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Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism

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In the last few years, Court-watchers have been particularly busy critiquing the constitutional decisions of the splintered Rehnquist Court. Two of the recurring critiques have posited that the Justices are overly activist and that their opinions are needlessly confusing. *American Lawyer*'s Stuart Taylor, for example, has decried both the "jurisprudential mess" of the Court's recent redistricting decisions[1] as well as the disturbing activism that Taylor believes marks each of the Equal Protection decisions of the 1995-96 Term—an activism that has led him to wonder "whether there is any life at all left in the idea of judicial restraint."[2] Eva Rodriguez of the *Legal Times* is even more critical of the Court's failure to issue opinions that lower courts and lawyers can follow, noting that "the justices have perplexed many court aficionados, who have spent long hours trying to decipher fractured and at times fractious decisions."[3] Likewise, Linda Greenhouse, the influential *New York Times* writer, has lamented both the activism of the Rehnquist Court[4] and its failure to provide guidance, arguing that the Court has "sometimes spoke[n] in multiple voices so muddled as to be barely comprehensible."[5] Academics and practitioners have joined the fray as well, with noted law professors such as Erwin Chemerinsky and Supreme Court lawyers like The-

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1 *See* Stuart Taylor Jr., *Drawing the Line on Racial Gerrymanders*, LEGAL TIMES, July 31, 1995, at S29 ("Justice O'Connor's handiwork [in race-based electoral districting cases] is a jurisprudential mess—a confusing and indeterminate mélange of apparently conflicting statutory and constitutional doctrines, which provides little useful guidance to lower courts and amounts to a formula for endless litigation and political chaos.").

2 Stuart Taylor Jr., *Is Judicial Restraint Dead?*, N.J. L.J., Aug. 26, 1996, at S-1 ("The theme is that it is becoming ever more clear that not a single member of the current Court can be called a consistent practitioner of judicial restraint. Each of the equal protection decisions—which were lauded, in turn, by liberal advocates of gay rights and women's rights, and by conservative advocates of 'colorblind Constitution' jurisprudence—was an exercise in judicial activism. And each of the nine justices joined at least one of them.").

3 Eva M. Rodriguez, *Confusion from the High Court*, CONN. L. TRIB., July 15, 1996, at 9.

4 *See* Linda Greenhouse, *Gavel Rousers: Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, § 4 (Week in Review), at 1 ("An ascendant bloc of three conservative Justices with an appetite for fundamental, even radical change drove the Court on a re-examination of basic Constitutional principles.").

5 Linda Greenhouse, *In Supreme Court's Decisions, a Clear Voice, and a Murmur*, N.Y. TIMES, July 3, 1996, at A1.

odore Olson voicing their concerns about the growing activism and divisiveness of the current Court.[6]

These two complaints—that the justices reach whatever decisions they want and that they provide little guidance to lower courts and practitioners—echo the long-standing critiques leveled by judges and academics at the judicial use of standards rather than rules to decide cases.[7] In constitutional law discourse, this distinction is often framed as the difference between categorization and balancing.[8] When a court uses a categorization technique, it simply determines whether a particular state action infringes upon a clearly defined right; if it does, the law is unconstitutional regardless of the strength of the state's interest.[9] On the other hand, when a court employs a balancing technique, it weighs the various interests and rights at stake against each other to determine the constitutionality of the state's action.[10] Scholars disagree about the extent to which the current Supreme Court favors balancing over categorization.[11] Although Justices Scalia and Thomas strongly favor a

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6 *See, e.g.*, Tony Mauro, *Fall Cases Offer Court Chance to Flex Muscles*, DENV. POST, Aug. 6, 1995, at 28A (quoting Georgetown law professor Louis Michael Seidman as saying, "This term saw a dramatic shift with the conservatives not only exerting more control but also engaging in judicial activism by striking down laws and policies"); W. John Moore, *High Court's Conservatives Are in Charge*, NAT'L. J., July 8, 1995, at 1772 (quoting Chemerinsky as saying, "It is much more an activist Supreme Court"); David O'Brien, *Rehnquist Tilt*, DALLAS MORNING NEWS, July 9, 1995, at 5J (criticizing the redistricting and affirmative action decisions of the Rehnquist Court); Rodriguez, *supra* note 3, at 9, 11 (quoting Olson as saying, "It seems to me that what they're doing is saying, 'We can apply whatever standard we decide to apply and come to the results that our instincts tell us is right,'" and quoting Georgetown law professor David Cole and Mayer, Brown & Platt partner Roy Englert Jr., both of whom criticized the Court for providing little guidance to courts and practitioners).

7 *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 113-14 (1996) (arguing that rules serve to constrain decisionmakers in particular cases and promote predictability and planning for private actors); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989) (arguing that rules promote judicial restraint as well as predictability and certainty); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (listing vices of standards, including manipulability, indeterminacy, and adventurism); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-65 (1992) (listing arguments for rules over standards). On the distinction between rules and standards, see generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987) and FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 (1991).

8 *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949 (1987); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293-94 (1992). The debate over categorization and balancing has been particularly acute in the First Amendment arena. *See* John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1490-1508 (1975); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

9 *See* Sullivan, *supra* note 8, at 293.

10 *See id.* at 293-94.

11 *Compare* Alienikoff, *supra* note 8, at 943-44 (arguing that balancing is pervasive), *with* Sullivan, *supra* note 8, at 295-96 ("Categorical and balancing approaches oscillate in an endless dialectic, casting doubt on any claim that either has become fully dominant.").

rules-based jurisprudence[12] and have led the Court to employ categorization in many circumstances,[13] the Court continues to balance frequently.[14] This balancing approach, perhaps more than anything else, has aroused the ire of Court-watchers in search of restraint and clarity.

Intermediate scrutiny is one of the Court's most frequently employed balancing techniques.[15] Unlike strict scrutiny, which is generally "'strict' in theory and fatal in fact,"[16] or rationality review, which is used to uphold laws justified even by hypothesized or ad hoc state interests,[17] intermediate scrutiny requires the Court to weigh conflicting rights and interests and does not predetermine the outcome of the case.[18] Depending on how the Court values the respective interests of the state and the claimant, either may prevail.[19] As

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12 *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (arguing that the *Central Hudson* balancing test should not be applied "to a restriction of 'commercial' speech . . . when . . . the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark"); Scalia, *supra* note 7 (arguing for a rule-of-law approach over a "discretion-conferring approach"). For a discussion of Justice Scalia's rule-based jurisprudence, see Sullivan, *supra* note 8, at 301-05.

13 *See, e.g.*, Carlisle v. United States, 116 S. Ct. 1460, 1470 (1996) (holding that Federal Rule of Criminal Procedure 29(e) constrains a trial judge from granting a motion for judgment of acquittal filed one day outside the seven-day time limit prescribed by the rule); Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882-90 (1990) (applying rationality review to all laws of general application that incidentally burden religion).

14 *See, e.g.*, Ohio v. Robinette, 117 S. Ct. 417, 421 (1996) (holding that a police practice of not informing a stopped driver, after traffic stop and before initiating consensual interrogation, that he is free to go is not unreasonable and refusing to adopt bright-line rules for Fourth Amendment analysis); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2390-94 (1996) (weighing the government's interest in protecting children against the burden on cable operators and programmers); United States v. Virginia, 116 S. Ct. 2264, 2275-82 (1996) (weighing a state's interest in maintaining its sole single-sex public institution of higher learning against the educational harm to women resulting from a categorical exclusion).

15 I use the term "intermediate scrutiny" here to refer to a test that requires a state interest which is greater than legitimate but less than compelling and a fit between means and end that is not necessarily narrowly tailored but has more than just an incidental connection. The Court has employed intermediate scrutiny in a variety of contexts, including gender discrimination, affirmative action, regulation of commercial speech, content-neutral burdens on speech, and time, place, and manner restrictions on speech. Generally, the formulation requires a law to substantially relate to an important end. *See* Craig v. Boren, 429 U.S. 190, 199-200, 204 (1976). For a discussion of the Court's applications of intermediate scrutiny, see *infra* notes 118-126 and accompanying text.

16 Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

17 *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (applying rational-basis review and stating that "[w]here, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute" (citation omitted) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))).

18 *See* Sullivan, *supra* note 8, at 297 ("'Intermediate scrutiny,' unlike the poles of the two-tier system, is an overtly balancing mode."); *id.* at 293-94 ("[T]he judge's job [in balancing] is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors.").

19 *See id.* at 298 ("Where intermediate scrutiny governs, the outcome is no longer foreor-

a paradigmatic balancing approach, intermediate scrutiny has been consistently critiqued by judges and scholars who point to its indeterminacy and its invitation to judicial activism. On the very day of its inception in the 1976 case of *Craig v. Boren*,[20] for example, then-Justice Rehnquist declared that the test was "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."[21] Later critics have been no kinder, calling the test "malleable,"[22] uncertain,[23] "highly flexible,"[24] "unpredictable,"[25] "contrived,"[26] "inconsistent,"[27] and inadequate.[28]

Not only are the terms of the intermediate scrutiny test themselves indeterminate,[29] but the test itself has also been particularly vulnerable to manipulation by the Supreme Court. On a number of occasions, the Court has either explicitly applied strict scrutiny to an area traditionally governed by intermediate scrutiny or changed the wording of the intermediate scrutiny test to require a justification falling somewhere between intermediate and strict scrutiny. For example, in *Madsen v. Women's Health Center, Inc.*,[30] the Court highlighted the differences between statutes and injunctions to reject the intermediate standard generally applicable to content-neutral laws,[31] and instead applied a standard somewhat more stringent than intermediate scrutiny but less stringent than strict scrutiny,[32] or what Justice Scalia referred to

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dained at the threshold. Instead of winning always or never, the government may sometimes win or sometimes lose—it all depends.").

20 429 U.S. 190 (1976).

21 *Id.* at 221 (Rehnquist, J., dissenting).

22 *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 185 (1996).

23 *See* George C. Hlavac, Chapter, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1378 (1993); *id.* at 1375 ("The intermediate-scrutiny test . . . has no basis whatsoever in precedent prior to *Craig v. Boren*, and is a much more malleable test that permits judges' subjective preferences to come into play. It is necessary to put an end to the Supreme Court's shell game . . . ." (footnote omitted)).

24 Rachel Stephanie Arnow, *The Implantation of Rights: An Argument for Unconditionally Funded Norplant Removal*, 11 BERKELEY WOMEN'S L.J. 19, 45 (1996).

25 *Id.*

26 *Id.*

27 Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953, 958 (1996).

28 *See* Collin O'Connor Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 521, 552 (1996); *see also* Sullivan, *supra* note 8, at 301 ("[Intermediate scrutiny] makes the Court more vulnerable to the charge of 'legislating from the bench.' No amount of bureaucratic lingo in the formulas of intermediate scrutiny . . . can wholly dispel that Lochnerian feeling one can get from intermediate scrutiny's shifting bottom line." (footnote omitted)); John Galotto, Note, *Strict Scrutiny for Gender, via* Croson, 93 COLUM. L. REV. 508, 545 (1993) ("[I]ntermediate scrutiny has chafed at the Court and has failed to convince most scholars."); Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1412 (1982) ("Unfortunately, standards of middle level review give the courts relatively little guidance in individual cases.").

29 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement?"); Udell, *supra* note 28, at 547-52 (describing problems of "inner and outer context" that render the intermediate scrutiny standard indeterminate).

30 512 U.S. 753 (1994).

31 *See id.* at 764-65.

32 *See id.* at 765 ("[W]hen evaluating a content-neutral injunction, we think that our stan-

as "intermediate-intermediate scrutiny."[33] In *Adarand Constructors, Inc. v. Pena*,[34] the Court applied strict scrutiny to congressionally mandated affirmative action contracting programs,[35] overruling its earlier decision in *Metro Broadcasting, Inc. v. FCC*,[36] in which the Court had applied intermediate scrutiny to such programs.[37] In *44 Liquormart, Inc. v. Rhode Island*,[38] at least four members of the Court applied a standard stricter than the traditional intermediate scrutiny standard generally applied to regulations of truthful, nonmisleading commercial speech.[39] Finally, in *United States v. Virginia*,[40] the Court required the government to offer an "exceedingly persuasive" justification for discriminating on the basis of gender,[41] a standard that many commentators believe is stricter than the intermediate scrutiny standard previously applied to gender-based laws.[42] These manipulations of the interme-

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dard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.").

33 *Id.* at 791 (Scalia, J., concurring in the judgment in part and dissenting in part).

34 515 U.S. 200 (1995).

35 *See id.* at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

36 497 U.S. 547 (1990), *overruled by Adarand,* 515 U.S. 200.

37 *See id.* at 564-65 ("We hold that benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." (footnote omitted)).

38 116 S. Ct. 1495 (1996).

39 *See id.* at 1507 (opinion of Stevens, J., joined by Kennedy, J., and Ginsburg, J.) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."); *id.* at 1508 (opinion of Stevens, J., joined by Kennedy, J., Souter, J., and Ginsburg, J.) ("[T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review . . . with 'special care,' mindful that speech prohibitions of this type rarely survive constitutional review." (citation omitted)); *id.* at 1515-16 (Thomas, J., concurring) ("In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied, in my view. Rather, such an 'interest' is *per se* illegitimate . . . ." (citation omitted)). For more on how the Justices came out in the case, see *infra* note 275.

40 116 S. Ct. 2264 (1996).

41 *See id.* at 2275.

42 *See, e.g.,* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) ("[T]he Court did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny. After *United States v. Virginia*, it is not simple to describe the appropriate standard of review. States must satisfy a standard somewhere between intermediate and strict scrutiny."); Udell, *supra* note 28, at 553 ("Justice Ginsburg . . . is moving the Court . . . to . . . finally endorse strict scrutiny for gender classifications. She did not have to look outside precedent for the more rigorous formulation of the intermediate scrutiny test she employed, the 'exceedingly persuasive justification' formulation. But she moved the phrase to a pivotal primary position . . . ." (footnote omitted)); Rodriguez, *supra* note 3 ("[Ginsburg] adopted a standard that seemed to go beyond the intermediate scrutiny that had been applied to gender classifications in the past."); Taylor, *supra* note 2 (stating that the *Virginia* decision "hints that gender classifications should be subjected to something close to 'strict scrutiny'").

diate scrutiny standard have led dissenting Justices to critique them as violations of stare decisis.[43]

All of these critiques of intermediate scrutiny—that it promotes activism, confuses lower courts, and threatens principles of stare decisis—are important and troubling. Nevertheless, this Article argues that, despite the criticisms, intermediate scrutiny remains an indispensable tool that the Court should employ in particular situations. Specifically, it argues that intermediate scrutiny is a form of judicial minimalism that is uniquely suited to resolving analogical crises over time. This Article proceeds in four parts. In Part I, the Article explores and expands upon Cass Sunstein's theory of judicial minimalism. Professor Sunstein posits that in situations where either factual circumstances or moral judgments are in flux, the Supreme Court should act in ways that will further rather than forestall democratic deliberation and should render judgments that avoid statements of broad principle, thereby allowing room for moral and legal evolution over time.[44] Part II first discusses the Court's use of intermediate scrutiny and the concept of analogical crisis, which posits that the Court applies intermediate scrutiny when it is unsure whether a particular claimed right is more like one that is protected by strict scrutiny or one that is protected by mere rationality review.[45] Part II then proceeds to argue that intermediate scrutiny can be a form of judicial minimalism that can appropriately resolve these crises over time because it invites democratic deliberation, allows for moral evolution, promotes societal education, and provides judges with greater opportunities to consider the details of analogical crises. In Part III, the Article employs the theoretical framework set forth in Part II to evaluate recent decisions of the Court. This part makes the descriptive argument that the Court perhaps has sometimes used intermediate scrutiny to at least partially resolve analogical crises. More important, Part III makes the normative argument that the Court could go a long way towards silencing critics of intermediate scrutiny by explicitly announcing its use of the doctrine as a transitional tool to resolve moral and legal uncertainty. Finally, the Article concludes with some final thoughts about the future application of intermediate scrutiny.

I. The Benefits and Limits of Judicial Minimalism

A. Sunstein's Constitutional Theory

In his Supreme Court *Foreword* to the 1995 Term, Cass Sunstein draws upon a tradition of scholarship addressing deliberative democracy and its relationship to the judiciary[46] to argue in favor of "decisional minimalism," a

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43 *See, e.g., Virginia*, 116 S. Ct. at 2291 (Scalia, J., dissenting) (asserting that the decision "drastically revises our established standards for reviewing sex-based classifications"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 264 (1995) (Stevens, J., dissenting) ("[T]he majority's concept of *stare decisis* ignores the force of binding precedent.").

44 See Sunstein, *supra* note 42, at 7-9.

45 *See* Sullivan, *supra* note 7, at 61 n.248.

46 Sunstein makes clear his debt to a number of important works, including ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962), ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992), AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996), JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., MIT Press

phrase that refers to "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[47] According to Sunstein, minimalist judges[48] write decisions that are both narrow, in the sense that they decide the case at hand rather than articulate broad rules to govern other cases,[49] and shallow, in the sense that they rely on "incompletely theorized agreements" and avoid "issues of basic principle."[50] Minimalists give explanations for their decisions, but they reason analogically rather than deductively.[51] They think "by close reference to actual and hypothetical cases" rather than seeing the outcomes of cases "as reflecting rules or theories laid down in advance."[52] Minimalism contrasts with maximalism, which Sunstein defines as "an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes."[53] Minimalism can take many forms. In addition to not deciding all possible issues in a case in accordance with broadly applicable and deeply reasoned principles, minimalists can deny certiorari, avoid deciding constitutional questions, investigate actual rather than hypothetical purposes of statutes, and follow prior holdings but not prior dicta.[54] Sunstein describes these minimalist techniques as "constructive uses of silence."[55]

Minimalism has two principal advantages. First, minimalism is both democracy-friendly and democracy-forcing because it "leaves issues open for democratic deliberation, . . . promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors."[56] Second, by refusing to decide issues that either may be affected by quickly changing factual circumstances or are not supported by any clear moral consensus among members of the society, minimalism minimizes judicial mistakes.[57] This advantage is particularly important in cases surrounded by

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1996) (1992), Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991), and Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). *See* Sunstein, *supra* note 42, at 7-9 & nn.3-5, 7-8.

47 Sunstein, *supra* note 42, at 6-7. Sunstein's *Foreword* builds upon and expands a constitutional theory that he has been developing for several years. *See* SUNSTEIN, *supra* note 7, at 35-100; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) [hereinafter Sunstein, *Incompletely Theorized Agreements*]; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) [hereinafter Sunstein, *On Analogical Reasoning*]; Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995) [hereinafter Sunstein, *Problems with Rules*].

48 Sunstein believes that on the current Court, Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer are essentially minimalists. *See* Sunstein, *supra* note 42, at 14-15.

