THE STRUCTURE OF PLANNED PARENTHOOD V. CASEY
ABORTION RIGHTS LAW: STRICT SCRUTINITY FOR
SUBSTANTIAL OBSTACLES ON ABORTION CHOICE AND
OTHERWISE REASONABLENESS BALANCING

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I. INTRODUCTION

Following the 2010 elections, when Republicans took over, or increased their majorities, in a number of state legislatures, and also won a number of state Governor races, a spate of new abortion restricting laws have increased abortion rights litigation. Many government actions have been held unconstitutional by courts. A number of these cases have involved direct challenges to the *Roe v. Wade* and *Planned Parenthood v. Casey* doctrine that viability is a critical point in terms of state ability to regulate abortion.¹ Not surprisingly, courts have found these regulations unconstitutional.²

A number of other cases have involved challenges to statutes requiring abortion clinics to have admitting privileges at a local hospital, ostensibly to facilitate transfer of patients from the clinic to a hospital in

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² *See Roe v. Wade, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.”); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992) (plurality opinion) (“[T]he concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”).*

³ *See, e.g., Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013) (holding that Arizona law *prohibiting* abortions where the probable gestational age is at least 20 weeks is unconstitutional, as viability is usually thought to occur between the 23rd and 24th weeks of pregnancy), *cert. denied*, 134 S. Ct. 2841 (2014); MKB Mgmt. Corp. v. Burdick, 16 F. Supp. 3d 1059 (D.N.D. 2014) (invalidating North Dakota House Bill 1456, which prohibited abortions following detection of heartbeat, which occurs many weeks before viability).
the event of a medical emergency arising during the abortion procedure, and to improve care once admitted. In reality, most hospitals choose not to grant abortion clinics admitting privileges, and thus the effect of the regulation, if enforced, would be to shut down the abortion clinic. In the event of a medical emergency, the emergency room would be required to admit and treat the patient, so the admitting privilege requirement serves little legitimate state purpose.

Most courts confronting this issue have recognized that to follow the doctrine laid down in Planned Parenthood v. Casey requires a two-step analysis, so that: (1) even if the regulation, in the language of Casey, is not a “substantial obstacle” to abortion choice, and thus not an “undue burden,” (2) the regulation still must be, in the language of Casey, a “reasonable measure” to advance a legitimate interest. Some courts have stated this reasonableness test reflects mere minimum ra-

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3 See, e.g., Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 951 F. Supp. 2d 891, 899–900 (W.D. Tex. 2013) (“The State argues that when an abortion provider has privileges at a local hospital, the provider is more likely to effectively manage patient complications by providing continuity of care and decreasing the likelihood of medical errors. . . . The state also argues that . . . [the requirement] would improve treatment, once an abortion patient is at the hospital.”), rev’d in part, 748 F.3d 583 (2014).[The Court granted certiorari in a case raising the same issues, Whole Woman’s Health v. Cole, No. 15-274 (Nov. 13, 2015), discussed infra at notes 235-52.]

4 See, e.g., Miss. Jackson Women’s Health Org. v. Currier, 760 F.3d 448, 450 (5th Cir. 2014) (“[Doctors] sought admitting privileges at seven of the Jackson-area hospitals [Jackson, Mississippi, having the only abortion clinic in the state of Mississippi], but no hospital was willing to grant either of the doctors these privileges. The hospitals maintained this stance despite the doctors’ request that they reconsider. The State subsequently denied [their] request for a waiver . . . .”); Abbott, 951 F. Supp. 2d at 900–01 (“Each hospital’s bylaws are unique, thereby causing variability in hospital-privilege application requirements, such as: physician residency, board certification, threshold number of surgical procedures, threshold numbers of annual hospital admissions, among others. . . . [T]he vast majority of abortion providers are unable to ever meet the threshold annual hospital admissions, because the nature of the physicians’ low-risk abortion practice does not generally yield any hospital admissions. Clinic physicians are similarly unable or unlikely to meet the threshold surgery numbers because they simply do not perform the qualifying surgeries.”).

5 Casey, 505 U.S. at 878 (plurality opinion) (“[R]egulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden[,]”); id. at 883 (considering whether an informed consent regulation is a “reasonable measure to ensure an informed choice”).
tionality review. Others have recognized it is a higher form of reasonableness balancing where the “feeblest the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous. It is not a matter of the number of women likely to be affected.”

Similar confusion regarding what is required to follow Planned Parenthood v. Casey is mirrored in other recent cases involving a range of post-2010 abortion regulations. In deciding these cases, some courts have viewed the inquiry demanded by Casey as a simple dichotomy between what they view as undue burdens because they impose a substantial obstacle to abortion choice, which are categorically unconstitutiona,l versus what they view as not undue burdens, which are categorically constitutional. In contrast, most courts have viewed Casey as requiring a reasonableness analysis, in addition to the undue burden analysis. Similar to the courts in the admitting privileges cases, some courts have applied minimum rationality review as the second step in the analysis.

Other courts applying the reasonableness inquiry have focused more on

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7 See, e.g., Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 748 F.3d 583, 593–96 (5th Cir. 2014) (finding a Texas regulation requiring physicians performing abortions to have admitting privileges at a hospital within 30 miles of their clinic constitutional under “minimum rationality review”).

8 See, e.g., Planned Parenthood of Wisc., Inc. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013) (granting preliminary injunction against Wisconsin law requiring physicians performing abortions to have admitting privileges at a hospital within 30 miles of their clinic), discussed infra notes 171–72. See also Planned Parenthood Se., Inc. v. Bentley, 951 F. Supp. 2d 1280, 1285–88 (M.D. Ala. 2013) (granting preliminary injunction by applying two-part reasonable relation and “undue burden” test with respect to Alabama law requiring admitting privileges at a local hospital).

9 See, e.g., McCormack v. Hiedeman, 694 F.3d 1004, 1014–18 (9th Cir. 2012) (finding an Idaho law prohibiting a person from seeking an abortion in any place other than a hospital, doctor’s office, or clinic unconstitutional as applied to a woman who terminated her pregnancy by taking an abortion-inducing drug prescribed by a physician and lawfully purchased over the Internet).

10 See, e.g., Comprehensive Health of Planned Parenthood of Kan. and Mid-Mo., Inc. v. Templeton, 954 F. Supp. 2d 1205, 1221–1223 (D. Kan. 2013) (holding an “informed consent” provision requiring a physician to provide a woman seeking an abortion with information about the capacity of the fetus to feel pain at specific gestational ages constitutional as not a “substantial obstacle” to abortion choice and thus not an “undue burden.”).

11 See, e.g., Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 902–06 (8th Cir. 2012) (holding a South Dakota law requiring physicians to provide patients seeking abortion with written disclosure of a correlation, but not necessarily a causal link, between persons who have obtained abortions and an increased risk of suicide constitutional as truthful, non-misleading, and relevant to the patient’s decision, by adopting rational basis review deference to legislative judgment, stating “the state legislature, rather than a federal court, is in the best position to weigh the divergent results and come to a conclusion about the best way to protect its populace”).
reasonableness balancing.\footnote{12}

In many cases, this difference in analysis has not resulted in a difference in case outcomes, as less-than-undue burdens typically are viewed as not only satisfying minimum rationality review but satisfying reasonableness balancing as well.\footnote{13} In cases involving closer calls, however, like the recent admitting privileges cases, it can make a real difference if the burden on abortion rights does not pose such a substantial obstacle to choice as to be an undue burden, but the state’s interests in regulation are weak. Such weak reasons may be enough to satisfy a minimum rationality review test, but not reasonableness balancing.\footnote{14}

In deciding what the correct approach is to abortion regulation after \textit{Roe v. Wade} and \textit{Planned Parenthood v. Casey}, Part II of this article discusses the legal doctrine adopted by the Supreme Court in \textit{Roe} and \textit{Casey}. That discussion will show that the best reading of \textit{Casey} is that it adopted a doctrine whereby an “undue burden” on abortion choice, defined as a “substantial obstacle to a woman seeking an abortion,”\footnote{15} triggers \textit{Roe}’s strict scrutiny approach, while a less-than-undue burden on abortion choice triggers a reasonableness balancing approach higher than minimum rationality review. Part III of this article supports this analysis by paying careful attention to the application of the undue burden analysis in \textit{Casey} to the spousal notification, informed consent, and 24-hour waiting period regulations at issue in the case.

Part IV of this article expands on this discussion to note how the joint opinion’s reference in \textit{Casey} to its “undue burden” analysis track-

\footnote{12} Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 911–18 (9th Cir. 2014) (holding that the district court abused its discretion in denying a preliminary injunction against an Arizona statute requiring that medications used to induce abortions be administered in compliance with on-label regimen, when there was no evidence of medical justification for that requirement). The Ninth Circuit focused on the “independent constitutional duty to review” language from \textit{Gonzales v. Carhart}, 550 U.S. 124, 165–66 (2007), to underscore that rational basis review is not proper for undue burden analysis, but such analysis involves a balancing of the strengths of the state’s legitimate interests against the amount of the burden on the individual. \textit{Id.} at 916.

\footnote{13} See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–83, 885–97 (1992) (finding that informed consent requirements about the “nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus” and “24-hour waiting period” prior to obtaining an abortion with a “medical emergency” exception are “reasonable”).

\footnote{14} Compare Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 748 F.3d 583, 589–96 (5th Cir. 2014) (finding that admitting privileges regulation was constitutional under minimum rationality review) \textit{with} Planned Parenthood of Wisc., Inc. v. Van Hollen, 738 F.3d 786, 798 (7th Cir. 2013) (granting a preliminary injunction against admitting privileges regulation using a reasonableness balancing test).

\footnote{15} \textit{Casey}, 505 U.S. at 878.
ing the Supreme Court’s doctrine in the ballot access cases, like Anderson v. Celebrezze, strongly supports use of a reasonableness balancing test higher than minimum rationality review. Part IV also notes how this Casey/Celebrezze approach is mirrored in a range of other fundamental rights cases, where substantial burdens trigger strict scrutiny, and less-than-substantial burdens trigger a reasonable balancing test higher than minimum rationality review. Part V discusses how Gonzales v. Carhart, the Supreme Court’s last major abortion rights case, is consistent with this analysis and does nothing to change the Casey/Celebrezze reasonableness balancing doctrine.

In light of this doctrinal structure, Part VI of this article analyzes a number of recent district court and court of appeals cases involving abortion rights. Part VII places this Casey/Celebrezze reasonableness balancing approach in the context of the Supreme Court’s general doctrinal approach to individual rights adjudication. Part VIII provides a brief conclusion.

II. ABORTION RIGHTS DOCTRINE IN PLANNED PARENTHOOD V. CASEY

A. Background to Planned Parenthood v. Casey: Roe v. Wade and Its Progeny

As is well known, the United States Supreme Court held in 1973 in Roe v. Wade that under the Fourteenth Amendment’s concept of personal liberty a woman has a fundamental right to end a pregnancy by abortion. Under Roe v. Wade, any burden on that woman’s fundamental right triggered a strict scrutiny approach, requiring the government to justify any regulation by showing the regulation was narrowly tailored to advance a compelling government interest. Even under strict scrutiny review, the Court held in cases decided after Roe that all abortions after the first trimester could be required to be performed in a licensed hospital, where “hospital” included outpatient surgical clinics, and a second

16 See Casey, 505 U.S. at 873–74 (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).
17 505 U.S. 124 (2007)
19 Id. at 155–56, 162–64 (noting that the state’s legitimate interest in maternal health becomes compelling for purposes of strict scrutiny review at the end of the first trimester, while the state’s legitimate interest in protecting pre-natal life becomes compelling when the fetus is viable).
physician could be required at the abortion of a viable fetus to attempt to save its life when no delay occurs from that requirement that would increase the risk to the mother’s health.20

On the other hand, the Supreme Court held many state laws unconstitutional under a strict scrutiny standard. Regarding the surgical procedure itself, these included: abortion must be approved by more than one physician;21 saline amniocentesis cannot be used after the first 12 weeks of pregnancy;22 physicians must use the same care to preserve fetal life as if a live birth was intended, even before viability;23 abortions after the first trimester must be in a full-service hospital;24 doctors must use an abortion technique that favors the fetus, unless it would pose significantly greater risk to maternal health;25 and a second-physician requirement when viability is possible, with no exception for the mother’s health when a second physician is delayed.26 Regarding related matters of abortion regulation, the Court held it was unconstitutional: to require a wife to inform her husband before having an abortion;27 to require parental consent to a minor’s abortion, unless a medical emergency exists;28 to require a 24-hour waiting period after consent;29 to require the physician to tell the women that “an unborn child is a human life from the moment of conception;”30 to require that certain information must be provided in all cases regardless of whether in the physician’s judgment the information is relevant to the patient’s personal decision or whether certain

23 Id. at 81–83.
25 Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 768–69 (1986) (finding requirement of physicians to employ procedures that maximize the prospect of fetal survival unconstitutional on grounds that the state may not “trade-off” maternal health for fetal survival).
26 Id. at 769–71 (finding requirement of a second physician in any abortion when viability is possible, with no exception for the mother’s health in an emergency scenario unconstitutional).
28 Id. at 72–75.
29 Akron, 462 U.S. at 449–51.
30 Id. at 444–45.
risks are nonexistent for a particular patient; and to require physicians to file information in public records from which patients might be identified.

During this period, the Court upheld some laws relating to abortion under minimum rationality review because the Court viewed those laws as neutral—not burdening abortion rights. Ordinarily, laws that do not burden a fundamental right are treated as standard social or economic regulations triggering only minimum rationality review under the Due Process Clause or Equal Protection Clause. Examples of abortions laws triggering only minimum rationality review included: only physicians may perform abortions; women must provide written consent to an abortion; routine hospital records must be kept; states and the federal government can fund normal childbirth expenses, but refuse to reimburse for the cost of an abortion, and exempt abortion from laws reimbursing other medical costs; and all removed tissue from the abortion must be sent to a pathologist.

With respect to minors, the Court appeared to apply intermediate scrutiny, rather than strict scrutiny, for burdens on abortion rights for three reasons: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.” Thus, laws that would be unconstitutional if applied to adults, like requiring notification or consent of another person, may be constitutional if applied to minors if there is a “significant state interest”—under intermediate review this requires a “sufficient justification”—for the difference in treatment. Under this

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31 Id. at 445–47; see also Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 760–66 (1986) (“[M]uch of the information required is designed not to inform the woman’s consent but rather to persuade her to withhold it altogether’ and intrudes upon the discretion of the pregnant woman’s physician and thereby imposes the ‘undesired and uncomfortable straitjacket . . . .’” (citations omitted)).
32 Id. at 766–68 (noting that the required Pennsylvania reports, while claimed not to be “public,” were available nonetheless to the public for copying and thus raised the specter of public exposure).
36 Id. at 79–81.
37 Harris v. McRae, 448 U.S. 297, 325–26, 325 n.27 (1980).
40 Carey v. Population Services Int’l, 431 U.S. 678, 693 nn.15–16 (1977) (noting that the law “has generally regarded minors as having a lesser capability for making important deci-
analysis, the Court held a state law requiring parental consent constitutional as long as it assured a prompt judicial hearing where the minor could avoid the requirement by demonstrating: “(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”

With respect to possible application of criminal laws to physicians performing abortions, the Court held void for vagueness a statute requiring physicians to attempt to preserve the life of an aborted fetus if there is “a sufficient reason to believe that the fetus may be viable.” The Court is very skeptical about imposing any criminal liability for aborting a viable fetus unless a doctor knows it is viable or in bad faith ignores facts regarding viability. The Court also held void a criminal statute which required physicians to dispose of fetal remains in a “humane and sanitary manner” because the statute was too vague.

