

The Structure of Rational Basis and Reasonableness Review

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I. Introduction

In *Whole Woman's Health v. Hellerstedt*,¹ Justice Thomas criticized existing Supreme Court doctrine regarding the “tiers of scrutiny,” quoting a passage from an earlier Justice Scalia dissent that the “three basic tiers – ‘rational basis,’ intermediate, and strict scrutiny – ‘are [1] no more scientific than their names suggests, and [2] a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.’” Justice Thomas added, “But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily [3] the Court tinkers with levels of scrutiny to achieve its desired result. . . . [M]ore recent decisions reflect the Court’s tendency to relax purportedly higher standards of review for less-preferred rights. . . . Meanwhile, the Court [4] selectively applies rational-basis review – under which the question is supposed to be whether ‘any state of facts reasonably may be conceived to justify’ the law – with formidable toughness.”² A number of commentators have raised similar concerns about the Court’s use of existing standards of review and whether sometimes that rational basis review has some “bite.”³ Recent books also continue to comment on “heightened rational basis scrutiny” under the Equal Protection Clause.⁴

Despite these concerns, careful attention to the Court’s decisions reveals a predictable and principled structure to the Court’s existing standards of review. While the Court has not been as careful as one would like in making this structure clear,⁵ description of this structure and modest adjustments in Court terminology would resolve most of the stated concerns.

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¹ 136 S. Ct. 2292, 2327 (2016), *quoting* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

² *Id.*, *quoting* McGowen v. Maryland, 366 U.S. 420, 426 (1961).

³ See, e.g., Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since Romer v. Evans*, 14 GEORGETOWN J.L. & PUB. POLY. 441, 442-43 (2016) (discussing a rational basis standard “with bite”); Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. Rev. 2070, 2071-76 (2015) (same).

⁴ See, e.g., RANDY E. BARNETT & JOSH A. BLACKMAN, 100 CONSTITUTIONAL LAW CASES EVERYONE SHOULD KNOW 215-19 (2019).

⁵ This is a criticism I have been making since 1992. See R. Randall Kelso, *Filling Gaps in the Supreme Court’s Approach to the Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. Tex. L. Rev. 493, 494-96 (1992).

The intent of this article is address to Justice Thomas' criticisms stated in points [1] and [4] above on the "scientific nature" of the standards of review⁶ and possible selective application of "rational basis review."⁷ Justice Thomas' criticism in point [2] about the malleability in selecting which standard of review to adopt will be addressed in a separate article entitled, "Justifying the Supreme Court's Standards of Review."⁸ Justice Thomas' criticism in point [3] regarding selective application of the "higher standards of review" will be addressed into two related articles, "The Structure of Intermediate Review"⁹ and "The Structure of Strict Scrutiny."¹⁰

In responding to Justice Thomas' point [1] criticism of the lack of the "scientific nature" of the standards of review, Part II of this article discusses the differences between (1) rational basis review, sometimes called "minimum rationality review,"¹¹ used for review of standard social or economic regulation under the Equal Protection Clause¹² and Due Process Clauses (5th and 14th Amendment)¹³; (2) a higher level of scrutiny used by the Court under the Due Process Clauses and in many other cases, called in this article "reasonableness balancing"¹⁴; and (3) the structure of "higher levels" of review, such as (a) intermediate review¹⁵ and (b) strict scrutiny.¹⁶

⁶ See *supra* text accompanying note 1.

⁷ See *supra* text accompanying note 2.

⁸ See R. Randall Kelso, *Justifying the Supreme Court's Standards of Review* (2020) (draft available on SSRN or at: <http://libguides.stcl.edu/kelsomaterials>).

⁹ See R. Randall Kelso, *The Structure of Intermediate Review* (2020) (draft available on SSRN or at: <http://libguides.stcl.edu/kelsomaterials>).

¹⁰ See R. Randall Kelso, *The Structure of Strict Scrutiny Review* (2020) (draft available on SSRN or at: <http://libguides.stcl.edu/kelsomaterials>).

¹¹ See *generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 699 (5th Ed. 2015) ("The rational basis test is the *minimal* level of scrutiny that all government actions challenged under equal protection must meet.") (emphasis added); 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.") (emphasis added). It should be noted that the term "rational basis review" or "rational review" could have been used where ever "minimum rationality review" appears in this article and nothing would be changed in the analysis.

¹² See *infra* text accompanying notes 31-66.

¹³ See *infra* text accompanying notes 67-76.

¹⁴ See *infra* text accompanying notes 77-100.

¹⁵ See *infra* text accompanying notes 101-04.

¹⁶ See *infra* text accompanying notes 105-10.

Parts III and IV of this article then address Justice Thomas' point [4] criticism about selective application of rational basis review. The argument in Part III is that, despite the argument of Justice Thomas and some commentators to the contrary, in cases involving standard social or economic regulation under the Equal Protection Clause the Supreme Court has been careful since 1937 to use only "minimum rationality review," not any heightened rational review or rational review with bite.¹⁷ Part IV makes the same argument with respect to the Due Process Clauses.¹⁸

Part V of this article then describes those areas of the law where the Court does use the higher level of "reasonableness balancing" review, also called in this article "2nd-order reasonableness review."¹⁹ This review involves cases dealing with less than substantial burdens on unenumerated fundamental rights under the Due Process Clauses,²⁰ but also involves some cases under the Dormant Commerce Clause,²¹ the Contract Clause,²² cases dealing with excessive punitive damage awards under the Due Process Clauses,²³ and the Takings Clause.²⁴ This review also involves First Amendment non-viewpoint based regulations of speech in a nonpublic forum²⁵ and Procedural Due Process analysis.²⁶

Part VI of the article then addresses the fact that in some "reasonableness balancing" cases the Court has shifted the burden from the challenger to prove the government action is "unreasonable" to requiring the government to prove the action is "reasonable."²⁷ Because this shifting of the burden of proof imposes a greater challenge for the government to justify its course of action, this article calls this level of review "3rd-order reasonableness review," or "heightened reasonableness balancing."²⁸

¹⁷ See *infra* text accompanying notes 111-200.

¹⁸ See *infra* text accompanying notes 201-14.

¹⁹ See *supra* text accompanying note 14; *infra* text accompanying note 96.

²⁰ See *infra* text accompanying notes 216-42.

²¹ See *infra* text accompanying notes 263-68.

²² See *infra* text accompanying notes 269-72.

²³ See *infra* text accompanying notes 273-76.

²⁴ See *infra* text accompanying notes 277-80.

²⁵ See *infra* text accompanying notes 281-300.

²⁶ See *infra* text accompanying notes 301-02.

²⁷ See *infra* text accompanying notes 303-34.

²⁸ See *infra* text accompanying note 98.

Finally, Part VII responds to Justice Thomas' examples in *Hellerstedt* where he questioned whether the Court has been principled in applying the standards of review.²⁹ Part VIII provides a brief conclusion.³⁰

II. Cataloguing the Supreme Court's Standards of Review

A. Rational Basis Review

1. Rational Basis Review under the Equal Protection Clause

a. The Pre-1937 Cases

Determining what constitutes "equal protection of the laws" has been difficult. The term "equal protection" does not define itself. Logically, all laws, by drawing classifications between permitted and prohibited conduct, treat some persons differently than others – that is the nature of legislation. Thus, mere different treatment does not constitute a denial of equal protection of the laws, for every law treats some persons differently than others.³¹ However, as stated in one early case in 1897, *Gulf, Colorado & Santa Fe Railroad Co. v. Ellis*,³² classifications in the law "must always rest on some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Similarly, in 1920, in *F.S. Royster Guano Co. v. Virginia*,³³ the Court phrased the test as whether the classification rested on some ground of difference "having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

As initially applied in these nineteenth and early twentieth centuries, the rational basis test did have some "bite." For example, the Court said in *Gulf, Colorado & Santa Fe Railroad Co* that the railroads were being unconstitutionally discriminated against by a statute requiring only railroads to pay the other party's attorney fees (up to \$10) in cases where the plaintiff was a prevailing party.³⁴ In *F.S. Royster Guano Co.* the Court said a law requiring a corporation to pay taxes not only on in-state business activities, but on activities out of the state, denied the corporation equal protection of the laws.³⁵

²⁹ See *infra* text accompanying notes 335-86.

³⁰ See *infra* text accompanying notes 387-92.

³¹ See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-48 (1982) (discussing the need for some substantive theory to determine which kinds of unequal treatment are permissible versus which kinds of unequal treatment are not permissible).

³² 165 U.S. 150, 155 (1897).

³³ 253 U.S. 412, 415 (1920).

³⁴ 165 U.S. at 159-66.

³⁵ 253 U.S. at 415-17.

More generally, the Court used this doctrine to rule unconstitutional many examples of “class” legislation, that is, laws that treated rich persons or corporations differently from poor persons or individual entrepreneurs. As the Court noted in *Quaker City Cab Co. v. Pennsylvania*,³⁶ “The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' . . . The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal Constitution.” Based on this observation, the Court invalidated in *Quaker City Cab* a taxing scheme that taxed corporately-owned cabs differently than those owned by individual entrepreneurs. A substantial number of statutes were similarly struck down that discriminated against corporations or made tax classifications not based on circumstances “peculiarly applicable to corporations, as are taxes on their capital stock or franchises.”³⁷

These decisions reflected the general predisposition of the conservative Court of this era to be protective of business interests and to be a bulwark against what the Court perceived as “socialist” legislation.³⁸ Even so, it was not always easy to predict when the Court would find that a classification was not reasonable. For example, the New York Milk Control Law, as it existed in the 1930s, allowed a milk dealer to sell to stores at one cent per quart lower than a fixed price if the dealer lacked a well-advertised trade name and had been in business prior to the effective date of the Act, April 10, 1933. The Court sustained the trade name provision, saying that the legislature might reasonably have thought that trade conditions justified the differential, which gave smaller, less well-advertised businesses a one cent price advantage in competition with larger, well-advertised businesses, like Borden’s.³⁹ However,

³⁶ 277 U.S. 389, 400-02 (1928).