49 *See id.* at 15-20.

50 *Id.* at 20.

51 *See id.* at 14.

52 *Id.*

53 *Id.* at 15.

54 *See id.* at 7.

55 *Id.*

56 *Id.* (footnote omitted).

57 *See id.* at 8. Sunstein asserts:

> [A] minimalist path usually—not always, but usually—makes sense when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise). The complexity may result

morally charged disagreement where a maximalist decision may "activate forces of opposition," "produce an intense social backlash," and "hinder social deliberation, learning, compromise, and moral evolution over time."[58] These two powerful rationales often will combine in hard cases to counsel in favor of following a minimalist path.

Minimalism, however, is not always appropriate. Indeed, minimalism has two important drawbacks. First, although the decision costs may be lower for the actual judge who employs judicial minimalism, the minimalist decision may "export" decision costs to lower courts and practitioners by leaving open a variety of unanswered questions.[59] Second, minimalism may threaten the ideal of the rule of law in certain circumstances by allowing lower courts to treat similarly situated parties differently.[60] This possibility is especially problematic in situations where advanced planning is important; in these situations, people require clarity to plan their affairs and will prefer broad rules to narrow holdings.[61] For these two reasons, Sunstein recognizes that whether a minimalist path is appropriate in any particular situation depends on a variety of pragmatic considerations.[62] Sunstein summarizes the factors that favor minimalism and those that favor maximalism as follows:

> From these observations we cannot come up with an algorithm to decide when minimalism makes sense, but some generalizations may be helpful. Anglo-American judges usually speak as if minimalism is the appropriate presumption, and of course if minimalism is the only possible route for a multimember tribunal, then minimalism will be inevitable. Minimalism becomes more attractive if judges are proceeding in the midst of factual or (constitutionally relevant) moral uncertainty and rapidly changing circumstances, if any solution seems likely to be confounded by future cases, or if the need for advance planning is not insistent. But the argument for a broad and deep solution becomes stronger if diverse judges have considerable confidence in the merits of that solution, if the solution can reduce costly uncertainty for other branches, future courts, and litigants (and hence decision costs would otherwise be high), or if advance planning is important.[63]

> from a lack of information, from changing circumstances, or from (legally relevant) moral uncertainty.

Id. (footnote omitted).

58 *Id.* at 33. Sunstein believes that *Roe v. Wade*, 410 U.S. 113 (1973), arguably made this maximalist mistake. *See id.* at 50. For a similar evaluation of *Roe*, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385-86 (1985).

59 *See* Sunstein, *supra* note 42, at 28-29.

60 *See id.* at 29 ("It is true that rules may be unfair if they place diverse situations under a single umbrella. But it may be even worse to allow cases to be decided by multiple district court judges thinking very differently about the problem at hand.").

61 *See id.*

62 *See id.* at 30.

63 *Id.*

Sunstein, unlike the commentators discussed earlier,[64] generally supports the Supreme Court's recent constitutional decisions. Although he finds the Court's decision in *Romer v. Evans*[65] astonishing for its failure to mention *Bowers v. Hardwick*,[66] he believes that the decision's caution, prudence, and understanding of the fundamental purpose of the Equal Protection Clause make it a "masterful stroke—an extraordinary and salutary moment in American law."[67] He approves of Justice Breyer's minimalist decision in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[68] because rapid technological change, the lack of information regarding the effects of programming on children, and the absence of a need for planning all counseled against a maximalist decision in the case.[69] Likewise, Sunstein approves of Justice Ginsburg's opinion in *Virginia* both because it analyzed the state's actual purposes in perpetuating the college's single-sex policy and because it focused on the unique qualities of the Virginia Military Institute rather than on single-sex schools generally.[70] He also approves of both Justice Stevens's majority opinion and Justice Breyer's concurrence in *BMW of North America, Inc. v. Gore*,[71] both of which displayed a wise minimalism appropriate to the exceedingly complex question of when excessive punitive damages should be unconstitutional.[72] Finally, Sunstein disapproves of the plurality's opinion in *44 Liquormart*, which by failing to follow the Court's previous decisions on commercial speech, blurred the important distinctions between political and commercial speech and announced a problematic broad principle to govern regulations of true and nonmisleading advertis-

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64 *See supra* notes 1-6 and accompanying text.

65 116 S. Ct. 1620 (1996).

66 478 U.S. 186 (1986). For Sunstein's discussion of this omission, see Sunstein, *supra* note 42, at 64-69.

67 Sunstein, *supra* note 42, at 9.

68 116 S. Ct. 2374 (1996). The Court upheld section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, which permits cable operators to prohibit leased access channels from airing indecent programming. *See id.* at 2390 (plurality opinion). Unlike Justice Thomas, who would have upheld the law because it simply restored to the operators rights of editorial discretion that federal regulations had taken away, *see id.* at 2423-24 (Thomas, J., concurring in the judgment in part and dissenting in part), Justice Breyer considered a variety of factors, including the importance of the state interest and the similarity of the regulation to the one upheld in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *see Denver Area*, 116 S. Ct. at 2386-87 (plurality opinion). Not all commentators have been as full of praise for the decision as Sunstein. *See* Linda Greenhouse, *When a Justice Suffers from Indecision*, N.Y. TIMES, July 14, 1996, at E5 (quoting First Amendment lawyer Floyd Abrams as saying that the decision was "disturbing"). For more on *Denver Area*, see *infra* notes 98-102 and accompanying text.

69 *See* Sunstein, *supra* note 42, at 31-32.

70 *See id.* at 74-77.

71 116 S. Ct. 1589 (1996).

72 *See* Sunstein, *supra* note 42, at 79-82. Sunstein states:

> With respect to punitive damages, a minimalist approach of some kind is probably the wisest course for the present time. . . . In view of the complexity of the underlying issues, it is best for the Court to pursue a minimalist course in which it invalidates only the most extreme outcomes. To return to our basic theme, minimalism can be seen as a way of reducing decision costs and error costs, and the Court is not now in a good position to generate anything like clear rules to constrain punitive damages.

Id. at 81-82 (footnote omitted).

ing.[73] The Court's lack of caution was inappropriate for an issue that continues to require a minimalist approach.[74] In sum, although Sunstein devotes much effort to distinguishing between those cases that demand minimalism and those that counsel against it, in practice, he seems to think that minimalism is almost always the appropriate course for constitutional decisionmaking.[75]

B. Evolutionary Constitutionalism

Sunstein recognizes that judicial minimalism, by leaving questions open for future cases, can facilitate legal evolution over time.[76] By providing judges with the flexibility required to adapt to changing situations, minimalism allows judges to adopt maximalist solutions when such solutions become appropriate. Sunstein hints at this strategy in his *Foreword* when he says that minimalism is uniquely suited to situations in which there is either factual or moral uncertainty,[77] but he makes the point even more clearly in earlier works, in which he notes, for example that, "[S]mall-scale, low-level principles can eventually become part of something more ambitious . . . . After a time, the use of low-level principles can produce a more completely theorized system of law."[78]

Sunstein describes several scenarios involving the shift from minimalism to maximalism. First, he argues that judges may adopt a maximalist approach in response to commentators and observers who have written on a particular area of law.[79] These observers, who have the luxury of spending a great deal of time pondering discrete legal issues, often can sort through case law and suggest deeply principled and highly theorized solutions to questions that judges, who act under greater time and resource restraints, have previously dealt with through minimalist means.[80] One example of this exchange is the development of an antitrust jurisprudence that incorporates the principle of economic efficiency articulated by scholars of law and economics.[81] Second, by analyzing a variety of cases on the same issue, judges can reach a deeper understanding of the issue over time.[82] Third, background conditions can change, making a particular maximalist solution that was inconceivable in the past seem quite obvious over time.[83] Broad shifts in moral consensus among members of society can affect judges' interpretations of controversial issues in constitutional law. As examples of this point, Sunstein points to racial

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73 *See id.* at 82-86.

74 *See id.*

75 *But see id.* at 76-77 (defending both the decision in *Brown v. Board of Education* and the deep discussion of gender equality in *United States v. Virginia* as appropriate uses of maximalism).

76 *See supra* notes 56-58 and accompanying text.

77 *See* Sunstein, *supra* note 42, at 30-33.

78 SUNSTEIN, *supra* note 7, at 55.

79 *See* Sunstein, *Incompletely Theorized Agreements*, *supra* note 47, at 1765.

80 *See* SUNSTEIN, *supra* note 7, at 54-55.

81 *See id.* at 55.

82 *See* Sunstein, *Incompletely Theorized Agreements*, *supra* note 47, at 1764.

83 *See id.* at 1765-68.

intermarriage, once condemned but now accepted, and gender discrimination, once accepted but now perceived as similar to race discrimination.[84]

But although Sunstein recognizes this evolutionary advantage of minimalism, he equivocates both on how often minimalism gives way to maximalism and on how important the shift is to the case for minimalism. He does suggest that if judges can agree upon a high-level theory to resolve some particular legal issue, it "is an occasion for celebration,"[85] but he seems to think that such agreement rarely occurs.[86] This position implicitly suggests that he believes that conditions that counsel in favor of a minimalist approach will rarely evolve into conditions that require maximalist solutions. Moreover, when he considers specific cases, Sunstein does not always rigorously examine the issue of whether minimalist conditions have given way to maximalist ones. For example, in his consideration of *44 Liquormart*, Sunstein criticizes the plurality for reaching a conclusion—truthful, nonmisleading commercial speech should be treated the same as political speech—that he thinks is both doubtful in principle and apt to create difficulties down the road.[87] But his comment is not so much a criticism of employing a maximalist approach instead of a minimalist one as it is a criticism of employing one particular maximalist approach rather than another. Sunstein does not believe that commercial speech (even truthful and nonmisleading commercial speech) deserves the same protection as political speech,[88] but his position[89] does not mean that the area is in such flux or disarray that the Court should refrain from implementing a maximalist solution when it believes such a response is appropriate. In fact, the plurality opinion in *44 Liquormart*, as well as Justice Thomas's concurrence in that case and the Court's opinion in *Rubin v. Coors Brewing Co.*,[90] suggest that the Court has thoughtfully contemplated the question of how nonmisleading commercial speech should be treated and is forming a broad, maximalist consensus on the issue.[91] Sunstein's disagreement with the Court's approach does not mean that the Court, which has considered many commercial speech cases and has the benefit both of countless commentaries and perhaps a shift in societal attitudes towards advertising regulations, should not announce some broad principles

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84 *Id.* at 1766.

85 SUNSTEIN, *supra* note 7, at 56.

86 *See id.* at 57.

87 *See* Sunstein, *supra* note 42, at 84-86. Sunstein asserts:

> Moreover, the idea that commercial speech should be treated the same as political speech is historically unsupported. It is also doubtful in principle. The protection of commercial speech has a great deal in common with the protection of market arrangements in the *Lochner* era, and it has similar pitfalls. . . . The plurality's broader principle may create difficulties for the future, as in easily imaginable cases involving protection of teenagers from cigarette advertising or violent programming. In *44 Liquormart*, there was no reason for the Court to create this risk.

Id. at 86 (footnotes omitted).

88 *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 236-39 (1993) (arguing that the First Amendment should primarily protect political speech, defined as speech "both intended and received as a contribution to public deliberation about some issue").

89 And, granted, the position of other scholars who agree with him. *See infra* note 279.

90 514 U.S. 476 (1995).

91 *See infra* notes 275-288 and accompanying text.

if it can agree on them. It is unfortunate that Sunstein does not consider the possibility that conditions have changed; his analysis of *44 Liquormart* suggests that his theoretical position is not always borne out in his consideration of concrete cases.

This absence of analysis is particularly unfortunate because one of the best arguments in favor of using minimalism in conditions of moral or factual flux is that it allows for a shift to maximalism when these conditions have reached some level of stasis. Moreover, minimalism does more than allow such a shift; it may even help cause the shift. By leaving questions open, the Court can open a dialogue with other governmental actors, can invite legal scholars to comment on issues that they hope to influence, can require lower courts to consider the issues and analyze them in written opinions that the Court can then learn from, and can guarantee that the Court will have the opportunity to hear additional cases in which it can revise and expand upon its previous attempts at resolving the issues. This process perhaps has happened already in the commercial speech, affirmative action, and gender discrimination areas.[92] It probably also occurred to some degree in the First Amendment obscenity and incitement contexts where, over time, the Court eventually replaced case-by-case determinations (minimalism) with broadly applicable and deeply theorized formulations (maximalism).[93] Likewise, though Sunstein praises *Romer* and *Denver Area* for their minimalist reactions to changing circumstances, one of the attractive features of both cases is that the Court's opinions are narrow enough so that when consensus finally forms on gay rights and when the face of modern broadcasting technologies becomes clear, the Court will still have room to announce maximalist principles to govern both situations. The important challenge will be to recognize when those days are here; it will not do to continue preaching minimalism when the time for maximalism has arrived.

C. Lingering Questions

Sunstein's framework for constitutional decisionmaking is well-reasoned, illuminating, and extremely persuasive. It leaves open, however, sev-

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92 *See infra* notes 248-289 and accompanying text.

93 This is more true for incitement than obscenity, for the *Miller* test is still quite minimalist, though not nearly as minimalist as the *Redrup* approach. *Compare* Redrup v. New York, 386 U.S. 767, 770-71 (1967) (discussing a variety of views on whether a state can criminalize the distribution of obscenity and then concluding without analysis that "[w]hichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand"), *with* Miller v. California, 413 U.S. 15, 24 (1973). The test adopted in *Miller* is:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citation and internal quotation marks omitted).

On incitement, compare *Dennis v. United States*, 341 U.S. 494, 515 (1951), which established the "clear and present danger test," with *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam), which held that a state cannot prohibit advocacy of law-breaking activity unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

eral questions that are uniquely important in evaluating the Court's use of intermediate scrutiny. The following sections expand upon Sunstein's theory and argue that (1) minimalism is more appropriate in cases involving moral, rather than factual, uncertainty; (2) when deciding whether to employ minimalism, the Court should consider not only its appropriateness in any given case, but also the extent to which it already has used minimalism in other cases because a Court that uses too much minimalism may undermine its own legitimacy; and (3) when deciding what kind of minimalism to employ in a situation involving moral flux, the Court should choose one that will facilitate a shift to conditions favoring maximalism.

1. Facts vs. Values

Sunstein suggests that minimalism is equally appropriate for situations involving factual and moral uncertainty. At more than one point in his *Foreword*, he argues that either changing factual circumstances or constitutionally relevant moral uncertainty can justify taking a minimalist path.[94] Minimalism, therefore, was the correct solution not only for the lack of a consensus regarding gay rights in *Romer* but also for the quickly changing technological environment at issue in *Denver Area*.[95]

There is good reason to believe that the arguments in favor of minimalism, however, are more persuasive in cases involving disputes over values than in those involving rapidly evolving factual circumstances. First, cases involving changing facts do not ordinarily present the possibility for social backlash that Professor Sunstein discusses and that is quite possibly the most compelling justification for courts to move slowly.[96] Although one might imagine that a broad maximalist ruling on a morally charged and highly divisive issue like same-sex marriage could, like the *Roe v. Wade* decision, mobilize opposition and undermine the rationality of public debate, such a result is probably unlikely when the question is simply one of rapidly changing facts.

Second, a maximalist ruling in an area of evolving factual circumstances does not raise the same type of stare decisis concerns that a maximalist decision in a case involving moral flux might implicate. A court that issues a maximalist ruling on, for example, same-sex marriages but a decade later finds that it must reverse its maximalist ruling with another equally maximalist ruling that comports more closely with a new moral consensus will face serious stare decisis obstacles. But a court will not meet such obstacles if the only change from the first to the second case is a purely factual one because the application of settled principles of law to a new fact situation does not violate principles of stare decisis.[97] Third, courts, as a matter of institutional

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94 *See* Sunstein, *supra* note 42, at 8, 30.

95 *See supra* notes 65-69 and accompanying text.

96 *See* Sunstein, *supra* note 42, at 32-33.

97 *See* Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467, 2468-69 (1990) ("There is a critical difference between the precedential import of a *legal standard* articulated by a court and the *specific application* of the standard to the set of facts before the court. An absolute rule of statutory stare decisis does not claim to govern applications of law to changing factual patterns . . . ."); John Wallace, Comment, Stare Decisis *and the Rehnquist Court: The Collision of Activism, Pas-*

capacity, are simply better at adjudicating disputes involving everyday facts than they are at resolving sensitive moral issues.[98] Courts, with their traditional attention to detail and focus on particular factual controversies, are better equipped to grapple with the intricacies of the cable television industry despite its rapidly changing technology, than they are to wrestle with the extremely difficult ethical question of whether to extend the right to marry to gays and lesbians. For these reasons, courts should be more willing to embark on maximalist rulings in cases involving complicated and changing facts than they should be in cases involving difficult ethical quandaries.

Examined in this light, Justice Breyer's opinion in *Denver Area* appears both refreshing and frustrating. On the one hand, the opinion breaks new, important ground by openly acknowledging that the Court does not know exactly how to resolve the case and that therefore it will tread slowly and carefully through new terrain.[99] On the other hand, this case was inappropriate for such minimalistic caution. Justice Breyer is surely right to recognize that drawing analogies is difficult in the quickly changing world of emerging communications technology,[100] but it is also true that absent a compelling reason, the Court should make an effort to do so in order to provide clarity,

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sivism, and Politics in Casey, 42 BUFF. L. REV. 187, 251 (1994) ("Traditional notions of American *stare decisis* . . . permit[ ] departure or, at the very least, reconsideration when precedent has become unworkable, factually different, [or] eroded . . . .").

98 *See* Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 106 (1988) ("[I]t is the rare Supreme Court Justice who can keep up with more than a negligible sampling of the poetry, science, economics, literature, philosophy, theology, and history that should inform an expositor of moral reality."); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 635 (1994) ("In addition to the nonrepresentativeness of judges, courts have a number of other institutional disadvantages in deciding basic social and moral issues: their information is generally limited to the facts that litigants choose to present to them; they are institutionally insulated from the political and business worlds that give rise to the cases they hear; and their dockets are so crowded that judges can devote little time even to critical cases."). I do not think that these institutional limitations render courts unable to make moral judgments, but I do think they counsel in favor of caution when dealing with sensitive ethical issues.

99 *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385-86 (1996) (plurality opinion).