B. The Court’s Decision in Planned Parenthood v. Casey

In 1989, the Court was faced with an opportunity to overrule or dramatically limit Roe v. Wade in Webster v. Reproductive Health Services. In Webster, a three-Justice plurality opinion of Chief Justice Rehnquist, joined by Justices White and Kennedy, criticized Roe and stated that Roe’s “trimester framework has left this Court to serve as the country’s ‘ex officio’ medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.” Justice Scalia indicated his willingness to overturn Roe in its entirety.
In contrast, Justice O’Connor decided that it was not necessary in Webster to consider the broader implications of Roe. She concluded that even under the Roe framework the substantive regulations at issue in this case—a ban on use of public employees, facilities, or funds for performance or assistance with nontherapeutic abortions (i.e., those abortions not needed for the mother’s health), and physicians being required to perform reasonable viability tests on a fetus believed to be of 20 weeks or more gestational age—were constitutional.\(^{48}\) Laws banning public funds or facilities for abortions have routinely been viewed as constitutional under Roe.\(^{49}\) Regarding viability testing, while in 1973 the point of viability was typically viewed as around the 28th week of pregnancy, advances in medical technology by 1989 had moved viability back to typically the 24th week of pregnancy, where it remains today.\(^{50}\)

The legacy of Roe as a precedent was squarely faced three years later, in 1992, in Planned Parenthood v. Casey. There, in a 5-4 decision, the Court decided not to overrule Roe v. Wade in its entirety.\(^{51}\) Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, dissented on that matter. Justice Scalia said that the Constitution does

\(^{48}\) Id. at 522–31 (O’Connor, J., concurring in part and concurring the judgment) (citing Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O’Connor, J., dissenting)).

\(^{49}\) See, e.g., Harris v. McRae, 448 U.S. 297, 325–26, 325 n.27 (1980); see also supra note 37 and accompanying text.

\(^{50}\) See, e.g., Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013) (“The parties here agree that no fetus is viable at twenty weeks gestational age. The district court so recognized, declaring it undisputed that viability usually occurs between twenty-three and twenty-four weeks gestation.”), cert. denied, 134 S. Ct. 905 (2014). Based on fetal lung capacity, that point is not likely to change much in the future, although in rare cases fetuses believed to be 20 weeks or older gestational age have survived premature births. Particularly since the parties might be confused as to the time of conception, the statute’s requirement in Webster to perform a reasonable viability test on a fetus believed to be in the 20th week of pregnancy was constitutional. See Webster, 492 U.S. at 522–31 (1989) (O’Connor, J., concurring in part and concurring in the judgment). Of the approximately 1.3 million abortions performed in the United States each year, approximately 9 in 10 occur within the first 13 weeks, and approximately one percent are performed after 20 weeks. Some 300–600 abortions a year—or up to five one-hundredths of one percent—are performed after 26 weeks. Almost inevitably, these are done in the context of substantial health risks to the mother or fetal defects not diagnosed until late in the pregnancy. See generally Reproductive Health, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/reproductivehealth/data_stats (last visited Sept. 30, 2015) (“The majority of abortions in 2011 took place early in gestation. In 2011, most abortions (91.4%) were performed [before or] at 13 weeks’ gestation; a smaller number of abortions (7.3%) were performed at 14–20 weeks’ gestation, and even fewer (1.4%) were performed at [or after] 21 weeks’ gestation.”); Abortion Statistics, ORLANDO WOMEN’S CENTER, http://womenscenter.com/abortion_stats.html (last visited Oct. 16, 2015).

not protect a fundamental liberty to abort an unborn child because of two facts: “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.” 52 The same Justices also joined in a dissent by Chief Justice Rehnquist which said that the Court in Roe read earlier opinions much too broadly, noting, “Unlike marriage, procreation, and contraception, abortion ‘involves the purposeful termination of a potential life.’ ” 53

In contrast to this dissent, Justice Blackmun would have had the Court not disturb Roe’s holding and trimester framework in any respect. 54 Justice Stevens, also supporting Roe, said that it protected a woman’s freedom to decide matters of the most personal nature. 55 Thus, they would have continued the Roe doctrine of any burden on the right to choose an abortion triggering strict scrutiny.

The outcome of the case thus depended on the views of Justices O’Connor, Kennedy, and Souter. These three Justices joined in a rare joint opinion, parts of which were likely authored by each of the three Justices, but the opinion was not specifically authored by any one Justice. 56 This joint opinion reaffirmed what it regarded as Roe’s essential holding of the fundamental right to abortion choice before viability, i.e., the point at which the unborn life can survive outside of the womb. 57

52 Id. at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).
53 Id. at 952 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Harris, 448 U.S. at 325).
54 Id. at 923–25 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
55 Casey, 505 U.S. at 911–13 (Stevens, J., concurring in part and dissenting in part).
56 This may have been done, in part, because, although Roe v. Wade was a 7-2 opinion when decided, the fact that Justice Blackmun authored the majority opinion meant that he received more than his share of hate mail and death threats concerning the case over the years. Mark A. Davis, Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey, 10 N.C. ST. B.J. 27, 28 (2005).
57 Casey, 505 U.S. at 869–71 (plurality opinion). As a theoretical matter, even after viability, a woman has a fundamental right to abortion choice under Roe, requiring the government to satisfy strict scrutiny to justify abortion regulation. But, as the Court stated in Roe, “For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” Roe v. Wade, 410 U.S. 113, 164–65 (1973). Thus, after viability, whether or not a strict scrutiny approach is applied under Roe, the result is the same: governments may “regulate, and even proscribe, abortion” as long as a medical emergency exception exists. The joint opinion in Casey expressly reaffirmed this medical emergency exception language of Roe. Casey, 505 U.S. at 879 (quoting Roe, 410 U.S. at 164–65). The “medical necessity” exception is required under Roe because the state’s interest in maternal health, which becomes “compelling” at the end of the first trimester when the abortion procedure on average becomes less safe than childbirth, becomes “compelling” earlier in pregnancy than the state’s interest in protecting
The opinion then altered *Roe*’s strict scrutiny analysis for all burdens on abortion choice. The joint opinion stated that government may not impose an undue burden on abortion choice, defined as a regulation that has “the purpose or effect of placing a substantial obstacle” to a woman’s choice.58

In defending use of the undue burden standard, the joint opinion noted:

> For the most part, the Court’s early abortion cases adhered to this view. In *Maher v. Roe*, the Court explained: “Roe [*v. Wade*] did not declare an unqualified ‘constitutional right to an abortion,’ as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”59

As this quote suggests, where such an undue burden exists, defined in *Casey* as a substantial obstacle to abortion choice, the *Roe* doctrine should still continue to apply. That doctrine is not that every undue burden is unconstitutional, but rather that such undue burdens should be subjected to *Roe*’s strict scrutiny approach. To be sure, the joint opinion in *Roe* included language that stated, “In our considered judgment, an undue burden is an unconstitutional burden.”60 As discussed in Part III, however, when considering the joint opinion’s analysis in *Casey* of a spousal notification provision,61 and in Part IV when considering *Casey*’s place in the Court’s fundamental rights doctrine generally,62 concluding that an undue burden triggers strict scrutiny, not an automatic pre-natal life, which only becomes “compelling” at viability, and the interest in maternal health remains more “compelling” throughout the pregnancy. *Roe*, 410 U.S. at 150, 163–64. For cases discussing a medical emergency exception, see Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 511–14 (6th Cir. 2006) (upholding district court’s preliminary injunction, which held likely unconstitutional a law restricting use of RU-486 pill to uses approved by the Food and Drug Administration, because no adequate medical emergency exception existed if surgical abortion would pose significantly greater health risk to the mother); Women’s Med. Prof’l Corp. v. Voinovich, 130 F.3d 187, 209–10 (6th Cir. 1997) (holding an Ohio law that prohibited post-viability abortions unconstitutional because it did not provide an exception for the pregnant woman’s mental health), *cert. denied*, 523 U.S. 1036 (1998). Justice Thomas, along with two other justices, disagreed with the denial of *certiorari* in *Voinovich* arguing that no prior court ruling supported the proposition that a mental health exception is required under *Casey* and *Doe v. Bolton*, 410 U.S. 179 (1973). *Voinovich*, 523 U.S. at 1039 (Thomas, J., dissenting).

58 *Casey*, 505 U.S. at 877 (plurality opinion).
59 *Id.* at 874 (quoting *Maher v. Roe*, 432 U.S. 464, 473–74 (1977)).
60 *Id.* at 877.
61 *See infra* Part III.
62 *See infra* Part IV.
finding of unconstitutionality, is more faithful to the *Casey* joint opinion taken as a whole and to fundamental rights doctrine generally. The statement in *Casey* that an “undue burden” is an “unconstitutional burden” reflects the notion that strict scrutiny, while “strict in theory, is fatal in fact,” is a conclusion that the Court since *Casey* has been at pains to reject.

Where no such undue burden exists, the joint opinion added,

Unless it has that effect [substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if *reasonably related* to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

In deciding on whether a less-than-substantial obstacle is reasonably related to a legitimate interest, the joint opinion analogized their approach in *Casey* to the approach adopted in the ballot access cases. The joint opinion stated:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.

As discussed below, the structure of the ballot access cases, as well as most other unenumerated fundamental rights cases, is that substantial burdens or substantial obstacles on those rights trigger strict scrutiny, while less-than-substantial burdens trigger a reasonableness balancing test where the government will prevail unless the challenger is able to show the law is an unreasonable, excessive, or too onerous bur-

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63 *Casey*, 505 U.S. at 877 (plurality opinion).
65 *Casey*, 505 U.S. at 878 (plurality opinion) (emphasis added).
66 *Id.* at 873–74 (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Norman v. Reed, 502 U.S. 279 (1992)).
67 See infra Part IV.A.
68 See infra Part IV.B–D.
This test is a more vigorous form of review than minimum rationality review, which is used for burdens on standard social and economic activity not involving fundamental rights. The difference between the two approaches is the following. First, under minimum rationality review, the legislation must (1) advance legitimate government ends, (2) be rationally related to advancing these ends (not be irrationally underinclusive), and (3) not impose irrational burdens (not be irrationally overinclusive).69 This test ensures that the government is not engaged in illegitimate or arbitrary/irrational action. As the Court described minimum rationality review in *Heller v. Doe*:

[A] classification “must be upheld [under minimum rationality review] . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” . . . “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” A statute is presumed constitutional, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record. . . . A classification does not fail rational-basis review because it “‘is not made with mathematical nicety or because in practice it results in some inequality.’” . . . “[O]n the other hand[,] even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.”70

In contrast, under reasonableness balancing, the Court makes its own independent judgment on the strengths of the government’s legitimate interests and the burden on the individual, and then weighs the two to determine if the burden, even if not irrational, is nevertheless unrea-

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70 *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (citations omitted). The term “rational basis review” is often used to refer to this *Heller v. Doe* level of review. Because of its strong presumption of constitutionality and substantial deference to government action, the term “minimum rationality review” is used in this article to refer to this level of review. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 694 (4th ed. 2015) ("The rational basis test is the minimal level of scrutiny that all government actions challenged under equal protection must meet."); Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 437 (2005) ("[I]nvalidating the law under minimum rationality review is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard."). The term “rational basis review” or “rational basis test” could have been used in this article wherever “minimum rationality review” appears, and nothing would change in the analysis.
sonable or excessive because the burden is too great given the minimal interests supporting the regulation. As phrased in the fundamental right to vote/ballot access case of Burdick v. Takushi:

A court . . . must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” 71

Despite the Court determining for itself the extent to which the alleged governmental interests are actually supported by fact, some deference to governmental judgment is still given under reasonableness balancing. For example, in Thornburgh v. Abbott, reviewing the less-than-substantial burden on a prisoner’s fundamental right to marry, the Court acknowledged that “[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder,” and adopted the Turner v. Safley’s reasonableness standard for determining marriage rights of prisoners because it “is not toothless [i.e., not minimum rationality review].” 72 Further, under the Burdick kind of reasonableness balancing the challenger still has the burden to prove the regulation is unconstitutional. 73 Under the Burdick reasonableness balancing test, however, to determine whether a law exceeds constitutional boundaries, a court, not a legislature, must assess the “state interests which justify the burden.” 74

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71 Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). See also District of Columbia v. Heller, 554 U.S. 570, 690 (Breyer, J., dissenting) (“In applying [the Burdick balancing approach] the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”).


73 See, e.g., Burdick, 504 U.S. at 434, 437–38, 441–42.

74 Id. at 448 (Kennedy, J., dissenting). See also Gonzales v. Carhart, 550 U.S. 124, 165 (2007) (“[T]he Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” (citing Crowell v. Benson, 285 U.S. 22, 60 (1932)) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance
Reasonableness balancing reflects that, when dealing with a fundamental right, minimum rationality review is not appropriate, as it does not take into account that a fundamental right is at stake. As Justice Scalia noted in District of Columbia v. Heller, whatever level of review might be appropriate for minor burdens on the Second Amendment right “to keep and bear arms,” it has to be higher than minimum rationality review.\footnote{Heller, 554 U.S. at 628 n.27.} Where a fundamental right is involved, minimum rationality review is never appropriate, unless that fundamental right is not being burdened at all, in which case minimum rationality review is appropriate even under Roe, as noted above.\footnote{See supra notes 33–38 and accompanying text; see also Planned Parenthood v. Casey, 505 U.S. 833, 966, 971–76 (1992) (Rehnquist, J., concurring in the judgment in part and dissenting in part) (rejecting Roe and the Casey joint opinion’s finding of a fundamental right to an abortion, and thus applying to the spousal notification provision standard non-fundamental right, social or economic legislation minimum rationality review).}

The importance of the undue burden analysis in the joint opinion in Casey was to ensure that not every abortion regulation triggered strict scrutiny, and thus the Court did not act as a super-legislature second-guessing every aspect of abortion regulation. Rather, the strict scrutiny analysis was restricted in Casey to protecting the core principle of personal liberty from undue burdens. This has allowed states wider latitude than they had under Roe to pass various kinds of regulation of abortion procedures, and not have to face a strict scrutiny analysis as they did under Roe, as long as the regulations do not place, in the language of Casey, a “substantial obstacle in the path of a woman seeking an abortion.”\footnote{Casey, 505 U.S. at 877–78 (plurality opinion).}

### III. Application of the Undue Burden Standard in Planned Parenthood v. Casey

#### A. Finding of an Undue Burden in Casey

Given the isolated text of some passages in Casey, such as the language cited above that “[i]n our considered judgment, an undue burden is an unconstitutional burden,”\footnote{Id. at 877.} or “[r]egulations designed to foster the
health of a woman seeking an abortion are valid if they do not constitute
an undue burden, it could be argued that once something is viewed as
an undue burden, it is automatically unconstitutional. As suggested in
the previous section, however, the better analysis of Casey, consistent
with the general structure of fundamental rights analysis, is that when
the joint opinion stated it was upholding the essential holding of Roe,
that meant a court should apply Roe’s strict scrutiny analysis to an undue
burden/substantial obstacle on abortion rights. This would mean that
where the state has a compelling interest to regulate, which under Roe
could occur to protect maternal health prior to viability, a narrowly tai-
lored statute directly related to advancing that interest and employing the
least burdensome effective alternative would be constitutional even if it
did place a substantial obstacle in the path of that woman obtaining an
abortion. That would not be true if a finding of an undue burden auto-
matically triggered a finding of unconstitutionality, as is suggested by
the passages in Casey cited directly above.