³⁷ *Id.* at 402. See, e.g., *Power Co. v. Saunders*, 274 U.S. 490, 493-97 (1927); *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 507-17 (1926); *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434-35 (1926); *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 112-14 (1918).

³⁸ See generally CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW* § 14.2.2 & n.31 (2007) (with 2020 Supplement) (available at: www.stcl.libguides/kelsomaterials) (“The judicial policy of this era followed the Republican conservatism on both fiscal and social policy. The courts placed a high priority on protecting business from economic regulation, while the courts permitted the traditional moral values of communities to trample of individual rights.”); Barry Cushman, *Teaching the Lochner Era*, 62 St. Louis U.L.J. 537, 538-62 (2018) (courts used *laissez-faire* liberal and formal “equality” to hold invalid “class”/“unequal” legislation trying to correct the bargaining power advantage of corporations).

Similar decisions striking down regulations on corporations were reached using a due process analysis, see, e.g., *Looney v. Crane Co.*, 245 U. S. 178, 187-89 (1917) (franchise tax and permit tax on corporation based on earnings out of the state violates due process), and cases cited therein, or a dormant commerce clause analysis, see, e.g., *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 201-05 (1914) (requirement that a corporation file articles of incorporation, appoint a resident agent for service of process, and pay a \$25 filing fee in order to do business in a state violates dormant commerce clause principles as an unlawful burden on interstate commerce), and cases cited therein.

³⁹ *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 262-63 (1936).

the Court struck down the requirement in the Act that the less well-advertised dealer had to have been in business by April 10, 1933, saying that it was arbitrary to deny the price benefit to newer businesses, and had no relation to the public welfare or prevention of monopoly.⁴⁰

(b) Post-1937 Cases

Following the “switch in time that saved the nine” in 1937,⁴¹ the Court became more deferential to legislative action. It reduced the level of equal protection review in social and economic cases to minimum rationality review. In applying this test, the Court stated in 1948 in *Railway Express Agency, Inc. v. New York*,⁴² “It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered.” Discussing the requirement of a “rational” relationship, the Court noted in 1992 in *Nordlinger v. Hahn*:

As a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” . . . Accordingly, this Court’s cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.⁴³

⁴⁰ *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274 (1936).

⁴¹ As is well known, in 1937 President Roosevelt sought to enlarge the Court in order to “pack” it with Justices who would change the existing Commerce Clause and *Lochner*-era doctrine which had ruled unconstitutional a number of Roosevelt’s “New Deal” initiatives. Roosevelt’s specific proposal was to add one new Justice for each current Justice over 70 years of age, if that Justice did not retire within six months. In 1937, this would have given Roosevelt 6 new appointments to the Court, increasing the Court’s membership from 9 to 15, and would have tipped the balance on the Court in favor of upholding “New Deal” regulations. See generally KELSO & KELSO, *supra* note 38, at § 14.2.3; KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 281-82 (1989).

Before the “Court-Packing Plan” was considered by Congress, Justice Roberts, who had voted to uphold existing doctrine prior to 1937, began to decide cases upholding the power of Congress and the states to regulate economic matters. Given this shift, the “Court-Packing Plan” became unnecessary and it died in Congress during the summer of 1937. At the time, this switch in voting gave rise to the phrase, “the switch in time that saved nine.” As subsequent historical documents reveal, Justice Roberts’ initial shift in these cases was made at the Court’s weekly conference after the November 1936 elections, which Roosevelt won in a landslide, but before the “Court-Packing Plan” was announced. See William Lasser, *Justice Roberts and the Constitutional Revolution of 1937 – Was There A “Switch in Time,”* 78 TEX. L. REV. 1347, 1350 (2000). For further discussion of the “switch-in-time”, see Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 62-78 (2006).

⁴² 336 U.S. 106, 110 (1948).

⁴³ 505 U.S. 1, 10 (1992), quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

About how deferential to the government this version of rational review has been in practice, the Court stated in 1993 in *Heller v. Doe*:

A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory 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. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. 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." . . . [On 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.⁴⁴

Under this approach, most laws are upheld. For example, in *Dandridge v. Williams*,⁴⁵ a case involving a limit on the amount of money a family can receive under the Aid to Families with Dependent Children program no matter how many children are in the family, the Court noted, "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. . . . [T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."⁴⁶

To determine whether a statute "rationally furthers a legitimate state interest," the Court considers three things. The first inquiry is what government ends, or interests, support the statute's constitutionality. Under rational basis review, the government ends supported by the statute must be "legitimate": that is, they are within the usual "police power" of the state because they involve the health, safety, or general welfare of the people, broadly defined.⁴⁷ In practice, as noted in *Heller v. Doe*, the Court presumes the legislature is motivated by legitimate interests, leaving the burden on the challenger to prove that there are no "reasonably conceivable" legitimate interests that might have motivated the legislature (or government actor, for executive or administrative action).⁴⁸

⁴⁴ 509 U.S. 312, 320-21 (1993) (citations omitted).

⁴⁵ 397 U.S. 471 (1970).

⁴⁶ *Id.* at 486-86.

⁴⁷ See, e.g., *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as to the protection of lives, limbs, health, comfort, and quiet of all persons.").

⁴⁸ *Heller*, 509 U.S. at 320 ("[A] classification 'must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' . . . and '[t]he burden is on the one attacking the legislative arrangement to negative

Since 1954, the Court has held that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁴⁹ In a sequence of cases, the Court has applied this principle to both federal and state action involving discrimination against “hippies” wishing to live in a commune;⁵⁰ prejudice against persons who enter into an interracial marriage;⁵¹ prejudice against the mentally impaired;⁵² and animus against individuals based upon their sexual orientation.⁵³ The idea behind this conclusion is that irrational hostility toward a particular group cannot be used satisfy even deferential rational review.⁵⁴ Laws must be based, at least in part, on reason.⁵⁵ Judges more willing to defer to historical or traditional attitudes are more willing to count as

every conceivable basis which might support it,’ whether or not the basis has a foundation in the record.”), *citing, inter alia*, *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), *excerpted* at note 44.

⁴⁹ See *generally* *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (use of “bare congressional desire” language); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“invidious racial discrimination” an illegitimate interest); *Brown v. Board of Education*, 347 U.S. 483, 493-95 (1954) (“segregation of children in public schools solely on the basis of race” violates equal protection).

⁵⁰ *United States Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534, 537 (1973) (“purpose to discriminate against hippies” not legitimate interest to prevent “hippie communes” from food stamp program).

⁵¹ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (prejudice against interracial marriage illegitimate).

⁵² *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (prejudice against the mentally impaired held to be an illegitimate governmental interest).

⁵³ *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“animus” against a politically unpopular group, in this case animus based upon sexual orientation, an illegitimate governmental interest).

⁵⁴ See, e.g., Randy E. Barnett, *Foreward: Why Popular Sovereignty Requires the Due Process of Law to Challenge “Irrational or Arbitrary” Statutes*, 14 GEO. J.L. & PUB. POL’Y 355, 368-69 (2016) (“Such improper ends include: (a) the end of assisting favored persons or groups at the expense of other citizens; (b) the end of harming some individuals or groups; or (c) the end of stigmatizing or making costlier the exercise of a liberty of which some disapprove.”); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 992-26 (2012) (“animus” as product of “groups of persons identified by status, not conduct.”).

⁵⁵ See, e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690-93 (1984) (“government action” must reflect something other than “raw political power”). This principle is based on 18th-century natural law Enlightenment commitment to “reason” and “reasoned elaboration of the law.” See KELSO & KELSO, *supra* note 38, at § 6.2.3.2 nn.96-97; § 12.2.2.2 nn.60-70, *citing, inter alia*, Justice Anthony Kennedy, Commencement Address: University of the Pacific, McGeorge School of Law (May 21, 1988) (“[R]eason, which is the distinguishing mark of the human race, must be embodied in the law if our civilization is to aspire to excellence.”). This commitment to reason also applies to the “rational relationship” part of the rational review test. See *infra* text accompanying notes 57-66.

legitimate government interests irrational prejudices if they reflect the attitudes of the electorate as reflected in legislation.⁵⁶

Once it is determined that the statute is advancing a “legitimate state interest,” the next inquiry turns to whether the statute “rationally furthers” that interest. As with the presumption that the statute’s ends are legitimate, in practice the Court presumes the statute’s means are “rationally related” to furthering its ends, leaving the burden on the challenger to prove that no rational relationship exists.⁵⁷ In addition, the Court grants substantial deference to legislative judgment regarding the rationality of the legislative classification because, as the Court has often observed, the judiciary does not sit “as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”⁵⁸ It has been noted, “The traditional deference *both* to legislative purpose [*i.e.*, legislative interests or ends] *and* to legislative selections among means continues, on the whole, to make the rationality requirement largely equivalent to a strong presumption of constitutionality.”⁵⁹ For this reason, this standard of review has been called minimum rationality review, because the government action only need be minimally rational to be upheld.⁶⁰

Under the Court’s doctrine, this “rational relationship” inquiry has two parts. The first aspect focuses on the statute’s “underinclusiveness” – that is, to what extent does the statute fail to regulate all individuals who are part of a problem.⁶¹ A statute may be held to be “irrationally underinclusive” if that statute fails to regulate certain individuals who are an equal part, or perhaps even a greater part, of

⁵⁶ Following a focus on historical attitudes and deference to legislative and executive practice, some judges adopt the view that legislation reflecting historical or traditional attitudes against some group can constitute a legitimate government interest for regulation since they reflect the views of the majority which should be followed in a democracy, as stated in the dissent in *Romer v. Evans*, 517 U.S. 620, 640-43 (1996) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting). *See also* *Lawrence v. Texas*, 539 U.S. 558, 589-91 (Scalia, joined by Rehnquist, C.J. & Thomas, J., dissenting) (law banning homosexual sodomy should be upheld as constitutional based on traditional moral disapproval of homosexual conduct); *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (“In determining the question or reasonableness, [a court] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable . . .”).

