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Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden

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CONSIDERATIONS OF LEGISLATIVE FIT UNDER EQUAL PROTECTION, SUBSTANTIVE DUE PROCESS, AND FREE SPEECH DOCTRINE: SEPARATING QUESTIONS OF ADVANCEMENT, RELATIONSHIP AND BURDEN

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I. INTRODUCTION

Whenever a court reviews legislation under an equal protection, substantive due process, or free speech analysis, the court considers whether the fit between the legislature's chosen means and intended ends is sufficient to pass constitutional muster. The Supreme Court analyzes these "fit" questions by considering the manner in which the statute achieves its benefits and burdens in terms of whom the statute regulates and whom the statute fails to regulate.[1] Of course, these "fit" questions are different depending upon whether the Court uses minimum rationality review, "heightened" rational review, inter-

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1. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 370-71, 571-73, 952, 1034-35 (4th ed. 1991) (discussing the legislative fit analysis under the Equal Protection, Due Process, and free speech doctrine) [hereinafter NOWAK & ROTUNDA]; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3 at 797-804, § 15-2 at 1306-07, § 16-4 at 1446-50 (2d ed. 1988); Leonard Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1075-96 (1968) (examining legislative fit and due process); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190-97 (1983) (discussing the legislative fit and free speech doctrine); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343-65 (1949) (discussing legislative fit and equal protection).

mediate review, or strict scrutiny.[2] But in all cases, the question of legislative fit plays a large part in the analysis.

This article explores the three different aspects of the legislative "fit" inquiry in light of recent Supreme Court precedents. Historically, the Court has not been careful to distinguish among the three different aspects. Recent cases, however, indicate that the Court is paying closer attention to this aspect of constitutional analysis.

II. THE THREE ASPECTS OF LEGISLATIVE FIT ANALYSIS: AN OVERVIEW OF ADVANCEMENT, RELATIONSHIP, AND BURDEN

Three different questions must be addressed when considering a statute's fit with its intended ends. The first of these questions, the advancement inquiry, asks what governmental ends the statute actually advances. This inquiry determines whether the statute advances compelling governmental interests; important, substantial, or significant governmental inter-

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2. *See generally* NOWAK & ROTUNDA, *supra* note 1, at 370-71, 573-80, 1090-93. As noted in an earlier article, the Supreme Court actually applies six different levels of review under Equal Protection, Due Process, Free Speech, Contract Clause, Takings Clause, dormant Commerce Clause, and other related constitutional doctrines. *See* R. Randall Kelso, *Fillings Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 497-508 (1992). These six levels of review involve three kinds of rational review (minimum rationality review, basic rational review, and rational review with bite); two kinds of intermediate review (basic mid-level review and mid-level review with bite); and strict scrutiny. *Id.* In this article, the basic elements of minimum rationality review regarding legislative fit are summarized *infra* at text accompanying notes 20-21; the basic elements of basic rational review and rational review with bite are summarized *infra* at text accompanying note 22; and the basic elements of mid-level review, mid-level review with bite, and strict scrutiny are summarized *infra* at note 19.

For purposes of clarity, the phrase "rational review" is used in this article only when referring to all three kinds of rational review which the Court has employed. The phrase "heightened rational review" is used when referring to the two versions of rational review more stringent than minimum rationality review: basic rational review and rational review with bite. The phrase "intermediate review" is used when referring to both basic mid-level review and mid-level review with bite. Finally, the phrase "heightened review" is used when referring to intermediate review and strict scrutiny, that is, any review higher than rational review. When a particular kind of rational review or intermediate scrutiny is referenced, the particular term, such as minimum rationality review or basic mid-level review, is used.

ests; legitimate or permissible governmental interests; or impermissible governmental interests.[3]

The second and third questions that must be addressed when considering a statute's fit involve consideration of the statute's benefits and burdens in terms of whom the statute regulates and whom the statute fails to regulate. The second question concerns the relationship between the statutory means and the benefits achieved by the statute. This relationship inquiry has two parts: (1) the extent to which the statute fails to regulate all individuals who are part of some problem (the underinclusiveness inquiry); and (2) the way in which the statute serves to achieve its benefits on those whom the statute does regulate (the service inquiry).[4]

The third question that must be addressed involves the nature of the statute's burdens. This burden inquiry also has two parts: (1) the extent to which the statute imposes burdens on individuals who are not intended to be be regulated (the overinclusiveness inquiry); and (2) the amount of the burden on individuals who are properly regulated by the statute (the oppressiveness or restrictiveness inquiry).[5]

Before 1976, the Supreme Court did not carefully consider the three separate inquiries of advancement, relationship, and burden. This lack of careful consideration was not critical at that time because prior to 1976, only minimum rationality review and strict scrutiny were used to analyze Equal Protection and Due Process Clause challenges. Under minimum rationality review most statutes are constitutional, while under strict scrutiny, most statutes are unconstitutional.[6] Since the advent of intermediate scrutiny in 1976, however, closer consideration of these three separate inquiries has become increasingly important.

Craig v. Boren[7] is the seminal 1976 case which inaugurated

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3. *See* discussion *infra* part II.A.

4. *See* discussion *infra* part II.B.

5. *See infra* part II.C. Because it mirrors the phrase "least restrictive alternative," which the Court has used with strict scrutiny, *see infra* note 71 and accompanying text, the remainder of this article refers to this as the "restrictiveness" inquiry.

6. *See generally* NOWAK & ROTUNDA, *supra* note 1, at 573-80.

7. 429 U.S. 190 (1976). For a discussion of *Craig v. Boren* as inaugurating inter-

intermediate review. In this case, the Court used the phrase "substantially related to achievement of [important governmental] objectives" to encompass all three aspects of the legislative "fit" analysis.[8] In *Craig,* the Court held that an Oklahoma statute preventing males under 21 from buying 3.2% beer, while only preventing women under 18 from buying 3.2% beer, did not have a "substantial relationship" to the state's interest in reducing teenage drunk driving.[9] First, reflecting the advancement inquiry, the Court assumed that the State was trying to advance a substantial or important governmental interest by attempting to reduce teenage drunk driving.[10] Then, examining the service component of the relationship inquiry, the Court noted that the statute did not substantially serve the government's end.[11] Regarding the underinclusiveness aspect of the relationship inquiry, the Court noted that the statute was substantially underinclusive.[12] Finally, reflecting the overinclusiveness aspect of burden analysis, the Court noted that the statute was overinclusive because it unduly burdened males who were not likely to drink and drive.[13]

Since 1976, the Court has distinguished more clearly the relationship inquiries of underinclusiveness and service from the burden inquiries of overinclusiveness and restrictiveness with clarification of the "narrowly drawn" and "least restrictive alternative" components of burden analysis.[14] The Court under

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mediate review, *see* NOWAK & ROTUNDA, *supra* note 1, at 734.

8. 429 U.S. at 197.

9. *Id.* at 204.

10. *Id.* at 199-200.

11. *Id.* at 202 & n.13, 203-04 (stating that a statistical correlation of 2% between maleness and drunk driving was insufficient to establish a statistically permissible "fit" and "adequate justification" for regulation, and requiring that a greater accuracy in serving the State's interest in reducing drunk driving be shown).

12. *Id.* at 203 n.16, 204 (ruling that women and men are similarly situated because "statistical disparities between the sexes are not substantial" in terms of alcohol consumption and driving, thus making the gender-based differential substantially underinclusive. The ban on 18-20 year-old males only prohibited them from buying beer, not from drinking beer, which made the statute even more underinclusive in light of the important governmental interest of reducing teenage drunk driving).

13. *Id.* at 201-02 (banning all 18-20 year-old males from buying 3.2% beer in order to reduce drunk driving, while statistics showed that only 2% of males in that age group were arrested for drunk driving, represents an overinclusive statute. "[A] correlation of 2% must be considered an unduly tenuous 'fit'."). *Id.*

14. *See infra* text accompanying notes 68-74.

the relationship component has also begun to differentiate the underinclusiveness inquiry from the service inquiry.[15] Finally, the Court has begun to distinguish clearly between the intermediate review service test of "substantially" or "materially" serving the government's important interests and the strict scrutiny service test, which in addition requires the statute "directly" serve the government's compelling interests.[16]

Ultimately, the end result of this elaboration should be explicit acknowledgement of two separate levels at heightened scrutiny for each of the three legislative fit inquiries: (1) "materially advancing an important (or substantial or significant) governmental interest" versus "materially advancing a compelling governmental interest" for the advancement inquiry;[17] (2) a "substantial relationship" test versus a "direct relationship" test for the underinclusiveness and service inquiries;[18] and (3) a "narrowly drawn" versus "least restrictive alternative" test for the overinclusiveness and restrictiveness inquiries.[19]

Regarding the question of legislative fit and the various versions of rational review, minimum rationality review only requires a minimally rational relationship, rationally (i.e., "minimally" or "marginally") advancing a legitimate interest, and no less restrictive alternative analysis.[20] This inquiry takes place against a backdrop of strong deference to legislative judgments.[21] In basic rational review and rational review with bite,

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15. *See infra* text accompanying notes 39-57.

16. *See infra* text accompanying notes 50-67.

17. *See infra* text accompanying notes 33-34.

18. *See infra* text accompanying notes 43-44, 50-67.