The Court’s discussion of a spousal notification provision in Casey
supports this analysis. In Casey, the Court reviewed § 3209 of Pennsyl-
vania’s abortion law, which provided:

[E]xcept in cases of medical emergency . . . no physician shall perform an
abortion on a married woman without receiving a signed statement from the
woman that she has notified her spouse that she is about to undergo an abor-
tion. The woman has the option of providing an alternative signed statement
certifying that her husband is not the man who impregnated her; that her hus-
band could not be located; that the pregnancy is the result of spousal sexual ass-
sault which she has reported; or that the woman believes that notifying her
husband will cause him or someone else to inflict bodily injury upon her. A
physician who performs an abortion on a married woman without receiving the
appropriate signed statement will have his or her license revoked, and is liable
to the husband for damages.

In deciding whether this law, in operation, would constitute a sub-
stantial obstacle to a married woman’s choice to have an abortion, the
joint opinion cited to the “detailed findings of fact regarding the effect of
this statute,” which had been made by the district court. Faced with

79 Id. at 878.
80 See supra notes 57–64 and accompanying text.
81 See Roe v. Wade, 410 U.S. 113, 163 (1973) (noting a “compelling interest” to protect mater-
ial health at the end of the first trimester, long before viability); see also supra note 57.
82 Casey, 505 U.S. at 887–88 (plurality opinion).
83 The joint opinion noted:
These [findings of fact] included: “273. The vast majority of women consult their
these findings, the joint opinion concluded that:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.\(^\text{84}\)

husbands prior to deciding to terminate their pregnancy... 279. The ‘bodily injury’ exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. ... 298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of whether the section applies to them.”

... This information and the District Court’s findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209’s notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209’s notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, § 3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins, § 3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by § 3209.

\(^{84}\) Id. at 888–93 (citation omitted).
If the *Casey* doctrine held that an undue burden/substantial obstacle automatically renders the regulation unconstitutional, the joint opinion would have stopped at this point. Instead, consistent with a strict scrutiny approach, the joint opinion proceeded to consider whether there were any compelling government interests that could be used to make the regulation constitutional. The joint opinion thus engaged in an elaborate discussion of whether the pregnant woman’s husband had a strong enough interest in continuing the pregnancy of his child that the state could claim a strong enough interest to validate the spousal notification provision.\(^{85}\) While acknowledging that “[w]ith regard to the children he has fathered and raised, the Court has recognized [the father’s] ‘cognizable and substantial’ interest in their custody.”\(^{86}\) The joint opinion noted that:

> Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s. The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.\(^{87}\)

For this reason, consistent with a strict scrutiny approach, the state did not have a sufficient interest in protecting the husband’s interests to justify the substantial obstacle to abortion choice represented by the spousal notification provision.\(^{88}\) The joint opinion concluded:

\(^{85}\) Id. at 895–98.  
\(^{86}\) *Casey*, 505 U.S. at 895 (quoting Stanley v. Illinois, 405 U.S. 645 (1972)).  
\(^{87}\) Id. at 896. The joint opinion continued:  
The Court has held that “when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.” This conclusion rests upon the basic nature of marriage and the nature of our Constitution: “[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.  
\(^{88}\) Id. (emphasis in original) (citations omitted).  
\(^{89}\) Id. 896–98. The joint opinion added:  
For the great many women who are victims of abuse inflicted by their husbands, or
In keeping with our rejection of the common-law understanding of a woman’s role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband’s consent before undergoing an abortion. The principles that guided the Court in *Danforth* should be our guides today.89

The “principles that guided the Court in *Danforth*” in 1976, of course, were *Roe v. Wade*’s strict scrutiny approach to abortion regulation.90

**B. Less-than-Undue Burdens in Casey**

In contrast to striking down the requirement of spousal notification in *Casey*, the joint opinion of Justices O’Connor, Kennedy, and Souter upheld as not undue burdens the requirements of written consent, providing certain information to the patient as a matter of informed consent, a 24-hour waiting period after registering for an abortion before the procedure could be done, required record keeping, and a parental consent provision for women under 18, with a judicial bypass.91 Some of these provisions, like written consent, required record-keeping, and parental consent with a judicial bypass, had already been upheld as constitutional under *Roe*, as noted above.92 Other provisions, such as a 24-hour waiting period or informed consent requirement, had been viewed as unconstitutional under *Roe*’s strict scrutiny approach.93 Now they were upheld as less-than-undue burdens on abortion rights. Regarding the informed consent provision, the joint opinion stated:

A requirement that the physician make available information similar to that whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife’s decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

*Casey*, 505 U.S. at 897.

89 *Id.* at 897 (citation omitted).


91 *Casey*, 505 U.S. at 874–901.

92 See, e.g., *Danforth*, 428 U.S. at 67–71 (holding parental consent with judicial bypass constitutional).

mandated by the statute here was described in *Thornburgh* as “an outright attempt to wedge the Commonwealth’s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician.” We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.94

As this discussion indicated, because there was no substantial obstacle, there was no undue burden. Given a less-than-substantial obstacle, the joint opinion concluded that the regulation was “a reasonable measure.”95 There would have been no need to discuss the reasonableness of the measure if the lack of a substantial obstacle/undue burden were conclusive on the issue of constitutionality. As noted above, such a reasonableness inquiry is not mere minimum rationality review,96 but, consistent with the ballot access cases discussed more fully below, a balance of relative benefits and burdens of the provision to determine whether the burden imposed is reasonable or excessive given the benefits advanced by the regulation.97 Regarding the 24-hour waiting period, the joint opinion did blur the lines between the substantial obstacle/undue burden inquiry and the reasonableness inquiry, which takes place in the event of a less-than-substantial burden. The joint opinion started properly with considering whether the 24-hour waiting period did create a substantial obstacle/undue burden to abortion choice.98 The joint opinion stated:

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman’s choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an

94 *Casey*, 505 U.S. at 883 (emphasis added) (citation omitted).
95 *Id.*
96 See *supra* notes 65–77.
97 See *infra* Part IV.A.
98 *Casey*, 505 U.S. at 885–86.
abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to “the harassment and hostility of anti-abortion protestors demonstrating outside a clinic.” As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be “particularly burdensome.”

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of “increasing the cost and risk of delay of abortions,” but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. Rather, applying the trimester framework’s strict prohibition of all regulation designed to promote the State’s interest in potential life before viability, the District Court concluded that the waiting period does not further the state “interest in maternal health” and “infringes the physician’s discretion to exercise sound medical judgment.”

Given that there was no substantial obstacle/undue burden, the question becomes, under a proper understanding of Casey, whether the regulation is reasonably related to legitimate state interests. In undertaking this inquiry, governments can use any legitimate interest, not merely the interests identified in Roe v. Wade as compelling, i.e., the interest in maternal health after the first trimester, and the interest in protecting prenatal life after viability. As the joint opinion phrased this point:

The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

It would have been clearer had the final sentence of this paragraph read “the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does

99 Id. (citations omitted).
101 Casey, 505 U.S. at 885 (plurality opinion) (emphasis added).
not amount to an unreasonable burden,” rather than using the phrase “undue burden.” That, however, is the import of the analysis. This is especially true since under the reasonableness balancing test applied in ballot access and other fundamental rights cases, the challenger has the burden to prove the regulation is unreasonable or excessive; it is only at higher standards of review, like intermediate review or strict scrutiny, that the burden is imposed on the government to justify its action.

IV. **PLANNED PARENTHOOD V. CASEY IN CONTEXT WITH OTHER SUPREME COURT PRECEDENTS**

**A. Casey’s Reference to Anderson v. Celebrezze and Other Voting Rights Cases**

As noted above, the joint opinion in *Casey* analogized the undue burden analysis to the ballot access cases which involve the fundamental constitutional right to vote, sometimes in the context of the fundamental freedom of association. In a trilogy of cases between 1983 and 1997, the Court explored how to phrase the relevant test for analyzing burdens on the fundamental right to vote and fundamental freedom of political association in cases where strict scrutiny would not be applied.

The first case, *Anderson v. Celebrezze*, in 1983, involved a March filing date for candidates to run for President, which a 5-4 Court found unreasonable when applied to independent candidates, as “several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nomi-

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102 As this quote indicates, the issue involves considering whether the waiting period “is a reasonable measure to implement the State’s interest in protecting the life of the unborn.” *Id.*; see also *id.* at 900–01 (balancing the State’s legitimate interest in collecting patient information—which the Court deemed a vital element of medical research—against the only slight increase in cost of abortions, and therefore upholding the challenged recordkeeping and reporting requirements).


104 See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2012) (“Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] ‘classifications are constitutional . . . [by proving that] they are narrowly tailored to further compelling governmental interests.’” (citation omitted)); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (discussing intermediate review used for gender discrimination, the Court noted: “The burden of justification is demanding and rests entirely on the State. The State must show ‘at least that the [challenged] classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”’” (citations omitted)).

105 See supra note 66 and accompanying text.
nees at national conventions . . . .” The Court reasoned:

[T]he state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. . . . [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court . . . also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.

The use of the word “important” was not indicative of intermediate review, as the Court noted later in its opinion, “If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.” Use of the term “legitimate” interest reflects less than the intermediate scrutiny requirement of an important, significant, or substantial interest.

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107 Id. at 788–89.
108 Id. at 806 (emphasis added) (quoting Kusper v. Pontikes, 414 U.S. 51, 59 (1973)).
109 For the requirement of an important/significant/substantial interest at intermediate review, higher than a mere legitimate/ permissible interest at minimum rationality review or reasonableness balancing, see United States v. Virginia, 518 U.S. 515, 533 (1996) (discussing intermediate review used for gender discrimination, the Court noted, “The State must show ‘at least that the [challenged] classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”’” (emphasis added) (citations omitted)). See also Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (discussing intermediate review applicable to content-neutral time, place, or manner regulations under the First Amendment free speech doctrine, the Court noted, “[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” (emphasis added)); id. at 294 (“Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.” (emphasis added)); Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980) (discussing the intermediate review level of interest necessary in commercial speech cases, the Court stated, “[W]e ask whether the asserted governmental interest is substantial.” (emphasis added)). Of course, this intermediate requirement of an important/significant/substantial interest is less than the strict scrutiny requirement of a compelling/overriding interest to justify the regulation. See e.g., Fisher, 133 S. Ct. at 2419 (“Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] ‘classifications are constitutional . . . [by showing that] they are narrowly tailored to further compelling governmental interests.’” (citations omitted) (emphasis added)); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a ban on interracial marriage, the Court noted, “There is patentl no legitimate overriding pur-
The second case in the trilogy of cases was *Burdick v. Takushi*, decided in 1992, where a 6-3 Court upheld Hawaii’s ban on write-in voting. The Court stated,

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State’s system “creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.” . . . A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

In *Burdick*, the Court placed the burden of proof on the challenger to prove the regulation was an unreasonable or excessive burden. A dissent in *Burdick* concluded that the ban on write-in voting was a “substantial burden” on voting rights, and failed any level of scrutiny that could be applied.

The third case, in 1997, was *Timmons v. Twin Cities Area New Party*. *Timmons* involved a Minnesota antifusion law that prohibited a candidate from appearing on the ballot as the candidate of more than one political party. For example, a Republican candidate could not appear on both the Republican and Libertarian party lines, or a Democratic candidate could not appear on both the Democratic and Green party lines. In *Timmons*, a 6-3 Court stated, “Regulations imposing severe burdens on

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footnotes:

111 Id. at 433–34 (first quoting Bullock v. Carter, 405 U.S. 134, 143 (1972); and then quoting Anderson, 460 U.S. at 788–89).
112 See id. at 438.
113 Id. at 444–48 (Kennedy, J., dissenting) (arguing the write-in ban constitutes a “significant burden” on voting rights similar to Reynolds v. Sims, 377 U.S. 533 (1964), rendering presumption of constitutionality an error and noting, “[I]t is useful to remember that until the late 1800’s, all ballots cast in this country were write-in ballots. The system of state-prepared ballots . . . was introduced in this country in 1888.”). While the dissent did not adopt any specific level of scrutiny, the majority opinion in *Burdick* accused the dissent of adopting strict scrutiny review, *Burdick*, 504 U.S. at 440 n.10, which under Court doctrine would be the appropriate level of scrutiny for severe/substantial burdens on voting rights. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).
114 *Timmons*, 520 U.S. at 353–54.
plaintiff’s rights must be narrowly tailored and advance a compelling government interest. Lesser burdens, however, trigger less exacting review, and a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’ The Court held, “[T]he burdens Minnesota’s fusion ban imposes on the New Party’s associational rights are justified by ‘correspondingly weighty’ valid state interests in ballot integrity and political stability.”

In Timmons, both the majority and the two dissenting opinions agreed that for “severe” burdens on an individual’s First Amendment political association rights strict scrutiny is appropriate. For less severe burdens, Justice Souter’s dissent opted for intermediate review, and Justice Stevens’ dissent, joined by Justice Ginsburg and Souter, also appeared to adopt an intermediate form of review. Because of its willingness to consider any legitimate government interests, the majority opinion in Timmons is best viewed, like Celebrezze and Burdick, as a reasonableness balancing approach. As in Anderson, the majority’s language in Timmons about the government needing “important” interests to regulate—an intermediate requirement regarding government interests—appears to be unnecessary to the case. Indeed, when cataloguing the state’s interests, the majority noted that “[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes,” without any further finding that those interests were important or substantial.

Each of these cases involved some level of review higher than minimum rationality review, as each involved the Court undertaking a real weighing of the benefits and burdens of the regulation against a back-

115 Id. at 358 (quoting Burdick, 504 U.S. at 434).
116 Id. at 369–70.
117 Id. at 358; id. at 374 (Stevens, J., dissenting); Timmons, 520 U.S. at 382 (Souter, J., dissenting).
118 Id. at 383 n.1; id. at 377–78 (Stevens, J., dissenting).
119 Id. at 358 (majority opinion).
120 Timmons, 520 U.S. at 364.
121 In addition to these cases, the Court had earlier held that a New York law requiring voters to register 8 months prior to a presidential primary, or 11 months prior to a nonpresidential primary, to vote in the primary was not an “unconstitutionally onerous burden.” See Rosario v. Rockefeller, 410 U.S. 752, 760–62 (1973). Rosario is also an example of the Court conducting reasonableness balancing review. See id. Four Justices dissented, noting that only one other state had similarly burdensome regulations. Id. at 763–64 (Powell, J., dissenting). In another ballot access case, this one involving an Illinois law dealing with the number of signatures required in order to be placed on the ballot, the Court phrased the issue as whether the law “unduly burdens [plaintiffs’] right to run for those seats under the Party name.” Norman v. Reed, 502 U.S. 279, 295 (1992).
drop of less burdensome alternatives, not the substantial deference to government under minimum rationality review as described in *Heller v. Doe*. In each case, legitimate government interests could be used to justify the regulation, despite the occasional use of the word “important.” Each case therefore represents a reasonableness balancing approach, which is higher than minimum rationality review.