⁵⁷ *See supra* note 48 and accompanying text, *citing* *Heller v. Doe*, 509 U.S. 312, 320 (1993), *excerpted supra* note 44.

⁵⁸ *Id.* at 319, *citing* *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*).

⁵⁹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16.3, at 1442-43 (2d ed. 1988). *See also* CHEMERINSKY, *supra* note 11, at 700 (“The rational basis test is enormously deferential to the government, and only rarely have laws been declared unconstitutional for failing to meet this level of review.”).

⁶⁰ *See supra* note 11 and accompanying text.

⁶¹ *See, e.g.*, CHEMERINSKY, *supra* note 11, at 701 (“A law is underinclusive if it does not apply to individuals who are similar to those to whom the law applies.”).

creating some problem as are individuals whom the statute does regulate, unless there is some rational explanation for why the persons who are equally or a greater part of some problem are not being equally regulated, such as administrative cost considerations support regulating the lesser part first at lower cost (getting a bigger bang for the buck), or the greater problem represents a different category (“genus”) of thing to regulate (and thus not part of the same regulatory initiative).⁶² A statute that does not regulate all persons who are part of some problem, but which regulates the greater part of the problem first, will be held to be “rational” because, as the Court stated in *Railway Express Agency, Inc. v. New York*,⁶³ “[e]qual protection doesn't require that all evils of the same genus be eliminated or none at all.” The legislature can adopt a step-by-step approach, as long as each step is rational in terms of which part is regulated first.

The second part of the “rationally furthers” or “rational relationship” inquiry focuses on the statute’s “overinclusiveness” – that is, the extent to which the statute imposes burdens on individuals who are not the focus of the statute’s regulation. Ideally, of course, a statute should only regulate those persons who are part of creating some problem, and not regulate innocent persons.⁶⁴ However, as the Court has noted, “If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”⁶⁵ On the other hand, a statute that burdens innocent persons for no rational reason will be held to be irrationally overinclusive. As the Court noted in *New York City Transit Authority v. Beazer*,⁶⁶ “[L]egislative classifications are valid unless they bear no rational relationship to the State’s objectives.” The question is thus whether Congress achieved its purpose by burdening innocent individuals in an arbitrary or irrational way.

2. Rational Basis Review under the Due Process Clauses

Regarding the Due Process Clauses, since 1937 the Court has adopted the same level of minimum rationality review for standard social or economic regulation as is used under Equal Protection Clause review. As the Court stated in the 1938 case of *United States v. Carolene Products Co.*,⁶⁷ when a

⁶² See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (noting the regulation was rational because “local authorities may well have concluded that those who advertise their wares on their own trucks do not present the same traffic problem [of being distracting] in view of the nature [e.g., ads for one’s own business may tend to be less splashy or eye-catching than commercial ads] or extent [e.g., more ads on side of trucks may be commercial] of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If the judgment is correct, the advertising displays that are exempt have less incidence on traffic [lesser part of the problem].”).

⁶³ *Id.*

⁶⁴ See, e.g., CHEMERINSKY, *supra* note 11, at 702 (“A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose.”).

⁶⁵ *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980), *quoting* *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

⁶⁶ 440 U.S. 568, 592 n.39 (1979), *quoting* *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

legislative judgment is drawn in question, the judicial inquiry must be restricted to "whether any state of facts either known or which could reasonably be assumed affords support for it."

Similarly, in *Williamson v. Lee Optical Co. of Oklahoma*,⁶⁸ the Court rejected a challenge to an Oklahoma law that forbid an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. For the Court, Justice Douglas speculated that the legislature may have decided that in some cases the directions in a prescription regarding the fit of spectacles are essential or that the legislature sought to encourage repeated eye examinations. He noted:

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. . . . To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.⁶⁹

As with rational review under the Equal Protection Clause, this Due Process Clause review involves three considerations: governmental ends, rational relationship between the benefits obtained by the means and these ends, and no irrational burdens imposed by the means. With regard to the first consideration, under Due Process Clause review, as under Equal Protection Clause review,⁷⁰ the legislation (1) must advance "reasonably conceivable" legitimate governmental interests. For example, just as the Court refused in 1985 in *City of Cleburne v. Cleburne Living Center* to permit irrational prejudice against mentally retarded persons to be used as a legitimate interest to deny a use permit for the operation of a group home for the mentally retarded under the Equal Protection Clause,⁷¹ the Court refused under the

⁶⁷ 304 U.S. 144, 154 (1938).

⁶⁸ 348 U.S. 483, 489 (1955).

⁶⁹ *Id.* at 487-88. It has been suggested that perhaps *Lee Optical* was more deferential than *Carolene Products* in permitting the Court to use "any reasonably conceivable interest" to uphold the constitutionality of the government's action. See, e.g., BARNETT & BLACKMAN, *supra* note 4, at Chapter 35-36. This seems wrong. As quoted above, *supra* text accompanying note 67, even in *Carolene Products* the Court was willing to consider "any state of facts . . . which could reasonably be assumed" to exist. In any event, today the Court follows the same "any reasonably conceivable interest" analysis under both equal protection doctrine as defined in *Heller v. Doe*, *supra* note 44, and *Lee Optical*, cited here.

⁷⁰ See *supra* text accompanying notes 47-56.

Due Process Clause to consider prejudice against persons based on sexual orientation as a legitimate government interest in 2003 in *Lawrence v. Texas*.⁷²

The focus of the two means inquiries is slightly different under Due Process Clause review than under Equal Protection Clause review. Logically, whether a statute is rationally related to advancing its legitimate ends has two parts: (2)(a) the extent to which the statute fails to regulate all individuals who are part of some problem (the *underinclusiveness* inquiry); and (2)(b) the way in which the statute serves to achieve its benefits on those whom the statute does regulate (the *service* inquiry).⁷³ Similarly, regarding whether the statute imposes an irrational burden has two parts: (3)(a) the extent to which the statute imposes burdens on individuals who are not part of the problem (the *overinclusiveness* inquiry); and (3)(b) the amount of the burden on individuals who are properly regulated by the statute (the *restrictiveness* or *oppressiveness* inquiry).⁷⁴ Viewed this way, the underinclusiveness and overinclusiveness inquiries are proper under Equal Protection Clause analysis, as discussed above,⁷⁵ and the service and restrictiveness inquiries are proper for Due Process Clause analysis. This is because “a statute which is neither underinclusive nor overinclusive, but which only minimally serves the government’s interests, or greatly burdens individuals, does not deny a citizen equal protection of the laws, because the law is equally applied to all similarly situated parties. It may, however, deny the citizen substantive due process if the burden on the individual is sufficiently great compared to the minimal benefit that is achieved.”⁷⁶

B. Heightened Rational Basis or Reasonableness Review

1. Reasonableness Review (or 2nd-Order Reasonableness Review)

Despite the kind of hypothetical “rational review with bite” noted in Part III.A,⁷⁷ but shown in Part III.B not to exist,⁷⁸ there is a heightened kind of rational review, or better called “reasonableness balancing,”

⁷¹ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (prejudice against the mentally impaired held to be an illegitimate governmental interest).

⁷² *Lawrence v. Texas*, 539 U.S. 558, 575-79 (2003) (animus based on sexual orientation an illegitimate interest).

⁷³ See generally R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden*, 28 U. RICHMOND L. REV. 1279, 1281 (1994).

⁷⁴ *Id.*

⁷⁵ See *supra* text accompanying notes 57-66.

⁷⁶ Kelso, *supra* note 73, at 1281. Case examples of (1) “reasonably conceivable” legitimate government interests are discussed *infra* text accompanying notes 124-62, 201-02. Case examples of (2)(a) and (3)(a) equal protection issues are discussed *infra* text accompanying notes 163-200. Case examples of (2)(b) and (3)(b) due process issues are discussed *infra* text accompanying notes 203-24.

⁷⁷ See *infra* text accompanying notes 117-23.

that the Court does use in various cases. Under this “reasonableness balancing” approach, 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 “unreasonableness” or “excessive” because the burden is too great given the minimal interests supporting the regulation.⁷⁹ Thus, the question is not simply the minimum rationality review question of *Heller v. Doe* whether the statute is rationally related to a legitimate interest giving substantial deference given to legislative judgment on what action is rational.⁸⁰

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. . . . “[R]easonable, nondiscriminatory restrictions . . . are generally sufficient to justify” the restrictions.”⁸¹

This test is different from the minimum rationality review test in a number of ways. First, in *Burdick* the Court is limited to the “precise interests put forward by the State,” not “any reasonably conceivable interest.” Under minimum rationality review the government can use “any reasonably conceivable legitimate interest” to support the constitutionality of the government action.⁸² In contrast, under “reasonableness balancing” “legitimate” government interests can still be used to validate government action as constitutional,⁸³ but the *Burdick* test requires the Court to only consider government interests

⁷⁸ See *infra* text accompanying notes 124-200.

⁷⁹ See *infra* text accompanying notes 81-96.

⁸⁰ See *supra* text accompanying note 44 (summarizing minimum rationality review in *Heller v. Doe*).

⁸¹ 504 U.S. 428, 434 (1992), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

⁸² See *supra* text accompanying note 48. See also *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (“[B]ecause [the court] never require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature.”). See generally *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (“[W]e are not bound by the parties’ arguments as to what legitimate state interests the statute seeks to further.”); *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) (emphasis added) (“Even if Soto’s stated justification . . . is insufficient, this Court is *obligated to seek out* other conceivable reasons . . .”).