100 *See id.* at 2385 (plurality opinion) ("But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . [A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now." (citation omitted)); *id.* at 2402 (Souter, J., concurring) ("Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself we should be shy about saying the final word today about what will be accepted as reasonable tomorrow."). For commentary on the difficulty in picking analogies in the emerging technology field, see Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995), William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995), I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994), and Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995) ("[I]f we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.").

reduce decision costs, and promote rule-of-law values.[101] It may be the case, as Sunstein argues, that cable regulation is not an area in which the lack of clear rules seriously impedes planning,[102] but the case for minimalism requires more. In *Denver Area*, there was no risk that a maximalist ruling, such as Justice Kennedy's characterization of public access channels as public fora and leased access channels as common carriers,[103] would create a social backlash, and Justice Kennedy's clearly reasoned opinion demonstrates that the Court could have sorted through the admittedly complex facts to reach such a maximalist decision. Finally, if facts change, the Court can revisit the issues without threatening stare decisis values. In short, the case for maximalism in *Denver Area* was quite strong; by refusing to extend settled First Amendment doctrine to the specific facts at issue in the case, the Court produced great confusion where it could easily have provided clarity. Nonetheless, Justice Breyer's frankness is admirable. One only wishes that the Court had been so frank about its use of minimalism in a highly charged, value-laden case like *Romer*, in which the arguments counseling in favor of minimalism were much more compelling.

2. *Minimalism in the Court's Portfolio*

Sunstein suggests that whether the Court should employ maximalism or minimalism in any particular case depends solely on the circumstances of that case alone.[104] In other words, whether the Court should take a minimalist path in, for example, the cable regulation context depends solely on the circumstances surrounding the cable regulation context; in determining whether to employ minimalism, the Court should look only at whether facts in the cable area are changing quickly and whether the need for planning in the cable area is insistent. The Court apparently need not consider whether it already has used minimalism in past cases or how much minimalism it already has employed in the current Term. This approach means that the Court can use as much minimalism as it wants as long as the facts in the particular case demand it: if thirty cases in a Term present opportunities for minimalism, then the Court may be minimalist thirty times; if every case demands minimalism, then the Court can use minimalism every time.

This practice, however, ignores the fact that the disadvantages of minimalism are cumulative with respect to both decision costs and rule-of-law values. As the Court announces a greater number of minimalist decisions, the burden on lower courts and advocates rises, and one could specu-

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101 *See supra* notes 59-63 and accompanying text. Justices Kennedy and Thomas took this position in *Denver Area*. *See Denver Area*, 116 S. Ct. at 2404 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles."); *id.* at 2422 (Thomas, J., concurring in the judgment in part and dissenting in part) (criticizing Justice Breyer's opinion for failing to decide on a governing standard).

102 *See* Sunstein, *supra* note 42, at 32.

103 *See Denver Area*, 116 S. Ct. at 2408-14 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

104 *See* Sunstein, *supra* note 42, at 30-34 (focusing on the case, situation, or area at hand).

late that at some point these costs begin having a serious effect on the work of these courts and practitioners. Perhaps more important, however, is the effect of excessive minimalism upon the public's and media's perception of the Court's legitimacy. As the examples at the beginning of this Article suggest,[105] when the Court employs too much minimalism—when it leaves too many issues open in too many cases—respect for the Court declines. Although Court-watchers may tolerate a few cautious decisions, people mostly expect the Court to speak decisively and are troubled when the Court wavers, refuses to answer important issues, or produces confusing opinions.[106]

This expectation means that the Court should carefully pick its spots for minimalism. Instead of simply analyzing the case in front of it, the Court also should consider the extent to which it has already employed minimalism in recent cases. If the Court has issued a lot of minimalist decisions, it should consider rendering a maximalist decision even if the need for planning is not insistent and there are changing circumstances. A set of circumstances, when examined in isolation, may appear favorable to minimalism, but if the Court has already announced several minimalist decisions, another one may seriously threaten rule-of-law values and the legitimacy of the Court. In other words, in some situations where minimalism might appear appropriate on a micro-level, a macro-level analysis demands maximalism.[107]

Analyzed this way, the Court's 1995 Term looks somewhat less rosy than Sunstein suggests (though more rosy than Taylor or Rodriguez would have us believe[108]). Although the case for minimalism was perhaps quite persuasive in *Romer* and *BMW*, both of which demanded sensitive value-based judgments, the need for minimizing minimalism counseled in favor of maximalist decisions in other cases, such as *Denver Area* and *44 Liquormart*. In *Denver Area*, for example, the Court should have asked not only whether conditions in the cable industry demanded minimalism, but also whether another minimalist decision was appropriate on top of minimalist cases such as *Romer*, *Virginia*, and *BMW*. As it turns out, many commentators believe the Court picked too many spots for minimalism during the 1995 Term.[109] If the Court wants to use minimalism as a democracy-forcing technique to speed resolu-

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105 *See supra* notes 1-6 and accompanying text.

106 *See, e.g.*, Greenhouse, *supra* note 68. In discussing Justice Breyer's indecision in *Denver Area*, Greenhouse wrote:

> That is not, of course, typical Supreme Court discourse—and as a daily diet it probably should not be.... In interpreting the Constitution, where the Court can expect to have the last word, the Justices' duty is to make every opinion "a coherent communication about the Constitution," as Prof. Joseph Goldstein of Yale Law School said in "The Intelligible Constitution".... Too much public soul-searching... can be an obstacle to coherence.

Id.

107 This is not to say that there should be a quota for minimalism per se. Certain types of minimalism—such as narrow, rule-like holdings—are legitimate, lawyerly, and do not threaten rule-of-law values. The point is simply that the Court, when deciding whether to make another decision that would create confusion and implicate rule-of-law values, should consider, in addition to other factors, whether it has already rendered many other similar decisions.

108 *See* Rodriguez, *supra* note 3; Taylor, *supra* note 2.

109 *See, e.g.*, Rodriguez, *supra* note 3.

tions of morally divisive constitutional issues, it should reserve minimalism for cases that truly deserve it.

3. *What Kind of Minimalism?*

Although Sunstein describes numerous examples of judicial minimalism,[110] he does not provide much analysis of what kind of minimalism courts should employ in any given case. The question is important because different types of minimalism produce different results. Some types, such as denying certiorari or dismissing for mootness, allow democratic processes to function without interference from the judicial system, but do little to protect rights, provide guidance to lower courts, or spur moral evolution over time. Others, such as investigating the actual purposes of statutes, affirmatively spur democratic processes and provide some guidance and protection of rights. Still other types, such as definitively resolving narrow issues, may provide concrete guidance for those issues but leave others untouched, allowing democratic processes to work on the unresolved issues without any judicial guidance. This latter method is either protective of rights or not, depending on the concrete ruling. In short, different minimalist techniques serve different functions; ideally, courts should have some idea of how to decide among them.

Examining the various types of minimalism and developing guidelines for when courts should employ them is a difficult task and one that is beyond the scope both of this Article and of Sunstein's *Foreword*. But one question regarding one type of judicial minimalism—namely, when should the Court exercise passive virtues[111] and deny certiorari in a case involving sensitive moral questions upon which there is no consensus—does demand at least some attention here.

Denying certiorari and refusing to speak on a morally charged issue is certainly justified in certain circumstances. If the Court simply does not think it can come to a consensus even on a narrow and shallow ruling, then denying certiorari is appropriate. Likewise, if the Court has already rendered a number of minimalist decisions and thinks that it could only reach a consensus on a minimalist decision in the case in question, then it may want to refuse to hear the case in order to avoid the problems that accompany rendering too many minimalist decisions.[112]

Denying certiorari as a matter of routine, however, is problematic. As Professor Gerald Gunther argued in his compelling critique of Alexander Bickel's *The Least Dangerous Branch*, the Court has an institutional obliga-

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110 *See supra* notes 54-55 and accompanying text.

111 *See* BICKEL, *supra* note 46, at 111-98.

112 *See supra* notes 104-107 and accompanying text. I use "minimalist decision" in this context to refer to an actual written opinion that is minimalist. Refusing to hear the case is of course also a minimalist technique so denying certiorari would not decrease the net amount of minimalism exercised. Denying certiorari, however, although admittedly exporting costs to other actors, probably does not threaten rule-of-law values in the same way that writing numerous minimalist opinions does.

tion to decide important cases.[113] "[T]here is a limit," Gunther writes, "beyond which avoidance devices cannot be pressed and constitutional dicta cannot be urged without enervating principle to an impermissible degree."[114] Sunstein deftly points out, however, that often the Court cannot reach deeply principled, maximalist rulings in controversial cases.[115] What, then, is the Court to do? The answer is that it can announce minimalist decisions that provide guidance, force democratic processes, and facilitate the move to maximalist conditions under which the Court can follow Gunther and announce deeply principled decisions in important cases. Minimalist opinions, then, can be understood as a compromise position somewhere between Bickel and Gunther[116]—they do not resolve difficult issues with finality, but they do not avoid them either. Minimalist opinions allow the Court to fulfill its institutional role, but they do not require the Court to do the impossible. And importantly, these opinions, unlike denying certiorari, can begin an evolutionary process that will bring about maximalism along with all its advantages.[117] In sum, as a first step towards resolving difficult value-laden cases, the Court should choose a minimalist technique that will facilitate the shift to maximalism. The next section argues that intermediate scrutiny is one such technique.

II. Intermediate Scrutiny As Judicial Minimalism

A. Intermediate Scrutiny and the Supreme Court

For purposes of this Article, the term "intermediate scrutiny" refers to a level of review somewhere between strict scrutiny and rationality review that the Court uses in an area of law where it consistently employs such tier-based terminology. This admittedly arbitrary definition means that, for purposes of this Article, the Court really only uses intermediate scrutiny in the Equal Protection Clause and First Amendment contexts.[118] In the Equal Protection

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113 *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

114 *Id.*

115 *See* Sunstein, *supra* note 42, at 30 ("[I]f minimalism is the only possible route for a multimember tribunal, then minimalism will be inevitable.").

116 *See id.* at 64 (arguing that in *Romer* it made sense "to have rendered an opinion lying somewhere between a denial of certiorari and a fully articulated defense").

117 *See supra* notes 76-93 and accompanying text.

118 The definition means that, as I use it, the term "intermediate scrutiny" does not refer to balancing modes that are used in other areas of constitutional law, which can be quite similar to the balancing method used in the Equal Protection and First Amendment contexts. For example, at least one prominent scholar has described the Court's recent landmark Commerce Clause decision of *United States v. Lopez*, 514 U.S. 549 (1995), as embodying an intermediate scrutiny test. *See* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 186-89 (1996). In the dormant Commerce Clause context, the balancing test the Court has employed has also been described as an intermediate level of review. *See* Sullivan, *supra* note 8, at 297; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) (striking down an Arizona statute prohibiting the operation of trains with more than 14 passenger cars or 70 freight cars because the burden on

context, the Court has applied intermediate scrutiny to laws involving affirmative action,[119] laws that discriminate on the basis of gender,[120] and occasionally, laws that discriminate against aliens,[121] nonmarital children,[122] and

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interstate commerce was significant and the contribution to safety was "slight and dubious"). Sullivan also characterizes the Court's test for determining the constitutionality of state laws that discriminate against nonresidents as an intermediate scrutiny test. *See* Sullivan, *supra* note 8, at 297; *see also* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284-85 (1985) (holding that New Hampshire cannot restrict the right to practice law to residents because it failed to show "a substantial reason for the difference in treatment," which had "a substantial relationship to the State's objective"); Hicklin v. Orbeck, 437 U.S. 518, 526-27, 534 (1978) (rejecting an Alaska law giving Alaskan residents an absolute preference over nonresidents for jobs on the Alaskan Pipeline because the state failed to show that "non-residents were 'a peculiar source of the evil' [the law] was enacted to remedy" and that the discriminatory law would have a "substantial relationship to the particular 'evil'" (quoting Toomer v. Witsell, 334 U.S. 385, 398 (1948))).

An interesting issue, and one worth further exploration, is what these areas have in common that might explain the existence of a three-tiered system. In other areas of constitutional law, the Court employs general balancing tests, which are not, like intermediate scrutiny, a compromise position between two rule-like alternatives. One example is the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test in the procedural due process context. This balancing test is not perceived of as being transitional or unstable. Perhaps the answer to this question lies in the concept of "suspicion." Both the antidiscrimination area and the First Amendment area involve a suspicion of governmental motives (i.e., group-based bigotry, ideological censoring) which cannot always be explicitly discovered. The intermediate mode allows courts to closely examine government justifications for suspect laws to discover proxies for these hard-to-find illegitimate motives. Such a mode is not necessary, for example, in the procedural due process context, where such suspicion generally is not present.

119 *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-68, 600 (1990) (upholding FCC minority preference policies and holding that intermediate scrutiny was applicable standard for federal affirmative action programs), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (upholding a congressional requirement that 10% of federal funds granted for local public works projects must be allocated to businesses controlled by minority groups; at least three Justices applied intermediate scrutiny); Regents of the Univ. v. Bakke, 438 U.S. 265, 320 (1978) (plurality opinion) (finding University of California's racial quota system unconstitutional but finding that race can be a factor in admissions decisions; four Justices applied intermediate scrutiny).

120 *See* United States v. Virginia, 116 S. Ct. 2264, 2275, 2286-87 (1996) (holding unconstitutional Virginia Military Institute's single-sex policy and applying an "exceedingly persuasive justification" variant of intermediate scrutiny); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that a state-sponsored nursing university could not limit its enrollment to women because the state failed to provide an "exceedingly persuasive justification" to sustain the classification); Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (holding that the military could authorize only registration of males for the draft because women and men are not similarly situated for purposes of military service); Michael M. v. Superior Court, 450 U.S. 464, 475-76 (1981) (holding that a California statutory rape law did not unconstitutionally discriminate on basis of gender even though only men could be held criminally liable); Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977) (plurality opinion) (holding unconstitutional gender-based discrimination between widows and widowers under Social Security Act provisions); Craig v. Boren, 429 U.S. 190, 204 (1976) (announcing intermediate scrutiny standard and striking down statute prohibiting the sale of 3.2% beer to males under age 21 but females under age 18).

121 Generally, laws discriminating on the basis of alienage are subjected to strict scrutiny. *See In re* Griffiths, 413 U.S. 717, 729 (1973) (holding that states may not prohibit resident aliens from practicing law); Graham v. Richardson, 403 U.S. 365, 382-83 (1971) (holding that states may not deny welfare benefits to aliens). Laws that prohibit aliens from exercising political functions, defined broadly, however, are reviewed under a deferential standard. *See* Ambach v. Norwick, 441 U.S. 68, 80-81 (1979) (holding that a state could bar aliens from becoming public

individuals with mental disabilities.[123] In the First Amendment context, the Court has applied intermediate scrutiny to content-neutral regulations,[124] time, place, and manner regulations,[125] and regulations of commercial speech.[126] The intermediate scrutiny formulation ordinarily requires the gov-

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school teachers); Foley v. Connelie, 435 U.S. 291, 300 (1978) (holding that a state could prohibit aliens from becoming state troopers). The Court at one time explicitly applied intermediate scrutiny to a law discriminating on the basis of alienage. *See* Plyler v. Doe, 457 U.S. 202 (1982) (striking down Texas law that denied school districts funds for educating children who were undocumented aliens). Most likely, however, the Court applied intermediate scrutiny because the law both discriminated against a disadvantaged group *and* denied education, a basic right; this decision left it unclear whether the Court in the future would apply intermediate scrutiny to a regulation discriminating on the basis of alienage. For a critique of *Plyler* as indeterminate, see Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167.

122 *See* Clark v. Jeter, 486 U.S. 456, 461, 465 (1988) (holding that a six-year statute of limitations on paternity claims violates the Equal Protection Clause and announcing an intermediate scrutiny test); Lalli v. Lalli, 439 U.S. 259, 275-76 (1978) (upholding a law preventing illegitimate children from inheriting from their fathers by intestate succession unless a court made a finding of paternity during the father's lifetime); Trimble v. Gordon, 430 U.S. 762, 776 (1977) (striking down a law completely preventing illegitimate children from inheriting by intestate succession from their fathers).

123 The Court has explicitly held that mental retardation is not a suspect or quasi-suspect class and that laws which discriminate against the mentally retarded do not merit heightened scrutiny. *See* City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 442-43 (1985) (noting state's legitimate interest in treating the mentally retarded specially, the lack of antipathy towards the mentally retarded on the part of lawmakers who are addressing their plight, the political power of the group, and the line-drawing difficulties involved in identifying quasi-suspect groups). The Court in finding unconstitutional a municipality's refusal to grant a special use permit for the establishment of a group home for the mentally retarded, however, applied a very heightened form of rationality review, which scholars have likened to a de facto intermediate scrutiny standard. *See id.* at 446-50; Sullivan, *supra* note 7, at 61 n.248.

124 *See* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1184 (1997) (upholding sections 4 and 5 of the 1992 Cable Act requiring cable television systems to dedicate channels to local broadcast television stations); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (upholding Indiana's public indecency law banning totally nude dancing in public establishments); United States v. O'Brien, 391 U.S. 367, 386 (1968) (upholding statute criminalizing the knowing destruction or mutilation of a draft card). For a comprehensive review of the Court's treatment of content-neutral regulations, see Geoffrey R. Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46 (1987).

125 *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding a regulation mandating the use of the city's sound-amplification guideline for concerts in a public park); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984) (upholding a National Park Service ban on sleeping in public parks except in designated campground areas); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (upholding an ordinance prohibiting the posting of signs on public property as applied to putting up signs on utility poles); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (upholding a Minnesota fair regulation prohibiting the sale or distribution of merchandise or literature except from booths rented to applicants in a nondiscriminatory manner).

126 *See* Florida Bar v. Went for It, Inc., 515 U.S. 618, 635 (1995) (upholding Florida Bar Association rules prohibiting lawyers from using direct mail to solicit personal injury clients within 30 days of an accident); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (finding that Federal Alcohol Administration Act's prohibition of posting alcohol content on beer labels was unconstitutional); United States v. Edge Broad. Co., 509 U.S. 418, 436 (1993) (upholding federal statutes regulating lottery broadcasting as applied to a broadcaster located in nonlottery state but near border of lottery state); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 344 (1986) (upholding statute restricting advertising of casino gambling to residents of Pu-

ernment to demonstrate that the law in question serves actual,[127] important[128] governmental objectives and is closely related[129] to the achievement of those objectives. The most striking feature of intermediate scrutiny is that, unlike strict scrutiny or rationality review, the tier of scrutiny that the Court decides to apply does not predetermine the outcome of the case; with intermediate scrutiny, sometimes the state wins, and sometimes it loses.[130]

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erto Rico); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 571-72 (1980) (striking down regulation completely banning promotional advertising by electrical utility).

127 In other words, post-hoc hypothesized rationales will not suffice. *See* United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977) (plurality opinion) (finding that the State's actual purposes in passing the statute were not the same as those hypothesized during litigation); *Trimble*, 430 U.S. at 774-76 (refusing to allow a state to hypothesize that the law in question was to enforce the presumed intention of intestate decedents).