The Court returned to the issue of voting rights in 2008. In *Crawford v. Marion County Election Bd.*, the Court upheld an Indiana voter identification law that required citizens voting in person on Election Day, or casting a ballot in person with the clerk prior to Election Day, to present government-issued photo identification. Voters who did not have proper identification could cast a provisional ballot, and then meet the statute’s requirement within 10 days following the election. Justice Stevens announced the decision of the Court and delivered an opinion joined by Chief Justice Roberts and Justice Kennedy. Without attempting to characterize the extent of the burden that a state might impose, Stevens said that however slight the burden may appear, “it must be justified by . . . legitimate state interests ‘sufficiently weighty to justify the limitations.’” Underscoring that these right to vote/voter ID cases were not minimum rationality review, the plurality opinion noted the hard judgment that these cases entail.

This language in *Crawford* is consistent with *Burdick v. Takushi*, whereby substantial burdens on voting rights trigger strict scrutiny, but less-than-substantial burdens trigger a balancing of the benefits and burdens to determine whether the regulation is unreasonable or excessively burdensome. Applying such an approach, Stevens concluded in *Crawford* that the state’s interest in deterring and detecting voter fraud, modernizing voting procedures, and safeguarding voter confidence justified the photo requirement, and that given the evidence presented by the challengers in the case, it was not “excessively burdensome” on any class of voters. The opinion did imply, however, that new facts might call for a different balancing of benefits and burdens of voter ID laws in

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122 See *supra* note 70.
124 *Id.* at 186.
125 *Id.* at 185.
126 *Id.* at 191 (quoting *Norman*, 502 U.S. at 288–89).
127 *Crawford*, 553 U.S. at 190.
128 *Id.* at 191–197.
129 *Id.* at 202.
the future.\footnote{Id. at 200. At least two circuits follow the holding and rationale of \textit{Crawford}. See, e.g., ACLU of N.M. v. Santillanes, 546 F.3d 1313, 1325 (10th Cir. 2008) (upholding Albuquerque city ordinance requiring a photo ID to vote); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (upholding Georgia state law requiring a voter ID).}

The three Justices in dissent also applied a reasonableness balancing approach, not minimum rationality review, when analyzing the Indiana regulations as a less-than-substantial burden on voting rights.\footnote{\textit{Crawford}, 553 U.S. at 209–37 (Souter, J., dissenting) (concluding that the state interests failed to justify the practical limitations placed on the right to vote by the travel costs and fees needed for acquiring a photo, particularly for the poor or the elderly); id. at 237–240 (Breyer, J., dissenting) (balancing the voting interests that the state law affects, asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects on the state’s interests, and concluding that the statute was unconstitutional for imposing a disproportionate burden on eligible voters who lack a driver’s license or other statutorily valid forms of photo ID).} As an aside, since 2010, a number of states have passed various versions of photo ID laws, some without the provisional ballot aspect of the Indiana law in \textit{Crawford}, and some denying certain kinds of photo IDs, such as a college or university IDs, from being used, as in Wisconsin and Texas.\footnote{See, e.g., \textit{Frank} v. Walker, 768 F.3d 744, 745–48 (7th Cir. 2014) (upholding Wisconsin voter ID law based on \textit{Crawford}), \textit{reh’g en banc denied}, 773 F.3d 783 (7th Cir. 2014) (5-5 decision), \textit{cert. denied}, 135 S. Ct. 1551 (2015). In his dissent to the denial of the rehearing en banc, Judge Posner stated that he believed the Wisconsin voter ID law was unconstitutional by applying \textit{Crawford}’s “reasonableness balancing” approach to facts concerning benefits and burdens of voter ID laws developed since 2008, including empirical support concluding that there is virtually no problem of voter fraud caused by persons faking identification in voting, and real burdens exist for tens of thousands of individuals—many poor, some elderly, some college students—who do not have a driver’s license or other regularized government-issued photo ID. \textit{Frank}, 773 F.3d at 783–797 (Posner, J., dissenting). Even if the photo ID itself is provided by the state free of charge, getting the required documentation, such as a copy of a birth certificate, will require some expenditure of money, certainly an amount more than a $1.50 poll tax ($10 today adjusted for inflation) which was ruled unconstitutional in \textit{Harper v. Va. State Bd. of Elections}, 383 U.S. 663 (1966). Such voter restrictions will be tested both under the \textit{Crawford} analysis, and under § 2 of the Voting Rights Act, as creating an unlawful disparate impact on voting participation based on race. See Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (noting that a § 2 Voting Rights Act challenge still remains despite striking down § 5); see also Claire Foster Martin, \textit{Note, Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters & The Dilemma of How to Prevent It}, 43 CUM. L. REV. 95 (2012) (discussing the Supreme Court’s role in determining the constitutionality of voter ID laws). For further information on the particular requirements of each state’s voter ID laws, see Wendy Underhill, \textit{Voter Identification Requirements}, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Oct. 3, 2015).} This issue regarding the constitutionality of these voter ID laws is likely to come before the Supreme Court before too long.
B. Fundamental Right to Marry Cases

The same structure of substantial obstacles/undue burdens triggering strict scrutiny, but less-than-substantial obstacles/undue burdens triggering a reasonableness balancing test higher than minimum rationality review, applies to burdens on the fundamental right to marry. As indicated in Zablocki v. Redhail, a government regulation that interferes “directly and substantially” with the right to marry triggers strict scrutiny. 133 On the other hand, as the Court noted in Zablocki,

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. 134

Later cases involving the fundamental right to marry have followed the distinction in Zablocki between substantial and less-than-substantial burdens. For example, in Turner v. Safley, the Court considered a ban on the right to marry of a prisoner. 135 Because the law recognizes that prisoners forfeit many rights that law-abiding citizens enjoy, this ban was not viewed as a substantial burden on the right to marry triggering strict scrutiny. 136 Instead, the Court applied a reasonableness test. 137 Even under this test, the absolute ban on marriage was declared unconstitutional as unreasonably broad. 138 In contrast, standard administrative regulations surrounding marriage are routinely upheld under a reasonableness analy-

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134 Id. (emphasis added) (citing Califano v. Jobst, 434 U.S. 47, 55 (1977)). In Zablocki, the Court distinguished its holding from the holding of Califano where the Court upheld sections of the Social Security Act provision that provide for continuation of a child’s insurance benefits for a disabled dependent child who marries someone eligible for social security benefits, but discontinues benefits if that child marries a person who is ineligible to receive social security benefits because that law was not “a direct legal obstacle in the path of persons desiring to get married . . . .” Id at 387 n.12. The Court continued, “The statutory classification at issue here [banning a person from getting married until child support obligations had been paid], however, clearly does interfere directly and substantially with the right to marry.” Id. at 387. The Court in Zablocki then applied “strict scrutiny” and held that the Wisconsin statute was not “closely tailored” to deal with the problem of delinquent child support, thus failing “strict scrutiny.” Id. at 388–91.
136 See id. at 95.
137 Id. at 89–91, 94–99.
138 Id. at 98.
The Court has made it clear that the *Turner* kind of review for reasonableness is a higher standard of review than mere minimum rationality review. Instead of applying substantial deference to legislative or administrative judgment, as under a minimum rationality approach, the Court considered in *Turner* several factors that were viewed as relevant to a reasonableness inquiry.140 As summarized in *Thornburgh v. Abbott*:

> The Court in *Turner* identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry.
>
> The first *Turner* factor is multifold: we must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective.
>
> A second factor the Court in *Turner* held to be “relevant in determining the reasonableness of a prison restriction... is whether there are alternative means of exercising the right that remain open to prison inmates.”
>
> The third factor to be addressed under the *Turner* analysis is the impact that accommodation of the asserted constitutional right will have on others.
>
> Finally, *Turner* held: “[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns. But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”141

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139 See, e.g., Greenberg v. Kimmelman, 99 N.J. 552 (1985) (upholding a ban on casino employment by “any member of the immediate family of any State officer or employee, or [member of the judiciary]” under the reasonableness” test).

140 *Turner*, 482 U.S. at 89–91.

141 *Thornburgh v. Abbott*, 490 U.S. 401, 414–18 (1989) (citations omitted). For application of this reasonableness balancing in the context of burdens on fundamental free speech rights in the non-public forum of prisons, see *Beard v. Banks*, 548 U.S. 521, 528-30 (2006) (plurality opinion) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). *Beard* involved burdening a prisoner’s access to newspapers, magazines, and photographs while the prisoner was in the prison’s long-term segregation unit. *Id.* at 524–25. The reasonableness review involved balancing: (1) the government’s legitimate interest in effective prison management (*Turner* factor one); (2) the manner in which the regulation achieved its benefits for prison guards and other inmates, including considering less burdensome alternatives (*Turner* factors three and four), and (3) the burdens imposed on the prisoner, including alternative means of exercising First Amendment rights (*Turner* factor two), with the ultimate burden on the prisoner to establish that the government’s regulation was unreasonable. *See id.* at 528–30. For discussion of this reasonableness analysis being applied to any non-viewpoint based discrimination in a non-public forum, whether a prison, military base, or aspects of a school’s curriculum or regulations at school-sponsored events, see R. Randall Kelso, The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing (Oct. 1, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668321 (concluding non-viewpoint discrimination in a non-public
In 1969, in *Shapiro v. Thompson*, the Court held that a one-year durational residency requirement for welfare applicants to receive welfare penalized the exercise of a fundamental right to travel and, thus, triggered strict scrutiny. The state interest in keeping out poor migrants was held to be illegitimate as a penalty on migration. Budgetary and administrative justifications were held not compelling, and, furthermore, were not sufficient because less burdensome means were available.

In subsequent cases, substantial or severe burdens on the right to travel have continued to trigger the *Shapiro* strict scrutiny approach. Thus, in *Memorial Hospital v. Maricopa County*, in the course of invalidating a durational residence requirement on state payment for non-emergency hospital service under a state welfare program, the Court noted that the strict scrutiny of *Shapiro* applied only where there had been a denial of a “basic necessity of life,” or a “vital” government benefit, and that medical care qualified as such a “vital” government benefit. In *Dunn v. Blumstein*, the Court said that there is no need to show actual deterrence of travel; it is enough that a law penalizes the exercise of the right. A one-year durational residence law on voting “completely bar[s]” exercise of the fundamental right to vote. Even if the goal were compelling, such as preventing fraud in voting, the state must choose “less drastic means” for reaching it, and a one-year residency requirement is not “necessary to meet the State’s goal of stopping fraud.”

On the other hand, in cases after *Shapiro*, less-than-substantial or less-than-severe burdens on the fundamental right to travel have trig-

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143 Id. at 627–29.
144 Id. at 634–38. Justice Harlan dissented in *Shapiro*, stating that it was a return to the “super-legislature” days of due process review in *Lochner v. New York*, 198 U.S. 45 (1905), and adding, “I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection under an unusually stringent equal protection test.” *Id.* at 661–62 (Harlan, J., dissenting).
147 Id. at 336.
148 Id. at 343, 354.
In some cases, the regulations were upheld. For example, in *Vlandis v. Kline*, the Court indicated *in dicta* that a one-year durational residence requirement for lower tuition at a state university would be constitutional, because such a requirement did not impose the kind of burden as found in *Shapiro*, which involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance.\(^{149}\) In *Sosna v. Iowa*, the Court held that Iowa could impose a one-year durational residence requirement for obtaining a divorce, a requirement many states had at the time.\(^{150}\) Justice Rehnquist explained that this law “may reasonably be justified” on grounds other than budget or administrative convenience, i.e., avoiding officious intermeddling in matters in which another state (where the parties lived when married) may have a greater interest, and protecting judgments from collateral attack.\(^{151}\) Justice Rehnquist added that unlike the situation in *Shapiro, Dunn, and Memorial Hospital*, the plaintiff was not “irretrievably foreclosed” from obtaining some part of what she sought.\(^{152}\) In *Jones v. Helms*, the Court allowed a state to transform the misdemeanor of parental abandonment into a felony if the parent left the state.\(^{153}\) Justice Stevens explained that the criminal conduct engaged in by the individual in the first state “necessarily qualified” the right to travel to another state.\(^{154}\) Justice Stevens also noted the case did not involve disparate treatment of residents and non-residents or new and old residents.\(^{155}\)

In other cases, the Court found the state action unconstitutional, concluding the regulation violated rationality review, without specifying whether this was minimum rationality review or reasonableness balancing. This lack of specificity may have been because the law was seen as violating even minimum rationality review in any event. For example, in *Williams v. Vermont*, the Court invalidated the failure by Vermont in a “vehicle purchase and use tax” to give a credit for sales tax paid in another state on the purchase of a car by a person who, at that time, was not a resident of Vermont.\(^{156}\) Such a credit was given if the buyer was a


\(^{150}\) *Sosna v. Iowa*, 419 U.S. 393, 410 (1975).

\(^{151}\) *Id.* at 406–07.

\(^{152}\) *Id.* at 406.


\(^{154}\) *Id.* at 421.

\(^{155}\) *Id.* at 422.

resident of Vermont at the time of purchase. The Court said that residence at the time of purchase bears no rational relation to the purpose of the tax, i.e., to improve and maintain Vermont highways. In Zobel v. Williams, the Court said that distinctions between new and old residents in payments from Alaska’s mineral fund violated the Equal Protection Clause, as it was not rational to give pre-enactment residents more cash to create incentives for living in Alaska or to encourage more prudent management of the fund. Further, a purpose to reward citizens for past contributions is not legitimate because it could open the door to apportioning other rights according to length of residence. In Hooper v. Bernalillo, the Court struck down a tax exemption for veterans who resided in the state before May 8, 1976. Applying rational basis scrutiny, the Court held that it was illegitimate for laws to create permanent distinctions among residents based on the length or timing of their residence in the state.