⁸³ See *Burdick*, 504 U.S. 440 (“We think these legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii’s voters.”). Admittedly, the Court in both related voting rights cases of *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983), and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), talked about “important” interests to regulate – an intermediate requirement regarding government interests. See *infra* text accompanying notes 101-04. However, those references appeared to be completely unnecessary to the cases. Indeed, when cataloguing the state’s interests, the majority noted that in *Timmons*, “States certainly have an

“put forward by the government” in the litigation, not “any conceivable” government interest to be argued to the Court.⁸⁴ Thus, the ability of the Court to make up conceivable interests to justify a statute at minimum rationality review does not exist under “reasonableness balancing.”⁸⁵

Second, *Burdick* represents a “reasonableness balancing” concerned with the extent of the statute’s benefits versus the amount of the burden placed on the individual, not merely whether the statute is rationally advancing any legitimate interests. As phrased in *Burdick*, the question is whether the state’s regulatory interests are “sufficient to justify” “reasonable, nondiscriminatory restrictions.”⁸⁶ Part of this balance, as stated in *Burdick*, does involve the Court considering less burdensome alternatives to determine “the extent to which those interests make it necessary to burden the plaintiff’s rights.”⁸⁷ The only issue under minimum rationality review is whether the burden on the individual is irrational.⁸⁸

Third, as stated in *Burdick*, the court does the balancing of benefit and burdens to determine the reasonableness of the government action.⁸⁹ Thus, under the *Burdick* reasonableness balancing test, to determine whether a law exceeds constitutional boundaries, a court, not a legislature, must “weigh the

interest in protecting integrity, fairness, and efficiency of their ballots and election processes,” without any further finding that those interests were important or substantial. 520 U.S. at 364-65.

⁸⁴ *Burdick*, 504 U.S. at 434 (“precise interests put forward by the State”), *citing Andersen*, 460 U.S. at 789.

⁸⁵ While making up conceivable interests is permitted under minimum rationality review, *see supra* note 82 and accompanying text, it has been noted that, in any event, the Supreme Court rarely considers hypothetical interests unconnected to government arguments. *See* Dana Berliner, *The Federal Rational Basis Test – Fact or Fiction*, 14 GEORGETOWN J.L. & PUB. POLY. 373, 387-88 (2016) (noting that “when the Supreme Court heard the case [*Armour v. City of Indianapolis*, 566 U.S. 673 (2012)], *aff’g*, 946 N.E.2d 553, 562 (Ind. 2011)] it did not decide it based on [the State Supreme Court’s] fabricated rationale; . . . the fact that the Court itself did not mention the fabricated rationale in its opinion suggest that judicially-invented purposes provide a less than secure finding for law.”).

⁸⁶ *Burdick*, 504 U.S. at 434, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). *See also Anderson*, 460 U.S. at 806-08 (Rehnquist, J., joined by White, Powell & O’Connor, JJ., dissenting) (regulation permissible as allowing “reasonable” access to the ballot.”); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (a state’s “regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.”) *Id.* at 358, *citing Burdick*, 504 U.S. at 434.

⁸⁷ *Burdick*, 504 U.S. at 434, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

⁸⁸ *See supra* text accompanying notes 64-66.

⁸⁹ *Burdick*, 504 U.S. 434 (“A court . . . must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments’”) (citations omitted). *See also Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (“Only after weighing all these factors is a reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic, as we have recognized, there is “no substitute for the hard judgments that must be made.”).

character and magnitude of the asserted injury . . . against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule.’”⁹⁰ There is not the kind of substantial deference to legislative or executive judgment on the rationality of the government action that appears at minimum rationality review.⁹¹

Fourth, 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*,⁹² reviewing the less than substantial burden on a prisoner’s fundamental right to marry, the Court said that while *Turner v. Safley*’s “reasonableness” standard for determining marriage rights of prisoners “is not toothless [*i.e.*, not minimum rationality review],” “[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder.” Further, under the *Burdick* kind of “reasonableness balancing” the challenger still has the burden to prove the regulation is unconstitutional.⁹³

In the context of *Burdick*, use of “reasonableness balancing,” rather than minimum rationality review, reflects that when dealing with a fundamental right, like the right to vote, minimum rationality review is not appropriate, as it does not take into account that a fundamental right is at stake. As Justice Scalia

⁹⁰ *Burdick*, 504 U.S. at 434. *See also id.* at 448 (Kennedy, J., joined by Stevens & Blackmun, JJ., dissenting) (the State “must put forward the state interests which justify the burden so that we can assess them.”). *See generally* *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (Kennedy, J., opinion for the Court) (“[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. *See 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 of that supreme function.’)); *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality opinion of Breyer, J., joined by Roberts, C.J., and Alito, J.), *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (court makes “independent examination of the whole record”).

⁹¹ *See supra* text accompanying notes 44, 57-66.

⁹² *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989), *citing* *Turner v. Safley*, 482 U.S. 78, 89 (1987). *See also* *District of Columbia v. Heller*, 554 U.S. 570, 690 (2008) (Breyer, J., joined by Stevens, Souter & Ginsburg, dissenting) (“In applying this kind of [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.”), *citing, inter alia*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Mathews v. Eldridge*, 424 U.S. 319, 339-349 (1976) (applying a similar reasonableness balancing test to determine what process is due, the Court noted, “[S]ubstantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs.” *Id.* at 349).

⁹³ The dissent in *Burdick* would have put the burden on the State, but that was because the dissent found the burden to be “significant” which under Court doctrine would trigger strict scrutiny under the right to vote, *see infra* text accompanying notes 217-18, where the burden is properly on the State, *see infra* text accompanying note 105.

noted in *District of Columbia v. Heller*,⁹⁴ 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. 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.⁹⁵ Because this “reasonableness balancing” is a more stringent form of review, but still permits the government to use legitimate interests to justify the regulation, as at rational review, it can be called 2nd-order reasonableness balancing.⁹⁶

2. Heightened Reasonableness Balancing (or 3rd-Order Reasonableness Balancing)

As discussed in Part VI,⁹⁷ in some cases involving “reasonableness balancing” the Court has shifted the burden from the challenger to prove the government regulation is “unreasonableness/excessive” to the government to prove that their action is “reasonable/not excessive.” To distinguish all these levels of review which involve “legitimate government interests” being used, it is perhaps appropriate to call these levels: (1) minimum rationality review, or just rational review⁹⁸; (2) reasonableness balancing, or 2nd-order reasonableness balancing⁹⁹; and (3) heightened reasonableness balancing, or 3rd-order reasonableness balancing.¹⁰⁰

⁹⁴ 554 U.S. 570, 628 & n.27 (2008) (Scalia, J., opinion for the Court).

⁹⁵ See, e.g., *Harris v. McRae*, 448 U.S. 297, 316-18 (1980). See also *Planned Parenthood v. Casey*, 505 U.S. 966, 971-76 (1992) (Rehnquist, J., joined by White, Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part) (rejecting *Roe* and *Casey*’s finding of a fundamental right to an abortion, and thus applying to the “spousal notification” provision standard non-fundamental social or economic legislation “minimum rationality review”).

⁹⁶ See generally KELSO & KELSO, *supra* note 38, at § 7.2.1 at page 186 (using the terminology “2nd-order rational review” to describe this “reasonableness balancing” approach). Upon reflection, to make it clearer that this level of scrutiny is higher than the kind of minimum rationality review used for standard social and economic regulation under equal protection and due process analysis, and it does not involve merely asking whether the regulation rationally advances reasonably conceivable legitimate governmental interests, the term used in this article is “2nd-order reasonableness balancing,” rather than “2nd-order rational review.” The term “2nd-order” reflects this test is higher than minimum rationality review, but the term “reasonableness balancing” reflects it is not a matter of merely asking whether the government action is rationally related to furthering the government’s interests. Of course, as long as one follows the elements of this *Burdick* review, whether it is called “2nd-order rational review” or “2nd-order reasonableness balancing” does not make any difference in terms of the standard of review.

⁹⁷ See *infra* text accompanying notes 283-316.

⁹⁸ See *supra* text accompanying note 11.

⁹⁹ See *supra* text accompanying notes 96.

¹⁰⁰ See generally KELSO & KELSO, *supra* note 38, at § 7.2.1 & page 186 (using the terminology “3rd-order rational review” to describe this “reasonableness balancing” approach). As with 2nd-order reasonableness balancing, see *supra* note 96 and accompanying text, to make it clearer that this level of scrutiny is higher than the kind of minimum rationality review used for standard social and economic

C. Standards of Review Higher than Rational Basis or Reasonableness Balancing

1. Intermediate Review

Under intermediate review, the government must prove the government action: (1) advances important/significant/substantial government ends; (2) is substantially related to advancing those ends; and (3) is not substantially more burdensome than necessary to advance those ends.¹⁰¹ Important, significant, or substantial ends seem to reflect the same level of government interest, higher than mere legitimate interests at rational review, but less than compelling interests required at strict scrutiny.¹⁰²

regulation under equal protection and due process analysis, and it does not involve merely asking whether the regulation rationally advances reasonably conceivable legitimate governmental interests, the term used in this article is “3rd-order reasonableness balancing,” rather than “3rd-order rational review.” This “3rd-order reasonableness balancing” involves the same kind of balancing as at “2nd-order reasonableness balancing,” but shifts the burden to the government to justify its action.