19. *See infra* text accompanying notes 70-77, 89-91. Regarding the various versions of heightened scrutiny, at basic mid-level review, applicable to cases like gender discrimination under the Equal Protection Clause, the Court applies the important government interest, substantial relationship, and narrowly drawn legislative fit inquiries. *See infra* text accompanying notes 33, 44, 50, 74. At mid-level review with bite, used in cases such as those involving commercial speech, the Court applies the important governmental interest and narrowly drawn inquiries, but then adds to those requirements the direct relationship requirement of strict scrutiny. *See infra* text accompanying notes 56, 60-67, 75-76. At strict scrutiny, the Court applies the compelling governmental interest, direct relationship, and least restrictive alternative legislative fit test. *See infra* text accompanying notes 34, 45, 51, 55, 71-73. On these three heightened standards of review generally, see Kelso, *supra* note 2, at 504-08, 586-91.

20. *See infra* text accompanying notes 32, 42, 46, 87.

21. *See also* TRIBE, *supra* note 1, at 1442-43 ("The traditional deference *both* to legislative purpose *and* to legislative selections among means continues, on the whole,

this extreme deference to legislative judgments is dropped, and the Court will consider on its own whether there is a rational relationship between means and ends and a rational advancement. Furthermore, the Court will apply a version of the restrictiveness and overinclusiveness inquiries that I have previously denominated a "weak" less restrictive alternative test.[22]

III. A CLOSER LOOK AT THE ADVANCEMENT, RELATIONSHIP, AND BURDEN INQUIRIES

The most well-developed doctrinal approach to issues of legislative fit between means and ends has occurred in Equal Protection and Due Process Clause analysis of the benefits and burdens of a particular legislative scheme. From Equal Protection Clause doctrine, questions arise as to what extent the statute is underinclusive in the way it achieves its benefits or overinclusive in the way it distributes its burdens.[23] From Due

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to make the [minimum] rationality requirement largely equivalent to a strong presumption of constitutionality."). *See generally* Heller v. Doe, 113 S. Ct. 2637, 2642-43, 2648 (1993) (discussing the elements of minimum rationality review, and emphasizing the deference due to legislative judgment under rational review).

22. The heightened rational review relationship inquiry is discussed *infra* at notes 43, 47-49 and accompanying text. The "weak" less restrictive alternative test is discussed *infra* at notes 78-86 and accompanying text. As described in a previous article, the difference between basic rational review and rational review with bite is that at basic rational review the challenger has the burden of demonstrating that the challenged conduct is unconstitutional. At rational review with bite, the burden shifts to the government to demonstrate that its action is constitutional. For a discussion of cases where the burden has shifted to the government to establish the constitutionality of its action, see Kelso, *supra* note 2, at 499-504. Compare direct discrimination against interstate commerce cases under dormant Commerce Clause analysis in Maine v. Taylor, 477 U.S. 131, (1986) and cases involving the First Amendment rights of government workers to speak on matters of public concern, Rankin v. McPherson, 483 U.S. 378, 388 (1987) with cases where the challenger still has the burden of proof, such as cases of indirect discrimination on interstate commerce under Pike v. Bruce Church, 397 U.S. 137, 138-39 (1970) and cases involving the government substantially impairing the obligation of its own contracts under the Contract Clause, Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 (1983). For a recent example under heightened rational review of the Court placing the burden on the government, see Dolan v. City of Tigard, 114 S. Ct. 2309, 2318-20 (1994). This holding was vigorously questioned by the four dissenting Justices. *Id.* at 2323, 2326 (Stevens, J., joined by Blackmun & Ginsburg, J.J., dissenting); *id.* at 2331 (Souter, J., dissenting).

23. *See generally* NOWAK & ROTUNDA, *supra* note 1, at 572:

> An under-inclusive classification contains all similarly situated people but excludes some people who are similar to them in terms of the purpose of

Process Clause doctrine, there are issues regarding the extent of the benefits achieved under the statute and whether the burden on the regulated individual is simply too great given these benefits.[24] Under free speech doctrine, the Supreme Court has struggled with questions of legislative fit in cases involving commercial speech[25] and in cases distinguishing between content-neutral and content-based restrictions on speech.[26]

For example, in commercial speech cases, the Court has stated explicitly that two basic issues frame the "fit" inquiry.[27] These two issues involve how to define the phrase "directly advance" under the third prong of the *Central Hudson Gas & Electric Co. v. Public Service Commission* test, and how to define the phrase "not more extensive than necessary" under the

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> the law. . . . A law may be said to be over-inclusive when the legislative classification includes all persons who are similarly situated in terms of the law plus an additional group of persons.

Id. (footnote omitted).

24. *See generally* TRIBE, *supra* note 1, at 1306:

> The inquiry must examine likely results. . . . [I]ntrusions must be measured for their necessity and efficacy, and if the intrusions are extreme alternatives must be considered. In each case, it will be necessary to ask: Who is being hurt? Who benefits? By what process is the rule imposed? For what reasons? With what likely effect as precedent?

Id. (Footnote omitted).

25. Modern commercial speech doctrine began in 1976. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In 1980, the Court set forth a four-part test to be used in commercial speech cases in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

> For commercial speech to come within [the protection of the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Id.

26. *See, e.g.*, Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477-80 (1989) (comparing the "least restrictive alternative" test used at strict scrutiny with the "looser" less restrictive alternative test of intermediate review for content-neutral time, place, or manner regulations of speech); Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988) (strict scrutiny applied to a content-based regulation of speech).

27. *See, e.g.*, Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) ("The last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends.").

fourth prong of the *Central Hudson* test.[28] A third issue, addressed by the second prong of the *Central Hudson* test is the question of what level of government interests are required to be advanced by the regulation.[29] All three of these prongs are part of a proper legislative fit analysis.[30]

A. *The Advancement Inquiry*

The first inquiry under the three-part "legislative fit" analysis concerns what types of interests the legislature must advance in passing its statute.[31] Under current doctrine, rational review requires that legitimate or permissible governmental interests be advanced.[32] At intermediate review, important, substantial or significant governmental interests need to be advanced.[33] At strict scrutiny, the statute must advance compel-

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28. 447 U.S. at 564 (1980). For the *Central Hudson* test reproduced in full, see *supra* note 25.

29. 447 U.S. at 564. The *Central Hudson* test requires that the regulation advance a substantial government interest. *Id.*

30. The first prong of the *Central Hudson* test asks whether the government is regulating illegal or misleading commercial speech. *Id.* In such a case, no further review takes place under commercial speech analysis, and the challenger is left with only a claim under the Equal Protection or Due Process Clause. *See id.* at 563-64.

31. The same analysis applies if it is an administrative agency adopting a rule pursuant to delegated rule-making authority, or the President passing an executive order. More broadly, the question is what interests the relevant governmental entity is trying to advance in undertaking the action under review by the court. *See generally* NOWAK & ROTUNDA, *supra* note 1, at 452 ("When a legislature, executive official, or a court takes some official action against an individual, that action is subjected to review under the Constitution."). *Id.* at 568 ("The equal protection guarantee . . . governs *all* governmental actions.") (emphasis added). For ease of reference, throughout this article reference is typically made only to the paradigm case of a court reviewing legislative action in passing a statute.

32. The Court has occasionally spoken in terms of "permissible" interests. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). The more common phrasing, however, and the phrasing used in the remainder of this article, is "legitimate" governmental interests. *See* TRIBE, *supra* note 1, at 1439-40.

33. In various opinions the Court has used the terms "important," "substantial" or "significant" to describe the level of governmental interests required at intermediate review. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (requiring "significant" governmental ends in a case involving a content-neutral time, place, or manner regulation of speech); *Central Hudson*, 447 U.S. at 564 (1980) (requiring "substantial" governmental ends in a case involving commercial speech); Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring "important" governmental interests in a case involving gender discrimination). For a discussion of these three cases as representative of intermediate review (either basic mid-level review or mid-level re-

ling or overriding governmental interests.[34] If the statute under review does not advance this level of interest, the statute will be held unconstitutional, without consideration of the remaining two prongs of the legislative fit analysis. Furthermore, if the statute only advances impermissible interests, the statute will be held unconstitutional even at minimum rationality review.[35]

In determining which governmental interests can be used to support the constitutionality of a legislative enactment, the Court has indicated that in applying rational review it will consider whether "any conceivable set of facts . . . provide[s] a rational basis for the classification."[36] In cases applying intermediate scrutiny, the standard is whether any government interest "put forward by the State" is a substantial governmental interest.[37] Finally, in applying strict scrutiny, the Court

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view with bite), see *supra* note 7 and *infra* notes 58, 74 and accompanying text.

Because it mirrors the nature of the relationship required under intermediate scrutiny, see *infra* text accompanying notes 44, 50, 51, the term "substantial" governmental interest is used in the remainder of this article to describe the requisite governmental interest which must be advanced at intermediate review.

34. The Court has occasionally used the term "overriding" to describe the nature of the governmental interest required under strict scrutiny. *See e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982). The more common term, however, and the term used in the remainder of this article, is "compelling" governmental interest. *See generally* NOWAK & ROTUNDA, *supra* note 1, at 530.

35. For a few examples of "impermissible" governmental interests, see Oregon Waste Sys. Inc., v. Oregon Dep't of Envtl. Quality, 114 S. Ct. 1345, 1354 (1994) (stating that it is impermissible under dormant Commerce Clause analysis for a state to engage in economic protectionism); Palmore v. Sidoti, 466 U.S. 429, 433 (1989) (holding that a court may not take private biases against interracial marriage into account in child custody decisions); Zobel v. Williams, 457 U.S. 55, 63-64 (1982) (stating that Alaska may not base its oil revenue dividend distribution plan on time of residency in the state in order to reward long-time residents for past contributions to the state); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (holding that a university may not increase the number of minority medical students solely for the purpose of increasing the percentage of minority medical students).