128 *See Virginia*, 116 S. Ct. at 2275 (requiring "important governmental objectives" and an "exceedingly persuasive" justification); Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990) (requiring "important governmental objectives"), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); *Central Hudson*, 447 U.S. at 564 (requiring "substantial" state interests); *O'Brien*, 391 U.S. at 377 (requiring "important or substantial governmental interest").

Generally, the government has had an easy time demonstrating that laws serve important or substantial governmental interests. *See Turner Broad.*, 117 S. Ct. at 1181 (identifying as interests "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the television programming market"); *Coors Brewing*, 514 U.S. at 485 (preventing strength wars); *Metro Broad.*, 497 U.S. at 567-68 (promoting broadcast diversity); *Rock Against Racism*, 491 U.S. at 796 (reducing noise); *Posadas*, 478 U.S. at 341 (protecting health, safety, and welfare); *Taxpayers for Vincent*, 466 U.S. at 805-07 (aesthetics); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (raising and supporting armies); *Heffron*, 452 U.S. at 649-50 (maintaining orderly movement of crowds); Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (preventing illegitimate teenage pregnancy); *O'Brien*, 391 U.S. at 381 (administrative efficiency).

In rare cases, however, the Court has found that a proffered state justification does not meet the important or substantial interest requirement. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508-10 (1996) (plurality opinion) (rejecting Rhode Island's interest in promoting temperance through keeping consumers "in the dark"); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (rejecting a government interest in preventing noncommercial educational broadcasting stations from capture by private interest groups); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728-31 (1982) (rejecting interest in compensating for discrimination against women in area of education in which women predominate and where such compensation promotes traditional stereotypes); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (rejecting interest in administrative convenience).

129 The formulation is slightly different in the Equal Protection and First Amendment contexts. In the Equal Protection context, the law must be "substantially related" to the achievement of state objectives. *See Virginia,* 116 S. Ct. at 2275; *Metro Broad.*, 497 U.S. at 565. In the commercial speech context, the Court requires that the regulation "directly advance[ ] the governmental interest asserted," and that "it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. For content-neutral speech regulations, the Court requires that the regulation further the interest and be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. For time, place, and manner restrictions, the Court additionally requires that the speaker have adequate alternative channels for his or her expression. *See Heffron*, 452 U.S. at 648. For an in-depth analysis of the Court's means-based inquiry for content-neutral regulations, see Stone, *supra* note 124, at 48-54.

130 *See* Sullivan, *supra* note 8, at 301. In the gender area, compare *Virginia*, 116 S. Ct. at 2287 (state loses), with *Michael M.*, 450 U.S. at 475-76 (state wins). In the commercial speech

Kathleen Sullivan has argued that the Court employs intermediate scrutiny when it faces an "analogical crisis."[131] In Professor Sullivan's terms, "[a] set of cases comes along that just can't be steered readily onto the strict scrutiny or the rationality track,"[132] so the Court "splits the difference"[133] with intermediate scrutiny. According to Sullivan, the Court's treatment of both affirmative action and gender-based laws developed this way. Gender discrimination is "like race discrimination, but not exactly."[134] Gender is an immutable characteristic, and women historically have been discriminated against; however, women are not a numerical minority in the political process, and unlike race, some gender differences relevant to law are biological and not socially constructed.[135] Likewise, affirmative action, which once received an intermediate standard of review, is like traditional race discrimination because it distinguishes among people on the basis of race, undermines trust in meritocracy, and stigmatizes minorities, but it is also significantly different in that it helps, rather than hurts racial minorities.[136] Both instances triggered analogical crises that required the Court to choose a standard of review somewhere between the strict scrutiny that it uses to analyze traditional racial discrimination and the rationality review that it uses to analyze laws distinguishing among nonsuspect classes such as "opticians, hot dog vendors, or debt adjusters."[137]

Analogical crises also help explain other areas in which the Court has employed intermediate scrutiny. For example, the Court has struggled with the question of whether commercial speech is more like core political speech or more like forms of speech such as obscenity and fighting words, which do not receive First Amendment protection.[138] Before 1976, it was assumed that commercial speech should receive no special constitutional protection,[139] but in the landmark decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[140] the Court thoughtfully analyzed the nature of commercial speech and determined that it did deserve some protection.[141] Nevertheless, the Court emphasized that there are important differences between commercial speech and other types of protected speech that counsel in favor of treating commercial speech differently than core political or artistic speech.[142] The Court again split the difference, and when it considered the

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area, compare *Went for It*, 515 U.S. at 635 (state wins), with *Coors Brewing*, 514 U.S. at 491 (state loses). In the content-neutral area, compare *Rock Against Racism*, 490 U.S. at 803 (state wins), with United States v. Grace, 461 U.S. 171, 183 (1983) (state loses).

131 Sullivan, *supra* note 7, at 61 n.248.

132 Sullivan, *supra* note 8, at 297.

133 Sullivan, *supra* note 7, at 61 n.248.

134 *Id.*

135 *See* Sullivan, *supra* note 8, at 298.

136 *See id.*

137 Sullivan, *supra* note 7, at 61 n.248.

138 *See* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 127-29.

139 *See* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (upholding a prohibition on the distribution of advertising material in or upon any street).

140 425 U.S. 748 (1976).

141 *See id.* at 761-70.

142 *See id.* at 771 n.24 (noting that the truth of commercial speech is more easily verifiable

question of commercial speech four years later, it explicitly announced that it would apply intermediate scrutiny to regulations of advertising.[143] Likewise, after the Court held in *City of Richmond v. J.A. Croson Co.*[144] that it would apply strict scrutiny to state and local affirmative action programs,[145] the analogical crisis facing the Court in the area of affirmative action was no longer whether benign racial discrimination should be treated like harmful racial discrimination, but whether benign racial discrimination programs implemented by Congress should be treated more like benign race-based programs implemented by states or more like economic legislation implemented by Congress. Again, the Court split the difference by applying intermediate scrutiny in *Metro Broadcasting, Inc. v. FCC*;[146] however, it resolved the analogical crisis five years later by applying strict scrutiny to such regulations in *Adarand Constructors, Inc. v. Pena*.[147]

Whether the Court's treatment of content-neutral speech regulations and time, place, and manner speech regulations has developed from an analogical crisis is a more difficult question. The Court has certainly split the difference here too, treating content-neutral speech laws with a level of scrutiny somewhere between the scrutiny used to evaluate content-based laws[148] and laws that aim at unprotected speech.[149] But the term "crisis" implies difficulty, and the Court mostly has been unified and consistent in treating content-neutral and content-based laws differently, ordinarily upholding the former and striking down the latter.[150] Although this treatment implies that the Court has split the difference, it has really never been tempted to treat

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and that commercial speech is more durable than other forms of speech and concluding that "[e]ven if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired").

143 *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980).

144 488 U.S. 469 (1989).

145 *See id.* at 505-06.

146 497 U.S. 547, 564-65 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

147 515 U.S. at 235. There is still an open question regarding whether the standard announced in *Adarand* will truly turn out to be strict scrutiny in the sense that state regulations will almost always be invalidated or whether the Court's admonition that strict scrutiny is not fatal in fact, *see id.* at 237, will result in a regime similar to the pre-*Croson* treatment of affirmative action programs, which Sullivan calls a regime of "de facto" intermediate scrutiny, *see* Sullivan, *supra* note 8, at 298. The Court failed to provide an answer to this question when it denied certiorari in the University of Texas affirmative action case. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). For an argument that *Adarand* should not govern the school context, see Akhil Amar & Neal Katyal, *School Colors*, NEW REPUBLIC, July 17 & 24, 1995, at 24.

148 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 412 (1989) (applying strict scrutiny to a content-based law).

149 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942) (finding no First Amendment protection for fighting words).

150 Sullivan states:

> Viewpoint discrimination is so clearly the cardinal First Amendment sin that legislatures now will take pains not to be caught at it. . . .
>
> More frequently the Court reviews laws regulating the subject matter rather

content-neutral laws anything like content-based laws. In other words, there is an analogical question, but no crisis. On the other hand, the Court at times has struck down content-neutral laws[151] and has, as Professor Geoffrey Stone argues, applied different levels of scrutiny to different types of content-neutral regulations.[152] Moreover, the Court recently has announced a formal level of scrutiny for content-neutral laws that exceeds the formulation traditionally used for such legislation.[153] In addition, scholars, who believe that the state should be authorized to pass content-based regulations of speech in order to bring about certain favored ends, have increasingly attacked the content-neutral/content-based distinction.[154] This commentary suggests that perhaps a crisis does indeed exist—or that one might arise soon. In the end, though, the question is not overly important. There is surely some element of analogical crisis in the Court's treatment of content-neutral regulations, even if the "crisis" is not nearly as clear as it is in the case of commercial speech or gender discrimination. And whether or not the Court actually has understood the issue in terms of analogical crisis does not affect the normative analysis of how the Court should treat an analogical crisis if it believes one exists. As the next two sections argue, if the Court does perceive an analogical crisis, it can employ intermediate scrutiny as a tool to resolve the crisis over time.

> than the viewpoint of speech. These too are considered content regulation and typically struck down. . . .
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> . . . .
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> . . . If a challenged regulation aims at something other than content, then the government nearly always wins.

Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 446-47 (1995) (footnotes omitted).

151 *See, e.g.*, United States v. Grace, 461 U.S. 171, 183 (1983) (striking down a law prohibiting displays on Supreme Court grounds as applied to public sidewalks surrounding the Court building); Anderson v. Celebrezze, 460 U.S. 780, 806 (1983) (striking down a requirement that independent candidates for November elections file by March); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981) (striking down an ordinance prohibiting live entertainment).

152 *See* Stone, *supra* note 124, at 48-54 (arguing that the Court sometimes evaluates content-neutral laws with deferential review and other times uses either intermediate or strict levels of review).

153 *See* Schenck v. Pro-Choice Network, 117 S. Ct. 855, 865 (1997) (injunction must burden no more speech than necessary to achieve a significant governmental interest); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (same); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (requiring that the state "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

154 *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CATHARINE A. MACKINNON, ONLY WORDS 3-41 (1993) (arguing in favor of legislation to prohibit pornography); MARI J.MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (arguing in favor of regulating hate speech); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) (arguing in favor of content-based regulations to promote deliberative democracy); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986) (arguing in favor of extending the rationale of *Red Lion*).

B. *Intermediate Scrutiny Is Judicial Minimalism*

The critics of intermediate scrutiny have one thing right: Intermediate scrutiny is not a deeply principled, highly theorized response to problems of constitutional law. It is instead a compromise position that lies between two more-or-less theorized and principled poles. Unlike strict scrutiny or rationality review, both of which predetermine the outcome of the case in front of the Court through the application of broadly applicable, deeply theorized principles,[155] intermediate scrutiny is a form of judicial minimalism because it allows the Court to decide individual cases in both a narrow and a shallow manner.[156]

Intermediate scrutiny facilitates and encourages narrow decisionmaking by requiring the Court to focus its attention on the facts of particular cases. This practice means that each new case will generally not be predetermined by previous cases and that the decision in any given case will not resolve many issues in future cases. Unlike rationality review and strict scrutiny, where the threshold decision of what level of scrutiny to apply generally controls the outcome of the case, with intermediate scrutiny the real work comes after the Court makes its initial threshold decision on the standard of review.[157] The Court must ask specific questions about the case at hand: What are the state interests that allegedly justify the law? What is the means-end relationship between the law and the state interests? Are there alternative channels of communication available? The Court also asks these questions with strict scrutiny, but the answers rarely matter. With intermediate scrutiny, the answers to these questions really do matter, and therefore midlevel review focuses the Court's attention on the particular case in front of it and renders the Court's decision binding on only a narrow range of potential fact situations.

A comparison of the Court's treatment of laws regulating commercial speech and laws regulating political speech illustrates this point. When dealing with restrictions on core political speech, the Court early on decided upon a broadly applicable and deeply theorized principle: As Justice Brennan stated in *Texas v. Johnson*,[158] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreea-

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155 Examples of such principles are that government cannot ban political or artistic speech because of its content, that government cannot discriminate on the basis of race, or that government can regulate purely economic actors as long as it acts rationally.

156 *See* Sunstein, *supra* note 42, at 15, 20. Notably, intermediate scrutiny is not minimalism because it is a standard rather than a rule; both standards and rules can be minimalistic. *See id.* at 42-43.

157 Sullivan states:

> Like the poles of two-tier review, [intermediate scrutiny] employs the vocabulary of weights and measures as a metaphor for justification. But unlike two-tier review, it really means it. Two-tier review, like overtly taxonomic or categorical analysis . . . uses classification at the threshold to cut off further serious debate: "this is an x case and therefore the government (or rightholder) wins." Intermediate scrutiny requires far more evaluative work after the threshold has been crossed.

Sullivan, *supra* note 8, at 300-01.

158 491 U.S. 397 (1989).

ble."[159] When the Court makes the threshold decision that a law is a content-based regulation of core speech, it almost invariably employs this principle to strike the legislation.[160] But once the Court decides that a law infringes upon commercial speech, it carefully analyzes the particular circumstances of the case to determine if the law is constitutional. For example, in *Coors Brewing*, the Court closely examined the state's interests in suppressing alcohol strength wars (important) and facilitating state efforts to regulate alcohol under the Twenty-first Amendment (not sufficiently important).[161] It also examined the government's entire alcohol regulatory scheme, evidence demonstrating a link between the labeling ban and decreased strength wars, and potential alternatives to the labeling ban in deciding that the law in question did not pass intermediate scrutiny.[162] Similarly, the Court in *United States v. Edge Broadcasting Co.*[163] analyzed both the federal interest in balancing the interests of lottery and nonlottery states and whether the law as applied to the particular plaintiff was more extensive than necessary.[164] For this latter inquiry, the Court analyzed specific data regarding the number of North Carolina residents who could potentially have constituted the plaintiff radio station's audience, the percentage of radio listening time taken up by these residents, the percentage of North Carolina residents in counties reached by plaintiff's signal who watched Virginia television stations, and other statistics uniquely relevant to the case.[165] The decision in *Edge Broadcasting*—that

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159 *Id.* at 414. For an earlier statement of this principle, see Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). *See also* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115-16 (1991) ("This is a notion so engrained in our First Amendment jurisprudence that last Term we found it so 'obvious' as to not require explanation. It is but one manifestation of a far broader principle: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" (citation omitted) (quoting Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984))).

160 *See, e.g.*, United States v. Eichman, 496 U.S. 310, 318-19 (1990) (striking down The Flag Protection Act of 1989); Texas v. Johnson, 491 U.S. 397, 420 (1989) (reversing a flag burning conviction under Texas flag desecration statute); Boos v. Barry, 485 U.S. 312, 334 (1988) (striking down a regulation prohibiting the display within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into disrepute); Widmar v. Vincent, 454 U.S. 263, 276-77 (1981) (finding unconstitutional a university policy prohibiting use of university buildings or grounds for purposes of religious teaching or worship); Carey v. Brown, 447 U.S. 455, 471 (1980) (holding unconstitutional a statute prohibiting picketing of residences or dwellings but exempting peaceful picketing of a place of employment involved in a labor dispute); *Mosley*, 408 U.S. at 94 (holding unconstitutional an ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute). *But see* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding a law prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place).

161 *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 485-86 (1995).

162 *See id.* at 486-91.

163 509 U.S. 418 (1993).

164 *See id.* at 425-35.

165 *See id.* at 429-35. The Court's most recent *Turner Broadcasting* decision also exemplifies the fact-intensive nature of intermediate scrutiny. As one example of how the Court is willing to look at case-specific statistics to determine the constitutional outcome of a case, the Court in *Turner Broadcasting* cited statistics showing that under the must-carry rules, cable oper-

Congress's decision to prohibit broadcasters in nonlottery states from broadcasting lottery advertisements was constitutional as applied to the particular North Carolina plaintiff[166]—is a very narrow one and one that might come out differently in a case involving slightly different facts. This narrowness is a hallmark of the intermediate scrutiny mode.

Intermediate scrutiny is also clearly shallow rather than deep in the sense that it reflects a "crisis in analogical reasoning"[167] rather than a deeply theorized principle.[168] The Court applies strict scrutiny to content-based restrictions of political speech because of the principle that government may not distort the marketplace of ideas; likewise, the Court applies rationality review to laws that distinguish among economic actors because of the principle that government must have broad authority to regulate business affairs.[169] Both of these ideas, while perhaps not reaching the heights of philosophical principles like the categorical imperative[170] or the difference principle,[171] surely represent two of the most well-thought-out and deeply theorized principles in constitutional law. No such principles animate the Court's use of intermediate scrutiny. It uses intermediate scrutiny for commercial speech because commercial speech is like political speech, but also like forms of unprotected speech. It uses intermediate scrutiny for regulations that discriminate on the basis of gender because these regulations are like those that discriminate on the basis of race, but also resemble those that discriminate on the basis of economic affiliation. Because there is no deeply theorized principle that supports the intermediate scrutiny mode itself, the individual cases involving intermediate scrutiny also do not reflect any deep principle. The Court's decisions to uphold a law banning lottery advertising within nonlottery states but to strike down a law prohibiting beer manufacturers from putting the beer's alcohol content on the bottle reflect no profound perspective on the authority of the state or the inalienability of certain civil or human rights. The decisions simply reflect the Court's judgment that in one case the state justified the law well enough and in the other it fell a little short.

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ators satisfied their obligations 87% of the time using previously unused channel capacity, that 94.5% of cable systems had not had to drop any programming in order to fulfill these obligations, that the remaining 5.5% of cable systems had to drop only an average of 1.22 services, that cable operators nationwide carry 99.8% of the programming they carried before the must-carry rules, and that only 1.18% of nationwide cable channels are devoted to channels added because of must-carry. See Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1198 (1997).

166 *See Edge Broadcasting*, 509 U.S. at 435.

167 *See* Sullivan, *supra* note 8, at 297.

168 Sunstein argues that one mark of minimalism is analogical reasoning as opposed to reasoning based on abstract theories. *See* Sunstein, *supra* note 42, at 14.

169 *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

170 *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46-47 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785) (stating that one should act only according to a maxim that one can will as a universal law).

171 *See* JOHN RAWLS, A THEORY OF JUSTICE 75-78 (1971) (economic and social inequalities are only justified if the inequalities help the least well off in society).

As a form of judicial minimalism, intermediate scrutiny brings with it both the advantages and disadvantages of minimalism. The next section discusses the advantages in some detail and argues that in some cases they outweigh the disadvantages, but it is worth pausing here to recall these disadvantages. When the Court employs intermediate scrutiny, it certainly exports decision costs to other actors. Because the test is indeterminate, it causes confusion among lower courts and practitioners.[172] It also requires intensively fact-oriented decisionmaking that increases the amount of time and money that lawyers must spend to litigate cases as well as the amount of time and effort that judges must spend to resolve the cases.[173] Finally, the Court's use of intermediate scrutiny makes it vulnerable to charges of ad hoc decisionmaking.[174] Because the text is so elastic, it can appear that the Justices are simply applying it to reach whatever decision they want. As Sullivan puts it, "No amount of bureaucratic lingo in the formulas of intermediate scrutiny . . . can wholly dispel that Lochnerian feeling one can get from intermediate scrutiny's shifting bottom line."[175] The case for intermediate scrutiny recognizes these problems but realizes that in situations of analogical crisis it may nevertheless be the best of all possible options.