In Attorney General of New York v. Soto-Lopez, the Court split on whether it should apply strict scrutiny or only rational basis review. The law in Soto-Lopez involved a civil service preference for resident veterans who lived in the state when they entered military service. Justice Brennan, with Justices Marshall, Blackmun, and Powell, said that because the law penalized those persons who had exercised their right to migrate, strict scrutiny should be used. Justice Brennan noted that “even temporary deprivations of very important benefits and rights can operate to penalize migration.” Once strict scrutiny was triggered, it was easy for Justice Brennan to conclude that none of the interests advanced by New York could satisfy strict scrutiny review. Chief Justice Burger and Justice White, in separate concurrences, found that the law failed even rational basis review, as in Zobel and Hooper. Justice

157 Id. at 15.
158 Id. at 23–24.
160 Id. at 63–64.
162 Id. at 623.
164 Id. at 900.
165 See id. at 904.
166 Id. at 907.
167 Soto-Lopez, 472 U.S. at 907–12.
168 See id. at 912–16 (Burger, C.J., concurring in the judgment); id. at 916 (White, J., concurring in the judgment).
O’Connor, dissenting with Justices Rehnquist and Stevens, said that more than a minimal effect on the right to travel or migrate should be required to trigger heightened scrutiny.169

As in Zobel and Hooper, the Court failed to make clear in Soto-Lopez whether the rational basis review was simply minimum rationality review, which for the concurring Justices the legislation failed to meet, or a kind of reasonableness balancing. To the extent there is a fundamental right to travel implicated, the proper level of review should be reasonableness balancing. This conclusion is supported by the results in cases like Soto-Lopez, Zobel, and Hooper, which found the regulations unconstitutional.170 It is also supported by Chief Justice Rehnquist, who joined Justice O’Connor’s dissent in Soto-Lopez.171 In 1999, dissenting in Saenz v. Roe, Chief Justice Rehnquist analogized these right to travel cases to voting rights cases like Rosario v. Rockefeller,172 which applied an “onerous burden” standard in a right to vote case, consistent with reasonableness balancing.173

Admittedly, the majority opinion in Saenz v. Roe departed from this Shapiro line of analysis, and seemed to adopt a categorical rule that any burden, whether substantial or not, on what the Court called the “third aspect of the right to travel,” would perhaps trigger, under the Fourteenth Amendment Privileges or Immunities Clause, strict scrutiny, and more likely, an absolute categorical bar.174 The scope of the Saenz theory remains unclear. In any event, the majority in Saenz viewed the statute which limited maximum welfare benefits available to newly arrived residents to the amount payable by the state of the residents’ prior residence as similar to the one-year residency requirement of Shapiro, and thus ruled it unconstitutional on, inter alia, the strength of Shapiro.175 In later cases, perhaps the best response to Saenz would be to merely follow the Shapiro line of cases, and view the resort to a categorical bar based on the Fourteenth Amendment Privileges and Immunities Clause as unnecessary dicta in Saenz, not required to decide the case.

169 Id. at 921 (O’Connor, J., dissenting).
171 Soto-Lopez, 476 U.S. at 918–925 (O’Connor, J. dissenting).
172 410 U.S. 752.
174 Saenz, 526 U.S. at 502–504.
175 Id. at 506–07.
D. Fundamental Access to Court Cases

Cases involving the fundamental access to courts follow a similar structure of substantial burdens on access triggering strict scrutiny, while less-than-substantial burdens trigger a reasonableness balancing test. In *M.L.B. v. S.L.J.*, a case involving a more than $2,000 fee for record preparation in order for a party to appeal from a termination of parental rights, the Court noted:

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as “of basic importance in our society,” rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect. M.L.B.’s case, involving the State’s authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake. We approach M.L.B.’s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point: *Lassiter v. Department of Social Servs. of Durham Cty.*, and *Santosky v. Kramer*.

In contrast, less-than-substantial burdens on the right of access to courts trigger reasonableness review. For example, in 1996 in *Lewis v. Casey*, the Court considered a case involving complaints by prisoners that the prison law library was not adequately maintained. Indicating the minimal injury suffered by the prisoners, the Court noted that the proper standard of review was whether the prison practice was “reasonably related to legitimate penological interests.”

The same year *Lewis v. Casey* was decided, the Court in *M.L.B.*, relying on two cases from 1973—*United States v. Kras* and *Ortwein v. Schwab*—indicated that in cases involving access to courts which did not involve some other fundamental right (like the termination of the fundamental right to rear one’s child in *M.L.B.*), only minimum rationality review would be applied, as no fundamental right was implicated. This *dicta* in *M.L.B.* is in error. In *Kras* and *Ortwein*, while there is
no fundamental right to bankruptcy (Kras)\(^\text{183}\) or to receive welfare benefits (Ortwein)\(^\text{184}\) (thus a modest fee requirement to file a case is not a substantial burden on access to courts in these cases) there is still some burden on the fundamental right of access to courts. Thus, under standard fundamental rights analysis, Kras and Ortwein should have triggered a “reasonableness balancing” approach, not minimum rationality review. Language in both the Kras and Ortwein opinions support this analysis. In Kras, the Court stated:

> [T]he reasonableness of the structure Congress produced, and congressional concern for the debtor, are apparent from the provisions permitting the debtor to file his petition without payment of any fee, with consequent freedom of subsequent earnings and of after-acquired assets (with the rare exception specified in § 70(a) of the Act) from the claims of then-existing obligations. These provisions, coupled with the bankrupt’s ability to obtain a stay of all debt enforcement actions pending at the filing of the petition or thereafter commenced, enable a bankrupt to terminate his harassment by creditors, to protect his future earnings and property, and to have his new start with a minimum of effort and financial obligation. They serve also, as an incidental effect, to promote and not to defeat the purpose of making the bankruptcy system financially self-sufficient.\(^\text{185}\)

Similarly, in Ortwein, the Court balanced the extent of the burden on the individual against the state’s interests in defraying some of the costs of administering the system by the imposition of modest fees:

Each of the present appellants has received an agency hearing at which it was determined that the minimum level of payments authorized by law was being provided. . . . In Kras, the Court also stressed the existence of alternatives, not conditioned on the payment of the fees, to the judicial remedy. The Court has held that procedural due process requires that a welfare recipient be given a pretermination evidentiary hearing. These appellants have had hearings. The hearings provide a procedure, not conditioned on payment of any fee, through which appellants have been able to seek redress.\(^\text{186}\)

This language from Ortwein, like the “reasonableness” language cited above from Kras, indicates a sensitive balancing of the benefits and burdens of the fee requirement, not minimum rationality review deference to legislative judgment. Where the burden on access to courts is

\(^{183}\) Kras, 409 U.S. at 445.

\(^{184}\) Ortwein, 410 U.S. at 659.

\(^{185}\) Kras, 409 U.S. at 448–49 (emphasis added) (citations omitted).

\(^{186}\) Ortwein, 410 U.S. at 659–60 (citations omitted).
more substantial, like burdening access to courts in a case involving some other fundamental right—such as the right to rear children in *M.L.B.*\(^{187}\) or the right to marry/divorce in *Boddie v. Connecticut*\(^{188}\)—the Court should apply the strict scrutiny approach.

V. **Gonzales v. Carhart and the Undue Burden Standard**

In *Stenberg v. Carhart*, a 5-4 Court ruled that a Nebraska statute banning partial-birth abortions was unconstitutional as not having a sufficient exception for the life or health interests of the mother, as required by *Roe* and *Casey*, and was an undue burden on a woman’s right to abortion choice.\(^{189}\) In dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that the law was a less-than-undue burden on abortion choice and sufficient to meet the health exception of *Casey*.\(^{190}\) Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote a dissent calling for *Roe* and *Casey* to be overruled.\(^{191}\)

Following *Stenberg*, Congress passed its own version of a partial-birth abortion ban in 2003.\(^{192}\) By the time a case challenging the ban, *Gonzalez v. Carhart*,\(^{193}\) reached the Supreme Court in 2007, Justice O’Connor, who was the critical fifth vote in *Stenberg* to strike down the partial-birth ban as unconstitutional,\(^{194}\) had been replaced by Justice Alito, and Chief Justice Roberts had replaced Chief Justice Rehnquist.\(^{195}\) Justices Scalia and Thomas had voted to uphold the Nebraska ban in *Stenberg*, and the jurisprudential philosophy of Chief Justice Roberts and Justice Alito tended to suggest that they each would join with Justic-

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\(^{187}\) 519 U.S. at 116–17.


\(^{189}\) *Stenberg* v. *Carhart*, 530 U.S. 914, 920–22, 929–30 (2000). For discussion on the need for a medical emergency exception under *Roe* and *Casey*, see supra note 57.

\(^{190}\) *Stenberg*, 530 U.S. at 963–68 (Kennedy, J., dissenting).

\(^{191}\) Id. at 980–82 (Thomas, J., dissenting).


\(^{194}\) See *Stenberg*, 530 U.S. at 918.

es Scalia and Thomas in favor of upholding the congressional partial-birth abortion ban in *Gonzales*, as they did. Justice Kennedy therefore held the critical fifth vote in *Gonzales*.

Consistent with his *Stenberg* dissent, Justice Kennedy concluded in *Gonzales* that the congressional ban on partial-birth abortions, like the Nebraska ban at issue in *Stenberg*, was a less-than-undue burden on abortion rights, since it only limited one occasionally used means of abortion (so-called partial-birth abortions where part of the fetus is pulled intact through the cervix before being dismembered, rather than the standard abortion where the fetal embryo is vacuumed out or the fetus is dismembered into pieces in the uterus behind the cervix before being removed). Four Justices dissented in *Gonzales* viewing the regulation as creating a substantial obstacle/undue burden to abortion choice. Reflecting the closeness of the case, Justice Kennedy noted in *Gonzales* that the case involved a facial challenge to the statute, and thus his conclusion of no “undue burden” was based on the fact that, for a “large fraction of relevant cases” of women seeking an abortion, the statute was not a “substantial obstacle” to abortion choice. As Justice Kennedy acknowledged, this left open the possibility of an as-applied challenge by a woman to whom the ban would be a “substantial obstacle” given her medical condition. Once the ban on partial-birth abort-

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196 See *Gonzales*, 550 U.S. at 130; *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting).
197 Compare *Gonzales*, 550 U.S. at 150–60, with *Stenberg*, 530 U.S. at 956–67 (Kennedy, J., dissenting). In *Gonzales*, Justice Kennedy was joined by Justices Scalia and Thomas, who previously stated that they reject the entire Roe/Casey view of abortion rights, *Stenberg* 530 U.S. at 980–82 (Thomas, J., dissenting), and by Chief Justice Roberts and Justice Alito, whose jurisprudential philosophy tends to suggest skepticism of the entire Roe/Casey view of abortion rights. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (stating that courts should not create constitutional rights not explicitly in the Constitution, rather leave decisionmaking to the people); *id.* at 2640–2643 (Alito, J., dissenting) (stating that if right is not part of “history and tradition” courts should not create such rights). To the extent one is prepared to overrule Roe and Casey, and hold that there is no fundamental right to abortion choice, then regulations of abortion under the Due Process Clause and Equal Protection Clause would trigger just the minimum rationality review approach described in *Heller v. Doe*, 509 U.S. 312 (1993).
198 *Gonzales*, 550 U.S. at 169–89 (Ginsburg, J., dissenting).
199 See *id.* at 167–68 (majority opinion).
200 See *id.* at 168. As Justice Kennedy noted:

We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. [I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. For this reason, [a]s-applied challenges are
tion was held not to be a “substantial obstacle” to abortion choice, the question then became, under the analysis of Roe and Casey presented in Parts II–IV, whether the regulation is “reasonable.” As Justice Kennedy’s opinion noted:

When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.\(^{201}\)

In deciding on whether the regulation was reasonable, or whether it created too great health risks for women seeking an abortion, Justice Kennedy rejected the kind of substantial deference to legislative judgment typical of minimum rationality review:

[T]he Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.\(^{202}\)

On the other hand, typical of reasonableness balancing, the Court does give some deference to legislative judgment, as indicated above.\(^{203}\) It is this kind of deference reflected in Gonzales when, after discussing different views on relative safety risks to women of banning the partial-birth abortion procedure, Justice Kennedy concluded:

The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. This

the basic building blocks of constitutional adjudication. The Act is open to a proper as-applied challenge in a discrete case. No as-applied challenge need be brought if the prohibition in the Act threatens a woman’s life because the Act already contains a life exception.

Id. (citations omitted). In response, the four Justices in dissent stated their belief that the option of an as-applied challenge would often be unrealistic in practice. Gonzales, 550 U.S. at 189–90 (Ginsburg, J., dissenting).

\(^{201}\) Id. at 166–67 (emphasis added).

\(^{202}\) Id. at 165 (citations omitted).

\(^{203}\) See supra notes 71–74 and accompanying text.
traditional rule is consistent with *Casey*, which confirms the State’s interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.\(^{204}\)

Despite this understanding of *Gonzales*, in two places in the opinion Justice Kennedy indicated that the relevant question was whether the State “has a rational basis to act, and it does not impose an undue burden”\(^{205}\) and “[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.”\(^{206}\) This isolated language might be used to suggest that once no substantial obstacle/undue burden is found, the court should only apply a minimum rationality review approach.

In opposition to such a conclusion, Justice Kennedy made clear in *Gonzales* that his intent was to follow the approach to abortion rights adopted by the joint opinion in *Casey*, not to alter it.\(^{207}\) Given the analysis of *Casey* discussed in Part II of this article, application in *Casey* of its approach to undue burdens and less-than-undue burdens discussed in Part III, *Casey*’s reference to its approach being consistent with the fundamental rights analysis in the ballot access, like *Anderson v. Celebrezze*, and other fundamental rights cases discussed in Part IV, and the “reasonableness” and “independent constitutional duty to review” language in *Gonzales* itself, it should be clear that *Gonzales*, like *Casey*, involves a reasonableness balancing test. Indeed, given the widespread use of strict scrutiny for substantial burdens on fundamental rights, and reasonableness balancing for less-than-substantial burdens on fundamental rights discussed in Part IV, it would be anomalous to create a special kind of doctrine in this area of fundamental rights jurisprudence.\(^{208}\)

\(^{204}\) *Gonzales*, 550 U.S. at 163 (emphasis added).
\(^{205}\) Id. at 158 (emphasis added).
\(^{206}\) Id. at 166 (emphasis added).
\(^{207}\) Id. at 146 (“*Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.”).
\(^{208}\) As the joint opinion noted in *Casey*, consistency with related doctrines is an important consideration in deciding whether to follow or overrule a case. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (“No evolution of legal principle has left *Roe*’s doctrinal footings weaker than they were in 1973. . . . [S]ubsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child.”); see also Arizona v. Gant, 556 U.S. 332, 358 (2009)
VI. DIFFERING APPROACHES IN FEDERAL DISTRICT COURTS AND THE COURTS OF APPEALS

Two recent Court of Appeals opinions—one from the Fifth Circuit and one from the Seventh Circuit—provide insight into how lower courts have been applying the undue burden test following *Casey* and *Gonzales*.

A. The Fifth Circuit Approach: Where No Undue Burden Exists, Apply Minimum Rationality Review

In 2014, the Fifth Circuit Court of Appeals denied an injunction against a Texas law requiring physicians performing abortions to have admitting privileges at a hospital within 30 miles of their clinic. In reaching this conclusion, the Fifth Circuit stated in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*:

In *Casey*, the Court reaffirmed what it regarded as *Roe*’s “essential holding,” the right to abort before viability, the point at which the unborn life can survive outside of the womb. Before viability, the State may not impose an “undue burden,” defined as any regulation that has the purpose or effect of creating a “substantial obstacle” to a woman’s choice. In *Gonzales*, the Court added that abortion restrictions must also pass rational basis review. In stating what standard of review to apply to determine whether the state “has a rational basis to act,” the Fifth Circuit applied the minimum rationality review test applicable to ordinary economic and social regulation under the Due Process and Equal Protection Clauses. The Court noted:

Nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of

(Alito, J., dissenting) (“Relevant factors identified in prior cases [on whether to follow or overrule a precedent] include whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned.” (citations omitted)); see generally R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 993, 1001–1007 (1996) (discussing the importance to the Supreme Court of whether the precedent creates an inconsistency or incoherence in the law).