36. Heller v. Doe, 113 S. Ct. 2637, 2642 (1993) (quoting FCC v. Beach Communications, 113 S. Ct. 2096, 2101 (1993)); *see* Edenfield v. Fane, 113 S. Ct. 1792 (1993) (limiting the "any conceivable interest" test to rational basis review and rejecting its use at intermediate scrutiny); *see generally* Kelso, *supra* note 2, at 535-36 (discussing use of the "any conceivable interest" standard in cases involving rational review).

37. *Fane*, 113 S. Ct. at 1798 (1993). This aspect of intermediate review is discussed more fully in R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. (forthcoming 1995).

will only consider whether the "actual purposes" of the government advance compelling governmental interests.[38]

B. *The Relationship Inquiry Regarding Statutory Benefits*

The relationship inquiry of legislative fit analysis involves two related parts. First, there is the issue of whether the statute fails to regulate some individuals who are part of the problem. This is the underinclusiveness inquiry.[39] Second, there is the issue of the extent to which the statute achieves its benefits over those whom it does not properly regulate. This is the service inquiry.[40]

Underinclusiveness occurs when one group is singled out to be the solution for a problem despite other similarly situated groups who are also part of the problem.[41] Minimum rationali-

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38. *See generally* Kelso, *supra* note 2, at 535-36 (discussing strict scrutiny); *see, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 762-67 (1986), *overruled in part by* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2800 (1992) (stating it was an illegitimate actual purpose for the legislature to deter women from exercising their right of choice regarding abortion); Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (holding it was an illegitimate actual purpose of the legislature to advance religion). In some earlier cases, the Court appeared to adopt the "actual purpose" test for cases involving intermediate review. *See* Kelso, *supra* note 2, at 536 n.233. However, the Court noted in the 1993 *Fane* decision that when dealing with an intermediate review case, it would not turn the case away "if it appears that the stated interests are not the actual interests served by the restriction." *Fane*, 113 S. Ct. at 1798 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)). The language in *Fane* clearly indicates that the Court has rejected the "actual purpose" test for intermediate review, and will apply it only in cases of strict scrutiny.

39. The phrase "underinclusiveness" is drawn from the Equal Protection Clause. *See infra* text and accompanying notes 41-44.

40. The phrase "service inquiry" is drawn from cases such as Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), where the Court has stated that part of the legislative fit inquiry under the Equal Protection Clause is whether the "discriminatory means employed" in the case "substantially serve the statutory end." *Id.* at 151; *see infra* text accompanying notes 45-55. It should be noted that the following discussion of relationship and burden under equal protection, due process, and free speech doctrine represents an expanded discussion of the relationship and burden analysis under commercial speech doctrine which appears in Kelso, *supra* note 37, at nn.101-33.

41. *See* TRIBE, *supra* note 1, at 1447. "Underinclusive classifications do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended governmental end." *Id.* As Professor Tribe further notes,

ty review tolerates underinclusiveness because of the strong presumption of deference to the government under this test.[42] However, this is not true at heightened rational review, intermediate review, or strict scrutiny. At heightened rational review, the Court will not defer to the government's finding that whatever underinclusiveness exists is the product of a rational governmental choice. Rather, the Court will independently determine whether the extent of the statute's underinclusiveness means that the statute is not rationally related to legitimate governmental ends.[43] At intermediate review, the Court asks

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> [J]udicial tolerance of underinclusiveness may well invite legislatures to avoid the full political consequences of their actions, for "nothing opens the door to arbitrary action so effectively as to allow . . . 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."

Id. at 1447-48 (quoting Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)). On the other hand:

> In defense of underinclusiveness it has been argued that piecemeal legislation is a pragmatic means of effecting needed reforms, where a demand for completeness may lead to total paralysis: "The State [is] not bound to deal alike with all . . . classes, or to strike at all evils at the same time or in the same way."

TRIBE, *supra* note 1, at 1447 (quoting Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935)).

42. *See generally* TRIBE, *supra* note 1, at 1447; *supra* note 21 and accompanying text. For example, in the classic minimum rationality review case of *Railway Express Agency*, 336 U.S. at 109-10, a New York law banned advertisements for hire on the side of trucks, ostensibly to prevent distraction to motorists and pedestrians from increasing traffic safety problems. However, the state did not ban advertisements on the side of trucks for the trucker's own company. Because the case pre-dated development of the commercial speech doctrine in 1976, see *supra* note 25, it involved only minimum rationality review, and thus the underinclusiveness of the statutory scheme did not raise any serious constitutional problems. While strongly deferring to the local government's judgment, the Court observed that:

> [t]he local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. . . . And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection [minimum rationality review] that all evils of the same genus be eradicated or none at all.

Id. at 110.

43. *See generally* TRIBE, *supra* note 1, at 1444 (discussing rational review of a more penetrating nature); NOWAK & ROTUNDA, *supra* note 1, at 580-85; Gerald

the more stringent question of whether the statute, even if rationally related to its ends, is or is not substantially underinclusive.[44] Under strict scrutiny, no *unnecessary* underinclusiveness is permitted.[45]

Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model of New Equal Protection*, 86 HARV. L. REV. 1 (1972) ("[T]hese cases found bite in the equal protection clause after explicitly voicing the traditional toothless minimum rationality standard."). *Id.* at 18-19.

Thus, in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), the Court did not defer to the government's judgment, but concluded for itself that the statute's underinclusiveness was not rational when the statute did not permit the construction of a home for the mentally retarded. The statute was based upon: (1) the safety concerns of the home being built on a "five hundred year flood plain" and possible problems with evacuation in the event of a flood, but did permit nursing homes, homes for the convalescents or the aged, which raised the same kind of evacuation concerns; (2) a concern with the number of people who might occupy it, but did permit the existence of other kinds of homes or houses, which raised similar occupancy concerns; (3) concerns of legal responsibility for actions which the inhabitants might take, but did permit boarding and fraternity houses, which raised similar concerns regarding legal responsibility. *Id.* at 449-50. Similarly, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 248, (1978), the Court did not defer to the government's judgment, but concluded that the statute was terribly underinclusive in applying

> only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established voluntary pension plans, qualified under § 401 of the Internal Revenue Code. And it applies only when such an employer closes his Minnesota office or terminates his pension plan.

Id. This determination was critically important in terms of the Court's finding that the statute was not "reasonable," that is, not rationally related to a legitimate government end. So, too, in Dolan v. City of Tigard, 114 S. Ct. 2309, 2318-22 (1994), the Court rejected a minimum rationality review level of scrutiny, and required a higher "reasonable relationship" or "rough proportionality" standard where the "nature and extent" of the regulation's benefits and burdens would be balanced by the Court.

For a general discussion of heightened rational review in Equal Protection, Due Process, Contract Clause, Takings Clause, and constitutional adjudications generally, see Kelso, *supra* note 2, at 499-504, 519-21, 553 n.353, 585-99; *supra* note 22 and accompanying text. For a discussion of heightened rational review and the service component of the relationship inquiry, see *infra* notes 47-49 and accompanying text. For a discussion of heightened rational review under the legislative fit burden analysis, see *infra* notes 77-84 and accompanying text.

44. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) (stating that a statutory rape law applicable only to men is not substantially underinclusive because teenage men are not similarly situated as teenage women with regard to the risk of teenage pregnancy); Craig v. Boren, 429 U.S. 190, 203 n.16, 204 (1976) (ruling that gender-based differential in terms of who can buy 3.2% beer is unconstitutional, in part because "statistical disparities between the sexes are not substantial" in terms of alcohol consumption and driving, and thus women and men are similarly situated, making the gender-based differential substantially underinclusive).

45. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (quoting McLaughlin

The second relationship inquiry, the service inquiry, which is concerned with the extent to which the statute serves its intended ends, also involves a tiered approach among minimum rationality review, heightened rational review, intermediate review, and strict scrutiny. At minimum rationality review, the statute need only marginally, or minimally, serve to advance the government's ends. At this level of scrutiny, the Court defers to the legislature's judgment concerning whether such marginal service exists.[46] In contrast, at heightened rational review (whether basic rational review or rational review with bite), the Court does not defer to the government's judgment but examines for itself whether such marginal service exists.[47] For example, in *City of Cleburne v. Cleburne Living Center, Inc.*,[48] the Court did not defer to the legislature's judgment concerning the rationality of the legislative scheme, but it rather determined for itself "whether the policies hypothesized to save the challenged action were actually supported by fact."[49]

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v. Florida, 379 U.S. 184, 196 (1964) ([R]acial classifications "must be justified by a compelling government interest and must be necessary . . . to the accomplishment of their legitimate purpose."); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("[R]acial classifications, . . . if they are ever to be upheld, . . . must be shown to be necessary to the accomplishment of some permissible state objective."); *see generally* NOWAK & ROTUNDA, *supra* note 1, at 575 ("If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.").

46. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("It is enough that there was an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *supra* notes 20-21 and accompanying text; *see also* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 293-96 (1993) (discussing various formulations of rational review, including the view that minimum rationality requires only that the statute not be "arbitrary [or capricious]", "ridiculous", or passed by "babbling idiots").

47. *See generally* TRIBE, *supra* note 1, at 1444 (discussing rational review of a more penetrating nature); NOWAK & ROTUNDA, *supra* note 1, at 580-85; Gunther, *supra* note 43, at 18-19 ("[T]hese cases found bite in the equal protection clause after explicitly voicing the traditional toothless minimum rationality standard.").

48. 473 U.S. 432, 449-50 (1985).