C. The Advantages of Intermediate Scrutiny

1. The Best Possible Alternative

Intermediate scrutiny is well-suited for use in situations of analogical crisis because it is a cautious, flexible doctrine that acknowledges both the difficulty of resolving divisive moral issues and the fallibility of individual judges. As this Article suggests,[176] the Court should reserve minimalist techniques for cases involving controversial moral uncertainty. Situations of analogical crisis certainly meet this criteria as they involve some of the most difficult questions in all of constitutional law. Unfortunately, judges are not ideally equipped to solve these challenging questions quickly and thoroughly in accordance with deeply-theorized principles.[177] Judges are all too human, and though one may legitimately expect them to speak authoritatively on subjects such as statutory interpretation and courtroom procedure, which are uniquely within the judicial domain, asking them to resolve our most intricate moral disputes in one fell swoop simply is asking too much. Intermediate scrutiny allows judges to take their time with these questions and is therefore the most realistic and desirable alternative for dealing with analogical crisis.

The other alternatives for dealing with analogical crisis are deeply problematic. One can imagine at least three major alternatives to applying an intermediate level of review. First, the Court could exercise its passive vir-

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172 *See supra* notes 59-61 and accompanying text.

173 *See, e.g.*, Turner Broad. v. FCC, 910 F. Supp. 734, 739-40 (D.D.C. 1995) (noting the 18,000 pages of congressional hearings as well as additional evidence that was before the court on remand after the Supreme Court announced that intermediate scrutiny was the appropriate standard for reviewing the must-carry legislation), *aff'd*, 117 S. Ct. 1174 (1997).

174 *See supra* notes 21-28 and accompanying text.

175 Sullivan, *supra* note 8, at 301 (footnote omitted).

176 *See supra* notes 94-103 and accompanying text.

177 *See supra* note 98 and accompanying text.

tues, deny certiorari, and put the crisis off indefinitely. Second, it could abandon the strict tier system and implement an explicit sliding scale, à la Justices Marshall and Stevens[178] for Equal Protection and other areas of constitutional law. Finally, the Court could resolve the crisis immediately by announcing a maximalist rule. In other words, it could apply either rationality review or strict scrutiny to the particular type of regulation in question. All of these alternatives carry serious problems and in most cases are inferior to intermediate scrutiny.

First, as noted above,[179] routinely denying certiorari is not an appropriate method for addressing important cases. Although the Court must exercise the passive virtues even in some important, divisive cases, it has an institutional obligation to give guidance to lower courts, to resolve circuit splits, and to speak to significant constitutional issues. Denying certiorari leaves lower courts confused and can result in different circuits applying different interpretations of the same constitutional provision. In these circumstances, denying certiorari can be, as Taylor says, "an abdication of responsibility."[180] The length of time it takes a case to work its way to the Supreme Court exacerbates these problems. When the Court initially refuses to decide an issue in one particular case, it may be years before the Court has the opportunity to address the issue again.[181] Therefore, because denying

178 *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451-55 (1985) (Stevens, J., concurring) ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process."); Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting) ("A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of [equal protection]. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.").

179 *See supra* notes 111-114 and accompanying text.

180 Stuart Taylor Jr., *Closing Argument: Maybe the Supremes Did the Right Thing*, TEX. LAWYER, July 15, 1996, at 27 (concluding that although denying certiorari is problematic, it was probably justified in *Hopwood*); *see also* Linda Greenhouse, *Justices Decline Affirmative-Action Case*, N.Y. TIMES, July 2, 1996, at A12 (noting that education lawyers and officials expressed consternation at the Court's refusal to hear the *Hopwood* case). For more on *Hopwood*, see *infra* notes 197-201 and accompanying text. Perhaps the Court's most infamous refusal to hear a case was its dismissal of *Naim v. Naim*, 90 S.E.2d 849 (Va.), *appeal dismissed*, 350 U.S. 985 (1956), involving the validity of the Virginia miscegenation statute, which the Court eventually invalidated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The *Naim* dismissal, which was made more controversial by the fact that the Court refused to exercise mandatory appellate jurisdiction over the case, was criticized harshly. *See* Gunther, *supra* note 113, at 11-13; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (calling the dismissal "wholly without basis in the law"). *But see* BICKEL, *supra* note 46, at 174 (defending the dismissal in *Naim*).

181 *See* Taylor, *supra* note 180 ("[I]t will probably take at least four years for another university admissions case to make its way to the court and present the justices with another opportunity to resolve the state of confusion they have helped create.").

certiorari at best seriously delays guidance from the Court and at worse delays it indefinitely, it is ordinarily not a suitable response to analogical crisis.

Second, the sliding-scale approach of Justices Stevens and Marshall is also not an appropriate solution to analogical crisis. Although it is true that intermediate scrutiny is fairly indeterminate and may, in some cases, threaten rule-of-law values, adopting a sliding scale surely would exacerbate these disadvantages to the point where the disadvantages would outweigh any possible advantages that the sliding scale may have over the current three-tier system.[182] As this Article suggests, a Court that employs too much minimalism places a large burden on lower courts and practitioners and threatens its own legitimacy.[183] Implementation of a sliding-scale balancing test for all Equal Protection Clause and First Amendment cases would remove the clarity that the strict scrutiny and rationality review tiers provide for most cases arising under these clauses, and would require lawyers and courts to analyze intensively the facts of each new case without much guidance from previous cases. This approach inevitably would increase decision costs and bring criticism upon the Court. By maintaining the traditional tiered system and reserving judicial minimalism for cases involving substantial value-based uncertainty, the Court can keep these costs to a minimum. Once again, the selective use of intermediate scrutiny is a superior option.

Finally, it is impossible for the Court to resolve adequately a true analogical crisis by announcing a maximalist rule after a single case. Three of the most notorious problems with rules are that they are under- and overinclusive with respect to the ends that they are meant to realize, that they make it difficult to react to changes over time, and that their rigidity guarantees injustice in some situations.[184] Although in some cases the advantages of rule-based decisionmaking (certainty and predictability)[185] will outweigh these disadvantages, the disadvantages usually will outweigh when the Court confronts a situation as complex and prone to change as an analogical crisis. First, in situations of analogical crisis the Court cannot possibly predict the precise contours of the problem that it seeks to address, and this nearly guarantees that a broad rule will turn out to fit the problem with a great degree of inexactitude. Second, the moral flux and uncertainty inherent in a situation of analogical crisis make it probable that the rule will become less appropriate over time. Third, many people will find a broad rule unjust and unfair because people disagree about basic values in situations involving analogical crisis. This situation can cause, as Professor Sunstein notes, "an intense so-

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182 Sunstein, in addressing the sliding-scale approach, states:

> But a general movement in the direction of balancing would be nothing to celebrate. The use of "tiers" has two important goals. The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work.... The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities.

Sunstein, *supra* note 42, at 78.

183 *See supra* notes 104-109 and accompanying text.

184 *See* SUNSTEIN, *supra* note 7, at 130-35.

185 *See supra* note 7.

cial backlash" and may "hinder social deliberation, learning, compromise, and moral evolution over time."[186] Generally, some mixture of the second and third situations will exist. Either the Court will face immediate criticism or it will encounter increasing criticism as moral values change. Either way, changing circumstances will force the Court either to keep a bad rule or to overrule itself wholly or partially. Both of these possibilities threaten to undermine the legitimacy of the Court.[187]

Some of the most vilified decisions in the Court's history have been ones in which the Court has attempted to resolve a divisive moral issue with a maximalist rule. This situation has occurred both when the Court has favored the state and when it has favored rightholders. The latter category contains both *Lochner v. New York*[188] and *Roe v. Wade*,[189] both of which were either limited or overruled by later cases.[190] The former category includes such condemned decisions as *Plessy v. Ferguson*[191] and *Goesaert v. Cleary*,[192] and perhaps even *Bowers v. Hardwick*.[193] The Court has regretted few phrases more than "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane,"[194] or "we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[195] The Court may soon—if it has not already—come to regret its conclusion in *Hardwick* that "to claim that a right to engage in [homosexual] conduct is . . . 'implicit in the concept of ordered liberty' is, at

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186 Sunstein, *supra* note 42, at 33.

187 Of course, this is not to say that the Court should not generally uphold laws if it is simply unsure about whether the law is constitutional. In other words, the Court's general presumption that popularly passed laws are constitutional is still a sound one. The only caveat to this is in cases of true analogical crisis, where a maximalist decision either striking or upholding the law risks serious consequences. The trick is to recognize those rare circumstances. For some thoughts on how the Court should do this, see *infra* Part IV.

188 198 U.S. 45 (1905). *Lochner* is, of course, one of the most highly criticized of all the Court's decisions. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980) ("*Lochner* . . . is one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse." (footnote omitted)).

189 410 U.S. 113 (1973). For an example of the criticism of *Roe*, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (arguing that *Roe* may be a more dangerous precedent than *Lochner*).

190 *Lochner* was overruled. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). *Roe* has been limited. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (announcing the "undue burden" test).

191 163 U.S. 537 (1896). Of course, *Plessy* was overruled. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

192 335 U.S. 464 (1948) (upholding Michigan law denying bartender licenses to females who were not wives or daughters of male tavern owners). *Goeseart* has been overruled. *See* Craig v. Boren, 429 U.S. 190, 210 n.23 (1976) (explicitly disapproving of *Goeseart*).

193 *See* Sunstein, *supra* note 42, at 68 (calling *Bowers v. Hardwick* "one of the most vilified decisions since World War II" (citing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 250 n.31 (1996), Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 770, 799-801 (1989), and Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655-56 (1987))).

194 *Plessy*, 163 U.S. at 552.

195 *Goesaert*, 335 U.S. at 467. *See also* United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (criticizing this quotation).

best, facetious."[196] Rigid and broad rules in conditions of moral flux, as these cases demonstrate, have often returned to haunt the Court. This is not to say that the Court should not announce broad rules when moral imperatives are clear (as in the case of racial discrimination even in the nineteenth century)—rather it means that the Court must proceed cautiously in situations of moral uncertainty and that generally, rules will not do, at least as a first attempt to solve a divisive analogical crisis.

Intermediate scrutiny, then, is generally a better solution to analogical crisis than denying certiorari, implementing a sliding-scale approach, or announcing a maximalist rule. It allows the Court to provide some guidance to lower courts and practitioners, thereby fulfilling its institutional role, but it does not commit the Court to a rigid position that it may eventually regret. For example, consider how the Court could have used intermediate scrutiny in *Hopwood v. Texas*.[197] Taylor has argued that although the Court's refusal to hear the case "sowed confusion," "left institutions in different states subject to disparate interpretations of the Constitution," and probably guaranteed that the Justices will have to wait years for another opportunity to "resolve the state of confusion they have helped create,"[198] the Court nevertheless acted correctly because any "climactic decision" in the case "could have pre-empted evolutionary, democratic decision-making on an issue of vital national importance as to which the country and the court alike are deeply divided."[199] Taylor's fears about the possible effects of a climactic decision are completely warranted, as the discussion above suggests.[200] But Taylor wrongly assumes that the only viable alternative to a climactic decision is to deny certiorari. Instead, the Court could have taken the case and explicitly applied an intermediate standard of review to affirmative action programs in the public education context. This would have signaled to school administrators and lower courts that the Court will continue to analyze carefully these programs according to the particular circumstances of each case. The Court would have provided guidance in an area desperately in need of direction but would not have pre-empted democratic deliberation or moral evolution over time.[201] In fact, the next section argues that an intermediate level of review actually could have spurred democratic deliberation and moral evolution towards a societal consensus on affirmative action, allowing the Court to an-

196 Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

197 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

198 Taylor, *supra* note 180.

199 *Id.*

200 *See supra* notes 184-196 and accompanying text.

201 Taylor argues that even the most narrow of decisions upholding racial preferences in admissions would be unfortunate because it would signal to administrators that they could continue to aim for a "racial-balance-at-any-cost bottom line," Taylor, *supra* note 180, but it is unclear why this would be the case if the Court clearly held that preference programs must serve important interests and be closely tailored to the achievement of those interests. Taylor argues that *Bakke* caused administrators to implement programs that essentially establish race-based quotas for university admissions, *see id.*, but this simply proves the point. *Bakke* was a confused opinion with no clear majority; its very confusion is what requires the Court to take up the question again to provide guidance. If the Court had taken *Hopwood* and clearly noted the limits of race-based admission preference programs, it would likely have deterred administrators from designing programs similar in effect to quota systems.

nounce a "climactic" decision without worrying about inciting a social backlash or undermining its legitimacy as the final arbiter of the Constitution.

2. Resolving Analogical Crises

The previous section argued that intermediate scrutiny is an appropriate response to analogical crisis because it allows the Court to provide guidance without committing itself to any rigid rule that it may later regret. This means that in any particular case involving a true analogical crisis, intermediate scrutiny is a better option than either denying certiorari or announcing a maximalist rule. But a perpetual regime of intermediate scrutiny in any area of constitutional law is not an ideal solution. As noted above, judicial minimalism and intermediate scrutiny have problems of their own,[202] and a Court that applies too much minimalism for too long will inevitably subject itself to much well-deserved criticism. The Court ideally should apply a technique in situations of analogical crisis that will realize the short-term advantages of minimalism while facilitating a long-term shift to conditions favoring maximalism. In other words, the Court should attempt to resolve the analogical crisis incrementally over time. The remainder of this section argues that intermediate scrutiny is a dynamic and evolutionary doctrine that can help the Court achieve this important goal.

Intermediate scrutiny can help the Court resolve analogical crises through two similar, yet distinct, mechanisms. The first mechanism is an "internal" mechanism that focuses on how the Court can educate itself on the complex parameters of the analogical crisis. The second mechanism is a "dialogic" mechanism that focuses on how the Court, by applying intermediate scrutiny in a situation of analogical crisis, can instigate a dialogue among itself, its coordinate branches of government, and society at large in order to reach a consensus on resolving the crisis over time. These mechanisms help facilitate the shift to maximalism by responding to independent reasons why the Court should not apply maximalist solutions to analogical crises in the first place. Maximalist rules do not work in situations of analogical crisis because (1) it is unlikely that the Court can comprehend fully the contours of the analogical crisis in such a way that it can adequately resolve the issue on the first try and (2) the divisive nature of the moral issue at stake in the analogical crisis guarantees that any rule will meet great resistance. The internal mechanism for change responds to the first of these problems; the dialogic mechanism responds to the second.

The internal mechanism works in at least four interrelated ways. First and most simply, by applying intermediate scrutiny in an analogical crisis with the ultimate goal of resolving the crisis, the Court buys itself more time to consider the various issues raised by the crisis. The Court essentially can place a particular type of legislation in a holding pattern, during which it can consider the issues more fully. Because intermediate scrutiny does not guarantee victory to either the individual litigant or the state, it guarantees that litigants will bring more cases than if the Court had announced a strict or rationality level of review. The Court can take advantage of these cases by

202 *See supra* notes 21-28, 59-63, 104-107, 172-175 and accompanying text.

accepting some of them and expanding its knowledge about the area in question. For example, in the commercial speech area, the Court has explored such questions as whether a city can distinguish between on- and off-site advertising,[203] whether advertisements for "vice"-related products and services (such as liquor and gambling) can be treated differently from other types of advertisements,[204] and what exactly constitutes commercial speech.[205] Undoubtedly, by considering the variety of issues raised by regulations of commercial speech, the Court can better understand its importance, its nature, and its scope. This experience will assist the Court in ultimately deciding whether commercial speech should be treated more like core political speech or more like, for example, fighting words and obscenity.

Second, by requiring a detailed and individualized consideration of both the ends and means-end relationship of a challenged regulation, intermediate scrutiny, as Sullivan says, "call[s] forth more explicit articulation on both the rights and interests side."[206] This means that the Court will have an opportunity to consider the various interests that regulations of commercial speech might serve as well as the reasons that might justify broad protection of commercial speakers' First Amendment rights. By applying an intermediate level of review, which requires litigants to demonstrate carefully why the facts in their particular case either justify or do not justify regulation, the Court can evaluate critically the specific ramifications of commercial regulations, what goals they serve, and how well they serve them. This process can create a more concrete as well as a more nuanced understanding of the area that inevitably will assist the Justices in developing a resolution of the analogical crisis.

Third, by encouraging more litigation in the area covered by the crisis, the Court can ensure a number of lower-court cases to illuminate the relevant issues. In this sense, applying intermediate scrutiny brings with it advantages similar to those arising from "percolation," a term that refers to the practice of denying certiorari until several circuit courts have considered an issue.[207] According to defenders of percolation, or "percolationists,"[208] this practice improves the Court's decisionmaking process in two important ways. First, the Court can benefit from the reasoning of lower courts and from lawyers who have tested their arguments in these courts. When the Supreme Court finally does hear the case, it can read these opinions in order to grasp better the issues and render the best possible decision.[209] Second, percola-

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203 *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510-12 (1981) (plurality opinion) (concluding that city may constitutionally distinguish between on- and off-site advertising).

204 *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1513 (1996) (finding that no vice exception applies to price advertising ban); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 346-47 (1986) (indicating that because the state could outright ban the "deemed harmful" activity, it may permit the activity with restrictions on the activity's advertising).

205 *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 492-94 (1995) (Stevens, J., concurring) (arguing that a statement of alcohol strength on a beer label is not commercial speech).

206 Sullivan, *supra* note 8, at 313.

207 *See* Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 861 & n.3 (1993).

208 *See id.* at 864.

