of "non-compellingness" to future, possibly analogous cases.[125]

A more telling point about the exaggerated claims often made about the effect of focus on ends alone is that the Court rarely finds a state interest to be "non-compelling" in any general sense. Life, health, safety and practically any goal short of fiscal protection or administrative convenience would qualify as compelling. Even fiscal considerations would probably be considered compelling at some point.[126] Gunther's apparent fear of a broad *per se* prohibition of ends has not materialized. The real "danger" is a more specific denial of state ends as pursued in certain ways or in certain cases. That is what primarily happened in the *Lochner* era, not a *per se* denial of state ends as being of the wrong nature or insufficient import in the abstract.[127]

Focus on means/ends connections has, in practice, involved as much ends scrutiny and at least as much intrusion as focus on ends alone. The specific nature of the state means/ends relationship required by Gunther's test depends on the meaning of his "substantial connection" requirement. Possible meanings of the term "substantial connection" include, once again: (1) a "substantial" probability that the state end will be advanced to any non-zero magnitude; (2) any non-zero probability that a "substantial" magnitude of the state end will be advanced; (3) the product of the probability and magnitude of the state interest (the expectancy value); and (4) any one of the first three options and their comparison to the cost of achieving the state end.[128] Only the last option seems workable, and then only if in conjunction with the third option (consideration of the expectancy value of the state interest). The other options do not provide any guidance and do nothing to limit discretion. Yet Gunther specifically rejects any option that involves comparing the state and individual interests at stake. He states unequivocally that the yardstick

125. For a discussion of the Court's approach, see *supra* note 51 and accompanying text.

126. For a general discussion of the "compellingness" issue, see *supra* notes 50-51, 73 and accompanying text.

127. *See* L. TRIBE, *supra* note 7, at 567-74. Tribe correctly points out that the *Lochner* era Court upheld several regulations although they too arguably interfered with the liberty of contract. They were thought justifiable because of the greater amount of state interests they furthered.

128. For a discussion of Gunther's "substantial connection" requirement, see *supra* note 53-73 and accompanying text.

for judging state means/ends connections is not to be the cost of achieving them.[129]

Thus, under Gunther's test the Court's discretion would not be curtailed at all by forcing a comparison between the importance of the expectancy value of state ends at issue with the cost of attaining them. Instead, the Court would fashion its own hypothetical, statistical yardstick for "substantiality," considering only the probability and/or magnitude of the state interest. The product of all this discretion might well be greater incidence of what Gunther wishes to avoid—"second-guessing [of] the substantive validity" of the results of the political process.[130] Even though the Court would be forced to second guess at the stage of determining "substantiality" of state means/end connections rather than at the point of assessing the "compellingness" or "importance" of state ends, it would nevertheless be second-guessing the "substantive results of the political process," and perhaps in a potentially more intrusive manner. This second guessing would be done in a rather irrational way, as the benefits of state action would be closely examined but its costs would be ignored. The value analysis would be forced "underground" and less subject to thought and criticism. The Court might convince itself that it was not doing "ends" scrutiny or even any significant normative scrutiny at all. This would, of course, be a self-delusion, and a dangerous one because it would not breed any caution. The Court could convince itself that it is permissible to do this sort of facially non-normative or neutral decisionmaking.

Gunther's claim that his test avoids the formidable problems associated with determining actual purposes, while also improving the political process, must be further evaluated. His test does avoid problems associated with proving actual purpose by directing the Court to accept any purpose asserted by the state at trial.[131] Gunther argues that his test also promises to improve the political process by directly encouraging consideration of proposed benefits and indirectly stimulating consideration of costs and exposing illegitimate purposes. It has already been pointed out that promoting consideration of benefits (i.e., means/ends connections) would either directly or indirectly invite Court interference with legislative or political ends, and that asking the Court to ignore costs would give it even more discretion and an

129. Gunther, *supra* note 4, at 45.
130. *Id.* at 44.
131. *Id.* at 21, 44.

invitation to act irrationally.[132]