210 Id. at 590.
democratic self-government. It is not the courts’ duty to second guess legislative factfinding, “improve” on, or “cleanse” the legislative process by allowing relitigation of the facts that led to the passage of a law. Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. Because the determination does not lend itself to an evidentiary inquiry in court, the state is not required to “prove” that the objective of the law would be fulfilled. Most legislation deals ultimately in probabilities, the estimation of the people’s representatives that a law will be beneficial to the community. Success often cannot be “proven” in advance. The court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power.211

In his concurrence in the Seventh Circuit case, Planned Parenthood of Wisconsin, Inc. v. Van Hollen, Judge Manion discussed the appropriate inquiry in similar language.212 He stated:

“Where it has a rational basis to act, and it does not impose an undue burden, the State may” regulate the provision of abortions. Thus, legislation regulating abortions must pass muster under rational basis review and must not have the “practical effect of imposing an undue burden” on the ability of women to obtain abortions.

At the first step, we must presume that the admitting-privileges requirement is constitutional, and uphold it so long as the requirement is rationally related to Wisconsin’s legitimate interests. Wisconsin asserts that its admitting-privileges requirement furthers its legitimate interests in protecting the health of mothers and in maintaining the professional standards applicable to abortion doctors. The question, then, is whether Wisconsin’s adoption of the admitting-privileges requirement is rationally related to these interests. “Under rational basis review, ‘the plaintiff has the burden of proving the government’s action irrational,’ and ‘[t]he government may defend the rationality of its action on any ground it can muster, not just the one articulated at the time of decision.’”213

Judge Manion continued:

211 Id. at 594 (citations omitted). The Abbott court continued, “A law ‘based on rational speculation unsupported by evidence or empirical data’ satisfies rational basis review. The fact that reasonable minds can disagree on legislation, moreover, suffices to prove that the law has a rational basis. Finally, there is no least restrictive means component to rational basis review.” Abbott, 748 F.3d at 594 (citations omitted).
212 Planned Parenthood of Wis., Inc., v. Van Hollen, 738 F.3d 786, 799–800 (7th Cir. 2013) (Manion, J., concurring in part and in the judgment).
213 Id. (citations omitted).
The court suggests that Wisconsin must come forward with medical evidence that the admitting-privileges requirement furthers the State’s legitimate interests. But, under rational basis review, Wisconsin’s legislative choice “may be based on rational speculation unsupported by evidence or empirical data.” States have “broad latitude” to regulate abortion doctors, “even if an objective assessment might suggest that” the regulation is not medically necessary.214

B. The Seventh Circuit Approach: Casey Requires a Reasonableness Balancing Test

In contrast to this approach, the Seventh Circuit Court of Appeals in Planned Parenthood of Wisconsin, Inc. v. Van Hollen, upheld a preliminary injunction against a Wisconsin law that required physicians performing abortions to have admitting privileges at a hospital within 30 miles of their clinic.215 In reaching this conclusion, the court stated:

The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an undue burden on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if slight, to be “undue” in the sense of disproportionate or gratuitous. It is not a matter of the number of women likely to be affected. “[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” In this case the medical grounds thus far presented (“thus far” being an important qualification given the procedural setting—a preliminary-injunction proceeding) are feeble, yet the burden great because of the state’s refusal to have permitted abortion providers a reasonable time within which to comply.216

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214 Id. at 800 (citations omitted). Judge Manion continued:
Thus, the Supreme Court has rejected as misguided arguments that an abortion law is unconstitutional because the medical evidence contradicts the claim that the law has any medical basis. In sum, Wisconsin need offer only “a conceivable state of facts that could provide a rational basis’ for requiring abortion physicians to have hospital admission privileges.”

Id. (citations omitted).

215 Van Hollen, 738 F.3d at 799.

216 Id. at 798 (emphasis added) (citations omitted). The Van Hollen court added:
And so the district judge’s grant of the injunction must be upheld. But given the technical character of the evidence likely to figure in the trial—both evidence strictly medical and evidence statistical in character concerning the consequences both for the safety of abortions and the availability of abortion in Wisconsin—the district judge may want to reconsider appointing a neutral medical expert to testify at the trial, as authorized by Fed.R.Evid. 706, despite the parties’ earlier objections. Given the passions that swirl about abortion rights and their limitations there is a
In his dissent from the Fifth Circuit’s decision denying rehearing in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, Judge Dennis similarly noted that a reasonableness balancing test was required by *Casey* and *Gonzales*. He noted:

I respectfully but emphatically dissent from the court’s refusal to rehear this case *en banc*. In upholding Texas’s unconstitutional admitting-privileges requirement for abortion providers and medication-abortion restrictions, the panel opinion flouts the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, by refusing to apply the undue burden standard expressly required by *Casey*. Instead, the panel applied what effectively amounts to a rational-basis test—a standard rejected by *Casey*—under the guise of applying the undue burden standard. The panel’s assertion that it applies *Casey* is false because it does not assess the strength of the state’s justifications for the restrictive abortion laws or weigh them against the obstacles the laws place in the path of women seeking abortions, as required by *Casey*. A correct application of the *Casey* undue burden standard would require that the admitting-privileges provision and medication-abortion restrictions be stricken as undue burdens because the significant obstacles those legal restrictions place in the way of women’s rights to previability abortions clearly outweigh the strength of their purported justifications.

Judge Dennis continued:

While approving of Roe’s central premises, the controlling *Casey* plurality rejected a strict-scrutiny standard of review that cases following *Roe* had adopted and applied to challenges to abortion regulations, and for which Justice Blackmun argued in his partial dissent. The *Casey* plurality likewise rejected mere rational-basis review—the standard urged by Chief Justice Rehnquist in dissent. The controlling *Casey* plurality read *Roe* as acknowledging both the importance of a woman’s right to make the ultimate decision of whether to terminate her pregnancy previability, as well as the State’s legitimate interests in protecting fetal life and preserving the health of the pregnant woman. In danger that party experts will have strong biases, clouding their judgment. They will still be allowed to testify if they survive a *Daubert* challenge, but a court-appointed expert may help the judge to resolve the clash of the warring party experts. And the judge may be able to procure a genuine neutral expert simply by directing the party experts to confer and agree on two or three qualified neutrals among whom the judge can choose with confidence in their competence and neutrality. If either side’s party experts stonewall in the negotiations for the compilation of the neutral list, the judge can take disciplinary action; we doubt that will be necessary.

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218 Id. at 331–332 (citations omitted).
light of these competing interests, and in an effort to strike a balance between them, the Casey plurality announced the undue burden standard, which functions as a reconciliatory standard between strict scrutiny and rational-basis review. As the Court has emphasized, the undue burden test “struck a balance. The balance was central” to the Casey Court’s holding.

Casey thus adopted a compromise position, between the strict-scrutiny review endorsed by Justice Blackmun and the rational-basis review urged by Chief Justice Rehnquist. However, the Casey plurality did not adopt ordinary, intermediate scrutiny. Rather than apply one of the recognized tiers of scrutiny, the Court adopted the undue burden test, and in so doing, pointed to two ballot-access cases—namely Anderson v. Celebrezze, and Norman v. Reed—that similarly applied a standard of review that does not squarely fit into the established tiers of scrutiny. The ballot access cases apply a flexible balancing test that provides the State with leeway to regulate for a valid purpose, where such regulation does not unnecessarily infringe upon individuals’ voting rights. The Court explained that the “abortion right is similar” in that courts must weigh the individual woman’s right against the State’s legitimate interests. Therefore, we may look to the ballot access cases for guidance on how to apply the undue burden standard.219

After quoting the language from Anderson v. Celebrezze cited above in Part IV,220 Judge Dennis concluded:

The Casey plurality’s comparison to Anderson and Norman as it explained the competing interests at stake in challenges to abortion regulations reveals that, like the standard the Court applied in the ballot-access cases, the undue burden test requires a court to consider “the character and magnitude of the asserted injury,” and determine “whether the corresponding interest [is] sufficiently weighty to justify the limitation.” Thus, the undue burden test necessarily contains a proportionality principle: if a regulation has the effect of imposing a particularly severe obstacle upon a woman’s right to an abortion, then the government’s justification must be correspondingly strong.221

As both the Seventh Circuit and Judge Dennis in dissent indicated, consistent with the analysis of Casey and Gonzales discussed in Parts II–V, this inquiry requires weighing the magnitude of the burden imposed against the extent and strength of the State’s justification for the law. It would be clearer if the Seventh Circuit in Van Hollen had explicitly stated that the Casey analysis requires a two-step inquiry: (1) whether the government’s regulation is a “substantial obstacle to a woman seeking an abortion,” which, in a facial challenge, is more about determining the

219 Id. at 335-36 (footnote omitted) (citations omitted).
220 See supra note 107 and accompanying text.
221 Abbott, 769 F.3d at 337 (citations omitted).
number of women likely to be affected;\textsuperscript{222} but then (2) if that number is less than substantial, the court applies the \textit{Anderson v. Celebrezze} reasonableness balancing test to determine if the burden, even if not a substantial obstacle, is nonetheless unreasonable, or excessive, or undue based on the Seventh Circuit’s acknowledgment that “[t]he feeblest of the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”\textsuperscript{223}

\textbf{C. Analyzing District Court and Court of Appeals Cases After Casey and Gonzales}

1. Cases Finding Abortion Regulations Unconstitutional Applying Undue Burden or Reasonableness Balancing

The same split in approaches to abortion rights present in the Fifth Circuit and Seventh Circuit cases involving admitting privileges of hospitals, discussed above,\textsuperscript{224} are replicated in a number of other recent cases. In some cases, abortion regulations have been held unconstitutional as undue burdens.\textsuperscript{225} Other cases have held regulations unconstitutional under reasonableness balancing, rejecting minimum rationality review.\textsuperscript{226} Other cases have involved other doctrines, either constitutional doctrines, like freedom of speech objections to required disclosure of

\textsuperscript{222} See \textit{Gonzales v. Carhart}, 550 U.S. 124, 168 (2007). Of course, in an as-applied challenge, the issue would be whether the regulation is a substantial obstacle to the specific litigant in the case, as Justice Kennedy indicated in \textit{Gonzalez}. See supra notes 199–200 and accompanying text.

\textsuperscript{223} Van Hollen, 738 F.3d at 798. If the regulation is a substantial obstacle to abortion choice, under the analysis in Parts II–V of this article, that should trigger a strict scrutiny approach, not an automatic finding of unconstitutionality. See supra notes 57–64, 78–90, 105–188 and accompanying text.

\textsuperscript{224} See supra Part VI.A–B.

\textsuperscript{225} See, e.g., McCormack v. Hiedeman, 694 F.3d 1004, 1016–18 (9th Cir. 2012) (holding Idaho law prohibiting person from seeking an abortion in any place other than a hospital, doctor’s office, or clinic unconstitutional as an undue burden, as applied to a woman who terminated pregnancy by taking abortion-inducing drug prescribed by physician and lawfully purchased over the Internet).

\textsuperscript{226} See, e.g., Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 911–18 (9th Cir. 2014) (holding district court abused discretion in denying preliminary injunction against Arizona statute requiring that medications used to induce abortions be administered in compliance with on-label regimen, when no evidence existed of medical justification for that requirement, focusing on the “independent constitutional duty to review” language in \textit{Gonzales v. Carhart}, 550 U.S. 124, 165–66 (2007), to underscore that undue burden analysis is not minimum rationality review).
services provided or required communication of information about an ultrasound performed on a pregnant woman,\textsuperscript{227} or resolved as a matter of statutory interpretation when dealing with the interaction between state and federal laws.\textsuperscript{228}

2. Cases Upholding Abortion Regulations as Constitutional Applying Only Undue Burden Analysis or Minimum Rationality Review

Some government regulations have been upheld using undue burden analysis alone.\textsuperscript{229} Others have applied more minimum rationality review after concluding the law was not a substantial obstacle to abortion choice.\textsuperscript{230} Other laws have been upheld after facing other constitutional objections, like freedom of speech objections to required communication of information about an ultrasound,\textsuperscript{231} or after facing statutory objec-

\textsuperscript{227}See, e.g., Evergreen Ass’n, Inc. v. City of New York, 740 F.3d 233, 237–38 (2d Cir. 2014) (holding required disclosure whether “pregnancy center” provides emergency contraceptive, abortion services, or pre-natal care likely violates free speech rights of center, but holding required disclosure whether center has licensed medical provider on staff likely constitutional); Stuart v. Loomis, 992 F. Supp. 2d 585, 588 (M.D.N.C. 2014) (holding North Carolina law requiring abortion providers to perform ultrasound and describe images to women violates free speech rights of providers).

\textsuperscript{228}See, e.g., Planned Parenthood Ariz., Inc. v. Betlach, 727 F.3d 960, 962–63 (9th Cir. 2013) (holding Arizona’s attempt to defund abortion providers likely violates Medicaid’s “free choice” provisions); Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health, 699 F.3d 962 (7th Cir. 2012) (holding Indiana’s defunding abortion providers likely violates Medicaid’s “free choice provider” provisions, but provision involving block grant of funds for monitoring sexually transmitted diseases likely not preempted).

\textsuperscript{229}See, e.g., Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 513–18 (6th Cir. 2012) (McKeague, J., concurring in part and writing the majority as to Part VI) (holding Ohio law criminalizing the distribution of mifepristone, also known as RU-486, unless the distribution mirrored certain protocols and gestational time limits identified by the FDA when mifepristone was first approved in 2000, constitutional as not an undue burden on abortion); Comprehensive Health of Planned Parenthood of Kan. and Mid-Mo., Inc. v. Templeton, 954 F. Supp. 2d. 1205, 1222–24 (D. Kan. 2013) (holding “informed consent” provision requiring a physician to provide a woman seeking an abortion with information about the capacity of the fetus to feel pain at specific gestational ages likely constitutional, and not an undue burden).

\textsuperscript{230}See, e.g., Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 902–06 (8th Cir. 2012) (en banc) (holding South Dakota law requiring physicians to provide patients seeking an abortion with written disclosure of a correlation, but not necessarily a causal link, between persons who have obtained abortions and an increased risk of suicide constitutional as truthful, non-misleading, and relevant to the patient’s decision, adopting minimum rationality review deference to legislative judgment, stating “the state legislature, rather than a federal court, is in the best position to weigh the divergent results and come to a conclusion about the best way to protect its populace”).

\textsuperscript{231}See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577–78 (5th Cir. 2012) (holding Texas law requiring doctor to display a sonogram of the fe-
D. Reverse or Remand to Lower Courts: Fisher v. University of Texas at Austin Analogy

Given the analysis in Parts II–V above, those courts that have applied only a minimum rationality review approach after concluding a regulation does not pose a substantial obstacle to a woman choosing an abortion, including the Fifth Circuit’s opinion in Planned Parenthood of Greater Texas Surgical Health Services v. Abbott,233 or the Eighth Circuit’s opinion in Planned Parenthood Minn., N.D., S.D. v. Rounds234 are in error. [The Supreme Court has granted certiorari to the Fifrth Circuit in a similar case, Whole Woman’s Health v. Cole [Hellerstedt].235] In resolving the issues presented in the case, the court could take four different courses.