209 *See, e.g.*, COMMISSION ON REVISION OF THE FED. COURT APPELLATE SYSTEM, HEARINGS: SECOND PHASE 1974-1975, at 793 (1974) ("It may be preferable to allow the circuits to

tion allows the various circuits to act as laboratories where the results of different legal doctrines can be observed and evaluated. When the Court eventually decides the issue, it can look to these different laboratories and choose the best solution.[210] Critics of percolation have argued that percolation does not produce better Supreme Court opinions either because the Court actually does not read lower-court opinions or because the opinions have little to offer.[211] These criticisms, although somewhat persuasive, do not defeat the case for percolation in the intermediate scrutiny context. First, even critics of percolation tend to defend it in constitutional cases.[212] Percolation is particularly beneficial when addressing cases involving analogical crisis, which are often the most difficult and controversial constitutional cases the Court hears. Second, the argument that the Court does not read lower-court opinions does not defeat the normative argument that the Court should

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experiment with a variety of solutions to a difficult legal problem than to rush in with a binding national rule as soon as a conflict, or the potential of a conflict, develops. By resolving the problem at a later date, one may have more confidence in the wisdom of the result and more certainty that it will endure."); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 163 (1985) (arguing that difficult issues are more likely to be answered correctly after "different sets of judges" have considered it); Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689-90 (1990) (expressing doubts about the benefits of percolation but noting that "of course it *ought* to be true that solutions arrived at after experimental and tentative answers are reached elsewhere will be better solutions because they will be based on more information and a wider range of consideration"); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719 (1984) ("The views of the lower courts on a particular legal issue provide the Supreme Court with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law."); Sanford Caust-Ellenbogen, Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1080 (1984) ("[W]hen a court faces a particular issue, it may benefit from the reasoning of courts that have previously confronted the same issue."); Tiberi, *supra* note 207, at 864 (concluding that percolation is not beneficial but describing the percolationist's argument as: "The more attorneys who have briefed and argued an issue, and the more judges who have decided it, the better will be the decision from the Supreme Court. This is so because numerous arguments will have been advanced, and judges will have either accepted or rejected them, all the while providing their reasons for doing so").

210 *See, e.g.*, J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 929 (1983) ("The many circuit courts act as the 'laboratories' of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments." (footnote omitted)); Caust-Ellenbogen, *supra* note 209, at 1080-81 ("[P]ercolation allows different legal standards to operate simultaneously, so that the practical implications of each standard may emerge. The circuits become laboratories where different legal rules can be tested.").

211 *See, e.g.*, Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1408 (1987) (finding the percolation rationale unpersuasive); Bator, *supra* note 209, at 689-91 (arguing that better solutions resulting from percolation only happen "if the experience generated during percolation process is *both* enlightening *and* communicated to the ultimate decider" and expressing skepticism that both are true); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 634 (1989) (calling percolation a "euphemism for incoherence").

212 *See* Meador, *supra* note 211, at 633 ("[The percolation] argument has its greatest force in relation to constitutional questions."); Tiberi, *supra* note 207, at 870 ("[M]ost commentators on percolation, even nonpercolationists, agree that percolation is generally a good idea in constitutional cases.").

read them.[213] Finally, it makes intuitive sense that if the Court did study lower-court cases governed by intermediate scrutiny, it would gain a deeper appreciation for the various state interests and countervailing rights involved and would be able to better assess the relationship between different types of regulations and those interests and rights. Even if this benefit is modest, reviewing lower-court cases surely can help the Court to understand more thoroughly the contours of the analogical crisis that it seeks to resolve.

Finally, by leaving issues open, the Court invites scholarly commentary on the issue that it can use in the same way it can use lower-court opinions. Although some judges have explicitly stated that law review articles generally do not help them,[214] controversial issues of constitutional law, such as those arising under an analogical crisis, have motivated top scholars to contribute opinions upon which the Court can draw to hone its thinking about the issues. It appears that the Supreme Court cites law review articles far more often than lower courts do,[215] and it also appears that the Court frequently has cited important articles in cases involving analogical crisis.[216] Moreover, law review articles also may indirectly help the Court by assisting lower-court

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213 Whether the Court does read these opinions, and to what degree, is unknown. Interviews with Justices and clerks, however, have indicated that the Justices believe percolation is important and that they are interested in lower court cases and law review articles. *See* H.W. PERRY, JR., DECIDING TO DECIDE 210-30 (1991). Moreover, there is some evidence that lower court opinions help mold the thinking of lawyers before the Court; this suggests that lower court cases may also have an indirect effect on the Court. *See, e.g.*, Brief for the Petitioner at 27 n.20, Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (No. 93-1631) (discussing eight state and lower federal court cases dealing with the relationship between advertising regulation and decreased consumption of alcohol); Brief for the Petitioners, United States v. Edge Broad. Co., 509 U.S. 418 (1993) (No. 92-486) (citing 12 lower court cases decided after *Virginia State Board of Pharmacy* on a variety of issues).

214 *See, e.g.*, Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 285 (1988) (arguing that there is a great gulf between legal academics on the one hand and lawyers and judges on the other); Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986) (arguing that law review articles are generally not helpful for appellate decisionmaking). On the use of law review articles by courts, see generally, Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996), and Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467 (1992).

215 *See* Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 (1991) (noting that the Supreme Court is "far more disposed to cite law reviews" than the courts of appeals and "[o]n average, 100 Supreme Court opinions will contain 138 citations, while 100 circuit court opinions will contain eighteen citations").

216 This is probably most true in the context of affirmative action. For example, John Hart Ely's classic article *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974), has been cited in five of the most important Supreme Court affirmative action cases. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 566 n.14 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989) (plurality opinion); United States v. Paradise, 480 U.S. 149, 199 (1987) (O'Connor, J., dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion); Regents of the Univ. v. Bakke, 438 U.S. 265, 288 n.25 (1978) (plurality opinion). Terrance Sandalow's article *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975) has been cited twice. *See Metro*, 497 U.S. at 565 n.12; *Bakke*, 438 U.S. at 288 n.25. Kent Greenawalt's article *Judicial Scrutiny of "Benign" Racial*

judges and lawyers who argue before the Court. In short, law review articles, like lower-court opinions, the passage of time, and the requirement that litigants articulate rights and interests with particularity should theoretically assist the Court in familiarizing itself with the relevant analogical crisis and developing more confidence that it can satisfactorily resolve the crisis.

Intermediate scrutiny also can speed the resolution of an analogical crisis through its dialogic mechanism. This mechanism itself works in two different, yet interrelated, ways. First, by applying intermediate scrutiny, the Court signals to law-making bodies that they must carefully consider the justifications for regulating in a particular area. Second, by sending a symbolic message to society at-large, the Court can help focus public attention on the issue in question, spur debate about the types of state action involved, and perhaps instigate a change in social attitudes. By forcing public conversation about the analogical crisis, the Court can increase the chances that society will move towards consensus, thus decreasing moral uncertainty and laying the groundwork for maximalism.

The Court can affect the work of legislatures by requiring them to pay careful, explicit attention to the justifications of the laws they seek to implement. Because the intermediate scrutiny standard requires law-making bodies to justify their regulation in terms of actual purposes, it forces them to articulate clearly the interests that the law is intended to serve. It requires legislatures to make these interests explicit, thereby improving the democratic process and inviting debate about the true motivations for legislation.[217] Moreover, by requiring law-making bodies to prove that a particular law directly advances these interests, intermediate scrutiny forces them to consider carefully whether and how well the proposed law will actually work. Presumably, legislatures will only persist in regulating the relevant area if they truly believe the regulations are justified. Intermediate scrutiny therefore indirectly forces legislatures to take a position on the analogical crisis. The Court can then respond to a particular legislature's decision. If the legislature continues to persist in attempting to regulate the given area, the Court may feel that it should resolve the crisis through rationality review; if the legislature relents by regulating less, the Court may become convinced that the trend is towards recognizing a right that should be protected with strict scrutiny. In essence, the Court starts the interbranch conversation by signaling to the legislature that a certain type of law is suspect. The legislature can then respond as it sees fit, and the dialogue continues from there.[218]

Preference in Law School Admissions, 75 COLUM. L. REV. 559 (1975) has been cited twice. *See Wygant*, 476 U.S. at 280 n.6; *Bakke*, 438 U.S. at 288 n.25.

Likewise, the Court has cited important articles in the commercial speech context. For example, the classic article by Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979), has been cited three times. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340 n.7 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980); Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979).

217 *See* Sunstein, *supra* note 42, at 36-39.

218 Many constitutional scholars have argued that the Court's most important role is to engage in a dialogue with lower courts, the other branches of government, and society as a whole. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 111 (1975) (noting that

In addition to the purely legal requirements that intermediate scrutiny places upon legislatures, intermediate scrutiny also sends an important symbolic message to the other branches of government that similarly can instigate interbranch dialogue. Justice Ruth Bader Ginsburg—whose pioneering Supreme Court litigation first persuaded the Court to adopt an intermediate standard of review for statutes discriminating on the basis of gender—defended the Court's use of intermediate scrutiny in essentially these terms:

> In a core set of cases . . . dealing with social insurance benefits for a worker's spouse or family, the decisions did not utterly condemn the legislature's product. Instead, the Court, in effect, opened a dialogue with the political branches of government. In essence, the Court instructed Congress and state legislatures: rethink ancient positions on these questions. Should you determine that special treatment for women is warranted, . . . we have left you a corridor in which to move. But your classifications must be refined, adopted for remedial reasons, and not rooted in prejudice . . . .
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> . . . With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not "a bevy of Platonic Guardians," the Justices generally follow, they do not lead, changes taking place elsewhere in society. But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for social change.[219]

Constitutional law scholar Robert Burt has also defended intermediate scrutiny as a dialogue-enhancing doctrinal technique. He has argued that the doctrine allows the Court to fulfill its institutional role as one coequal branch of government with a coequal responsibility to interpret the Constitution:

> If the Court is interested in pursuing conversation—as it should be—rather than imposing silence on a wide range of constitutional issues, an additional, especially useful technique appeared in the Court's jurisprudence in the mid-1970s . . . . This was the invention, in the context of gender-discrimination cases, of the so-called "middle-tier" constitutional scrutiny. . . .
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> . . . .
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> . . . Its great virtue, from my perspective, is its conversational character: when the Court invalidates a statute on this basis, this action permits and even invites a legislative response. . . .

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the Supreme Court engages in conversation with society and lower courts); BURT, *supra* note 46 (arguing that the Court's role in constitutional interpretation should be equal with that of the other branches); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653 (1993) ("I call the process of judicial review that actually occurs in the workaday world *dialogue*. The term emphasizes that judicial review is significantly more interdependent and interactive than generally described." (footnote omitted)). *But see* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 7-12 (1989) (suggesting that less dialogue might be better).

219 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204, 1208 (1992) (footnotes omitted).

> . . . [U]nlike strict scrutiny, when the Court invalidates a statute under the middle-tier test, the successful litigant has not won a conclusive victory. Her triumph is only tentative, subject to later reversal if her adversary returns to the legislative battlefield. The Court's action does, however, significantly alter the terms of this subsequent combat. By overturning the original enactment, the Court shifts the balance of advantage toward the winning litigant. Her claim has been given heightened public visibility and moral sanction. The losing litigant knows, moreover, that he cannot muster the same majority to do nothing more than re-enact the identical measure that the Court has overturned . . . .
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> . . . [M]id-level scrutiny is admirably suited in many different contexts as a technique—like those identified by Bickel—for promoting interchange between court and legislature.[220]

Legislative responses to recent cases involving intermediate scrutiny demonstrate this interbranch dialogue. For example, after the Court decided *Adarand*, which announced a formal strict scrutiny standard for affirmative action programs but which was perceived by many as announcing a de facto intermediate scrutiny standard because of the Court's statement that strict scrutiny is not "fatal in fact,"[221] the Department of Justice, relying specifically on this language in the *Adarand* opinion,[222] issued a comprehensive defense of affirmative action programs that included an analysis of why affirmative action serves compelling interests and how it achieves these interests.[223] The report includes an extensive appendix documenting the legislative history of various congressional affirmative action programs[224] and demonstrating that minorities are consistently discriminated against when competing for contracting jobs.[225] The report concludes that although society has made much progress towards fulfilling racial equality, nevertheless "the information compiled by the Justice Department to date demonstrates that racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets."[226] This report is the next step in an ongoing dialogue among the Court and the other branches of government regarding how to resolve the analogical crisis posed by affirmative action programs. The Court took a big step in *Adarand* by nearly resolving the crisis in favor of strict scrutiny. By leaving at least some doubt that it would invalidate all affirmative action programs, however, the Court invited a response by the Executive Branch, which believes that the time for maximalism has not yet arrived. When the Court next faces this issue, it will have to take account of this position in deciding whether it should conclu-

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220 BURT, *supra* note 46, at 362-65.

221 *See supra* note 147.

222 *See* Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,050 & n.2 (May 23, 1996).

223 *See id.* at 26,042-63.

224 *See id.* at 26,050-54.

225 *See id.* at 26,054-62.

226 *Id.* at 26,062.

sively resolve the affirmative action issue or perhaps retreat a bit, allowing further consideration and conversation before speaking definitively on one of society's most divisive social issues.[227]

The Court can also use intermediate scrutiny to instigate a dialogue between itself and the public at-large.[228] As others have pointed out, the Court stands in a unique position to spur and influence public debate. For example, David Schultz and Stephen Gottlieb argue that, "[T]he judiciary's real power and efficacy lies in how its decisions influence our political language and the way we think about political and social issues. The Court's decisions have tremendous sway over the way we think about politics . . . ."[229] Likewise, as Barry Friedman notes, "The Court facilitates and shapes the constitutional debate. The Court sparks discussion as to what the text should mean by siding with one constituency's interpretation, or synthesizing several, as to what our norms should be."[230] The Court can help focus, synthesize, shape, and prod the public debate over constitutional values.[231] By applying intermediate scrutiny to a particular type of legislation, the Court can signal that the countervailing interest deserves protection. Whether the interest is the desire not to be discriminated against because of gender or mental disability or even the desire to advertise free of governmental constraints, intermediate scrutiny signals to the public at-large that the desire at issue is, in some important sense, a right. Calling something a "right" has a transformative effect on how that interest is perceived and protected in the political process,[232] and by recognizing a right, the Court grants public legitimacy to the claim of the rightholder.[233] If the Court truly can influence the public agenda, shape the political language, and serve as an educative institution,[234] then the decision

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227 For another example of how intermediate scrutiny can instigate dialogue among the branches, see *infra* note 286.

228 Of course, the distinction between the people "at-large" and the legislature, which theoretically at least is controlled by the people, is an artificial one. I refer to the "public at-large" in this section to refer to public opinion in general (both about the issue and the Court) as opposed to how the public might make its desires known through the legislative process.

229 David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's* The Hollow Hope: Can Courts Bring About Social Change?, 12 J.L. & POL. 63, 90 (1996).

230 Friedman, *supra* note 218, at 654.

231 *See id.* at 668-71.

232 *See* Kathleen M. Sullivan, *The Nonsupreme Court*, 91 MICH. L. REV. 1121, 1128 (1993) (book review); *see also* Michael J. Sandel, *Last Rights*, NEW REPUBLIC, Apr. 14, 1997, at 27, 27 ("The philosophers rightly observe that existing laws against assisted suicide reflect and entrench certain views about what gives life meaning. . . . [W]ere the Court to declare . . . a right to assisted suicide, [t]he new regime . . . would encourage the tendency to view life less as a gift and more as a possession.").

233 *See* Schultz & Gottlieb, *supra* note 229, at 74 ("Judicial decisions can change assumptions not only by opening new options for opposition, but also through their power to grant legitimacy to certain claims and to redefine norms of institutional action.").

234 *See* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 964 (1992). Eisgruber states:

> I defend the claim that the Supreme Court cannot be fully understood except as an institution with educative responsibilities, responsibilities that depend upon the excellence of its arguments. At the heart of my theory is an argument about what kind of education the Court is able to give to the American people. That argument

to apply intermediate scrutiny to a particular classification or regulation will likely create at least a modest dialogue between the Court and the public about the nature of the analogical crisis at hand.[235]

This dialogue among the Court, the coordinate branches, and the public can increase the chances that over time, moral uncertainty over controversial constitutional issues will decline, thereby tipping the balance in favor of the Court employing maximalism, rather than minimalism, to resolve analogical crisis. In other words, dialogue is not important only because it allows an exchange between different institutions, but also because it improves the chances that society can move towards consensus on controversial issues. As

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> takes seriously a feature of the Court's educative practice normally regarded as merely ornamental: namely, that the Court's interpretations of American politics are somehow "inspirational."

Id.

235 In his important book, Gerald Rosenberg argues that Court decisions generally do not spur public debate and do not affect social change. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). As evidence of the former, Rosenberg points to, among other things, the fact that the Court's decisions on women's rights did not attract any increase in press coverage of women's issues. *See id.* at 230. But Rosenberg only analyzes press coverage for a few years following the important Court cases. Of course, the Court's influence may take time to instigate debate or change attitudes. *See* Schultz & Gottlieb, *supra* note 229, at 72-74. Moreover, there is evidence that recent cases on controversial constitutional issues have attracted increased press coverage. For example, a LEXIS database search shows that the number of magazine stories mentioning the phrases "right to die" or "physician assisted suicide" nearly doubled in 1996, when the Court agreed to hear *Quill v. Vacco*. During the period of 1992-1995, between 124 and 135 magazine articles mentioned one of these phrases. In 1996, 205 articles mentioned one of them, and from January 1, 1997, through April 7, 1997, 83 articles mentioned one of them. A search in the major paper database demonstrates this even more forcefully. Mentions of one of the phrases rose from 755 in 1994 and 577 in 1995 to 1,663 in 1996. As of April 7, 1997, there were 688 mentions in 1997. *See also* Sunstein, *supra* note 42, at 70 & n.315 (describing the "immediate, intense public reaction to *Romer*").

Although Rosenberg's broader point about the Court's ability to influence social change has been extremely influential, it has been criticized by many scholars. One argument is that Rosenberg focuses on hard data while ignoring equally important types of influence, such as the Court's "role in shaping the national conscience." Book Note, *Grand Illusion*, 105 HARV. L. REV. 1135, 1140 (1992); *see also* Stephen J. Kastenberg, Book Note, 29 HARV. J. ON LEGIS. 589, 598 (1992) ("[H]e overvalues 'hard numbers' as compared to anecdotal, interview, or other evidence that offer glimmers of more opaque, perhaps longer-term or more diffused impacts of a decision or series of decisions."). Others have argued that Rosenberg overstates his claims. *See* Stephen L. Carter, *Do Courts Matter?*, 90 MICH. L. REV. 1216, 1221 (1992); Kastenberg, *supra*, at 596-98. Most important, however, is the argument that although Rosenberg may convincingly argue that courts cannot affect social change by themselves, his position actually strengthens the argument that the Court can act together with other social and political institutions to affect social change. *See* Schultz & Gottlieb, *supra* note 229, at 67 ("We conclude that Rosenberg's analysis actually demonstrates that the Court is, indeed, an effective institution. When we realize that the Court is but one branch of government, which, like every other branch, must work with others to effect its goals, Rosenberg's claim that courts can effect change in combination with others is in reality an important affirmation of judicial efficacy . . . ."); *see also* Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1067 (1992) (book review) ("While Rosenberg does a masterful job of showing that courts do not effect change alone, he goes too far in refusing to recognize that the judiciary is actively involved in a partnership with elected government."). Of course, this Article's thesis rests on the idea that the Court can reach consensus on certain issues through dialogue with other institutions. Because it does not claim that the Court can effect change alone, it is not undermined by Rosenberg's thesis.

this Article argues, it is generally preferable for the Court to employ maximalism rather than minimalism if possible.[236] Moreover, one of the important advantages of minimalism is that it facilitates a shift to conditions favoring maximalism.[237] By instigating dialogue through minimalism, the Court can accelerate this shift. Of course, increasing debate will not always lead to consensus. Some crises are probably forever insoluble without great conflict. Abortion may be one of these crises. It is unlikely that the Court could have resolved the issue much better than it did had it employed minimalism rather than maximalism in *Roe v. Wade*.[238] But dialogue can help resolve analogical crisis in two ways. First, by focusing attention on the issue and encouraging public debate, the Court can educate itself about the extent of moral uncertainty that exists on the issue and the direction of that uncertainty. As a result, the Court might realize that there is a broad consensus on certain values. This information can help the Court in determining the appropriateness of a maximalist solution to the "crisis." Second, by getting arguments out in the open, testing these arguments in public debate, and evaluating the implications of various ideas, public dialogue can help change social attitudes and create consensus as one set of ideas gradually gains a majority position. The notion that public dialogue can spur consensus through the clash of ideas is at the heart of our First Amendment jurisprudence.[239] The Court cannot reach a social consensus by itself. When faced with an analogical crisis about the meaning of the Constitution, the Court must recognize that "[t]he process of reaching an interpretative consensus on the text is dynamic,"[240] and it should apply a minimalistic technique like intermediate scrutiny to prompt dialogue that will gradually lead the Court and society together towards a fruitful, legitimate, and broadly appealing resolution of the crisis.[241]

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236 *See supra* notes 104-109 and accompanying text.