How Gunther's test would "indirectly" encourage consideration of costs of state actions is not clear. The point must be either that: (1) the Court would covertly consider costs (a proposition Gunther seems to disfavor); or (2) although the Court might avoid such consideration, the legislators and others could not so compartmentalize their thought processes when directly driven to consider benefits by the requirement of assertion of a purpose or establishing a substantial connection. Either way the point is weak. It is clear how Gunther *supposes* his test would *indirectly* encourage exposure of illegitimate purposes: the goals of legislators or other politicians would be exposed at time of trial.[133]

Gunther's claim that legislators or others will be encouraged to consider benefits and costs of their actions and deterred from asserting false purposes based on his test is somewhat improbable. Most constitutional objections to legislation come to court several years after original consideration of the legislation. By this time, the legislature's membership will be substantially changed and the role of individuals in the passage of the law unclear. Similarly, the rare legislator whose constituency could later trace his involvement in the questionable law could argue that the party presenting the state's case has asserted a purpose not actually or primarily embraced when the legislation was passed.

This attenuation of responsibility makes it unlikely that initial consideration of benefits and/or costs would be encouraged or that furtive attempts to advance unpopular or illegitimate motives would be discouraged. The concrete threat posed by a requirement of proving actual purposes—once again a requirement Gunther would properly eschew as allowing too much ends scrutiny[134]—is much more likely to encourage immediate discussion and recordation of purpose(s) and consequent political accountability. If so, the political process would be improved. An incentive would be provided by the possibility that the state could not meet its burden of proving actual purpose without building a

132. For a discussion of court consideration of benefits and costs to the state, see *supra* notes 118-31 and accompanying text.

133. "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 rationalization by perfunctory judicial hypothesizing." Gunther, *supra* note 4, at 21, 45-46.

134. For a discussion of Gunther's views on ends scrutiny, see *supra* notes 96-97, 131 and accompanying text.

legislative record when its action were taken.[135] The lesser incentive of merely requiring assertion of any purpose at trial would probably not work.[136]

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135. For a discussion of the actual interest requirement and its potential as a second intermediate test, see *supra* notes 96-97 and accompanying text. *But see* Schweiker v. Wilson, 450 U.S. 221, 244-45 (1981) (Powell, J., dissenting) (suggesting a test in which state would either have to show an actual interest that was conceivably advanced or conceivable interest that was in fact advanced).

136. Dean Bice has pointed out a possible problem with Gunther's test: certain state Attorneys General might not have the power to assert interests not explicitly contained in legislation. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 46-49 (1980). Bice commends a particular version of "rationality analysis" which, in his opinion, is very similar to the alternative principle. *Id.* It is not advanced as a form of intermediate scrutiny but as a version of rationality analysis that should be used whenever instrumental justification is thought necessary. *Id.* Bice describes his rationality analysis as follows:

> [F]ollowing the paradigm sketched in the individual actor model, courts should adhere to the marginal rationality criterion and should invalidate laws when there is a less costly means of achieving the same goal to the same extent. Although this marginal rationality approach is similar to one form of the less restrictive alternative test employed in constitutional law, it can be distinguished from the version of the less restrictive alternative test that balances the costs of legislation against the benefits. The absence of a balancing component in the rationality standard proposed in this Article is one of the key analytic distinctions between this test and the familiar forms of intermediate review and strict scrutiny in the equal protection and due process contexts. Nonetheless, rejection of the "any conceivable goal" approach to goal characterization, attention to current conditions, and enforcement of marginal rationality renders the proposed "minimum" standard of review capable of invalidating legislation.