49. TRIBE, *supra* note 1, at 1444; *see also* Kelso, *supra* note 2, at 500 n.27, 501 n.30, *citing, inter alia*, City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 458-59 (1985) (Marshall, J., joined by Brennan & Blackmun, JJ., concurring) (noting that the majority applied "second-order" rational review); Heller v. Doe, 113 S. Ct. 2637, 2652-53 (1993) (Souter, J., joined by Blackmun, Stevens, & O'Connor, JJ., dissenting) (chastising the majority for improperly applying *Cleburne* in a case involving regulations concerning the mentally impaired).

At intermediate review, the statute must substantially serve the governmental ends.[50] Under strict scrutiny, the statute must not only substantially serve the governmental ends, but do so directly.[51]

The same level of non-deferential rational basis scrutiny also appears in other areas of constitutional law, like dormant Commerce Clause analysis, Contract Clause analysis, or analysis under the Takings Clause.

For example, when examining legislation under the dormant Commerce Clause, the Court independently examines whether the state is advancing legitimate interests "unrelated to economic protectionism." *See* Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality, 114 S. Ct. 1345, 1354 (1994). Similarly, under the Contract Clause, where the state is impairing the obligation of either its own contracts or a narrow range of contract actors, the Court does not defer to legislative judgment. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 n.14 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243-44 (1978). Likewise, under Takings Clause doctrine, the Court does not defer to the legislature's judgment under the recently developed "essential nexus" test in Dolan v. City of Tigard, 114 S. Ct. 2309, 2317-18 (1994). For further discussion of heightened rational review and the dormant Commerce Clause and Contract Clause, see Kelso, *supra* note 2, at 501-04, 519-21. For further discussion of *Dolan*, see Kelso, *supra* note 37, at nn.48-71 and accompanying text.

50. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980) (stating that in a gender discrimination case involving intermediate review under the Equal Protection Clause, the Court considers whether the "discriminatory means employed" in the case "substantially serve[s] the statutory end"); Carey v. Population Serv. Int'l, 431 U.S. 678, 695 (1977) (explaining that in a substantive due process case, the Court will ask whether there is a "substantial reason" to support the government's contention that the ban on a minor's access to contraceptives would serve the state's interest). Though the Court has never explicitly held that the standard of review in *Carey* represents intermediate review, the *Carey* Court did note that something less than strict scrutiny was being applied. Additionally, the *Carey* opinion tracks an intermediate standard of review in all of its aspects. *See* Kelso, *supra* note 2, at 528-29.

51. *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 280-85 (1990) (ruling that "heightened evidentiary requirements" concerning a surrogate's decision whether an incompetent patient would want life-supporting treatment removed was directly related to the state's compelling interest in the protection and preservation of human life); Bowers v. Hardwick, 478 U.S. 186, 212-13 (1986) (Blackmun, J., joined by Brennan, Marshall, & Stevens, JJ., dissenting) (applying a strict scrutiny approach rejected by the majority, the dissent noted that the state's interest in "protecting the public environment" was not directly served by banning private consensual sexual relationships of which the public might disapprove); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 765-66 (1986), *overruled in part by* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2800 (1992) (stating that "reporting requirements" under Pennsylvania abortion regulation law was not directly related to "the health-related interests" that serve to justify the regulation).

Although the Court has not been perfectly clear on this point, it is clear from the commercial speech cases that a direct relationship, not merely a substantial relationship, is required at strict scrutiny review. As the Court noted in United States v. Edge Broadcasting, 113 S. Ct. 2696, 2705 (1993), commercial speech cases involve a

It is arguable whether this "service" inquiry should apply in equal protection cases.[52] However, it is clear that under current equal protection analysis, the question of "service," as well as the question of "underinclusiveness," is part of intermediate and strict scrutiny review. For example, in *Wengler v. Druggists Mutual Insurance Co.*,[53] which involved intermediate scrutiny under the Equal Protection Clause, the Court considered whether the "discriminatory means employed" in the case "substantially serve[d] the statutory end."[54] The difference between the intermediate scrutiny "substantial service" test and the strict scrutiny "direct relationship" requirement is also apparent in equal protection cases. For example, under the strict scrutiny approach towards state affirmative action programs, only reme-

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less rigorous form of scrutiny than traditional First Amendment content-based regulations. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (content-based restrictions are subject to "most exacting scrutiny"). Since it is clear that a "direct relationship" requirement is applied in commercial speech cases, see *infra* notes 58-67 and accompanying text, *a fortiori* such a requirement, not the more lax requirement of a mere "substantial relationship", must be required at strict scrutiny.

52. It must be noted that under a "pristine" Equal Protection Clause analysis, the Court should perhaps restrict its inquiry to the underinclusiveness or overinclusiveness of the statute, and reserve for substantive due process review the question of how much the statute achieves ("serves") its ends or oppressively burdens individuals (the "restrictiveness" inquiry). In theory, a statute which is neither underinclusive nor overinclusive, but which only minimally serves the government's interest, or greatly burdens individuals, does not deny a citizen equal protection of the laws, because the law is applied equally to all similarly situated parties. It may, however, deny the citizen substantive due process if the burden on the individual is sufficiently great compared to the minimal benefit that is achieved.

Practically speaking, this theoretical difference is of little importance provided the standards of review under the Equal Protection Clause and Due Process Clause are the same. Thus, as long as burdens on suspect classes or fundamental rights trigger strict scrutiny analysis under both the Equal Protection and Due Process Clauses, the issues of underinclusiveness and overinclusiveness, and of balancing benefits and burdens, will both be considered at the same level of review. Whether the analysis is under equal protection, due process, or a combination, makes little difference. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 1, at 568-70, 578-80, 757-816 (noting the similarity between equal protection and substantive due process review, and discussing an entire range of fundamental rights cases, including the due process-based right of privacy and right to die cases, under the chapter heading of equal protection). Thus, it is perhaps unsurprising that the Court has occasionally not separated Equal Protection Clause analysis from Due Process Clause analysis. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 391-92, 395-96 (1978) (Stewart, J., concurring) (suggesting that the majority's equal protection analysis is really substantive due process analysis in disguise).

53. 446 U.S. 142 (1980).

54. *Id.* at 151.

dial steps "directly related" to remedying prior discrimination against individuals are constitutional.[55] In contrast, under the intermediate review approach to federal affirmative action programs as enunciated in *Metro Broadcasting, Inc. v. FCC*,[56] an indirect means of encouraging broadcasting diversity by adopting a preference for minority ownership satisfied the substantial service component of intermediate review.[57]

A similar tiered approach is employed in cases involving the freedom of speech. This approach is clearest in cases involving the commercial speech doctrine where the term "directly advance" in *Central Hudson* reflects the strict scrutiny concern with the way the statute's benefits are achieved.[58] While the Court has not been perfectly clear on the point, in traditional free speech cases the Court has basically applied intermediate scrutiny to content-neutral regulations of speech and strict scrutiny to content-based regulations of speech.[59]

With respect to commercial speech, the Court recently clarified the meaning of the phrase "directly advance" under the

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55. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-11 (1989). As the *Croson* Court noted, a state or local entity may take steps "to rectify the effects of identified discrimination within its jurisdiction" if the remedial relief is tailored "to those who truly have suffered the effects of prior discrimination." *Id.* at 508. In contrast, indirect means to remedy prior discrimination, such as role model approaches, are unconstitutional under the *Croson* strict scrutiny approach. *Id.* at 497-98.

56. 497 U.S. 547 (1990).

57. *Id.* at 579-84.

58. It is precisely because the *Central Hudson* test adopted the strict scrutiny term for describing the required relationship that I described the *Central Hudson* test as mid-level review "with bite," rather than basic mid-level review in my article three years ago. *See* Kelso, *supra* note 2, at 505-06, 577-78. The "bite" to *Central Hudson* is the application of a strict scrutiny direct relationship component to an otherwise basic mid-level test. *Id.* For a further discussion of this "direct" relationship test in *Central Hudson*, see *infra* text accompanying notes 60-67.

59. *Compare* Ward v. Rock Against Racism, 491 U.S. 781, 798-99 & n.6 (1989) (applying the intermediate scrutiny "substantial relationship" test in the context of a content-neutral regulation of speech by concluding that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals") *with* Boos v. Barry, 485 U.S. 312, 321-29 (1988) (indicating that strict scrutiny review is appropriate for a content-based regulation of speech in a public forum); *see generally* Kelso, *supra* note 2, at 558-78, 590-91. Of course, this analysis concerns speech in a public forum. The regulation of speech in a non-public forum is subject to different, and less rigorous, standards of review. This review is more akin to a version of rational review, unless viewpoint discrimination is involved, which would trigger strict scrutiny. *See id.* at 578-82.