237 *See supra* notes 110-117 and accompanying text.

238 *See* Sullivan, *supra* note 232, at 1128 ("I strongly doubt whether politics alone would have outperformed *Roe* in advancing reproductive rights. . . . Burt favors the optimistic view that American social relations are 'amenable to peaceful compromise,' but our recent national experience—consider not only abortion but also the debate over gay service members in the military—furnishes plenty of justification for Hobbesian pessimism." (footnote and citation omitted)).

239 Justice Holmes advanced this idea in his oft-quoted dissent, in which he stated:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

240 Friedman, *supra* note 218, at 654.

241 It should be noted here that there is a distinct anti-state bias in the mechanism that this Article suggests for resolving analogical crisis. If the Court applies intermediate scrutiny to legislation that previously received rationality review or no scrutiny (because it was never considered before), it sends a message that the particular right involved should be respected. This will have the inevitable effect of making it more likely that the crisis will be resolved through application of strict scrutiny rather than rationality review. The Court's recent proclivity to ratchet up review rather than ratchet it down tends to support this point. *See supra* notes 29-42 and accompanying text. Nonetheless, this result is not inevitable, particularly if the Court makes its reasons

III. Evaluating Recent Decisions

A. The Need for Explicitness

In recent years, in diverse areas of constitutional law such as affirmative action, commercial speech, and gender discrimination, the Court, in varying degrees, has heightened its standard of scrutiny from an intermediate level towards a strict one.[242] Although it is certainly tempting to conclude from this trend that the Court does consciously use intermediate scrutiny as a transitional tool to resolve analogical crisis in just the way that this Article suggests it should, this is an overambitious and unprovable inference. Not only is it difficult, if not impossible, to document how the Justices' thinking has evolved—for example, were they influenced by lower-court decisions, did they suddenly have an epiphany regarding the propriety of some type of regulation, did they sense that moral viewpoints were shifting in society at-large—but it is also surely true that some of the Court's shifts are attributable either directly or indirectly to changes in the Court's personnel.[243] Instead, this Article opts for a weak descriptive claim. It is clear that intermediate scrutiny is highly unstable and often evolves into a stricter form of scrutiny. Moreover, there are a number of coherent explanations for why and how intermediate scrutiny might facilitate such an evolution. One can plausibly conclude that at least in some situations, to some degree, the Court has used techniques such as those described in the last section to hone its thinking, support its conclusions, and help it move closer to resolving the various analogical crises it has faced in recent years.

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for applying intermediate scrutiny explicit. One could imagine that the other branches and the public at-large might stand firm in supporting the state's right to pass certain types of legislation and reject the Court's message about the importance of a particular "right." The Court might then decide to resolve the crisis by limiting review to a rationality standard. One might conceive of the Court's experiments with heightened scrutiny for wealth classifications in this way. The Court initially suggested that the state could not discriminate on the basis of wealth. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." (citation omitted)); Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."). Later, it retreated from this position and has "shown increasing reluctance to strictly scrutinize state practices withholding benefits because of inability to pay for them." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 755 (3d ed. 1996). One explanation for the Court's retreat might be that it realized the state must have latitude to discriminate on the basis of ability-to-pay, and it might have realized this because state and federal law-making bodies stood firm against the Court's pronouncements in cases like *Griffin* and *Harper* and continued to pass such laws.

242 *See supra* notes 29-42 and accompanying text.

243 This is certainly true with respect to the shift from *Metro Broadcasting* to *Adarand*. The four dissenters in *Metro Broadcasting* (Justices O'Connor, Scalia, and Kennedy, and Chief Justice Rehnquist) were joined by Justice Thomas to make up the 5-4 majority in *Adarand*. The analysis is not so clear in other contexts. For example, in the shift from *Posadas* to *44 Liquormart*, two Justices who voted to uphold the law in *Posadas* (Justices Rehnquist and O'Connor) voted to strike the law in *44 Liquormart*, although not for the maximalist reasons posited in Justice Stevens's or Justice Thomas's opinions. Moreover, the other member of the Court who heard both cases, Justice Stevens, took a much harder line on commercial speech regulations in *44 Liquormart* than he did in *Posadas*. *Compare* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1504-13 (1996) (Stevens, J., writing for the plurality), *with* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 359-63 (1986) (Stevens, J., dissenting).

More important, this Article posits two basic normative arguments. The first of these arguments, discussed already, is that the Court should use intermediate scrutiny to help it resolve analogical crises.[244] The second argument is that the Court should be as explicit as possible in its opinions about how and why it has chosen to employ intermediate scrutiny to help it resolve an analogical crisis. By being explicit about its purposes, the Court can go a long way towards answering those critics who have charged that intermediate scrutiny fosters indeterminacy, encourages judicial activism, and undermines principles of stare decisis. The remainder of this section explores this second normative claim and analyzes some of the Court's recent decisions in light of it.

If intermediate scrutiny is understood primarily as a transitional device rather than as a final solution to constitutional problems, its defects suddenly appear much less disturbing. For example, one of intermediate scrutiny's main drawbacks is that it does not provide lower courts with much guidance about how to decide particular cases. If intermediate scrutiny is viewed as a permanent solution to issues of constitutional law, this lack of guidance is highly problematic. The Court, from this perspective, has deliberately chosen a path that will guarantee widespread confusion indefinitely. But the Court would be on much better footing if it explicitly explained that although its use of intermediate scrutiny will certainly cause some temporary confusion, it is using the technique to develop maximalist solutions over time and to bring long-term benefits to both lower courts and practitioners. Though it may seem strange for the Court to include such an admission in an opinion, it is worth remembering three salient points: (1) As Justice Breyer's opinion in *Denver Area* suggests, the Court has already begun taking strides towards admitting when it does not know how to conclusively decide controversial issues;[245] (2) In certain situations, announcing a maximalist rule to govern situations involving moral flux poses a dangerous threat to the Court's legitimacy;[246] and (3) Because the Court is apparently already using intermediate scrutiny as a transitional tool,[247] an explicit statement to this effect will not change the Court's substantive resolution of the pertinent problems, but will simply express courageous honesty about how the judicial process really works.

Treating intermediate scrutiny as a transitional technique also alleviates the other problems inherent in a minimalistic balancing test like the midlevel tier of review. Although intermediate scrutiny in any capacity is open to the charge that it invites judges to reach any decision they want in any particular case, this problem becomes less important if one stops viewing intermediate scrutiny in static terms—as a one-time solution to a single problem—and more in dynamic terms—as a method of solving a problem over time. Judges may reach decisions under intermediate scrutiny that are not entirely princi-

244 *See supra* notes 176-201 and accompanying text.

245 *See supra* note 99 and accompanying text.

246 *See supra* notes 184-196 and accompanying text.

247 This is true even if, as the above discussion of the Article's weak descriptive claim posits, the Court is not doing so consciously, purposefully, or for the reasons that this Article suggests.

pled, but they do so in service of a larger goal, and this makes the problem much less daunting. Likewise, viewing intermediate scrutiny dynamically reduces the concern that it threatens stare decisis values. If the Court explicitly reserves the right to change its thinking over time, then it will not threaten stare decisis values, such as reliance or predictability, when it later changes its mind because the Court will already have served notice to society of the future change. One could argue that the Court should not use a doctrine subject to change in the first place, but it is critical to remember here that the Court is already doing this, and, moreover, as the above discussion suggests, it benefits society for the Court to do so.

B. The Cases

Because the Court has decided several cases in recent Terms that move towards resolving analogical crises, it is important in evaluating these cases to consider what the ideal opinion in this context might look like. The ideal opinion would contain several important elements. First, it would explicitly explain the existence of the analogical crisis—what the crisis is and how it has developed. Second, it would discuss the Court's (as well as lower courts' and commentators') efforts to deal with the crisis and would note any progress or change in thinking that has already occurred. Finally, it would make very clear the Court's current thinking on the nature of the analogical crisis. If the Court has decided to resolve the crisis conclusively one way or the other, it should spend considerable time addressing the analogical questions in the case and explaining the resolution. If it decides not to issue a conclusive resolution, it should state clearly that certain issues remain too difficult to decide conclusively and reassert its right to reconsider the question in the future. Of course, given the current conception of intermediate scrutiny as a static doctrine, the decisions that the Court has rendered in the context of analogical crisis in recent Terms are not explicit about using intermediate scrutiny as a transitional tool and therefore do not exactly meet this ideal. This lack of explicitness has posed difficulties when the Court has tried to explain its decision as stemming naturally from precedent. Apart from this admittedly important problem, however, the three cases discussed here—*Adarand, Virginia,* and *44 Liquormart*—all impressively addressed the nature of the relevant analogical crisis and provided compelling reasoning in support of the particular resolution (or near-resolution) that the Court chose.

Adarand, at least as a formal matter,[248] dealt quite well with the analogical questions presented by affirmative action programs. Affirmative action raises a wide range of analogical questions, ranging from the question of whether it is permissible to discriminate against whites because they lack a history of being discriminated against[249] and possess adequate power in the

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248 In other words, although I find Justice Stevens's reasoning in dissent far more substantively persuasive than the majority's reasoning, *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242-64 (1995) (Stevens, J., dissenting), the majority opinion does meet the formal criteria of a near-ideal opinion attempting to resolve an analogical crisis.

249 *See, e.g.*, Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 ETHICS 86, 89 (1984) (discussing the irony of a white plaintiff's claim of race discrimination).

political process[250] to the problem of whether benign discrimination harms minorities through social stigmatization.[251] No case should be expected to deal explicitly with all the theoretical issues raised by a complex analogical crisis such as affirmative action, but *Adarand* adequately addressed many of them. The Court described the analogical crisis well by briefly reciting the precedent dealing with racial discrimination by the federal government and noting that most of the time, though not always, the Court has treated them the same as cases involving discrimination by the states.[252] The Court also presented a good account of past progress in addressing the analogical crisis by explaining its analysis in previous cases of affirmative action, discussing its decisions in *Regents of the University of California v. Bakke*,[253] *Fullilove v. Klutznick*,[254] *Wygant v. Jackson Board of Education*,[255] *United States v. Paradise*,[256] *Croson*, and *Metro Broadcasting*.[257] Interestingly, Justice O'Connor's opinion also noted academic commentary critical of the Court's *Metro Broadcasting* decision and stated: "*Metro Broadcasting*'s application of different standards of review to federal and state racial classifications has been consistently criticized by commentators."[258] This statement lends further support to the idea that the Court can use intermediate scrutiny to invite commentary that it can then draw upon to help it resolve analogical crises.

Most important, Justice O'Connor's opinion for the Court provides a coherent explanation of why the Court should treat benign discrimination as it does traditional discrimination. The opinion points to three general propositions established by previous cases (skepticism, consistency, and congruence) and concludes with the broad, maximalist principle that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to

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250 *See, e.g.*, Ely, *supra* note 216, at 735 ("When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."); *see also* Sandalow, *supra* note 216, at 694-95 (pointing out that affirmative action programs affect sub-groups within the white population differently).

251 *See, e.g.*, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) ("[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."). For other commentary on the question of affirmative action, see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991), Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297 (1994), Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991), Greenawalt, *supra* note 216, Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974), Richard A. Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, and Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

252 *See Adarand*, 515 U.S. at 213-18.

253 438 U.S. 265 (1978).

254 448 U.S. 448 (1980).

255 476 U.S. 267 (1986).

256 480 U.S. 149 (1987).

257 *See Adarand*, 515 U.S. at 218-27.

258 *See id.* at 232 (plurality opinion) (citing four law review articles).

unequal treatment under the strictest judicial scrutiny."[259] Moreover, Justice O'Connor defended this principle and argued strongly in favor of analogizing benign discrimination to traditional discrimination when she responded directly to Justice Stevens's dissent.[260] One may not agree with her conclusions that the Fourteenth Amendment protects persons rather than groups, that strict scrutiny is necessary in the benign discrimination context in order to differentiate between permissible and nonpermissible governmental use of race, and that consistency is critical to a principled understanding of the Equal Protection Clause,[261] but no resolution to an analogical crisis will satisfy everyone. At the low threshold of whether the opinion presents a well-reasoned, justifiable, and legitimate resolution to an analogical crisis, the opinion certainly succeeds. Finally, the Court wisely recognized that it should not conclusively resolve the divisive question of affirmative action; by emphasizing that strict scrutiny is not fatal in fact, the Court has, as Justice Ginsburg notes in dissent, allowed its affirmative action doctrine "to evolve, still to be informed by and responsive to changing conditions."[262]

The *Adarand* opinion is less successful in addressing *Metro Broadcasting*. Because *Adarand* applied strict scrutiny to federal benign discrimination programs, the Court had to explain over Justice Stevens's strident dissent[263] how it could violate principles of stare decisis and overrule *Metro Broadcasting*, which only five years earlier had applied intermediate scrutiny to such laws.[264] In order to do this, Justice O'Connor argued that *Metro Broadcasting* "undermined important principles of this Court's equal protection jurisprudence"[265] and that overruling *Metro Broadcasting* would therefore be a restoration rather than a departure from precedent.[266] To support its position, the Court distinguished its decision in *Adarand* from its articulation of stare decisis principles in *Planned Parenthood v. Casey*[267] on the ground that *Metro Broadcasting* itself was a departure from precedent and was decided a short time before *Adarand*.[268] The Court therefore admitted that it had decided a previous case incorrectly and implied that it can violate principles of stare decisis whenever it decides that a previous case was incorrect. Moreover, by using a circular argument to distinguish *Adarand* from *Casey*, the Court essentially said that it will not overrule a prior case simply because it thinks the case was decided wrongly unless it thinks it was *really* decided wrongly (i.e., it departed from previous law); this is certainly not the best position for the Court to put itself. In *Metro Broadcasting*, the Court instead should have realized that intermediate scrutiny is an inherently unstable

259 *Id.* at 224.

260 *See id.* at 227-31.

261 *See id.* at 226-31.

262 *Id.* at 276 (Ginsburg, J., dissenting).

263 *See id.* at 242-64 (Stevens, J., dissenting).

264 *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 600 (1990), *overruled by Adarand*, 515 U.S. 200.

265 *Adarand*, 515 U.S. at 231 (plurality opinion).

266 *See id.* at 233-34 (plurality opinion) ("By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.").

267 505 U.S. 833 (1992).

268 *See Adarand*, 515 U.S. at 233-34.

creature that often merely represents a transitional, tentative solution to a problem that the Court will later resolve differently. If the Court had recognized this in *Metro Broadcasting*, it simply could have said in *Adarand*:

> In *Metro Broadcasting,* we announced that we were applying intermediate scrutiny to federally supported benign discrimination programs because we were at that time unsure about whether we should treat these programs as we treat state-supported affirmative action programs. At that time, we noted that if after further reflection on the issue, we decided that we should treat these two types of laws similarly, we reserved the right to announce a heightened standard of review. Today, for the aforementioned reasons, we conclude that we should treat benign discrimination programs implemented by the federal government as we do those programs implemented by states and localities. Therefore, as of today, federal benign discrimination programs will be subject to strict scrutiny. Courts should no longer apply *Metro Broadcasting*'s intermediate scrutiny standard.

Such a solution would have been much better than the Court's actual treatment of *Metro Broadcasting* in *Adarand*, which is both inherently unsatisfactory and precedentially dangerous.

The Court's decision in *Virginia* also may have moved towards resolving an analogical crisis. In doing so, the case strongly analyzed the underlying issues, providing an excellent summary of previous cases and compelling reasons in favor of applying a high level of scrutiny to laws discriminating on the basis of gender.[269] But critics have attacked the opinion for substituting the stricter "exceedingly persuasive justification" standard in place of the intermediate scrutiny standard the Court traditionally had applied to gender-based laws.[270] Of course, the Court had articulated the "exceedingly persuasive justification" standard several times before *Virginia*,[271] but as one commentator has noted, in *Virginia,* the Court "moved the phrase to a pivotal primary position."[272] Two Justices in separate opinions attacked this alleged shift, noting that it "introduces an element of uncertainty"[273] and "drastically revises our established standards."[274] Although this criticism is unwarranted—for all the reasons given in this Article—it perhaps can be explained by the Court's conception of intermediate scrutiny as a static doctrine. If, for example, the Court had originally conceived of intermediate scrutiny as a dynamic, transitional doctrine, it could have noted in earlier cases that its intermediate level of review was subject to change over time. Then, in *Virginia*, the Court—if it indeed wanted to raise the level of review—simply could have announced that the time for change had arrived. It is quite likely

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269 *See* United States v. Virginia, 116 S. Ct. 2264, 2274-76 (1996).

270 *See supra* notes 42-43.

271 *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136, 141 n.12 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

272 Udell, *supra* note 28, at 553.

273 *Virginia*, 116 S. Ct. at 2288 (Rehnquist, C.J., concurring in judgment).

274 *Id.* at 2291 (Scalia, J., dissenting); *see also id.* at 2294 (Scalia, J., dissenting) (noting that the majority had adopted strict scrutiny without acknowledging it).

that such an explicit move would have helped silence those critics who believe that the majority exercised a sleight of hand by substituting a higher level of review for gender-based laws.