Id. at 40. As seen in this passage, Bice's description of rationality differs in some important respects from the alternative principle espoused in this article. First, he rejects the actual *or* asserted goal approach to the issue of what state interests will be considered relevant. *Id.* He would adopt a requirement that "the court . . . conceive of its task as identifying the legislature's *probable* goals based on the available evidence." *Id.* at 30 (emphasis in original) (footnote omitted). He notes, however, that the Court should be careful to avoid exclusion of goals on normative grounds. *Id.* at 30-31. The latter might be wishful thinking. For a discussion on this point, see *supra* text accompanying notes 96-97. Second, Bice argues that the Court should in many cases refuse enforcement of laws that have become outmoded, stating that "the benefits of invalidating empirically outmoded legislation must be weighed against the costs in terms of instability, relitigation, and lack of uniformity." Bice, *supra*, at 36. The quoted passage indicates that Bice endorses a form of examining whether legislation will further state goals that requires more than a common sense belief in a non-zero probability of a non-zero magnitude of the state interest. Bice's position is indicated even more strongly in the following passage:

> Professor Brest also argues convincingly that the challengers should carry a heavy burden of persuasion and thus should have to establish, beyond a mere preponderance of the evidence, that the goals are not served. He notes that legislatures should be able to impose regulations even when it is less certain that their goals will be advanced, as for example, in the banning of a food additive that *may* increase the risk of cancer. People attacking such a statute might be able to show by a preponderance of the evidence that the food additive does not increase the

In making the further assertion that his test eschews "value laden restrictions on the legislative choice among effective means,"[137] Gunther is apparently concerned with the compelling state interest test's requirement that the state must use the most effective or least restrictive means. The "substantiality" requirement of Gunther's test, however, can have a much greater impact on the judgments of the political process than may the alternative requirement. The latter requirement—which is embraced here—allows the Court to strike down the state's action and sacrifice its goals *only if* there are more effective or less restrictive alternatives.[138] Gunther's substantiality requirement, on the other hand, allows the Court to strike down state action whether or not there are alternative ways to achieve the state goals.

> risk of cancer. This showing does not mean that the regulation is arbitrary; the legislature is justified in paying less attention to the causal relationship between the additive and disease because of the magnitude of the potential harm. In effect, circumstances allow the legislature to discount the probability of the link. The imposition of the regulation can be said to be arbitrary only when no reasonable person could conclude that such discounting is appropriate. Thus Brest correctly suggests that a burden such as "clear-and-convincing evidence" or "beyond a reasonable doubt" is appropriate when the challenger attempts to show that the goals are not served by enforcement of the legislation.

Id. at 52-53 (emphasis in original) (footnotes omitted).

I argue that, to avoid an inevitable slip into a degree of ends scrutiny determined solely by the discretion of individual judges, the rational basis test should be interpreted to require only that there be a common sense belief in a non-zero probability of a non-zero magnitude of a state interest. Bice clearly reads the requirement to be more potent and his reading tends to merge the rational basis test with all other forms of invigorated scrutiny including ends scrutiny. For a critical discussion of this approach, see *supra* notes 53-73 and accompanying text. The alternative principle espoused here places a limited burden of proof on the state. However, it imposes alternatives only if they are equally effective and no more costly. It strikes state action only if the state can achieve its goal more efficiently in an alternative way. Any test that requires more than a conceivable connection between the state's means and ends, on the other hand, allows the Court to strike state action even if there is no alternative means by which the state's ends can be achieved.

Finally, a practical problem with Bice's approach is that it marks a sharp departure from the traditional rational basis test that has been applied for decades. We certainly should not radically change the meaning of "rational basis test" when we can simply call the alternative principle what it has always been called and employ it independently as has been done in previous cases in areas other than due process and equal protection. Even disregarding the differences between Bice's test and the alternative principle here, the difference in labels alone might have a significant impact on those who criticize and rely upon the Court.

137. Gunther, *supra* note 4, at 48.

138. For a discussion of the alternative requirement, see *supra* notes 147-49 and accompanying text.

Gunther's theory could be rationalized somewhat by construing it simply as a requirement that the state "in fact" prove a non-zero possibility of advancement of a non-zero magnitude of its interest. This would go beyond the "conceivable connection" requirement of the traditional rational basis test. It would not entail, however, a case-by-case normative determination of the amount of connection that would be considered "substantial." As pointed out above, however, such a requirement would often be trivial, while at other times it might destine the state to failure and thereby sacrifice its ends because of normative or factual uncertainty.[139]

In any event, Gunther does not seem to allow such a limited reading of his test. He speaks of a "real" *and* "substantial" connection requirement. Recognizing that policing this requirement will entail value judgments, Gunther writes toward the end of his article:

> Indeed, perhaps the greatest difficulty in applying the model will be to delineate the boundary between the narrow value judgments required in evaluating means and the broad ones implicit in choosing among ends—in short, to avoid a disguised examination of legislative ends, such as *Baird's* excessively intense concentration on actual state objectives. The line between means and ends will be drawn primarily in such terms of breadth of value judgments; it will present the most difficult questions of degree.[140]

The above discussion demonstrates that Gunther's supposed dichotomy between narrow and broad value judgments is illusory. The scrutiny he proposes does not differ sharply from that involved in the compelling state interest standard or the "intermediate test." Only a sharply distinct test can add the predictability and shift in focus that marks a discrete intermediate test and prevents overly broad value judgments while consistently and significantly contributing to the protection of societal interests and individual rights.

VIII. THE ALTERNATIVE PRINCIPLE AS INTERMEDIATE SCRUTINY

The alternative principle is generally conceived as a part of

139. For a discussion of the "substantiality" requirement, see *supra* notes 66-71 and accompanying text.

140. Gunther, *supra* note 4, at 48.

more encompassing tests. In substantive due process and equal protection cases it is considered part of the compelling state interest test. It is submitted here that if the Court determines that an intermediate test is needed, it should independently employ the alternative principle as a form of intermediate review in place of the "intermediate test". Of course, there is no theoretical bar to use of the alternative principle as a separate standard of review; it is a self-contained concept. It is as appropriate as one can think of. It is based on a basic and powerful notion that government ought not to inflict harm gratuitously or unnecessarily. That is, it requires that when the government inflicts harms on individuals it maximize the benefits of and minimize the costs of its actions. Any other action constitutes gratuitous infliction of harm. This is, in actuality, a simple requirement that the state act logically or rationally. The principle has been used as a part of the Court's analysis in virtually every field of constitutional adjudication,[141] and its roots date back to at least 1894.[142] As one commentator has observed: "[T]he pervasiveness and long-recognized utility of the less drastic means concept are noted, for tradition and precedent are keystones of our constitutional law, in much the same way as they are to our common law."[143] In addition, the Court has independently applied the principle in several first amendment and commerce clause cases.[144] There is even precedent for independent application of the principle in the due process area. It is arguably the only standard of review the Court applied in *Griswold*,[145] which preceded the initiation of the Court's due process compelling state interest analysis in *Roe*.[146]

Further examination of the alternative principle, including reiteration of some points made above, will demonstrate (1) how it allows only means as opposed to ends scrutiny, (2) how it makes substantial contributions to protecting individual rights, and

141. For a discussion of the alternative principle's role in the history of constitutional law, see *supra* note 76 and accompanying text.

142. Struve, *supra* note 74, at 1464 n.4.

143. *Less Restrictive Alternative*, *supra* note 74, at 1016.

144. For a discussion of these cases (some of which have applied the principle to entail a modicum of sacrifice of state ends as *would not be allowed* in the interpretation espoused here), see *infra* notes 147-49 and accompanying text. *See also* Wormuth & Mirkin, *supra* note 74, at 257-93 (discussing the first amendment cases which apply the alternative principle).

145. 381 U.S. 479 (1965). For a discussion of *Griswold*, see *supra* notes 99-100 and accompanying text.

146. 410 U.S. 113 (1973). For a discussion of the *Roe* case, see *supra* notes 51, 123 and accompanying text.

(3) why it is such an attractive form of intermediate review. The principle posits that the state must use alternative methods by which it can achieve its objectives at less per unit cost in terms of individual rights.[147] This maximization of benefit can be possible through use either of more effective or of less intrusive alternatives that are no more costly to the state. For example, if the state can achieve certain goals concerning certain mentally ill persons through either involuntary civil commitment or no more expensive outpatient care, then the latter alternative must be used if it is either more effective in advancing the state's goals (e.g., the well being of the "patients") or less intrusive upon the right to freedom from confinement and other rights of the patients.[148]

In some cases, the state has been required to use *less effective* alternatives, the Court using the alternative principle as a tool for balancing state interests and individual rights. In other cases, the Court has only required the use of equally effective alternatives.[149] The better interpretation when employing the alternative principle as an intermediate test is that more costly or less effective alternatives need not be used. This interpretation prevents the ends scrutiny that is part of the principle if it is interpreted to force the state to use more expensive or less effective alternatives.[150]

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147. For a discussion of the alternative principle, see *supra* note 74 and accompanying text.

148. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975) (state cannot involuntarily confine mentally ill person without more if he can live safely outside of institution with help of willing family or friends). This is not to say that the courts have generally agreed that the mentally disabled have a right to services in the least restrictive setting. For a good summary of the current state of the law on point, see Parry, *Youngberg and Pennhurst II Revisited—Part I*, 10 MENTAL & PHYSICAL DISABILITY L.R. 154, 158 (1986). This is not to say, moreover, that out-patient care is necessarily either more beneficial or generally less intrusive to mentally disabled persons. Certain mentally disabled persons have been harmed by being "dumped" out of institutions onto the streets where they lead more painful, miserable lives. *See* Comment, *Homelessness: The Policy and the Law*, 16 URB. LAW. 317 (1984).

149. For a discussion of this dual effect of the alternative principle, see Chambers, *supra* note 74, at 1108, 1111, 1146-49; Speece, *supra* note 1, at 1341-50; Warmuth & Mirkin, *supra* note 74; *Less Restrictive Alternative*, *supra* note 74, at 971, 993-1005, 1011-16.

150. It might be argued that the alternative principle could be especially intrusive on other branches of government as it can lead to a continual process of revision of political outcomes as opposed to a single, but seemingly more drastic, intervention. *See* L. TRIBE, *supra* note 7, at 1452. Drawing this point beyond Professor Tribe's application, a determination that a state's end is not valid settles the matter with one intervention. Finding that the state has not used the most effective or least restrictive alternative invites, however, further attempts to fashion better legislation *and* perhaps subsequent challenges to the

When the alternative principle is construed only to require the use of equally effective and not more expensive alternatives, it is sharply different from ends scrutiny of any sort. This is assuming, of course, that the alternative principle is employed independently of any other sense of invigorated scrutiny. Recall that one can invigorate scrutiny beyond the rational basis test at any one of the five levels of analysis identified above: (1) relevance of state interests, (2) the import or value required of state interests, (3) means/ends connections required of state interests, (4) alternatives required of the state, and (5) placement of burdens of proof. The alternative principle constitutes an invigoration of scrutiny at the fourth level of analysis as the base line rational basis test treats alternatives as irrelevant.

The alternative principle need not, however, be tied to invigoration of scrutiny at any other level. It need not limit the state to only actual or even asserted purposes. It need not limit the nature or import of state ends to only those that are, say, "compelling" or "important." It need not require a certain level of connection between state means and ends. And it does not even depend, necessarily, on placing any burden of proof on the state. The burden could be placed on the individual or the state on formal grounds such as superior access to evidence rather than because of normative assessments of the competing state and individual interests. It is helpful to examine the alternative principle's relationship to each of these levels of analysis.

The alternative principle need not be tied to any limitation on what state interests will be considered relevant. Means analysis is always potentially relevant to examination of the state's ends or purposes. A strained fit between the state means and its asserted or supposed ends suggests that the actual end is an impermissible or less weighty one attempting to be concealed. The compelling state interest test attempts to obviate such subterfuge by limiting the state to its actual purposes. It was demonstrated above, however, that such ends scrutiny can too easily be used to mask normative determinations that the state's interests are not important enough vis-a-vis the competing individual rights. Such

state's actions. The alternative principle, however, only strikes state action if alternatives are possible, and in applying the principle the Court will usually give some indication what those alternatives might be. *See* Chambers, *supra*, note 74, at 1145; *Less Restrictive Alternative, supra* note 74, at 998. The political process is required to be given a second chance and usually provided with some guidance in the effort. Indeed the chance for revision is a positive aspect of the principle. *See infra* text following note 151.

determinations are appropriate under the compelling state interest test. For another test to be significantly different from the compelling state interest test and thus serve as a viable intermediate test, however, it must not allow such normative judgments.