Central Hudson test. In 1993, the Court rejected an interpretation of "directly advance" that would have analyzed only whether the statute serves to advance its ends in a direct causal way, even if the statute only minimally or marginally serves to advance its ends.[60] This approach reflects more of a rational review service inquiry. Instead, the Court held in *Edenfield v. Fane* that the "directly advance" prong of the *Central Hudson* test requires a "direct and material" advancement of the state's interest.[61] As the discussion in *Fane* makes clear, the term "material" in this context is the equivalent of the term "substantial."[62] Thus, as in the Equal Protection and Due Process Clause contexts, in the commercial speech context, "direct advancement" under the service inquiry requires both "substantial service" and a "direct relationship."[63]

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60. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1800-02 (1993). This limitation of the term "direct" to a direct causal relationship was the position espoused by Chief Justice Rehnquist in City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1523 (1993) (Rehnquist, C.J., joined by White & Thomas, JJ., dissenting). Chief Justice Rehnquist concluded in *Discovery Network* that *Central Hudson*'s third prong could be satisfied merely by the government advancing its interests, even "marginally," in a direct causal way, without any additional "material" or "substantial" advancement requirement. *Id.* For a discussion of "marginal" or "minimal" advancement as meeting the rational review service inquiry, see *supra* text accompanying notes 46-49. However, this view represented the dissent in *Discovery Network*. The majority opinion in *Discovery Network* noted that the ban on commercial newspaper dispensers on public sidewalks, of which there were 62, while permitting regular newspaper dispensers on sidewalks, of which there were 1,500-2,000, achieved only a "marginal degree of protection," which helped to render the statute not sufficiently related to its intended ends to pass constitutional scrutiny. 113 S. Ct. at 1510, 1514-15.

61. *Fane*, 113 S. Ct. at 1800-02.

62. *See, e.g., id.* at 1801-02 ("[T]he prohibitions here do not serve these purposes in a direct and material manner. Where a restriction on speech lacks this close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place, or manner restriction.").

63. For discussion of the strict scrutiny dual requirement of "substantial service" and a "direct relationship" under the Equal Protection and Due Process Clauses, see *supra* notes 51, 55 and accompanying text. Though Justice Kennedy's opinion in *Fane* commanded eight votes, it is far from clear that each of these Justices agreed that this dual requirement is appropriate in cases involving commercial speech. As noted *supra* note 60, the *Discovery Network* dissent disagreed with this analysis. However, this leaves a majority of five votes for Justice Kennedy's opinion in *Fane* on this point.

The majority opinion of Justice White in United States v. Edge Broadcasting, 113 S. Ct. 2696 (1993) does not undercut the vitality of the *Fane* analysis. Reflecting the view he took in *Discovery Network*, Justice White noted in *Edge*, "The interests of lottery and non-lottery states are directly served . . . and this would plainly be the case even if, as applied to Edge, there were only marginal advancement of that inter-

Moreover, as in the Equal Protection and Due Process contexts, the requirement of a "direct" relationship in cases involving commercial speech adds some rigor to the intermediate "substantial" service requirement. This fact is discussed in Justice O'Connor's dissent in *Fane*. Justice O'Connor noted that there exists "profound" concern regarding the image of the legal and accounting professions because of the "incremental, indirect" effects of commercialization.[64] However, Justice O'Connor noted that *Central Hudson* permits states to target only "direct" harms to the listener, and thus "directly advance" governmental interests, while preventing regulation dealing with such "indirect" harms.[65]

The term "direct advancement" under commercial speech doctrine also reflects a heightened scrutiny concern that a statute not be unnecessarily underinclusive. In his dissent in *City of Cincinnati v. Discovery Network, Inc.*, Chief Justice

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est." *Id.* at 2704. However, this quote is *dicta* for two reasons. First, the Court held that, in any event, as applied to Edge Broadcasting, the government "may be said to advance its purpose by substantially reducing lottery advertising." *Id.* at 2707. Thus, a "substantial" or "material" advancement of the government interest was present in *Edge*. Second, even if there were only marginal advancement as applied to Edge, it would be an open question whether the "direct and material" standard of *Fane* should be applied to the effects on the particular challenger before the Court or applied to all individuals. *See id.* at 2708 (Souter, J., joined by Kennedy, J., concurring) (leaving that question open). Thus, the definition of "directly related" in Chief Justice Rehnquist's dissent in *Discovery Network* seems to be just that, a dissent.

64. *Fane*, 113 S. Ct. at 1804 (1993) (O'Connor, J., dissenting).

65. *Id.* Justice O'Connor stated that in her view, contrary to current commercial speech analysis under *Central Hudson*, states should have the authority under the commercial speech doctrine "to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession. . . . Commercialization has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well." *Id.* Such speech could possibly be regulated under the substantial relationship test of basic mid-level review but cannot be regulated under a "direct relationship" requirement because no regulation can directly respond to such an indirect effect. As Justice O'Connor's frustration with the current commercial speech doctrine reflects, a "direct relationship" requirement, such as in *Central Hudson*, means that the government can only respond to "direct harms," such as advertising which are "false or misleading, or amount to 'overreaching, invasion of privacy, [or] exercise of undue influence.'" *Id.* (quoting Shapiro v. Kentucky Bar Ass'n., 486 U.S. 466, 478 (1988)); *see also* Ibanez v. Florida Dep't of Business & Professional Regulation, 114 S. Ct. 2084 (1994) (holding that a commercial speech regulation of certified public accountants was not directly related to regulating misleading advertising: Chief Justice Rehnquist and Justice O'Connor dissented in part, claiming that the regulation was directly related to preventing misleading advertising.).

Rehnquist suggested an interpretation of "direct" that would have allowed the government to satisfy the "direct advance" requirement of *Central Hudson* by adopting a mere direct causal relationship, even if the statute were terribly underinclusive.[66] The majority, however, rejected this interpretation and signaled that the direct relationship requirement under *Central Hudson* embodies a heightened scrutiny underinclusiveness inquiry.[67]

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66. *See Discovery Network*, 113 S. Ct. at 1523 (1993) (Rehnquist, C.J., joined by White & Thomas, JJ., dissenting), discussed *supra* note 60. Under this view, an incredibly underinclusive scheme could still be directly related. For example, under this view the ban on advertisements on the side of trucks for hire in the classic pre-*Central Hudson* commercial speech case of *Railway Express v. New York*, discussed *supra* note 42, would likely be found to be a direct causal link to traffic safety. If so, that would permit the minimum rationality test of allowing the legislature broad discretion to deal with one part of the problem at a time, to control under the *Central Hudson* test. *See supra* note 42 and accompanying text. For a further discussion of Chief Justice Rehnquist's similar possible attempt to "water down" other aspects of commercial speech doctrine to mirror rational review, see Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 299-304 (1987).

67. *Discovery Network*, 113 S. Ct. at 1510 n.13. In *Discovery Network*, the majority noted that banning commercial newspaper dispensers on public sidewalks while permitting regular newspaper dispensers on sidewalks was too underinclusive in response to the problem of "unattractive" or "eyesore" newsracks. *Id.* at 1510, 1514-15. Whether this heightened scrutiny underinclusiveness requirement is the intermediate level of substantial underinclusiveness or the strict scrutiny requirement of unnecessary underinclusiveness is in some doubt. The language in *Discovery Network* seems to adopt the "substantial underinclusiveness" analysis poised between rational basis review and strict scrutiny. *Id.* at 1510 n.13. However, based upon the requirement of a "direct" relationship, logically, it should be a strict scrutiny underinclusiveness inquiry. Of course, the *Central Hudson* test clearly adopts an intermediate level of scrutiny for the advancement inquiry (requiring only a substantial governmental interest). *See supra* note 24. Similarly, it adopts an intermediate level of scrutiny for burden analysis. *See infra* text accompanying notes 75-77 (rejecting the strict scrutiny "least restrictive alternative" analysis in cases involving commercial speech). To the extent that the underinclusiveness inquiry in *Central Hudson* only adopts a substantial underinclusiveness test, this would mean that the *Central Hudson* test adopts a strict scrutiny level of review only for the service inquiry. *See supra* text accompanying notes 60-65. On a related point, by not clearly separating these various inquiries from one another, the Court has sometimes confused the strict scrutiny "direct relationship" requirement and the intermediate review requirement of a "substantial relationship" in some recent cases discussing the proper standard of review in commercial speech and content-neutral time, place, or manner regulations of speech. *See infra* text accompanying notes 99-110.

C. *Legislative Burdens and Various Versions of the Narrowly Drawn/Less Restrictive Alternative Analysis*

The third major aspect of the "fit" analysis focuses on the burdens caused by governmental regulation. The Equal Protection Clause concern in this area is the problem of overinclusiveness. An overinclusive statute burdens individuals who are not part of a given problem and thus burdens individuals who *could* be free from regulation under a more carefully crafted, less broadly drafted statute.[68] The Due Process Clause concern relating to government regulation burdens is that a statute can burden too greatly individuals who *are* properly regulated, in light of both the benefits achieved and possible alternatives which would also advance the government's interests with less burden on the individual.[69] As with the relationship inquiry, the Court has not separated equal protection and due process concerns, and thus both overinclusiveness and restrictiveness are aspects of equal protection, substantive due process, and free speech review. Under each of these analyses, a statute is not "narrowly drawn" if it is too overinclusive or

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68. *See* NOWAK & ROTUNDA, *supra* note 1, at 572 ("A law may be said to be over-inclusive when the legislative classification includes all persons who are similarly situated in terms of the law plus an additional group of persons."); TRIBE, *supra* note 1, at 1450 & n.23 ("Because overinclusive classifications by definition burden some who are not similarly situated with respect to the purposes of a rule, they may of course be challenged as denying equal protection. Borrowing language ordinarily used elsewhere, it could be said that less restrictive alternatives exist for overinclusive classifications."); Professor Tribe has remarked,

> [A]n overinclusive law may well *burden* a politically powerless group which would have been spared if it had enough clout to compel normal attention to the relevant costs and benefits. . . . But as in the case of underinclusiveness, it has been argued with success . . . that legislative resort to somewhat overinclusive classifications is legitimate as a prophylactic device to insure the achievement of statutory ends: 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.'

TRIBE, *supra* note 1, at 1449-50 (quoting Dandridge v. Williams, 397 U.S. 471 (1970)).