¹⁰¹ See generally CHEMERINSKY, *supra* note 11, at 699 (“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 CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2, at § 20.1 nn.12-15, 22-24, 28 (2019 Orig. Ed. 2014) (available at: <http://libguides.stcl.edu/kelsomaterials>). Under intermediate review, the government always has the burden to justify its course of action. CHEMERINSKY, *supra* note 11, at 699 (“Under intermediate scrutiny, the government has the burden of proof.”); KELSO & KELSO, *supra* note 38, at § 26.1.3 n.82, *citing* United States v. Virginia, 518 U.S. 515, 529 (1996). While the cases are not perfectly consistent, the best understanding is that at intermediate review “actual” or “plausible” interests may be considered to justify the statute, *id.* at § 26.1.3 nn.92-99, but not implausible reasons even if “put forward by the government in litigation,” which can be used under “reasonableness balancing,” see *supra* note 84 and accompanying text, or “any reasonably conceivable” legitimate government interest, which can be used under minimum rationality review, see *supra* notes 48, 82 and accompanying text.

¹⁰² 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) (in 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.”’”) (citations omitted) (emphasis added); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (in 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).

Under intermediate review, government action must be shown to be substantially related to advancing the government's interest, not merely rationally or reasonably related to advancing the government interest,¹⁰³ and the government action cannot be substantially more burdensome than necessary to achieve the government's interest.¹⁰⁴

2. Strict Scrutiny Review

At strict scrutiny, the statute must: (1) advance compelling/overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends.¹⁰⁵ Only "compelling" or "overriding" interests can justify a statute at strict scrutiny, not substantial interests of intermediate review or mere legitimate interests at rational review.¹⁰⁶ At strict scrutiny the statute must be both substantially and directly related to advancing the compelling interests.¹⁰⁷ At strict scrutiny, the government must use the least burdensome (or least restrictive)

¹⁰³ See e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (under intermediate review gender classifications "must serve important government objectives and must be substantially related to achievement of those objectives").

¹⁰⁴ See, e.g., *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (under intermediate review government cannot "burden substantially more speech than is necessary" to further government ends). For detailed discussion of the intermediate scrutiny standard of review, see Kelso, *supra* note 9 ("The Structure of Intermediate Review").

¹⁰⁵ See CHEMERINSKY, *supra* note 11, at 699 ("Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government interest. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative."). See also KELSO & KELSO, *supra* note 101, at § 20.1 nn.1-11, 15-22, 25-28. Under strict scrutiny, the government always has the burden to justify its course of action. CHEMERINSKY, *supra* note 11, at 699 ("Under intermediate scrutiny, the government has the burden of proof.") ("The government has the burden of proof under strict scrutiny . . ."); KELSO & KELSO, *supra* note 38, at § 26.1.3 n.82, citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989). Under Court doctrine only "actual" government interests can be used at strict scrutiny, *id.* at 26.1.3 nn.85-86, while at intermediate review "actual" or "plausible" interests may be considered to justify the statute, see *supra* note 101; even implausible reasons if "put forward by the government in litigation can be used under "reasonableness balancing", see *supra* note 84 and accompanying text, or "any reasonably conceivable" government interest, which can be used under minimum rationality review, see *supra* notes 48, 82 and accompanying text.

¹⁰⁶ For discussion of the strict scrutiny requirement of a "compelling/overriding" interest to regulate, see *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove . . . [its] 'classifications are constitutional only if they are narrowly tailored to further *compelling* governmental interests.'") (emphasis added) (citations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (in applying strict scrutiny to a ban on interracial marriage, the Court noted: "There is patently no legitimate *overriding* purpose independent of invidious racial discrimination which justifies this classification.") (emphasis added).

¹⁰⁷ Because the regulation must be "necessary" to advance the government's ends under strict scrutiny, this means "unnecessary" underinclusiveness will render the regulation unconstitutional. In addition, the regulation must adopt means that "directly advance" the government ends, not merely

effective alternative, not merely, as at intermediate review, an alternative not substantially more burdensome than necessary.¹⁰⁸

The Court often phrases the last two parts of strict scrutiny as requiring the statute or regulation be “precisely tailored” or “necessary”; for intermediate review, the last two prongs are often phrased as the statute or regulation must be “narrowly drawn.”¹⁰⁹ But sometimes the Court uses the phrase “narrowly drawn” even under strict scrutiny.¹¹⁰ Predictability would be aided, of course, if the Court would reserve the term “narrowly drawn” for intermediate review, and consistently use the term “necessary” or “precisely tailored” for strict scrutiny.

III. Minimum Rational Review, Not Any Form of 2nd-Order Review or Rational Review with Bite, in the Context of Standard Social or Economic Regulation Under Equal Protection Clause Review

A. Suggestion in Some Cases That a Heightened Form of Rational Review is Being Applied

As noted in Part II.A,¹¹¹ since 1937 the Court has applied a minimum rationality review test for standard economic or social regulation under the Equal Protection and Due Process Clauses. While deferential,

“substantially advance” those ends, as at intermediate review. It is clear that this requirement of a “direct relationship” exists at strict scrutiny. Commercial speech cases involve a less rigorous form of scrutiny than strict scrutiny. See R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 370-73 (2016). Yet the Court has stated that for commercial speech regulation, under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980), the regulation must “directly advance the government’s interest.” Since a “direct relationship” is required in commercial speech cases, *a fortiori* such a requirement exists at strict scrutiny. See generally *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (Kennedy, J., plurality opinion) (“The First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest. There must be a *direct causal link* between the restriction imposed and the injury to be prevented.”) (emphasis added) (citation omitted).

¹⁰⁸ See CHEMERINKSY, *supra* note 11, at 699 (“The government . . . must show that it cannot achieve its objective through any less discriminatory alternative.”). For further discussion of the strict scrutiny standard of review, see Kelso, *supra* note 10.

¹⁰⁹ Compare *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990) (“precisely tailored to serve [a] compelling state interest”); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“necessary”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J., announcing the judgment of the Court) (“precisely tailored”) with *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (“narrowly drawn” at intermediate review).

¹¹⁰ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“narrowly drawn”); *Boos v. Barry*, 485 U.S. 312, 317 (1988) (same); *United States v. Grace*, 461 U.S. 171, 177 (1983) (same).

¹¹¹ See *supra* text accompanying notes 41-76.

this test does not mandate “rubber-stamp” deference¹¹² such that the presumption of unconstitutionality is “impossible to rebut.”¹¹³ Even under minimum rationality review, the law must advance a “reasonably conceivable” legitimate interest,¹¹⁴ and be “rationally related” to advancing that legitimate interest.¹¹⁵ If not rationally related to a conceivable legitimate interest, courts will find the law irrational, or arbitrary, or capricious, as indicated by a listing in a recent article of more than 80 cases in the Supreme Court or lower federal courts since 1970 where challengers have prevailed under minimum rationality review.¹¹⁶

Some commentators and Supreme Court Justices have suggested that in some of these cases involving victories for the challengers something higher than rational basis review was used.¹¹⁷ One argument has been that the court did not consider “any conceivable basis” for the government action.¹¹⁸ Another

¹¹² See Evan Bernick, *Subjecting the Rational Basis Test to Constitutional Scrutiny*, 14 Geo. J.L. & Pol. 347, 351 (2016) (“social and economic regulations often receive the equivalent of a judicial rubber-stamp.”).

¹¹³ See BARNETT & BLACKMUN, *supra* note 4, at 215 (“Such a presumption of constitutionality is impossible to rebut.”).

¹¹⁴ See *supra* text accompanying notes 47-56. See also Berliner, *supra* note 85, at 375 (discussing the “reasonably conceivable” test); *id.* at 383-87 (application of the “reasonably conceivable” test).

¹¹⁵ See *supra* text accompanying notes 57-66. See also Berliner, *supra* note 85, at 377-78 (discussing the “rational relationship” test); *id.* at 388-99 (application of the “rational relationship” test).

¹¹⁶ Berliner, *supra* note 85, at 378-82 & nn.28-30.

¹¹⁷ For commentators, see, e.g., BARNETT & BLACKMAN, *supra* note 4, at 215-19; Farrell, *supra* note 3, at 442-43; Holoszyc-Pimentel, *supra* note 3, at 2071-76; Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 21-22 (1972) (classic article suggesting a “rational review with bite” standard). For Supreme Court Justices, see, e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 458-59 (1985) (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment and dissenting in part); *Heller v. Doe*, 509 U.S. 312, 335-36 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., dissenting) (implying that *Cleburne* is a higher standard of scrutiny than normal minimum rationality review applied by the majority in *Heller*); *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”); *Hellerstedt*, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (“Whatever the Court claims to be doing, in practice it is treating its ‘doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied.’ Williams-Yulee, 135 S. Ct. at 1673 (Breyer, J., concurring). The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any case.”).

¹¹⁸ BARNETT & BLACKMAN, *supra* note 4, at 219 (discussing *Romer v. Evans*, 517 U.S. 620 (1996)); Farrell, *supra* note 3, at 454 (discussing *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

argument is that the court did not properly defer to legislative judgment on whether a rational relationship existed to the legitimate interests which were identified.¹¹⁹

As discussed in the remainder of this section, such findings of unconstitutionality do not mean some higher standard of minimum rationality review was being applied. With the exception of equal protection cases that also involve the right-to-travel, such as *Zobel v. Williams*, *Williams v. Vermont*, or *Hooper v. Bernalillo Cty. Assessor*,¹²⁰ which are better viewed as 2nd-order reasonableness balancing right-to-travel Due Process Clause cases, discussed *infra* at Part V.A.3,¹²¹ or cases involving higher standards of review, such as the intermediate scrutiny in *Plyler v. Doe*,¹²² the rest of the 80+ cases presented in the article discussed above involve standard minimum rationality review, as the author of that article indicated.¹²³

B. Only Standard Minimum Rationality Review Was Applied in The Equal Protection Cases

1. Legitimate Interests and the Any Conceivable Basis Test

*Romer v. Evans*¹²⁴ is a case where it is sometime alleged that the Court looked to actual purposes, rather than any conceivable purpose, in rendering its decision.¹²⁵ *Romer* involved a referendum passed by

¹¹⁹ BARNETT & BLACKMAN, *supra* note 4, at 216-17 (discussing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)); Farrell, *supra* note 3, at 461 (same); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 373-75 (1999) (discussing *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973)).