One might argue, as Gunther does, in effect, that this objection can be answered by simply limiting the state to asserted purposes. As demonstrated above, however, such an indirect requirement does not offer enough of a contribution to improvement on the political process and protection of individual rights to form the foundation of a viable intermediate test.

The alternative principle *encourages* the state to consider and assert deliberate purposes and to fashion its laws so as to maximize its ends. More directly, it forces the state to choose the least intrusive and most effective means of achieving its ends. The alternative principle encourages the state to consider and assert deliberate purposes because if the state does not assert a purpose, the Court will be left to speculate about its purposes. If the Court does so, it might decide that the purpose is one that can be advanced in a more effective or less intrusive alternative way. The Court could then mandate use of the alternative rather than the State's preferred course of action.

One might argue that the Court should conceive of only purposes that are most likely to leave the state's chosen means undisturbed. That would be a most artificial limitation. A reasonable compromise that gives the state complete leeway to avoid ends scrutiny is to allow the Court to choose what it believes was the state's actual purpose if, and only if, the state does not assert a purpose. If it does assert a purpose, then that will be taken as the state's goal to be tested by means scrutiny.[151]

Although this interpretation leaves the state discretion concerning purposes it will rely on to defend its actions, the alternative principle encourages the state to articulate and consider deliberate purposes so it can maximize the connection between its means and ends. It will wish to do so because the more effective its means are, the less likely it will be that the Court will find

151. This suggestion is subject to Dean Bice's criticism of an across-the-board rule allowing state Attorneys General to assert purposes when that might be at odds with certain states' separation of powers doctrines. Bice, *supra* note 136. Bice does not, however, make a convincing case that this has ever been a problem in actual practice. If it is or does become a problem, the theory here should be modified to honor state separation of power doctrines that limit the purposes that can be embraced by state Attorneys General.

that there is a more effective or equally effective but less restrictive alternative.

Yet the alternative principle does not directly require any particular level of state means/ends connections as is true with ends scrutiny. It only requires that the state means not be gratuitously onerous. In that sense, efficiency is encouraged. As discussed above, Professor Gunther agrees that an intermediate test ought not directly limit state ends to those that are thought, say, "compelling" or "important." That level of analysis is, to him, inappropriate for an intermediate test. I have agreed because one cannot, in any practical or principled way, calibrate different levels of supposed direct examination of state interests. For example, the supposed difference between "compelling" and "important" does not distinguish the compelling state interest and intermediate tests.

Professor Gunther eschews ends scrutiny, but endorses supposed means-focused scrutiny based on a requirement of a substantial connection between the state's means and ends. I have demonstrated above that such a requirement is inextricably bound up with ends scrutiny. There is no practical or principled way to calibrate supposedly different levels of required means/ends connections. Once one moves beyond the rational basis test the door is open to full ends scrutiny under the guise of means scrutiny.

Yet, once again, the alternative principle does at least indirectly encourage the state to conceive and assert ends and to fashion its means to best achieve those ends. Moreover, the focus of the alternative principle is not to foster political accountability or, primarily, to make the political process more effective. These are, however, the focuses of Gunther's rational basis test with bite. The focus of the alternative principle, to the contrary, is to minimize intrusions on individual rights. Any intrusion that is unnecessary because there is a more effective or less intrusive alternative will be forbidden. Yet the state end will not be sacrificed because it is thought to be less important than the competing rights. The state action will be struck down only if there is an alternative way by which the state can achieve its end at less per unit cost to individual rights.