First, the Fifth Circuit overturned the district court’s conclusion that the Texas law did create a substantial obstacle to abortion choice.236 If the law is viewed as a substantial obstacle, that should lead to a finding that the law is unconstitutional under a strict scrutiny approach. Under standard procedural rules, a court of appeals should only overrule factual decisions of a district court if they are “clearly erroneous.”237 The Fifth Circuit concluded in Abbott that the district court’s decision on whether the law was a substantial obstacle was clearly erroneous.238 On appeal, the Supreme Court could find that decision in error, based on the evidence of the effect of the law discussed in the district court’s opinion.239

232 See, e.g., Planned Parenthood of Kan. and Mid-Mo. v. Moser, 747 F.3d 814, 822–838 (10th Cir. 2014) (holding state receiving federal funds as a block grant under Title X of the Public Health Service Act can restrict funds to abortion providers).
233 748 F.3d 583, 590–94 (5th Cir. 2014).
234 686 F.3d 889, 902–06 (8th Cir. 2012) (en banc).
235 Whole Woman’s Health v. Cole, No. 15-274 (Nov. 13, 2015) [decided sub. nom. Hellerstedt]
236 Abbott, 748 F.3d at 597–600.
237 See, e.g., Voting for Am., Inc. v. Steen, 732 F.3d 382, 386 (5th Cir. 2013) (“[T]he district court’s findings of fact are subject to a clearly-erroneous standard of review . . . .”); Okpalobi v. Foster, 190 F.3d 337, 342, 357 (5th Cir. 1999) (reviewing a challenge to an abortion regulation and applying the clearly erroneous standard of review to the district court’s factual findings).
238 Abbott, 748 F.3d at 599–600.
239 This was the conclusion of Judge Dennis’ dissent in Abbott. He observed:

We are obliged to review the district court’s findings of fact for clear error.
Second, even if that decision is not reversed, for a less-than-substantial obstacle, the law should be subject to reasonableness balancing, not mere minimum rationality review. The Fifth Circuit clearly applied a minimum rationality review standard.240 Faced with that error, the Court could state the proper standard as reasonableness balancing and then apply that standard and conclude as a matter of law that the regulation is an unreasonable burden on plaintiff’s abortion rights, as did Judge Dennis in his dissent in Abbott.241 Likewise, the Court could find that the regulation is, in fact, reasonable.242

Third, in the case of Fisher v. University of Texas at Austin, the Su-

Accordingly, when analyzing the district court’s factual findings, we ask whether they are “plausible in light of the record as a whole.” “If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” As discussed at length below, each of the five major findings by the district court is substantially supported by the record evidence and, consequently, is not clearly erroneous. Thus, the Abbott II panel’s reversal of these findings contravenes Supreme Court and Fifth Circuit precedent mandating clear error review. Abbott, 769 F.3d at 340–41 (Dennis, J., dissenting) (citations omitted).

240 Abbott, 748 F.3d at 594.
241 Abbott, 769 F.3d at 356–60 (Dennis, J., dissenting); [Hellerstedt, 136 S.Ct. at 2309-14.]
242 Given the weak interests supporting a requirement that doctors at abortion clinics have admitting privileges at local hospitals, but the significant burden it imposes, a conclusion that such a law is reasonable would not be likely, but it is at least possible. Judge Dennis noted in his dissent:

[The district court correctly found that the justifications for [the] admitting-privileges provision is virtually nonexistent because the evidence shows that requiring abortion doctors to have admitting privileges would not increase the competence of those doctors, the safety of abortions, or the quality of hospital care given to the few abortion patients who are treated in hospital emergency care facilities. In light of the heavy burden imposed upon a woman’s constitutionally protected right and the weak, if any, justifications for the law, the district court properly concluded that the law amounts to an undue burden on a woman’s liberty interest in obtaining an abortion and must be facially invalidated. The enormous flaw in the Fifth Circuit panel’s spurious undue burden analysis is that it nowhere assesses the strength of the justification that the State names for its legislation, nor does it weigh the weakness of the State’s justifications against the extent of the burden imposed upon women. Instead, it simply assumes that the legislation will result in what the State says it is seeking and, as explained directly below, erroneously minimizes the extent of the burden imposed upon women actually restricted by the admitting-privileges provision. The Abbott panel’s failure to consider the strength of the State’s justifications or to conduct the balancing required by Casey alone warrants en banc reconsideration.

Id. at 360.
The Supreme Court decided the Fifth Circuit had not applied the proper standard of review to determine the constitutionality of an affirmative action admissions program at the University of Texas at Austin. Because the Fifth Circuit had not applied the “demanding burden” of strict scrutiny, but a “good-faith,” deferential form of strict scrutiny, the Court remanded Fisher to the Fifth Circuit to apply the correct standard of review in the first instance. Prudence suggests this might also be the better course in this case, rather than the Court deciding “reasonableness balancing” on the merits in the first instance.

On the other hand, Fisher was decided based on a summary judgment motion without development of facts at a full trial. Here, there has already been a full trial and factual development, andthus the Court could more easily decide the case on the merits, as suggested in the second option above, rather than remand the case. In addition, after the remand in Fisher, the Fifth Circuit reached the same result upholding the constitutionality of the University of Texas-Austin affirmative action program under “demanding” strict scrutiny as they had under their initial, erroneous “good-faith,” deferential strict scrutiny, prompting the Court to grant certiorari again to consider that result. The Court may not want to go through that extra level of process again. Still, a remand of the case to give the Fifth Circuit first crack at a reasonableness balancing analysis, just as the Court in Fisher remanded the case to the Fifth Circuit, is probably the more prudent course of action.

Fourth, the Court could decide that if a less-than-substantial obstacle on abortion choice exists, a court should only apply a minimum ra-

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243 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013).
244 Id. at 2415, 2420–21.
245 See id. at 2421 (“[F]airness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.”); see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (“[W]e think it best to remand the case to the lower courts for further consideration in light of the principles we have announced.”).
246 Fisher, 133 S. Ct. at 2417.
248 Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014), reh’g en banc denied, 771 F.3d 274 (5th Cir. 2014), cert. granted, 135 S. Ct. 2888 (2015).
249 See supra note 244 and accompanying text.
tionality review approach, and not reasonableness balancing. This, however, would be inconsistent with the analysis of Roe, Casey, and Gonzales discussed in Parts II–V of this article, but it could be done. Under that approach, the Court could still, in theory, reverse the Fifth Circuit decision on the ground that the admitting privileges regulation is not even “rationally related to the state’s legitimate interest,” which is what the district court in Abbott concluded as an alternative holding to the conclusion that the law was an undue burden. But given the deferential nature of minimum rationality review, the law might well survive a principled application of that level of review, as the Fifth Circuit held in Abbott.

VII. REASONABLENESS BALANCING IN LIGHT OF SUPREME COURT PRECEDENTS

Considering constitutional law generally, there are not only the four standards of scrutiny discussed in Parts II–V of this article—minimum rationality review, reasonableness balancing, intermediate review, and strict scrutiny—but seven levels of scrutiny and an eighth level of a categorical approach where an automatic finding of unconstitutionality is made. This section will place the reasonableness balancing approach in the context of these eight kinds of Court doctrine.

The reasonableness balancing approach is used by the Court not only for less-than-substantial burdens on fundamental rights, as discussed in Part IV, but in a number of other constitutional doctrines. For example, the Court uses a similar reasonableness balancing test in deciding whether a burden is: (1) “clearly excessive” under the Pike v. Bruce Church, Inc. test for Dormant Commerce Clause review; (2) “grossly excessive” burden under the BMW v. Gore test for unconstitutionality of punitive damage awards; (3) not “reasonable and necessary” under the

250 See supra Parts II–V.
251 See Abbott, 951 F. Supp. 2d at 897–900.
252 Abbott, 748 F.3d at 590–96. [For result, see Hellerstedt, 136 S. Ct. 2292, 2309-14 (2016).]
253 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Under Pike, the Court considers: (1) the state’s “legitimate local public interest”; (2) the means by which the statute achieves these ends, including whether the benefits of the statute could be promoted “as well with a lesser impact on interstate activities”; and (3) given this, whether the “burden” on interstate commerce is “clearly excessive” given the statute’s benefits. Id.
254 BMW v. Gore, 517 U.S. 559, 575–85 (1996). Under BMW, the Court considers: (1) the degree of reprehensibility of the conduct; (2) the ratio between the punitive damage award and the compensatory damage award; and (3) sanctions for comparable misconduct in the law, to determine whether the challenger can show the punitive damage award is “grossly exces-
U.S. Trust v. New Jersey for Contract Clause review of government regulations burdening the government’s own contracts; 255 or (4) goes “too far” and thus is not “reasonable” under the Penn Central test for Takings Clause review. 256 Reasonableness balancing is thus an established feature of constitutional adjudication generally. 257 Reasonableness balancing also applies in other areas, such as procedural due process balancing under Mathews v. Eldridge. 258

Sometimes under reasonableness balancing the burden shifts to the government to justify its action. For example, in cases under the dormant commerce clause, where the regulation facially discriminates against interstate commerce, such as Maine v. Taylor, the Court balances (1) the state’s legitimate interest in the regulation; (2) whether the benefits could be achieved as well by available non-discriminatory alternatives;
and (3) the burden on interstate commerce, but the burden shifts to the government to establish the constitutionality of its regulation.\textsuperscript{259} The Fifth Amendment Takings Clause test in \textit{Dolan v. City of Tigard} requires the government to establish a “rough proportionality” between the government’s burden on the individual and the individual’s burden on society.\textsuperscript{260} As the Court noted in \textit{Dolan}, this test is similar to the balancing done in search and seizure cases under the Fourth Amendment, where the government has the burden to show any search and seizure is reasonable under the circumstances.\textsuperscript{261} Under the First Amendment, when considering the right of government workers to speak on matters of public concern, the government has the burden to establish in cases like \textit{Pickering v. Board of Education of Will County, Illinois} that: (1) the government’s legitimate ends in “promoting the efficiency of the public services it performs through its employees”; (2) prevails in a balance against “the interests of the [employee]” in free speech; (3) including whether the government could act with more “narrowly drawn grievance procedures.”\textsuperscript{262}

These cases all represent a higher level of review than the cases previously discussed. Under reasonableness balancing in the fundamental rights cases discussed in Part IV, or under \textit{Pike v. Bruce Church}, \textit{BMW v. Gore}, \textit{U.S. Trust}, or \textit{Penn Central}, the burden is on the challenger to prove the regulation is unreasonable, excessive, undue, or goes too far,\textsuperscript{263} while under \textit{Maine v. Taylor}, \textit{Dolan}, and \textit{Pickering} the burden is on the government.\textsuperscript{264}

Certain members of the Court, and some commentators, have used the phrase “second-order” rational review to describe a level of scrutiny higher than minimum rationality review but less than strict scrutiny.\textsuperscript{265}

\begin{itemize}
\item \textsuperscript{259} See, e.g., \textit{Maine v. Taylor}, 477 U.S. 131, 138 (1986).
\item \textsuperscript{260} \textit{Dolan v. City of Tigard}, 512 U.S. 374, 391 (1994).
\item \textsuperscript{261} See id. at 392. See also Aleimikoff, supra note 258, at 965 (describing cases in modern doctrine that use balancing under Fourth Amendment search and seizure doctrine).
\item \textsuperscript{263} See supra notes 73, 103, 253–258 and accompanying text.
\item \textsuperscript{264} See supra notes 259–262 and accompanying text.
\item \textsuperscript{265} See, e.g., \textit{City of Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (“To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called ‘second order’ rational-basis review rather than ‘heightened scrutiny.’”); Gerald Gunther, \textit{Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 \textit{HARV. L. REV.} 1, 20–24 (1972) (discussing “strengthened
Other members of the Court have referred to “reasonableness” or “proportionality” balancing. Perhaps the best terminology would be to acknowledge minimum rationality review as the “basic rational review” test, but use the term “second-order reasonableness balancing” for the higher Casey/Celebrezze kind of reasonableness balancing where the burden of proof remains on the challenger to prove unconstitutionality, and use the term “third-order reasonableness balancing” when the burden shifts to the government to justify its action as reasonable, as in Dolan/Pickering. That is the terminology used in Tables 1 & 2 in the Appendix to this article summarizing the Court’s doctrines in constitutional law generally (Table 1), and under the First Amendment (Table 2).

Such an understanding would create five levels of scrutiny: minimum rationality review, second-order reasonableness balancing, third-order reasonableness balancing, intermediate review, and strict scrutiny review. In addition to these levels of review, in a few cases the Supreme Court has adopted two levels of review higher than standard intermediate review, but less strict than strict scrutiny. These two additional levels track elements of strict scrutiny and intermediate review under Equal Protection and Due Process Clause doctrine. Under intermediate review, the legislation must (1) advance important/significant/substantial government ends, (2) be substantially related to advancing these ends, and (3) not be substantially more burdensome than necessary to advance these ends. Under strict scrutiny the statute must (1) advance compelling/overriding government ends, (2) be directly and substantially related to advancing these ends, and (3) be the least restrictive effective means to advance the ends. The Court often phrases the last two parts of

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266 See, e.g., District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting) (“I would simply adopt such an interest-balancing inquiry explicitly. . . . [T]his sort of ‘proportionality’ approach is [not] unprecedented [as] the Court has applied it in various contexts, including election-law cases, speech cases, and due process cases. . . . [In these cases, the court exercises] ‘independent judicial judgment’ in light of the whole record to determine whether a law exceeds constitutional boundaries.” (citation omitted)).

267 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 687 (4th ed. 2011) (“Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose . . . . The means used need not be necessary, but must have a ‘substantial relationship’ to the end being sought.”); see also supra notes 104, 109 (discussing government interests and burdens under intermediate review).

268 See CHEMERINSKY, supra note 267, at 687 (“Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government purpose. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative.”). See also supra notes 104, 109 and accompanying text (discussing government interests and burdens under strict scrutiny). Because the regulation must be “necessary” to advance the gov-
strict scrutiny as requiring the statute be “precisely tailored” or “necessary.” The last two prongs of intermediate review are often phrased as the regulation must be “narrowly drawn.” But, sometimes, the Court has used the phrase “narrowly drawn” under strict scrutiny.

The first additional level of review continues the intermediate level of scrutiny for the substantial government interest and not substantially too burdensome elements of the analysis, but increases the level of scrutiny under the second prong from the intermediate level of substantial relationship to the strict scrutiny level of direct relationship. This is the test used to determine the constitutionality of commercial speech regulations. As the Court stated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, “[W]e ask whether the asserted governmental interest is substantial. . . . [Next] we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.” Because it adds one strict scrutiny component (direct relationship) to an otherwise intermediate test, this level of review can be called “intermediate review with bite.”