¹²⁰ *Zobel v. Williams*, 457 U.S. 55 (1982); *Williams v. Vermont*, 472 U.S. 14 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985), all discussed *infra* at text accompanying notes 233-38.

¹²¹ See *supra* text accompanying notes 229-38.

¹²² 457 U.S. 202, 230 (1982) (government must show its regulation advances “some substantial state interest.”); *id.* at 238 (Powell, J. concurring) (“Our review in a case such as these is properly heightened.”). The majority opinion in *Plyler* did use loose language at one point in saying, “[T]he discrimination contained in [this statute] can hardly be considered rational unless it furthers some substantial goal of the State.” *Id.* at 224. However, the Supreme Court clarified in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988), that *Plyler* involved the same kind of intermediate scrutiny used in “discriminatory classifications based on sex and illegitimacy.” This was justified even in *Plyler* based on the same reasons intermediate review is used in illegitimacy cases, such as *Clark v. Jeter*, 486 U.S. 456, 461 (1988), that burdening a child for the illicit behavior of the parent is “illogical” and “unjust.” 457 U.S. at 219-20; *id.* at 238 (Powell, J., concurring).

¹²³ See Berliner, *supra* note 85, at 382-99, discussed at *supra* note 116 and accompanying text.

¹²⁴ 517 U.S. 620 (1996).

¹²⁵ See BARNETT & BLACKMAN, *supra* note 4, at 219 (“Justice Kennedy was concerned about whether the classification was *actually* adopted for an improper reason.”); Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEORGETOWN J.L. & PUB. POLY. 401, 411-13 (2016) (*Romer*’s analysis is consistent with court inquiry into “actual purposes” for the regulation).

Colorado voters which banned all state and local governments in Colorado from adopting any provision “entitl[ing] any person or class of persons to have or claim any minority status, quota preference, protected status or claim of discrimination.”¹²⁶ Justice Kennedy wrote for the Court in *Romer* that Amendment 2 of the Colorado Constitution violated the Equal Protection Clause because it lacked a rational relation to a legitimate end. Amendment 2 barred any law entitling gays, lesbians, or bisexuals to “claim any minority status, quota preferences, protected status or claim of discrimination.”¹²⁷ The state had argued that the Amendment was designed to respect other citizen's freedom of association, particularly landlords or employers who had personal or religious objections to homosexuality, and that the state had an interest in conserving resources to fight discrimination against other groups.¹²⁸ Justice Kennedy replied that the breadth of Amendment 2 was so far removed from these particular justifications that they could not be credited, and the law seemed merely to make homosexuals unequal to everyone else with respect to seeking aid from the government.¹²⁹ Consistent with faithful application of the (1) any “reasonably conceivable” legitimate basis test, the Court concluded that given the breadth of the statute “the amendment seems inexplicable by anything but animus toward the class it affects; [thus] it lacks a rational relationship to legitimate state interests.”¹³⁰

It has been alleged, “In a world where the Court is free to hypothesize an unlimited number of governmental purposes, there is no need to develop a theory that distinguishes permissible from impermissible purposes. It is always possible to imagine some legitimate purpose that might have been the motivation of a statute, even if the legislature never considered that purpose.”¹³¹ This statement is in error. Although the Court may consider conceivable purposes, it is necessary to have a theory about what conceivable purposes are permissible/legitimate and which are not, so that some conceivable purposes to which the statute might be rationally related can be rejected as illegitimate to consider.¹³² At minimum rationality review, the interests do not have to be the actual purposes, as they do at strict scrutiny,¹³³ or even actual or plausible purposes, as is required at intermediate review.¹³⁴ They do have

¹²⁶ 517 U.S. at 624.

¹²⁷ *Id.*

¹²⁸ *Id.* at 635.

¹²⁹ *Id.* Justice Kennedy had expounded on the breadth of the exclusion wrought by Amendment 2 based upon its affect to deny gay and lesbians any “protected status or claim of discrimination” earlier in his opinion for the Court. *Id.* at 626-31.

¹³⁰ *Id.* at 632. The use of “(1)” in the text reflects which aspect of minimum rational review was the focus of the court’s inquiry. For summary of issues (1), (2)(a), (2)(b), (3)(a), and (3)(b), see *supra* text accompanying notes 70-76.

¹³¹ Farrell, *supra* note 3, at 458.

¹³² See *supra* text accompanying notes 49-56.

¹³³ See *supra* note 105 and accompanying text.

¹³⁴ See *supra* note 101 and accompanying text.

to be “reasonably conceivable,” not irrational to postulate.¹³⁵ As noted, under rational basis review, any reasonably conceivable interest can be used to support the constitutionality of the statute.¹³⁶ However, if the conceivable interest is based on an illegitimate purpose, such as in *Romer* animus against a politically unpopular group,¹³⁷ the statute will not be upheld.

Justices in dissent argued for two conceivable legitimate purposes the Court failed to consider: (1) the moral belief of the majority of the electorate that homosexual acts are immoral¹³⁸ and (2) Amendment 2 was a desire to ban any “special treatment” of homosexuals, such as affirmative action preferences.¹³⁹ With regard to the view the law reflected a customary or traditional view that homosexuality is morally wrong and socially harmful, the dissent viewed this customary or traditional animus toward gays and lesbians as a legitimate interest based upon the Court’s 5-4 decision in 1986 in *Bowers v. Hardwick*.¹⁴⁰ *Bowers* had upheld a law criminalizing sodomy applied to a homosexual couple.¹⁴¹ However, as has been noted, the *Bowers* decision is inconsistent with the line of cases since 1954 where mere customary or traditional moral disapproval of an activity does not count as a legitimate interest.¹⁴² *Bowers* itself was specifically overruled on this ground in 2003 in *Lawrence v. Texas*.¹⁴³ As Justice Kennedy noted in *Lawrence*, “[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation [in *Loving v. Virginia*, 388 U.S. 1 (1967)] from constitutional attack.”¹⁴⁴ Thus, this interest of moral disapproval, while conceivable, is not a legitimate

¹³⁵ See *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citations omitted) (“any reasonably conceivable state of facts” that could provide a rational basis for the classification and must “find some footing in the realities of the subject addressed by the legislation.”). As noted, these requirements of interests that are “reasonably conceivable” and laws that have some “rational” basis with some footing in “realities” is reflective of judicial decisions committed to reason. See *supra* notes 54-55 and accompanying text.

¹³⁶ See *supra* text accompanying notes 44, 47-48; Farrell, *supra* note 3, at 456-57, citing, *inter alia*, *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

¹³⁷ 517 U.S. at 632. On illegitimate interests generally, see *supra* text accompanying notes 49-56.

¹³⁸ 517 U.S. at 636 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

¹³⁹ *Id.* at 637-39.

¹⁴⁰ *Id.* at 636, citing *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁴¹ 478 U.S. at 187-90.

¹⁴² See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and after Lawrence v. Texas*, 88 Minn. L. Rev. 1233, 1247-58 (2004).

¹⁴³ 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

interest that can be used under minimum rationality review, although *Romer* in 1996 may have foreshadowed this conclusion that the Court explicitly reached 7 years later in *Lawrence*.¹⁴⁵

An additional possible legitimate interest raised by dissenting Justices in *Romer* would be to view Colorado Amendment 2 as banning only affirmative action on behalf of gays and lesbians, not denying them all civil rights protections.¹⁴⁶ Banning affirmative action, whether racial, gender, or based on sexual orientation, has been held to be a legitimate government interest under the Equal Protection Clause since it only requires all parties to be treated equally.¹⁴⁷ The problem with this interest is that given the language of Colorado Amendment 2 such an interest was not “reasonably conceivable.” Had Colorado Amendment 2 barred any law entitling gays, lesbians, or bisexuals to “claim any minority status, [or] quota preferences” only, it would have been conceivable that it was an anti-affirmative action provision. Instead, Amendment 2 banned any law entitling gays, lesbians, or bisexuals to “claim any minority status, quota preferences, protected status or claim of discrimination.”¹⁴⁸ The addition of “protected status or claim of discrimination” in the language makes it clear the Amendment is not limited merely to banning affirmative action.¹⁴⁹ Further, even if the provision were viewed as merely requiring gays and lesbians to have recourse to a further constitutional amendment to protect their rights, instead of mere ordinary civil rights legislation,¹⁵⁰ that would be constitutional, as Justice Scalia admitted, only if there

¹⁴⁴ *Id.* at 577-78, *quoting* *Bowers v. Hardwick*, 478 U.S. 214, 216 (1986) (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

¹⁴⁵ This foreshadowing is reflected in the fact the Court noted in *Lawrence* in 2003 that *Bowers* was wrong “when it was decided,” *id.* at 578, and thus from 1986 on was not a proper basis for decisionmaking, including in 1996 in *Romer*. Justice O'Connor stated in *Lawrence*: “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review” *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). This is not true. The majority stated that there was no reasonably conceivable basis other than animus for the law, which follows standard rational basis review. *Romer*, 517 U.S. at 632

¹⁴⁶ 517 U.S. at 637-40 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

¹⁴⁷ *See, e.g.,* *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (Michigan constitutional amendment to prevent the state from adopting race-based affirmative action programs in public education, employment, and contracting constitutional); *Equity Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (Cincinnati charter providing for “no ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment” advances a legitimate interest).

¹⁴⁸ *See supra* text accompanying notes 126-27.

¹⁴⁹ *Romer*, 517 U.S. at 630 (“Amendment 2’s reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”).