The effect of the alternative principle is thus much like what Gunther hopes for the rational basis test with bite. Recall that he analogizes the difference between his test and more invigorated scrutiny to the difference Justice Jackson perceived between due

process and equal protection. That is, his test supposedly does not foreclose legislative purposes and leave conduct "ungoverned and ungovernable."[152] It is said to serve as a principled avoidance technique:

> Avoidance of the broad constitutional questions by resort to a narrower ground of decision has had a mixed history in Supreme Court adjudication. It degenerates into an unacceptable device when it is assumed that the "passive virtue" of avoidance justifies resort to tortured, unprincipled narrow grounds for prudential reasons. As the Warren Court showed with a variety of techniques from vagueness to statutory construction, manipulation of narrow grounds can exert considerable attraction. But avoidance of controversial and difficult broad questions via narrower routes has an honored history as well. It is mandatory if a genuine narrow ground is available; it is admirable so long as the Court remembers that the narrower ground, too, must have a principled content. Old equal protection with new bite can be such a principled ground. It warrants application whether or not a more difficult issue lurks in the case. And its availability as an avoidance device can increase its appeal without draining its integrity.[153]

In the preceding remarks, Gunther is cautioning against wide use of what Professor Bickel recognized as "passive virtues."[154] He is, however, embracing the notion that avoiding broad issues is a positive approach if based on principle and reality. The alternative principle is precisely such a principled and realistic avoidance technique.[155] It can achieve vindication of the rights of litigants in individual cases and at the same time contribute to healthy ongoing governmental/societal dialogue concerning vital public issues.[156]

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152. Gunther, *supra* note 4, at 22-23.

153. *Id.* at 22 (footnotes omitted).

154. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Bickel, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40 (1961). For further exposition of Gunther's views, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

155. *Less Restrictive Alternative, supra* note 74, at 1018-21 (praising alternative principle as superior to avoidance techniques espoused by Bickel).

156. This might be the sort of dialogue espoused in Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1984).

It is true—as will always be the case with mistaken factual determinations in *any* form of review—that state ends might be sacrificed by erroneous findings that equally or more effective alternatives exist when they do not. And this possibility is heightened if the burden of proof regarding the non-existence of alternatives is placed on the state. Ends scrutiny palpably appears if the state is assigned the burden of proof because its interest is thought generally less important than the competing individual right. The problem of ends scrutiny is exacerbated if a strict burden of proof is placed in the context of tremendously complex technical or normative questions as to which no strong "proof" is available.

One might be tempted to answer the last several objections to the idea of the alternative principle as solely means scrutiny by the neat move of placing the burden of proof on the individual. This move might disable the principle since the state usually has far superior access to data concerning alternatives and their effectiveness while the state's opponent usually has relatively limited resources.

Thus, what is proposed here is that the burden of proof be placed on the State out of recognition of its superior access to data and resources for argumentation.[157] The burden should be applied in a sensitive manner so as to not make the placement of the burden the primary determinant of the outcome in most cases. For example, if the technical questions are complex and the applicable studies subject to methodological criticism, that should not assure that the party with the burden of proof loses. Rather, the burden should be applied in the spirit that the party who has any edge in the disputed factual or legal arguments should win, the strength of the arguments being compared to each other rather than against an unrealistic requirement of proof by at least 50 per cent probability. Only if in this relative sense the arguments are equally persuasive should the burden of proof be outcome-determinative.

IX. CONCLUSION

There is in practical effect only one intermediate standard between the rational basis and compelling state interest tests that delineates the focus of each and as such can serve as a useful complement to both. That test is the alternative principle conceived

157. For exceptional cases in which the party opposing the state has superior access and resources, perhaps the burden should be shifted.

as an independent standard of review. When construed to require only that the state use more effective but no more expensive or equally effective but less restrictive alternatives, it constitutes a solely means-based scrutiny. All other possible forms of intermediate scrutiny fall within another category of review, that of ends scrutiny. This is especially true of both the "intermediate test" and the rational basis test with bite first proposed by Professor Gerald Gunther. As such, these forms of intermediate review are too similar to the compelling state interest test to serve as a useful complement to it in a set of constitutional standards of review comprised of the rational basis and compelling state interest tests and a form of intermediate review. Neither standard is sufficiently distinct to provide guidance or restraint and each involves substantial normative judgments concerning state ends. The alternative principle conceived as an independent standard of review is the sole means-focused test and the only workable form of intermediate review.