69. *See generally* TRIBE, *supra* note 1, at 1306

> ("The inquiry must examine likely results. . . . [I]ntrusions must be measured for their necessity and efficacy, and if the intrusions are extreme alternatives must be considered. In each case, it will be necessary to ask: Who is being hurt? Who benefits? By what process is the rule imposed? For what reasons? With what likely effect as precedent?").

Id.

too burdensome on individuals, given the benefits to be achieved and the availability of less restrictive alternatives.[70]

This "narrowly drawn" analysis is applied differently at strict scrutiny, intermediate scrutiny, heightened rationality review, and minimum rationality review. At strict scrutiny, the statute must be the "least restrictive" alternative under the restrictiveness analysis[71] and must have no unnecessary overinclusiveness pursuant to the overinclusiveness inquiry.[72]

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70. The Court's most recent restatement of this "narrowly drawn" analysis appears in Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994). In *Turner*, the Court discussed as part of the intermediate "narrowly drawn" analysis the various factual findings concerning the actual burden on cable television operators caused by cable television regulations to determine whether "substantially more speech than . . . necessary" was being suppressed (the overinclusiveness inquiry). *Id.* at 2472. It considered also "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." (the restrictiveness inquiry) *Id.*

71. *See, e.g.*, Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477-80 (1989) (discussing the "least restrictive alternative" test used at strict scrutiny versus the "looser" less restrictive alternative test of intermediate review); Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989); Boos v. Barry, 485 U.S. 312, 321-29 (1988) (applying the most exacting strict scrutiny restrictiveness requirement); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (adopting the more stringent restrictiveness inquiry for purposes of strict scrutiny review). As noted in *Wygant*, not every possible alternative approach must be considered to determine whether any less restrictive alternative exists. Rather, the Court will require the government to consider only those alternatives which promote the compelling governmental interest "'about as well and at tolerable administrative expense'." *Id.* at 480 n.6 (quoting Kent Greenwalt, *Judicial Scrutiny of 'Benign' Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578-79 (1975)).

72. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660-66 (1990). In *Austin*, the Court upheld a state regulation limiting the expenditure of funds by corporations in political campaigns because the regulation was "precisely targeted to eliminate the distortion caused by corporate spending." *Id.* at 660. The Court stated,

> [a]s we explained in the context of our discussions of whether the statute was overinclusive, . . . or underinclusive, . . . the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantage given to corporations.

Id. at 666. The Court's discussion in *Austin* applied this "precise" tailoring requirement by explaining why each of the distinctions drawn by the statute was necessary to accomplish the statute's purpose and thus was not unnecessarily overinclusive or underinclusive to any extent. *Id.* at 660-66. Given this "precise tailoring" analysis, it is clear that the Court in *Austin* adopted the strict scrutiny "no unnecessary underinclusiveness" inquiry despite the Court's passing use of the phrase "substantially overinclusive", an intermediate level of the overinclusiveness inquiry that was ap-

The Court has occasionally combined these requirements, stating that the statute must be "necessary" to advance the statute's ends.[73]

At intermediate scrutiny, the Court does not require the legislature to adopt the "least restrictive alternative" or "no unnecessary overinclusiveness." Rather, reflecting intermediate scrutiny's typical "substantial" level of rigor, the statute only need be "narrowly drawn"—that is, not "substantially more burdensome" than necessary under the overinclusiveness inquiry, and not too substantially burdensome under the restrictiveness inquiry so that, as phrased under First Amendment law, the regulation "leaves open ample alternative channels of communication."[74]

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parently used by the challengers in their brief to the Court. *Id.* at 661.

73. *See, e.g.*, *Fox*, 492 U.S. at 476-77 (noting that a strict interpretation of the word "necessary" translates into the "least restrictive means" test); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("[R]acial classifications, . . . if they are ever to be upheld, . . . must be shown to be necessary to the accomplishment of some permissible state objective"); *see also* NOWAK & ROTUNDA, *supra* note 1, at 579 ("'[s]trict scrutiny' . . . requires a classification to be necessary . . . to a compelling or overriding governmental interest").

74. *See, e.g.*, *Turner Broadcasting Sys.*, 114 S. Ct. at 2472 (1994) (holding that at an intermediate review involving a content-neutral regulation of speech, the court must consider the restrictiveness inquiry concerning "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests" and the overinclusiveness inquiry of whether the statute burdens "substantially more speech" than "necessary"); *Fox*, 492 U.S. at 477-80 (discussing the "least restrictive alternative" test used at strict scrutiny versus the "looser" less restrictive alternative test of intermediate review); *Ward*, 491 U.S. at 791, 799 (holding that narrow tailoring at intermediate scrutiny requires only that the means chosen do not "burden substantially more speech than is necessary to further the government's [substantial] interests," (the overinclusiveness inquiry) and "leave open ample alternative channels of communication" (the restrictiveness inquiry) concerned with whether the statute is too burdensome in failing to leave open ample alternative channels of communication even as applied to those whom the state properly regulates); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (applying the intermediate review "narrowly drawn" analysis for content-neutral time, place, or manner regulation of speech). Professor Kathleen Sullivan has referred to these two strands of burden analysis as "the discrimination strand" (the overinclusiveness inquiry), and "the distribution strand" (the oppressiveness or restrictiveness inquiry). Professor Kathleen Sullivan, Address at the United States Law Week Annual Constitutional Law Conference (Sept. 9-10, 1994). *See Constitutional Law Scholars Assess Impact of Supreme Court's 1993-94 Term*, 63 U.S.L.W. 2229, 2239 (Oct. 18, 1994). The phrase "close fit" has also been used to describe the required fit at intermediate review. *See* TRIBE, *supra* note 1, at 1603-04.

By concluding that the "not more extensive than necessary" language of *Central Hudson*'s fourth prong reflects this "narrowly drawn" analysis,[75] the Court has united commercial speech analysis with the similar "narrowly drawn" analysis under equal protection, due process and standard First Amendment law. In considering whether a statute is narrowly drawn under *Central Hudson*, it is important to note that this analysis does not require the least restrictive alternative, or no unnecessary overinclusiveness, before the statute can be constitutional. The only requirement is that the statute not be substantially overbroad or substantially too burdensome given other possible alternatives.[76] The "least restrictive alternative" analysis, which requires the least possible burden on those individuals who are properly regulated and no overbreadth except for that which is "necessary" to the furtherance of the government's interest, is reserved for the "precise tailoring" standard of strict scrutiny.[77]

For purposes of heightened rational review scrutiny, the Court has adopted a requirement under the burden component of the legislative fit analysis that I have referred to as a "weak" less restrictive alternative test.[78] Reflecting the first burden inquiry regarding overinclusiveness, this test asks whether the government's interests could be promoted as well with a lesser impact on protected individual rights.[79] Reflecting the second

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75. *See, e.g.*, United States v. Edge Broadcasting, 113 S. Ct. 2696, 2704-06 (1993) (citing *Fox*, 492 U.S. at 477-78).

76. *See, e.g.*, *Edge Broadcasting*, 113 S. Ct. at 2704-06 (citing *Ward*, 431 U.S. at 799). The majority in *Ward* held that narrow tailoring at intermediate scrutiny applicable to commercial speech cases requires only that the means chosen do not "burden substantially more speech than necessary to further the government's interests" and "leave open ample alternative channels of communication." *Ward*, 431 U.S. at 799, 802.

77. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990) ("precise" targeting and "precise" tailoring required with no unnecessary underinclusiveness or overinclusiveness present); *Ward*, 491 U.S. at 798 n.6 (discussing the difference between the "least restrictive alternative" analysis appropriate at strict scrutiny versus the requirement of "narrow tailoring" applicable to intermediate review); *supra* notes 71-73 (discussing use of the term "necessary" to describe this strict scrutiny analysis).

78. *See* Kelso, *supra* note 2, at 499-500.

79. This test is a "weak" version of the less restrictive alternative analysis because unlike intermediate review or strict scrutiny, there is no independent "narrowly drawn" or "least restrictive alternative" analysis that must be met. Rather, the concern with the extent to which the statute is overinclusive takes place as part of an

burden inquiry regarding restrictiveness, the Court requires that the burdens the statute imposes must not be excessive in relation to its benefits. This heightened rational review burden analysis has been phrased in different ways under different doctrines. For example, in *City of Cleburne v. Cleburne Living Center,*[80] the Court noted that the statute was not well crafted to advance whatever legitimate interests were conceivably present in the case.[81] A dormant Commerce Clause analysis looks to whether the burden on interstate commerce is "clearly excessive" given the state's legitimate interests and the availability of less restrictive alternatives.[82] Under the Contract Clause, the test is phrased as whether the impairment is "reasonable and necessary."[83] Procedural due process analysis requires the Court to consider whether "the private interests outweigh the government's interests" under a scheme which deprives an individual of a liberty or property right.[84] In *Dolan v. City of*

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overall balance inquiry into the rationality of the legislature's action. The fact that the government could have promoted its interests as well with a lesser impact on individual rights is used to support the conclusion that the statute is not sufficiently rationally related to the legitimate governmental ends. *See id.* at 499-500, 508 n.70.

80. 473 U.S. 432 (1985).

81. *Id.* at 449-50. As Professor Tribe has noted, the Court implicitly considered in *Cleburne* "how closely the state's actions were tailored to [its] policies." TRIBE, *supra* note 1, at 1444.