¹⁵⁰ *Id.* at 639-40 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

were some “legitimate rational basis” for that action, which Justice Scalia found in *Bowers*’ moral disapproval of homosexuality,¹⁵¹ an interest not viewed as legitimate, but mere animus, as discussed earlier.¹⁵²

The sheer breadth of the discrimination was also the basis for the Court’s conclusion in 2013 in *United States v. Windsor*¹⁵³ that the Defense of Marriage Act (DOMA) refusal to grant to same-sex couples legally married in their states the same federal rights granted to legally married opposite-sex couples. As in *Romer*, the sheer breadth of the refusal to grant any federal rights made it clear that the law was not based on any reasonably conceivable justifications such as “thorny choice-of-law issues”¹⁵⁴ or “promoting procreation”¹⁵⁵ Any conceivable desire for “uniform treatment” under federal law¹⁵⁶ was hopelessly compromised by the inevitability of some non-uniform treatment either way: under DOMA, some valid state marriages are not treated equally under federal law; if DOMA is struck down, the federal government will give federal rights to same-sex couples in states which legalized same-sex marriage, but deny those rights to same-sex couples not permitted to marry in the states in which they reside. Based on the evident animus toward same-sex marriages indicated by the law, the Court held, “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and

¹⁵¹ *Id.* at 640-42.

¹⁵² *See supra* text accompanying notes 140-45.

¹⁵³ 570 U.S. 744, 749-52 (2013). After extended discussion, *id.* at 769-74, the Court concluded, “What was been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage.” *Id.* at 774.

¹⁵⁴ *Id.* at 796 (Scalia, J., joined by Thomas, J., dissenting), *noted in* Farrell, *supra* note 3, at 454. The problem is actually not so “thorny.” After *Windsor*, but before *Obergefell*, there was an issue whether individuals legally married in one state, who moved to a state not recognizing same-sex marriage, should be treated by the federal government as validly married (*i.e.*, follow the state law where marriage “celebration” took place) or as unmarried (*i.e.*, following the law where the parties are “domiciled”). In February 2014, Attorney General Eric Holder said same-sex marriages would be viewed as valid if the parties were married in a state lawfully (place of “celebration”). The issue became moot when the Court struck down all bans on same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁵⁵ *See, e.g.*, *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (finding DOMA constitutional), *noted in* Farrell, *supra* note 3, at 454. For discussion of the “irrationality” of trying to deny same-sex marriage on grounds of “procreation” or “raising children,” *see* KELSO & KELSO, *supra* note 38, at § 26.4.6 nn.479-80.

¹⁵⁶ *Windsor*, 570 U.S. at 775 (Roberts, C.J., dissenting).

dignity.”¹⁵⁷ The Court had earlier noted that “‘a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”¹⁵⁸

Windsor, of course, is an unusual case since in the background of the case was the question of whether under the Due Process Clause to extend the fundamental right to marry to same-sex couples. If extended, then *Windsor* would be a strict scrutiny case under the Due Process Clause, and not mere rational basis under the Equal Protection Clause, which the Court did adopt 2 years later in *Obergefell v. Hodges*.¹⁵⁹ As with *Romer* perhaps foreshadowing *Lawrence*, perhaps *Windsor* foreshadowed *Obergefell*, a point noted in Justice Scalia’s dissent in *Windsor*.¹⁶⁰

“Subjective ill will” could also be viewed as an illegitimate interest for regulation in an appropriate case. The Court said in 2000 in *Village of Willowbrook v. Olech*,¹⁶¹ “[T]he purpose of the equal protection clause of the 14th Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” The Court explained that the plaintiff need not allege membership in a class that suffered discrimination. The law can be unconstitutional as applied to a single individual either based upon “subjective ill will” or the plaintiff can show “she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”¹⁶²

¹⁵⁷ *Id.* at 775.

¹⁵⁸ *Id.* at 770, citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973).

¹⁵⁹ 135 S. Ct. 2584, 2598-99 (2015).

¹⁶⁰ 570 U.S. at 799-802 (Scalia, J., joined by Thomas, J., dissenting). The majority in *Windsor* explicitly did not tackle the question of extending the fundamental right to marry. *Id.* at 775. However, as Justice Scalia noted in dissent in *Windsor*, while not saying so explicitly, the Court’s opinion foreshadowed a constitutional right to same-sex marriages. *Id.* at 799-802; see also *id.* at 808-09 (Alito, J., dissenting) (“[S]ubstantive due process may partially underlie the Court’s decision today.”). The Court did adopt that view two years after *Windsor* in *Obergefell*, 135 S. Ct. 2584 (2015), holding that the fundamental right to marriage included the right of same-sex marriages. As a fundamental right, only actual purposes can be used to support the statute. See *supra* text accompanying note 105. From this perspective, perhaps the Court’s conclusion in *Windsor* regarding DOMA being based on illegitimate animus foreshadowed the “actual purpose” analysis under strict scrutiny in *Obergefell*. The district court’s opinion in *Windsor* showed how the same result could be defended clearly using traditional rational basis review. *Windsor v. United States*, 833 F. Supp. 2d 394, 402-06 (2012) (discussing how DOMA is not rationally related to any interest in preserving the traditional institution of marriage, childrearing and procreation, consistency and uniformity of federal benefits, and conserving public resources).

¹⁶¹ 528 U.S. 562, 564 (2000)

¹⁶² *Id.* at 564-65. In *Olech*, the Court relied only upon an allegation of irrational treatment to state a claim for relief. *Id.* at 565. See generally *Lauth v. McCollum*, 424 F.3d 631, 632-34 (7th Cir. 2005) (Posner, J., opinion) (discussing difficulty of proving in “class of one” cases that action was motivated by illegitimate “animus” or was not conceivably “rationally related” to legitimate ends).

2. Issue of the Required Correlation Between Classification and Purpose

As noted earlier from *Heller v. Doe*: “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” [On 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.”¹⁶³ Thus, even under classic minimum rationality review, there must be some evidence to support the rationality of the government action. Any conclusion that the “presumption of unconstitutionality is impossible to rebut”¹⁶⁴ is in error. While the challenger has the burden to establish the “irrationality” of the government action, once the challenger shows no actual evidence supports the rationality of the government’s action, nor any evidence exists of which the court can take judicial notice of what a reasonable government legislator could presume, then the government will, and should, lose unless the government comes up with some evidence to support its action.¹⁶⁵ Absent such evidence, under minimum rationality review the government should lose.¹⁶⁶

*City of Cleburne v. Cleburne Living Center*¹⁶⁷ involves a case where it is sometimes alleged that the court did not properly defer to legislative judgment as is required under minimum rationality review.¹⁶⁸ Multiple conceivable legitimate interests were examined by the Court. In *Cleburne*, the Court noted that any conceivable prejudice against the mentally retarded by persons in the neighborhood provided no legitimate reason to deny a permit for a home for the mentally retarded.¹⁶⁹ A second interest in protecting the mentally retarded from harassment by local middle school students was rejected as not rational, as the school had a special education section and no harassment occurred for those students by the other middle school students.¹⁷⁰ A third interest was concern about evacuation in the event of a

¹⁶³ 509 U.S. 312, 320-21 (1993) (citations omitted).

¹⁶⁴ See BARNETT & BLACKMUN, *supra* note 4 at 215.

¹⁶⁵ See generally Berliner, *supra* note 85, at 388-92 (discussing lack of any factual basis for laws).

¹⁶⁶ It is for this reason that the minimum rationality review test is not a “rubber stamp” or “impossible” to fail. See *supra* text accompanying notes 111-16.

¹⁶⁷ 473 U.S. 432 (1985).

¹⁶⁸ See BARNETT & BLACKMAN, *supra* note 4, at 216-17; Farrell, *supra* note 3, at 461.

¹⁶⁹ 473 U.S. 432, 448 (1985) (“But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737 (1964), and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. ‘Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).”).

¹⁷⁰ *Id.* at 449.

flood was rejected as other individuals permitted to reside on the property – physically infirm, aged, convalescent home – had similar flood evacuation problems.¹⁷¹ On the other hand, as has been noted, “It is at least conceivable that the city might have thought the mentally disabled might need more assistance than others in the situation of an evacuation from a flood or hurricane, but the Court never considered this.”¹⁷² This has even caused some Supreme Court Justices to call *Cleburne* an example of heightened rational basis review.¹⁷³

The reality is that the home's location was that it was located on “a five hundred year flood plain.”¹⁷⁴ The Court noted that this concern with the possibility of a flood and evacuation needs could hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit.¹⁷⁵ The same may be said of another concern of the Council – doubts about the legal responsibility for actions which the mentally retarded might take. The Court noted, “If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.”¹⁷⁶

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The Supreme Court noted that lower courts had found that “[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.”¹⁷⁷ The Court then noted, “The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state

¹⁷¹ *Id.*

¹⁷² Farrell, *supra* note 3, at 461. This “flood plain” argument is probably the best argument for saying *Cleburne* did not involve minimum rationality review. See Kelso & Kelso, *supra* note 38, at § 21.2.4.3 nn.96-102.

¹⁷³ 473 U.S. at 458-59 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment and dissenting in part); *Heller v. Doe*, 509 U.S. 312, 335-36 (Souter, J., joined by Blackmun and Stevens, JJ., dissenting) (implying that *Cleburne* is a higher standard of scrutiny than normal minimum rationality review applied by the majority in *Heller*).

¹⁷⁴ 473 U.S. at 449.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type.”¹⁷⁸ The city also urged that the ordinance is “aimed at avoiding concentration of population and at lessening congestion of the streets.”¹⁷⁹ The Court responded, “These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit.”¹⁸⁰

For all of the conceivable concerns – flood zone, responsibility for actions, size of home and number of people, or density regulation – the government action was thus (2)(a) “irrationally underinclusive” because there was no rational explanation for why persons who posed equal problems would have been granted a permit, but the home for the mentally disabled was denied a permit.¹⁸¹ Finally, in terms of developing Court doctrine, even if the 1985 decision in *Cleburne* could be viewed as some form of heightened rational review, a five-Justice majority clearly stated in 1993 in *Heller v. Doe* that only minimum rational review should be applied for regulations of the mentally impaired.¹⁸² Thus, there is no anomaly in the Court’s decisions in these kind of cases today.