A second additional level of review adopts the strict scrutiny...
requirement of a compelling government interest and a direct relationship, but continues the intermediate level of scrutiny only requiring the regulation not be substantially too burdensome, rather than the strict scrutiny requirement of using the “least restrictive effective alternative.” Because this level adopts two of the three levels of strict scrutiny, but waters down the third element to an intermediate level of inquiry, this additional level can be called “loose strict scrutiny.” Use of this standard of review occurred in the Equal Protection challenge to racial redistricting in *Bush v. Vera.* In that case, although generally applying strict scrutiny to a case of race discrimination, the controlling plurality “reject[ed], as impossibly stringent, the District Court’s view of the narrow tailoring requirement, that ‘a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.’” Instead, the Court adopted the intermediate requirement that the racial redistricting only not be “substantially more [burdensome] than is ‘reasonably necessary.’” This kind of “loose strict scrutiny” was also used by four Justices in dissent in *Parents Involved in Comm. Schools v. Seattle School District No. 1.*

The addition of “intermediate review with bite” and “loose strict scrutiny” creates four clearly defined levels of heightened scrutiny, each one more rigorous than the preceding standard of review on only one element of the three-pronged standard of review test. Thus, there is basic intermediate review (with requirements of a substantial government interest, substantial relationship, and the regulation not substantially more burdensome than necessary); intermediate review with bite (substantial government interest and not substantially more burdensome than necessary, but the strict scrutiny requirement of a direct relationship); loose strict scrutiny (compelling government interest and direct relationship, but only that the regulation not be substantially more burdensome than necessary); and traditional strict scrutiny (compelling government interest, direct relationship, least burdensome effective alternative required). These levels of scrutiny provide a step-ladder approach toward standards of review, with each higher level of scrutiny clearly more rigorous than the preceding level.

There appears to be some movement to get rid of the tests denominated above as “intermediate review with bite” and “loose strict scruti-
ny,” and to replace them with traditional strict scrutiny.\(^{277}\) That would get the Supreme Court’s level of scrutiny down to the 3 basic tiers of review (minimum rationality review, intermediate review, and strict scrutiny) and 2 reasonableness balancing tests (burden on challenger in one; burden on the government in the other). On the other hand, there is some benefit in having “intermediate review with bite” and “loose strict scrutiny,” as they are logically consistent stepping stones in the level of review between intermediate review and strict scrutiny, and one can agree with the current approach that because commercial speech is more hearty it does not need strict scrutiny protection,\(^{278}\) and that state governments should be given greater flexibility than allowable under traditional strict scrutiny in making their political redistricting decisions.\(^{279}\)

Taken together, this discussion suggests there are seven different tests used by the Supreme Court in various cases to determine whether government interests are strong enough to make a government statute, regulation, or other government action constitutional. Justice Breyer has phrased the levels of scrutiny between minimum rationality review and strict scrutiny as reflecting one general interest balancing or proportionality approach. As Justice Breyer noted in dissent in *District of Columbia v. Heller*:

*I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, “where a law significantly implicates competing constitutionally protected interests in complex ways,” the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests. Any answer would take account both of the statute’s effects upon the competing interests and the existence of any clearly superior less restrictive alternative. Contrary to the majority’s unsupported suggestion that this sort of “proportionality” approach is unprecedented*.

\(^{277}\) Justice Thomas has specifically rejected these additional strata of review. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (stating *Central Hudson Gas* test should not be used, and regular content-based strict scrutiny analysis should apply); *Bush*, 517 U.S. at 1000 (Thomas, J., concurring in the judgment) (reaffirming the principle that all racial classifications should be governed by strict scrutiny, even in *Bush*).


\(^{279}\) See, e.g., *Bush*, 517 U.S. at 977 (plurality opinion) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (“[S]tate actors should not be ‘trapped between the competing hazards of liability’ by the imposition of unattainable requirements under the rubric of strict scrutiny”).
the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.280

Despite this listing of “balancing” or “proportionality” tests, the balancing tests used in these cases cited by Justice Breyer are not all the same. Burdick represents what is called here “second-order reasonableness balancing.”281 Because the burden of proof is on the government to justify its action, Pickering represents “third-order reasonableness balancing.”282 Commercial speech cases, like Thompson, involve a slightly higher than intermediate standard of review, what is called here “intermediate review with bite.”283 Nixon v. Shrink Missouri Government also indicated its standard was somewhere between intermediate review and strict scrutiny, and applied something on the order of what this article calls “loose strict scrutiny.”284 The model of standards of review presented here, and summarized in Tables 1 and 2 in the Appendix to this article, takes this into account.

It is true that, in many other countries around the world, their constitutional courts do use one “proportionality” standard of review to determine the constitutionality of all legislation.285 A comparison of United States constitutional review versus constitutional review around the world from the perspective of the levels of review discussed here does show many commonalities in concerns about means/end reasoning, relative burdens on rights, and reasonableness balancing.286

It is also true that the international standard of “proportionality” analysis is perhaps best seen as an approach somewhere between what is called in this article “third-order reasonableness balancing” and “intermediate review.”287 There are arguably advantages of simplicity and

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281 See supra notes 110–122, 253–258 and accompanying text.

282 See supra notes 259–264 and accompanying text.

283 See supra notes 272, 277 and accompanying text.

284 See Nixon, 528 at 386–89 (stating scrutiny of campaign contribution limitations should be higher than intermediate review, but less stringent than strict scrutiny).


287 Id. at 496–97.
ease of application in such a single standard of review approach, but such an approach may not sufficiently distinguish different kinds of cases and provide lower courts with enough guidance as to how skeptical to be about various kinds of regulations.  

A single standard approach is more consistent with civil law, deductive ways of reasoning, but perhaps not surprisingly the common-law inductive approach of deciding cases from the ground up has evolved a more fact-specific list of standards of review for different cases. For this reason, the international single-standard “proportionality analysis” is not consistent with United States Supreme Court doctrine. Both approaches, however, make possible vigorous protection of individual rights for judges predisposed to adopt such approaches, and not defer to governments under a literal interpretation, customs and traditions, or strong deference-to-government approach.

In addition to these seven levels of review, sometimes the Court adopts an absolute categorical approach whereby once the criteria are met the government action is automatically unconstitutional. This constitutes an eighth, and highest, level of review.

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288 Id. at 494–95.
289 See id. at 487–93 (discussing civil law versus common-law ways of reasoning, and summarizing the history behind development of the seven standards of review discussed here).
291 See Convergence and Symmetry, supra note 286, at 498–503 (discussing differences between (1) more “positivist” theories of constitutional interpretation, focusing on literal interpretation, with some deference to customs and traditions (an approach seen in decisions by Justices Scalia, Thomas, and Alito), along with strong deference-to-government under Justice Holmes’ and Professor James Thayer’s views, as represented in James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144 (1893), that courts should defer to government unless the unconstitutionality of the action is “so clear that it is not open to rational question” (an approach seen in decisions by Chief Justice Roberts) versus (2) more “normative” theories willing to see in constitutional provisions broad protection of fundamental natural rights (an approach more often seen in decisions of Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan)). For a discussion of how reasonable balancing and proportionality analysis fit into emerging trends of moral reasoning, both in the United States and around the world, based on equal concern and respect for others, see R. Randall Kelso, Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World, 29 QUINNIPIAC L. REV. 433, 451–62 (2011).
All these eight levels of scrutiny are summarized in the two Tables presented in an Appendix to this article. Basic constitutional doctrines are presented in Table 1. The various doctrines used in the context of the First Amendment are presented in Table 2.

VIII. CONCLUSION

As noted in the Introduction, following the 2010 elections, a spate of new abortion restricting laws were passed. Many government actions have been held unconstitutional by courts. A number of these cases have involved challenges to statutes requiring abortion clinics to have admitting privileges at local hospitals. In deciding what the correct approach is to abortion regulation, Part II of this article discussed the legal doctrine adopted by the Supreme Court in Roe and Casey. That discussion showed that the best reading of Casey is that it adopted a doctrine whereby an undue burden on abortion choice, defined as a “substantial obstacle to a woman seeking an abortion,” triggers Roe’s strict scrutiny approach, while a less-than-undue burden on abortion choice triggers a reasonableness balancing approach higher than minimum rationality review. Part III of this article supported this analysis by careful attention to the application of the undue burden analysis in Casey to the spousal notification, informed consent, and 24-hour waiting period regulations at

(1982). Under the Tenth Amendment, any “commandeering” of a state’s legislature, executive official, or administrative agency by the federal government is unlawful, no matter how small the “commandeering.” Printz v. United States, 521 U.S. 898, 908–12 (1997). The Thirteenth Amendment provides a categorical ban on “slavery or involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted.” U.S. CONST. amend. XIII, § 1.

For many criminal defendants’ constitutional rights, there are also categorical barriers. For example, under the Fifth Amendment persons accused of crimes cannot be put in double jeopardy or have their privilege against self-incrimination rights violated. Sixth Amendment rights to trial by an impartial jury, right to confront witnesses under the Confrontation Clause, or compulsory process for obtaining witnesses in defense, and Eighth Amendment rights that excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment inflicted, are phrased as absolute categorical barriers. For discussion of these provisions, see generally CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW § 23.2 (2007), available at http://libguides.stcl.edu/kelsomaterials.

While the Court has considered no cases under the Third Amendment, presumably its language that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law,” U.S. CONST. amend. III, reflects a categorical rule. See KELSO & KELSO, supra, note 257 at § 23.1.2. The Seventh Amendment preservation of the right to trial by jury at common law is also a categorical rule. See id at § 23.1.3.

issue in the case.

Part IV of this article expanded on this discussion to note how the joint opinion’s reference in *Casey* to its undue burden analysis tracking the Supreme Court’s doctrine in the ballot access cases, like *Anderson v. Celebrezze*, strongly supported use of a reasonableness balancing test higher than minimum rationality review. Part IV also noted how this *Casey/Celebrezze* approach is mirrored in a range of other fundamental rights cases, where substantial burdens trigger strict scrutiny, and less-than-substantial burdens trigger a reasonable balancing test higher than minimum rationality review. Part V discussed how *Gonzales v. Carhart*, the Supreme Court’s last major abortion rights case, is consistent with this analysis and does nothing to change the *Casey/Celebrezze* reasonableness balancing doctrine. In light of this doctrinal structure, Part VI of this article analyzed a number of recent district court and court of appeals cases involving abortion rights. Part VII placed this *Casey/Celebrezze* reasonableness balancing approach in the context of the Supreme Court’s general doctrinal approach to individual rights adjudication, with a brief comparison of this approach to analysis used in many constitutional courts around the world of proportionality review.
# APPENDIX

## TABLE 1: STANDARD CONSTITUTIONAL LAW DOCTRINE

<table>
<thead>
<tr>
<th>LEVEL OF SCRUTINY</th>
<th>GOV’T ENDS OR INTERESTS TO BE ADVANCED</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BENEFITS</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BURDENS</th>
<th>TYPICAL AREAS WHERE USED</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. “Base” Minimum Rationality Review (Three Requirements are Separate Elements to Meet)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>II. The “Plus Six” Standards of Increased Scrutiny</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Heightened Rational Review (Reasonableness Balancing of Means and Ends, Not Separate Elements)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Balance government interests and availability of less burdensome alternatives v. burden on persons (some deference to government, see supra notes 71–74).
| Third-Order Reasonableness Review: Burden on Government | [Same as Second-Order Review, except the burden shifts to the government to justify its action. Burden remains on government for all higher levels of review.] | Dormant Comm. Clause: Maine v. Taylor
Takings Clause: Dolan v. Tigard |

**Intermediate Review Standards (Three Requirements are Separate Elements to Meet)**

<table>
<thead>
<tr>
<th>Intermediate Review</th>
<th>Substantial/Important/Significant</th>
<th>Substantially Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Gender Discrimination; Illegitimacy; Alien Children: Plyler v. Doe, Art. IV, § 2 Priv. and Imm. Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediate Review with Bite</td>
<td>Substantial/Important/Significant</td>
<td>Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
<td>Commercial Speech: Central Hudson Gas</td>
</tr>
</tbody>
</table>

**Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)**

|-----------------------|-----------------------|------------------|-----------------------------------------------|----------------------------------------------------------------------------------|
| Strict Scrutiny Review | Compelling/Overriding | Directly Related | Least Restrictive Effective Alternative | Race, Ethnicity, National Origin; Aliens: State Regulation of Lawful Aliens Not Involving Self-Gov’t
Substantial Burden on Unenumerated Fundamental Right |

**III. Categorical Barrier to Constitutionality (see supra note 292).**
TABLE 2: FIRST AMENDMENT DOCTRINE*


<table>
<thead>
<tr>
<th>LEVEL OF SCRUTINY</th>
<th>GOV’T ENDS OR INTERESTS TO BE ADVANCED</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BENEFITS</th>
<th>STATUTORY MEANS TO ENDS: RELATIONSHIP TO BURDENS</th>
<th>TYPICAL AREAS WHERE USED</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. “Base” Minimum Rational Review</td>
<td>Burden on challenger to prove unconstitutionality</td>
<td>Legitimate (substantial deference to government)</td>
<td>Rational (substantial deference to government)</td>
<td>Not Irrational (substantial deference to government)</td>
</tr>
</tbody>
</table>

** Government funding own speech or enlisting private parties to convey government message, or non-viewpoint discrimination involving advocacy of illegal conduct, true threats, fighting words, obscenity, or child pornography.

II. The “Plus Six” Standards of Increased Scrutiny

<table>
<thead>
<tr>
<th>Heightened Rational Review</th>
<th>Legitimate Ends Reasonable Given Means</th>
<th>Legitimate Ends Reasonable Given Means</th>
<th>Legitimate Ends Reasonable Given Means</th>
<th>Non-Public Forum:</th>
</tr>
</thead>
<tbody>
<tr>
<td>on challenger to prove unconstitutionality</td>
<td>(no substantial deference to government)</td>
<td>(no substantial deference to government)</td>
<td>(no substantial deference to government)</td>
<td>Subject-Matter or Content-Neutral Regs.</td>
</tr>
<tr>
<td></td>
<td>Subject-Matter or Content-Neutral Regs.</td>
<td>Government Grants or Subsidies; Defamation and other Related Torts; Less-than-substantial Burdens on Freedom of Assembly/Association</td>
<td>Balance government interests and availability of less burdensome alternatives v. burden on persons (some deference to government, see supra notes 71–74).</td>
<td></td>
</tr>
</tbody>
</table>
Third-Order Reasonableness Review: Burden on Government

[Same as Second-Order Review, except the burden shifts to the government to justify its action. Burden remains on government for all higher levels of review.]

Government Employees on Matters of Public Concern: Picking

Intermediate Review Standards (Three Requirements are Separate Elements to Meet)

<table>
<thead>
<tr>
<th>Intermediate Review</th>
<th>Substantial/Important/ Significant</th>
<th>Substantially Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Public Forum: Content-Neutral Regulations of Speech; Content-Based Regulations of Broadcast TV and Radio: Red Lion v. FCC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediate Review with Bite</td>
<td>Substantial/Important/ Significant</td>
<td>Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
<td>Commercial Speech: Central Hudson Gas</td>
</tr>
</tbody>
</table>

Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)

<table>
<thead>
<tr>
<th>Loose Strict Scrutiny</th>
<th>Compelling/Overriding</th>
<th>Directly Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Content-Based Regulations of Cable/Satellite TV and Radio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny Review</td>
<td>Compelling/Overriding</td>
<td>Directly Related</td>
<td>Least Restrictive Effective Alternative</td>
<td>Public Forum: Content-Based Regulations of Speech; All Viewpoint Discrimination; Campaign Finance: Citizens United; Substantial Burdens on Freedom of Assembly/Association</td>
</tr>
</tbody>
</table>

***Strict Scrutiny also applies to Free Exercise: Strict Scrutiny for discrimination against religion; for hybrid cases involving Free Exercise and other fundamental rights; or cases involving the precise facts concerning unemployment in Sherbert v. Verner, as held in Employment Division v. Smith.***

III. Categorical Barrier to Constitutionality: Establishment Clause Doctrine.