82. *See* Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (asking whether the burden imposed upon interstate commerce "is clearly excessive in relation to putative local benefits," in part based upon whether the state's interests "could be promoted as well with a lesser impact on interstate activities"); *see also* Maine v. Taylor, 477 U.S. 131, 138 (1986) (discussing whether the state's burden on interstate commerce is excessive in light of legitimate state interests and whether those interests "could not be served as well by available nondiscriminatory means").

83. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 29-31 (1977) which found:

> We can only sustain the repeal of the . . . covenant if that impairment was both reasonable and necessary. . . . [A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally as well. . . . [Thus, we] cannot conclude that repeal of the covenant was reasonable in light of the surrounding circumstances.

84. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Under *Mathews*, the Court balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burden that

Tigard, the Court discusses the Takings Clause doctrine.[85] The Court's use of the phrase "rough proportionality" and the consideration of whether the government's action transgressed the "outer limits to how this may be done" tracks these similar heightened rational review inquiries.[86] The only minimum rationality review requirement is that the statute's burden be minimally rational and not arbitrary or capricious.[87]

Thus, the following four kinds of "fit" analysis emerge under the burden inquiry of legislative fit analysis: (1) *strict scrutiny*: "precise tailoring," "least restrictive alternative," or "necessary;" (2) *intermediate scrutiny (basic mid-level or mid-level review with bite)*: "narrowly tailored," "narrowly drawn," "close fit," or "does not burden substantially more speech than necessary;" (3) *heightened rational review (basic rational review or rational review with bite)*: "reasonable fit," "rough proportionality," "reasonable and necessary," or "not clearly excessive;" and (4) *minimum rationality*: "minimally rational," "not arbitrary or capri-

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the additional or substitute procedural requirement would entail.

Id.

85. 114 S. Ct. 2309, 2318-22 (1994).

86. *Id.* For example, a regulation will likely be held to be "roughly proportional" as long as it is not "clearly excessive," as phrased under dormant Commerce Clause analysis, or is "reasonable and necessary," as phrased under Contract Clause analysis. As the Court noted in *Dolan*, the phrase "rough proportionality" is used to make it clear that the "reasonableness" requirement in this context is more stringent than the "rationality" requirement under minimum rationality review. *Id.* at 2319-20. For further discussion of *Dolan* as representing heightened rational review, *see* Kelso, *supra* note 37, at nn.48-71.

The possible confusion between the "reasonableness" and "minimum rationality" requirements would be alleviated if the Court adopted the six-standard approach of my previous article. *See* Kelso, *supra* note 2, at 498-504, 585-89. That approach delineates clearly among the various kinds of rational review—minimum rationality review, basic rational review, and rational review with bite—that the Court is using in Equal Protection, Due Process, dormant Commerce Clause, Contract Clause, and Takings Clause cases. *See id.* Adoption of such an approach would also forestall concerns, expressed by three dissenting Justices, that the kind of heightened rational review scrutiny of the *Dolan* majority signals a return to the strict scrutiny-like approach of Lochner v. New York, 198 U.S. 45 (1905). *Dolan*, 114 S. Ct. at 2326-29 (Stevens, Blackmun, & Ginsberg, JJ., dissenting) *see also* Kelso, *supra* note 2, at 502 n.38 (discussing similar confusion with regard to heightened rational review scrutiny under the Contract Clause).

87. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the [statute]. . . . It is enough that . . . the particular legislative measure was a rational way to correct it."). For a discussion of the basic elements of minimum rationality review see *supra* notes 20-21 and accompanying text.

cious," or "not wholly irrelevant," with no less restrictive alternative test being applied.[88]

In some cases the Court has used phrases like "narrowly tailored" or "narrowly achieved" to refer to aspects of strict scrutiny.[89] However, in *Ward v. Rock Against Racism*, "narrowly drawn" was used to refer to intermediate scrutiny.[90] Thus, it would be less confusing if the Court would restrict the term "narrowly drawn" to intermediate scrutiny and use the terms "precise tailoring," "least restrictive alternative," or "necessary" for strict scrutiny.[91]

A similar example of confusing terminology exists when the Court uses the phrase "reasonable fit" in commercial speech cases to define the "fit" required at intermediate scrutiny.[92] This is not helpful in terms of clarity of expression. The "narrowly drawn" analysis at intermediate scrutiny is more stringent than the heightened rational review analysis suggested by the phrase "reasonable fit."[93] Thus, in the future it would be

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88. The strict scrutiny phrases are discussed *supra* notes 71-73 and accompanying text. The intermediate scrutiny phrases are discussed *supra* notes 74-77 and accompanying text. The heightened rational review phrases are discussed *supra* notes 78-84 and accompanying text. The minimum rationality phrases are discussed *supra* note 87 and accompanying text.

89. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 169 (1987) (using narrowly tailored); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (using narrowly achieved); *see generally* NOWAK & ROTUNDA, *supra* note 1, at 575, 579.

90. 491 U.S. 781, 798 (1989).

91. *See supra* notes 71-73. Such an approach would clarify the confusion that has occasionally arisen concerning whether at strict scrutiny the "least restrictive alternative" that will advance the compelling governmental interest "about as well" is always required. *See, e.g., Paradise*, 480 U.S. at 184 (plurality stating that despite a strict scrutiny approach, the affirmative action remedial plan was not required "to be limited to the least restrictive means"); *id.* at 199 (O'Connor, J., dissenting) (stating the general rule that "to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy." This is a least restrictive alternative approach.).

92. *See* United States v. Edge Broadcasting, 113 S. Ct. 2696, 2705 (1993) (citing Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)) ("We made clear in *Fox* that our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable.").

93. As indicated at *supra* note 79 and accompanying text, the "weak" less restrictive alternative test of heightened rational review, which is phrased in some cases as a requirement that the statute be "reasonable", *see supra* note 83 and accompanying text, is not as stringent as the independent requirement that the statute be "narrowly drawn" at intermediate scrutiny. *See generally* Kelso, *supra* note 2, at 499-500, 508 n.70.

preferable if the phrase "reasonable fit" were dropped in all cases of intermediate scrutiny in favor of using the phrases "narrowly drawn," "narrowly tailored," or "close fit."

A third example of confusing terminology results from the Court's use of the phrase "necessary" in two different ways. At strict scrutiny, "necessary" has been used as the equivalent of the "least restrictive alternative" test, or "absolute necessity."[94] At heightened rational review, the phrase "reasonable and necessary" has been used to refer to the "weak" less restrictive alternative test, which as part of the overall "reasonableness" balance, merely requires a "proper" balance between benefits and burdens, not "absolute necessity."[95] To avoid confusion, perhaps "proper" would be a better word choice at heightened rational review, and reserve "necessary" for the more absolute necessity of strict scrutiny.[96]

IV. ADDITIONAL CONSIDERATIONS

There are two final points regarding the development of a principled approach to the advancement, relationship, and burden inquiries under legislative "fit" analysis. In a number of recent cases, the Court has compared the standard of review in commercial speech cases with the standard of review applied to time, place, or manner regulations of speech.[97] If handled care-

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94. *See supra* notes 71-73 and accompanying text.

95. *See generally supra* notes 83-86 and accompanying text.

96. This alternative use of the phrase "necessary" and the recommendation that the term "proper" be substituted for "necessary" at heightened rational review is reminiscent of the discussion of the term "necessary" in the landmark case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412-22 (1819) (discussing whether "necessary" meant "absolute necessity" or merely "convenient," "useful" or "proper" for purposes of interpreting the "necessary and proper" clause of the Constitution).

A similar possible confusion may result from the Court's recent use of the phrase "essential nexus" as part of the Takings Clause analysis in Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994). Though the term "essential" may seem a strong term to use, the "essential nexus" test as applied by the Court in *Dolan* merely inquires whether the government is engaged in legitimate regulatory action unrelated to "obtaining [property rights] through gimmickry." *Id.* Thus, in this context, "essential" seems to mean no more than a "proper" or "useful" regulation advancing "legitimate" or "permissible" governmental ends.

97. *See, e.g.*, United States v. Edge Broadcasting, 113 S. Ct. 2696, 2705 (1993) (referring to Ward v. Rock Against Racism, 491 U.S. 781 (1989)) ("[T]he validity of time, place, or manner restrictions is determined under standards very similar to

fully, such an analogy to other free speech cases can be most appropriate.[98] However, the Court's discussion of this analogy has often been unfocused or just plain confused.

The confusion results from the fact that in three recent cases, *Edenfield v. Fane*,[99] *United States v. Edge Broadcasting*[100] and *Turner Broadcasting Systems, Inc. v. FCC*,[101] the Court has suggested that there is no difference between the basic mid-level review standard applied to content-neutral time, place, or manner regulations of speech in cases like *Ward v. Rock Against Racism*,[102] which traditionally has required only a substantial relationship between means and ends,[103] and the mid-level review with bite standard applicable to commercial speech, which normally requires a direct relationship between means and ends.[104] As an example of the Court's confusion, the majority opinion in *Edenfield* cited *Ward* for the proposition

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those applicable in the commercial speech context"); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)) (comparing the standard of review in commercial speech cases to that in *O'Brien*, the Court noted that "both . . . require a balance between the governmental interest and the magnitude of the speech restriction.").

98. For example, the Court has explicitly acknowledged that content-neutral time, place, or manner regulations as seen in *Ward*, and content-neutral complete bans on some activity as seen in *O'Brien*, are actually the same test. *See* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994) (using the *Ward* test and the *O'Brien* test simultaneously); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (noting that the two tests are "little, if any, different").