Finally, in *44 Liquormart*, at least four members of the Court voted to apply a stricter than intermediate level of review to regulations of truthful speech.[275] Justice Thomas argued that the *Central Hudson* test should not apply at all to regulations of truthful, nonmisleading commercial speech, which he believes are per se invalid.[276] Justice Stevens's plurality opinion argued that total bans of truthful and nonmisleading advertising for purposes unrelated to consumer protection must be reviewed with "special care" under *Central Hudson*.[277] Sunstein criticizes both the plurality opinion and Justice Thomas's concurrence for prematurely and unnecessarily reaching maximalist conclusions.[278] Although Sunstein is surely right that the question of whether commercial speech deserves protection commensurate with the protection afforded core political speech is a hotly contested one,[279] Justices

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275 Four Justices (Justices Stevens, Kennedy, Souter, and Ginsburg) joined Parts III and V of the plurality opinion, which held that prohibitions of truthful and nonmisleading speech about a lawful product for reasons unrelated to consumer protection, must be reviewed with "special care" under *Central Hudson*. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1506-07, 1508 (1996). Only three Justices (Justices Stevens, Kennedy, and Ginsburg) joined Part IV of the opinion, holding that where a state entirely prohibits "the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 1507. Justice Souter's refusal to join this part of the opinion, while joining other parts of the opinion which call for a higher standard of review, makes it somewhat unclear where the law in this area currently stands. For an analysis of the various positions on how to review commercial speech regulations articulated in *44 Liquormart*, see Sullivan, *supra* note 138, at 138-45.

276 *See 44 Liquormart*, 116 S. Ct. at 1517-19 (1996) (Thomas, J., concurring).

277 *See id.* at 1506-07 (plurality opinion).

278 *See* Sunstein, *supra* note 42, at 83-86.

279 *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[C]ommercial speech is not a manifestation of individual freedom or choice."); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486 (1985) ("Commercial advertising was never a concern in any of the historic political struggles over freedom of expression."); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317 (1988) (defending the Court's protection of commercial speech); R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 14 (1977) ("It seems to me that the arguments . . . use[d] to support freedom in the market for ideas are equally applicable in the market for goods."); Jackson & Jeffries, *supra* note 216, at 17-18 (arguing that protection of commercial speech is a resurrection of Lochnerism); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 39 (1986) ("Also sensible from an economic standpoint is the lesser protection given to speech or writing that is intended as commercial advertising . . . ."); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443-44 (1971) ("When the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information . . . [and to] exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment."); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 541 (1979) (arguing that commercial speech deserves less than full protection); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1225-39 (1983) (critiquing Jackson's and Jeffries's thesis).

Stevens and Thomas did offer well-reasoned defenses for their conclusions. Justice Stevens, for example, directly addressed the analogical crisis when he defended his decision to apply higher scrutiny to total bans of truthful and nonmisleading speech. In support of his position that the Court should treat these bans with "the rigorous review that the First Amendment generally demands,"[280] he argued that total bans "all but foreclose alternative means of disseminating certain information,"[281] that truth-suppressing regulations are not rendered less suspect by virtue of the fact that they aim at objectively verifiable or durable speech,[282] and that such bans "impede debate over central issues of public policy."[283] Such bans often obscure a true, underlying governmental policy,[284] and rest solely on the "offensive assumption that the public will respond 'irrationally' to the truth."[285] Although one may legitimately dispute these conclusions, they surely represent adequate justifications for resolving the analogical crisis in favor of stricter review, and the critics' silence regarding the decision certainly supports Justice Stevens's position that the time has arrived for the Court to apply a maximalist approach to at least some regulations of commercial speech.[286]

But, the Court was less than persuasive in its use of precedent to support its decision. Justice Stevens cited footnote nine of the *Central Hudson* opinion[287] four times in support of his position that the Court should use "special

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280 *44 Liquormart*, 116 S. Ct. at 1507 (plurality opinion).

281 *Id.*

282 *See id.* at 1507-08.

283 *Id.* at 1508.

284 *See id.*

285 *Id.*

286 Of course, because it is not clear how many Justices support this view, *see supra* note 275, the crisis has not yet been resolved. Moreover, it is also unclear how the Court will treat regulations of commercial speech that are not total bans or that do aim at misleading or untruthful speech. Importantly, these questions bear heavily on perhaps the most important commercial speech question still open at this time—whether the federal government can regulate cigarette advertising to protect children. For perspectives on *44 Liquormart*'s impact on this question, see Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1 (1997), Liza Goitein et al., *Developments in Policy: The FDA's Tobacco Regulations*, 15 YALE L. & POL'Y REV. 399 (1996), Barbara Dority, *The Rights of Joe Camel and the Marlboro Man*, HUMANIST, Jan./Feb. 1997, at 34 (arguing that the cigarette regulations are ill-advised and unconstitutional), and Kathleen M. Sullivan, *Muzzle Joe Camel? It May Be Illegal*, NEWSDAY, May 30, 1996, at A51 (arguing that the tobacco regulations ignore three basic free speech principles, which were reaffirmed in *44 Liquormart*). *See also* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996) (arguing that a total ban on tobacco advertising would violate *Central Hudson* test). The Clinton administration has argued at length that the new regulations do not violate *44 Liquormart*. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996). This can be seen as the next chapter in the dialogue over the commercial speech analogical crisis. Although some have argued that the cigarette regulations are unconstitutional, *see* Sullivan, *supra*, the fact that Americans overwhelmingly support the regulations might argue in favor of the Court taking a minimalistic approach when it eventually addresses this issue. *See* CBS News Poll, 8/26/96, *available in* Westlaw, POLL Database (finding that 67% of those polled approve of the recent regulations).

287 Footnote nine states:

> We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on

care" when reviewing total bans of commercial speech that were enacted for purposes unrelated to consumer protection.[288] Justice Stevens did accurately recite footnote nine, but importantly, the Court has not cited the footnote a single time between its decision in *Central Hudson* and its decision in *44 Liquormart* twenty-six years later. As such, it is questionable authority for the Court to rest an entire decision upon, particularly because in post-*Central Hudson* cases the Court repeatedly ignored footnote nine's warning.[289] Once again, the plurality faced the problem of having to appear as though it was grounding its decision in well-established precedent when it was in fact changing the law. Of course, courts do this all the time, but here the attempt was remarkably unpersuasive. The Court would have been in a much better position had it previously stated that it reserved the right to heighten the scrutiny applied to regulations of commercial speech. If it had explicitly recognized the transitional nature of intermediate scrutiny, then Justice Stevens could have avoided his questionable footnote-citing and simply announced that the time for maximalism had arrived.

Conclusion: Looking Towards the Future

So, where should the Court go from here? Under what circumstances should it apply intermediate scrutiny in the future? Commentators have called for the Court to apply it in a wide range of contexts,[290] but given the costs of minimalism, the Court should reserve it for the most deserving situations. Determining what these situations are is an exceedingly difficult question. It is an exercise that calls out for a precise definition of analogical crisis, but such a definition is probably unobtainable. Ultimately, the Court must consider a number of factors to decide if intermediate scrutiny is appropriate. These factors include the degree of moral uncertainty surrounding the issue, whether the Court would benefit from more time to consider the issues,

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> speech could screen from public view the underlying governmental policy. Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980) (citation omitted).

288 *See 44 Liquormart*, 116 S. Ct. at 1506, 1508, 1510 (plurality opinion). The brief for the petitioners relied on the footnote as well. *See* Brief for Petitioners at 20, *44 Liquormart* (No. 94-1140).

289 Specifically, the Court ignored the message of footnote nine in *Posadas*, which upheld a Puerto Rico ban on casino advertising to Puerto Rican residents. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 348 (1986). The plurality in *44 Liquormart* rejected the *Posadas* decision, finding that it "clearly erred" and "marked . . . a sharp break from our prior precedent." *44 Liquormart*, 116 S. Ct. at 1511.

290 *See, e.g.*, Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 MO. L. REV. 569 (1994); Marie Appleby, Note, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109 (1987); David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 397-413 (1990) (arguing that the Court should treat gays as a quasi-suspect class); Marc Stuart Gerber, Note, *Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited*, 81 GEO. L.J. 2141 (1993) (arguing that wealth classifications should be reviewed with intermediate scrutiny).

whether the Court would benefit from further percolation and academic commentary, whether a maximalist rule would likely spur social backlash and forestall rational democratic deliberation, and the probability that the Court could instigate social dialogue leading towards moral consensus. Moreover, the Court must analyze these factors while keeping the arguments in favor of maximalism in the background. The balance must weigh heavily in favor of minimalism before the Court applies intermediate scrutiny.[291]

With respect to the types of laws that the Court currently reviews with intermediate scrutiny, the pertinent question is whether the time for maximalism has arrived. With commercial speech and gender discrimination, the answer is increasingly becoming yes, at least for most types of laws.[292] A maximalist decision in either of these areas will most likely neither cause social backlash nor come back to haunt the Court anytime soon. Moreover, the Court has considered these issues for over twenty years and seems more confident about how to treat them. On the other hand, affirmative action laws remain highly divisive, and the Court should continue to apply a minimalist treatment. The Court can achieve this approach by at least leaving some flexibility in the strict scrutiny test and maintaining a de facto regime of intermediate scrutiny for affirmative action laws. Even better, the Court could expressly limit *Adarand* to the contracting context and continue to review affirmative action programs in other areas, such as the public school and employment contexts, with an intermediate level of review. The Court also should continue its current intermediate scrutiny treatment for content-neutral speech laws as it does not appear that there is any other way to resolve this analogical crisis, if indeed one exists in this area. Finally, if it has occasion to consider such laws again in the future, it probably should maintain intermediate scrutiny for alienage classifications, while abandoning it for nonmarital child classifications, as the former continue to stir passions in the society at-large while the latter no longer do.

In the future, the Court should consider employing intermediate scrutiny in the assisted-suicide context. The Court has recently held that there is no general right to physician-assisted suicide,[293] but as several Justices have indicated, the Court may have the chance to revisit aspects of this question in the future.[294] For example, a case in which the patient claims that a law prohibits

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291 It is also worth noting how this framework differs from the Court's current method of deciding whether to apply intermediate scrutiny to a classification in the Equal Protection context. Instead of asking whether a particular group possesses certain characteristics and is therefore a suspect or quasi-suspect class, the Court need only ask whether it is possible that the group possesses characteristics that would make it analogous to groups that are suspect and whether it would help the Court to have additional time to fully consider the case.

292 There may still be relevant distinctions between different types of regulations in these areas. For example, there may be reasons to review regulations of false commercial speech differently than regulations of true commercial speech. *See* Sullivan, *supra* note 138, at 152 (noting that Justices Stevens, Ginsburg, and Kennedy, who would apply strict scrutiny to regulations of nonmisleading speech, would nevertheless "give some discount from strict review" to regulations of false or misleading commercial speech).

293 *See* Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997); Washington v. Glucksberg, 117 S. Ct. 2258, 2261 (1997).

294 *See Glucksberg*, 117 S. Ct. at 2304-05 (Stevens, J., concurring); *id.* at 2303 (O'Connor, J., concurring); *id.* at 2311-12 (Breyer, J., concurring).

him from receiving pain-relief at the end of his life would present questions different from the ones decided in *Vacco v. Quill* and *Washington v. Glucksberg*.[295] Additionally, certain applications of laws such as those challenged in these cases might also demand a different mode of analysis.[296] Intermediate scrutiny might work for these issues because they are surrounded by great moral uncertainty and social divisiveness and involve serious analogical questions—with supporters of a right to assisted suicide arguing that the right is highly analogous to other rights recognized by the Court,[297] and opponents contending that the laws are analogous to the innumerable other laws that state legislatures pass to prohibit nondesirable behavior.[298] Moreover, as Justice Stevens persuasively demonstrated in his concurring opinions in these cases, the state's interests in preventing assisted-suicide become less compelling in certain situations.[299] For example, the state's interest in "preserving the traditional integrity of the medical profession" by prohibiting the doctor from assisting the patient with his suicide is less compelling in a case where a doctor treats the same suffering patient whom he has treated for a lifetime.[300] But rationality review cannot identify such cases. Only intermediate scrutiny, with its attention to the specific facts of cases and its detailed exploration of the relationship between the state's interests and those facts, can distinguish between those individual cases where physician-assisted suicide bans are justified and those where they are not. By using intermediate scrutiny to identify these cases, the Court could educate itself about the varying circumstances surrounding individual applications of assisted-suicide statutes and could accompany the nation as it engages "in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[301]

A similar analogical dispute exists with laws that discriminate on the basis of sexual orientation.[302] For example, the Court soon may have the opportunity to address the question of whether a state can prohibit same-sex

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295 *See id.* at 2312 (Breyer, J., concurring).

296 *See id.* at 2310 (Stevens, J., concurring).

297 *See, e.g.,* Kathryn L. Tucker & David J. Burman, *Physician Aid in Dying: A Humane Option, a Constitutionally Protected Choice*, 18 SEATTLE U. L. REV. 495, 508 (1995) ("The Fourteenth Amendment protects the liberty to choose between a tortured, hideous death and a less painful, more dignified one . . . ."); Joan W. Dalbey Donahue, Note, *Physician-Assisted Suicide: A "Right" Reserved for Only the Competent?*, 19 VT. L. REV. 795, 813 (1995) ("[M]oral justifications for physician-assisted suicide . . . are deeply rooted in our nation's traditions of liberty, self-determination, and the constitutional right to privacy . . . ."); David L. Sloss, Note, *The Right to Choose How To Die: A Constitutional Analysis of State Laws Prohibiting Physician-Assisted Suicide*, 48 STAN. L. REV. 937 (1996) (arguing that all competent, terminally ill patients have a fundamental right to die with dignity); Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2025 (1992) ("The current right to die is grounded in constitutional and common law sources that protect individuals' rights to self-determination.").

298 *See, e.g.,* Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, HASTINGS CENTER REP., May-June 1993, at 32; Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST. L.Q. 799 (1994).

299 *See Glucksberg*, 117 S. Ct. at 2307 (Stevens, J., concurring).

300 *See id.* at 2308-09 (Stevens, J., concurring).

301 *Id.* at 2275.

302 *Compare* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) (arguing for heightened scrutiny for gays), *with*

marriages. The Court could take one of a number of approaches to this issue. It could deny certiorari and refuse to speak on the question. But an exercise of the passive virtues here would be problematic for the reasons discussed above.[303] Alternatively, the Court could risk a severe divisive reaction by either striking down all such laws under a strict scrutiny standard or by upholding them using rationality review.[304] Or, as Sunstein argues, the Court could take a minimalist approach.[305] Assuming that minimalism is a wise choice, the question then becomes what kind of minimalism to apply. Intermediate scrutiny could work quite well here because it would allow the Court to test carefully the various interests asserted by the state and to ensure that they are directly and substantially related to the laws in question. It would allow the Court to act incrementally, to learn about the issue, and to instigate a fruitful dialogue with the nation as a whole, something the Court has yet to do on the issue of gay rights.

Of course, the existence of a serious analogical question does not necessarily mean that the Court must apply intermediate scrutiny. More minimalist forms of minimalism, such as adopting a Calabresian anti-desuetude stance[306] or writing very narrow opinions like *Romer*, might suffice for such divisive issues as physician-assisted suicide and gay rights. Understandably, the Court has been reluctant to apply a heightened standard of review to laws involving either of these issues. In part, this reluctance may stem from the Court's conception of intermediate scrutiny as a permanent solution to constitutional issues—as a way of saying, once and for all, that a particular type of law is inherently suspect. Sending such a message may ironically seem to the Court as a step too maximalist to take. But in fact and in theory, intermediate scrutiny is not a static doctrine but a dynamic one. It provides not conclusive answers but flexibility, time, and assistance to a Court that needs all three to help it resolve the most divisive constitutional issues of the day. The Court should recognize these attributes and should not hesitate to employ intermediate scrutiny when it perceives a situation, such as an analogical crisis, that calls for a relatively aggressive minimalist approach.

In his insightful concurring opinion in *Denver Area*, Justice Souter supported Justice Breyer's cautious plurality opinion by emphasizing the dynamic and transitional nature of the Court's constitutional decisions. He noted:

> Justice Breyer wisely reasons by direct analogy rather than by rule, concluding that the speech and the restriction at issue in this case may usefully be measured against the ones at issue in *Pacifica*. If that means it will take some time before reaching a final method of

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Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994) (addressing constitutional arguments in support of gay rights).

303 *See supra* notes 113-114 and accompanying text.

304 *See* Sunstein, *supra* note 42, at 97-98.

305 *See id.*

306 *See* Quill v. Vacco, 80 F.3d 716, 742 (2d Cir. 1996) (Calabresi, J., concurring) (arguing that the legislature should reconsider its reasons for keeping the state's anti-physician-assisted suicide laws and make these reasons explicit), *rev'd*, 117 S. Ct. 2293 (1997); *see also* Sunstein, *supra* note 42, at 94-96 (praising Judge Calabresi's "innovative solution").

> review for cases like this one, there may be consolation in recalling that 16 years passed, from *Roth v. United States* to *Miller v. California,* before the modern obscenity rule jelled; that it took over 40 years, from *Hague v. CIO* to *Perry Ed. Assn. v. Perry Local Educators' Assn.,* for the public forum category to settle out; and that a round half-century passed before the clear and present danger of *Schenck v. United States* evolved into the modern incitement rule of *Brandenburg v. Ohio.*
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> I cannot guess how much time will go by until the technologies of communication before us today have matured and their relationships become known. But until a category of indecency can be defined both with reference to the new technology and with a prospect of durability, the job of the courts will be just what Justice Breyer does today: recognizing established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here, maintaining the high value of open communication, measuring the costs of regulation by exact attention to fact, and compiling a pedigree of experience with the changing subject. These are familiar judicial responsibilities in times when we know too little to risk the finality of precision, and attention to them will probably take us through the communications revolution.[307]

Denver Area might not have been the best case for judicial minimalism, but Justice Souter's points are nonetheless still broadly important and worth remembering. His emphasis on the importance of constraining legislatures while maintaining open dialogue, of paying close attention to the particular facts of cases that come before the Court, and of developing an understanding of the subject matter in question resonates with what has been discussed here. Most important, Justice Souter reminds us that it can take time for the Court to settle upon a satisfactory resolution to difficult constitutional questions. The dynamic nature of constitutional law is too often either scoffed at or ignored. The Justices are fallible, and the issues they are called upon to solve are frequently daunting and enormously complex. Neither the Court nor its watchers should expect that these issues can always be solved on the first try. Instead, the Court and those who would criticize it should remember that each case is part of a larger process of solving difficult issues over time. Hopefully, *Denver Area* will mark the beginning of a trend where the Court and its watchers alike will together recognize that constitutional decisionmaking is often incremental, proceeding a step at a time towards solutions everyone can embrace.

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307 Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402-03 (1996) (Souter, J., concurring) (footnote and citations omitted).