Such acknowledgement indicates the Court can dispense with the malleable and often confusing test of whether a regulation should be classified as a reasonable time, place, or manner regulation versus a complete prohibition on some activity. *See* Kelso, *supra* note 2, at 563-64, 567-68. Instead, the Court can focus on the real questions involved in the regulation of speech—how much speech is being regulated and in what way—and analyze those questions under both the "content-based" versus "content-neutral" doctrine and the legislative fit inquiry into advancement, relationship, and burden. This approach towards time, place, or manner regulations seems to be implicit in the Court's statement in *Edenfield v. Fane* that whether a regulation is a content-neutral "reasonable time, place, or manner restriction" depends not on any independent inquiry into the extent of the time, place, or manner regulation, but instead upon a determination that the regulation has a "close and substantial relation to the governmental interests asserted." 113 S. Ct. 1792, 1801-02 (1993).

99. 113 S. Ct. 1792, 1801 (1993).

100. 113 S. Ct. 2696, 2705-06 (1993).

101. *Turner*, 114 S. Ct. at 2469.

102. 491 U.S. 781 (1989).

103. *See supra* note 59 and accompanying text.

104. *See supra* text accompanying notes 58-67.

that *Ward*, like *Central Hudson*, involved a requirement that the regulation advance the governmental interest in "a direct and effective way."[105] This is untrue. The Court did note in *Ward* that *in fact* the statute at issue in *Ward* did advance the government's interests in "a direct and effective way."[106] However, that statement is different than saying the regulation *had* to satisfy a "direct relationship" test. Indeed, the Court in *Ward* phrased the test by stating that the government could not regulate "in such a manner that a substantial portion of the burden does not serve to advance its goals."[107] This indicates a "substantial relationship" test.

Of course, the Court has the power to increase the level of scrutiny in content-neutral time, place, or manner cases like *Ward* to mid-level review with bite by requiring a "direct relationship" test to be satisfied. Indeed, if the Court wants to increase the level of scrutiny from a "substantial relationship" test to a "direct relationship" test in any of the other areas where currently basic mid-level review is applied, such as gender discrimination cases, or cases involving illegitimacy, or Article IV, Section 2 Privileges and Immunities Clause cases, the Court has that power as well.[108] However, the Court should not pretend that there is only one kind of intermediate review by implying that "substantial relationship" and "direct relationship" mean the same thing. As indicated above, there is a clear, analytically definable difference between a "substantial relationship" and a "direct relationship" test.[109]

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105. *Fane*, 113 S. Ct. at 1801.

106. *Ward*, 491 U.S. at 800.

107. *Id.* at 799.

108. For a discussion of these and other examples in which the Court has applied basic mid-level review, including discussion of content-neutral regulations of speech typically involving basic mid-level review, see Kelso, *supra* note 2, at 504-06, 528-29, 566-69.

109. *See supra* text accompanying notes 50-67. In any individual case, once the decision is reached to apply some version of intermediate review, the Court must decide whether to apply a "substantial relationship" test or the "direct relationship" test. Once that decision is made, the Court should be intellectually honest about that choice. For example, in *Turner Broadcasting*, the Court chose to apply the "direct relationship" test, citing *Edenfield*. *Turner Broadcasting*, 119 S. Ct. at 2470. Given this decision, the Court should acknowledge that *Turner* represents the mid-level review with bite standard of commercial speech, which differs from the traditional "substantial relationship" test of *Ward* involving basic mid-level review. For further discussion of *Turner* in this light, see Kelso, *supra* note 37, at nn.134-53 and accom-

A desire for fewer standards of review is understandable. Perhaps that explains an attempt to merge basic mid-level review and mid-level review with bite into one intermediate standard of review. However, it does not advance a reasoned understanding of the law to combine the substantial relationship and direct relationship tests, as the Court has recently done in *Fane*, *Edge*, and *Turner*. From the perspective of reasoned elaboration of the law, the difference between a "substantial relationship" and a "direct relationship" should be maintained, no matter what level of review is applied to any particular doctrine.[110]

The Court also lacks focus in its development of the analogy between commercial speech and time, place, or manner regulations because the Court does not always distinguish between time, place, or manner regulations which are content-neutral, to which the basic mid-level standard of *Ward* applies,[111] and content-based regulations concerning time, place, or manner that trigger the strict scrutiny standard of review.[112] The Court has noted that regulation of commercial speech should be no greater than non-commercial speech.[113] Although never officially stated by the Court, a corollary should be that a content-

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panying text.

Similarly, it would be useful if the Court were to acknowledge explicitly that the standard of review applied in the recent case of Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2524-26 (1994) (acknowledged by the Court as more vigorous than basic mid-level review, but not as rigorous as strict scrutiny) is really mid-level review with bite, since the Court imposed a "direct relationship" requirement in conjunction with an intermediate review advancement and narrowly drawn inquiry. *Id.*; *see also* Kelso, *supra* note 37, at nn.154-63 and accompanying text.

110. Once a choice is made on the level of scrutiny, it would be best for the Court to be clear about that choice, and not to use terminology haphazardly. For example, the Court in gender discrimination cases seems clearly to adopt the "substantial relationship" test of basic mid-level review. *See supra* notes 7-13 and accompanying text. However, the Court in Mississippi Univ. for Women v. Hogan, stated that the test was "whether the requisite direct, substantial relationship between objective and means is present." 458 U.S. 718, 724-25 (1981). This might be read to suggest that gender discrimination cases now involve mid-level review with bite, or it might be read to suggest that the reference to a "direct" relationship in *Hogan* was just "loose" language. After *Fane*, *Edge*, and *Turner*, it is not so clear.

111. *See Ward*, 491 U.S. at 799.

112. *See* Boos v. Barry, 485 U.S. 312, 321 (1988); *see generally* Kelso, *supra* note 2, at 569-73, 590.

113. *See Edge*, 113 S. Ct. at 2705 ("[I]t would be incompatible with the subordinate position of commercial speech . . . to apply a more rigid standard to commercial speech than is applied to fully protected speech.").

neutral commercial speech regulation receives only the basic mid-level review standard[114] applicable to content-neutral regulations of non-commercial speech, rather than the higher mid-level with bite standard of *Central Hudson*.[115] This corollary has not been important in practice. Virtually all commercial speech cases concern content-based regulations of speech since commercial speech, rather than political, artistic, or other kinds of speech, is being regulated.[116]

A second corollary to the proposition that commercial speech should receive no higher standard of review than non-commercial speech concerns content-based regulations. Content-based regulations of non-commercial speech trigger strict scrutiny.[117] Thus, as long as content-based commercial speech regulations trigger no standard of review higher than strict scrutiny, commercial speech will not be preferred over non-commercial speech. Content-based regulation of commercial speech will thus be consistent with the Court's basic proposition whether such regulation triggers strict scrutiny, mid-level review with bite, basic mid-level review, or rational review.[118] The Supreme Court proposition concerning the "subordinate position of commercial speech" therefore leads to no fixed conclusion regarding the regulation of content-based restrictions on commercial

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114. *See Ward*, 491 U.S. at 799.

115. On *Central Hudson* being a higher level of intermediate scrutiny than *Ward*, see generally *supra* text accompanying notes 58, 99-109.

116. *See, e.g., Fane*, 113 S. Ct. at 1801 (questioning whether "a flat ban on commercial solicitation could be regarded as a content-neutral time, place, or manner restriction on speech, a proposition that is open to serious doubt . . . "). The Court dodged this issue in *Fane* by improperly recasting the standard in *Ward* as mid-level review with bite. This not only heightened the standard of review in *Ward*, *see supra* text accompanying notes 102-107, but also implied, strangely, that for commercial speech there is no difference between a content-neutral and content-based regulation of speech: they are both entitled to exactly the same *Central Hudson* standard of review.

117. *See* Boos v. Barry, 485 U.S. 312, 321 (1988).

118. *See Fane*, 113 S. Ct. at 1804 (Blackmun, J., concurring) (suggesting strict scrutiny for content-based regulation of commercial speech); Lively, *supra* note 66, at 299-304 (implying that some commercial speech cases, particularly those authored by Chief Justice Rehnquist, suggest aspects of rational review); *supra* text accompanying notes 56-66 (mid-level review with bite currently the majority approach under the *Central Hudson* test); *supra* text accompanying notes 99-109 (perhaps basic mid-level review suggested by comparing commercial speech cases to the level of review in content-neutral time, place, or manner regulations of speech).

speech. Thus it is irrelevant to an informed analysis of this issue.

V. CONCLUSION

This article has explored the relationship between statutory means and ends under equal protection, substantive due process, and free speech analysis. Three different inquiries are part of this legislative "fit" analysis. First, consider what governmental ends the statute advances: compelling governmental interests; important, substantial, or significant governmental interests; legitimate or permissible governmental interests; or impermissible governmental interests. Second, apply the relationship inquiry between the statutory means and the benefits achieved by the statute. This inquiry has two parts: (1) the extent to which the statute does not regulate all individuals who are part of some problem (the underinclusiveness inquiry); and (2) the manner in which the statute benefits those whom it regulates (the service inquiry). The third question involves the nature of the statute's burdens. This burden inquiry also has two parts: (1) the extent to which the statute imposes burdens on individuals who are not part of the problem (the overinclusiveness inquiry); and (2) the degree of burden placed on individuals properly regulated by the statute (the oppressiveness or restrictiveness inquiry).

Of course, these "fit" questions differ depending upon whether minimum rationality review, heightened rational review, intermediate scrutiny, or strict scrutiny is involved in the case. These different aspects of legislative "fit" analysis provide a more structured approach to questions concerning equal protection, due process, and free speech doctrine.