*United States Department of Agriculture v. Moreno*¹⁸³ involved the constitutionality of § 3(e) of the Food Stamp Act of 1964. That Act, with certain exceptions, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household.¹⁸⁴ As the Court noted, “In practical effect, § 3(e) creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest. The latter class of persons is denied federal food assistance.”¹⁸⁵

¹⁷⁸ *Id.* at 449-50.

¹⁷⁹ *Id.* at 450.

¹⁸⁰ *Id.*

¹⁸¹ On being “irrationally underinclusive,” *see supra* text accompanying notes 62-63 (“A statute may be held to be ‘irrationally underinclusive’ if that statute fails to regulate certain individuals who are an equal part, or perhaps even a greater part, of creating some problem as are individuals whom the statute does regulate, unless there is some rational explanation for why the persons who are equally or a greater part of some problem are not being equally regulated.”).

¹⁸² 509 U.S. 312, 320-21 (1993) (citations omitted). A three-Justice dissent in *Heller* supported what they called the “*Cleburne*” kind of rational review. *Id.* at 335-36 (Souter, J., joined by Blackmun & Stevens, JJ., dissenting). No case since *Heller* has revisited this issue, and *Heller*’s clear use of minimum rationality review seems fixed as the Court’s review in these kind of cases. For example, a 5-Justice majority opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 366 (2001), made reference, in passing, to *Cleburne* adopting “minimum ‘rational basis’ review.”

¹⁸³ 413 U.S. 528, 534 (1978).

¹⁸⁴ *Id.* at 529, *citing* 7 U.S.C. § 2012(e), as amended in 1971, 84 Stat. 2048.

¹⁸⁵ *Id.*

In *Moreno*, the Court noted that animus against “hippie communes” could not be used to support an amendment to the food stamp program that denied benefits to households that included unrelated persons.¹⁸⁶ But the Court then considered a conceivable interest related to preventing fraud in the food stamp program. As the Court noted, “In essence, the Government contends that, in adopting the 1971 amendment, Congress might rationally have thought (1) that households with one or more unrelated members are more likely than “fully related” households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are “relatively unstable,” thereby increasing the difficulty of detecting such abuses.”¹⁸⁷

In response to this argument, the Court noted:

In practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. As previously noted, § 3(e) defines an eligible “household” as “a group of related individuals . . . (1) living as one economic unit (2) sharing common cooking facilities [and 3] for whom food is customarily purchased in common.” Thus, two unrelated persons living together and meeting all three of these conditions would constitute a single household ineligible for assistance. If financially feasible, however, these same two individuals can legally avoid the “unrelated person” exclusion simply by altering their living arrangements so as to eliminate any one of the three conditions. By so doing, they effectively create two separate “households” both of which are eligible for assistance. Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.¹⁸⁸

Thus, the Court noted, “[I]n practical operation, the 1971 amendment excludes from participation in the food stamp program, not those persons who are ‘likely to abuse the program,’ but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. . . . [T]he classification here in issue is not only ‘imprecise,’ it is wholly without any rational basis.”¹⁸⁹ This conclusion is consistent with traditional minimum

¹⁸⁶ *Id.* at 534-35 (“The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program. See H.R. Conf. Rep. No.91-1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, ‘(a) purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify the 1971 amendment.’ 345 F. Supp. at 314 n.11.”).

¹⁸⁷ *Id.* at 535.

¹⁸⁸ *Id.* at 537-38, *citing, inter alia*, *Knowles v. Butz*, 358 F. Supp. 228 (N.D. Cal. 1973).

¹⁸⁹ *Id.* at 538.

rationality review, since the regulation is (3)(a) “irrationally overinclusive” by punishing individuals who were not the targeted group concerned with fraud in the program.¹⁹⁰

In 1957, the Court did hold in *Morey v. Doud*,¹⁹¹ that a statute imposing licensing and financial standards on sellers and issuers of money orders unconstitutionally exempted the American Express Company. However, the Court overruled *Morey v. Doud* in 1976 in *New Orleans v. Dukes*.¹⁹² *Dukes* involved a ban in the New Orleans French Quarter on selling foodstuffs from pushcarts, with an exemption for vendors who had been operating for eight years. The exemption was upheld, with the Court explaining that *Morey* was a needlessly intrusive judicial infringement on a state's legislative powers to make exemptions for legitimate, rational reasons – here that some vendors had become part of the charm of the area. Indeed, clarifying the language from *Carolene Products* about deference to the legislature, the Court noted in 1980 in *United States Railroad Retirement Board v. Fritz*¹⁹³ that where there is a conceivable reason for governmental action, that reason can be used to support the action, it being constitutionally irrelevant whether the reasoning in fact underlay the legislative decision.

Of course, there are some cases where the Court applied minimum rationality review which would be viewed as triggering higher scrutiny today based on the discrimination in the law.¹⁹⁴ And there are some

¹⁹⁰ As noted earlier, *supra* text accompanying notes 111-16, even under traditional minimum rationality review, there must be some evidence the government action rationally advances the government interest. That court concluded no such evidence existed in *Moreno*. *Id.* at 537-38. This does not “turn on its head the rule that government need not provide any evidence of legislative purpose,” Farrell *supra* note 3, at 457, but rather just follows traditional minimum rationality review. Such a finding of “no evidence” in *Moreno* or “no reasonably conceivable legitimate interest, as in *Romer*, see *supra* text accompanying notes 124-52, does not mean the Court has “shifted the burden to the state,” as argued in Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy’s Retirement Removes the Most Lethal Quill From LGBT Advocates’ Equal Protection Quiver*, 69 *Syr. L. Rev.* 69, 83-84 (2019).

¹⁹¹ 354 U.S. 457 (1957).

¹⁹² 427 U.S. 297 (1976).

¹⁹³ 449 U.S. 166, 174-76 (1980).

¹⁹⁴ See, e.g., *Koch v. Board of River Port Pilot Commissioners for the Port of New Orleans*, 330 U.S. 552, 556-64 (1947) (rule that even otherwise qualified pilots must serve a 6-month apprenticeship to pilot ship to and through the Port of New Orleans constitutional, even where existing pilots had great discretion upon whom to take as apprentices, and they overwhelmingly favored relatives or friends of incumbents for the apprenticeships) (Rutledge, J., joined by Reed, Douglas & Murphy, JJ., dissenting) (viewing the case as similar to racial or religious discrimination which would trigger strict scrutiny under *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *Goesaert v. Cleary*, 335 U.S. 464, 465-67 (1948) (Michigan law upheld requiring a license for bartenders serving liquor in cities having a population of 50,000 or more, but providing “no female may be so licensed unless she be ‘the wife or daughter of the male owner’ of a licensed liquor establishment,” on the grounds that “Michigan evidently believes that the oversight assured through ownership of a bar by the barmaid’s husband or father minimizes hazards that may confront a barmaid without such protective oversight”) (Rutledge, J., joined by Douglas and Murphy, JJ., dissenting) (viewing the case as invidious discrimination that should trigger higher than minimum

cases which suggested a heightened rational review at the time they were decided, but in fact presaged a heightened standard of review which is used today. So, from today's perspective, they are simply heightened review cases. These include cases foreshadowing (1) intermediate review in gender discrimination cases,¹⁹⁵ (2) intermediate review in illegitimacy cases,¹⁹⁶ (3) less than substantial burdens on access to courts triggering reasonableness balancing review,¹⁹⁷ and (4) extending the fundamental right of privacy to make decisions about marriage to single individuals.¹⁹⁸ In each of these cases one can argue that at the time the case was framed as a minimum rationality review case under the equal protection clause, but applied a higher level of scrutiny.¹⁹⁹ From today's perspective, however, each case does involve a higher level of review and thus is not properly considered an anomalous case, but rather a case where the doctrine was not fully developed at the time, but is fully developed today.²⁰⁰

rationality review, which it would today under the intermediate standard of review applicable for gender discrimination adopted in *Craig v. Boren*, 429 U.S. 190 (1976)).

¹⁹⁵ See Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. Rev. 2070, 2078, 2106 (2015), citing *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (Stewart, J., concurs in the judgment) (Powell, J., joined by Burger, C.J., & Blackmun, J., concurring in the judgment). These results presaged intermediate review for gender discrimination adopted in *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁹⁶ See Holoszyc-Pimentel, *supra* note 195, at 2107-08, citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). This case presaged the intermediate review for illegitimacy cases adopted in *Trimble v. Gordon*, 430 U.S. 762, 769-73 & n.14 (1977) and *Clark v. Jeter*, 486 U.S. 456, 461-65 (1988).

¹⁹⁷ See Holoszyc-Pimentel, *supra* note 195, at 2106-07, citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (involving "double-bond prerequisite for appealing an FED [statutory eviction procedure] action"); *James v. Strange*, 407 U.S. 128, 139 (1972) (imposing liability on indigent defendant for state expenditures made to provide counsel required under *Gideon v. Wainwright*, 372 U.S. 335 (1963), where indigent defendants "denied basic exemptions accorded all other judgment debtors"). These cases presaged reasonableness review for nonsubstantial burden on access to courts, discussed *infra* notes 241-42 and accompanying text. See also Holoszyc-Pimentel, *supra* note 195, at 2106-07, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (due process case involving access to hearing before Fair Employment Practices Commission); *Jackson v. Indiana*, 406 U.S. 715 (1972) (indefinite commitment of criminal defendant solely on account of incompetency to stand trial violates due process and equal protection).

¹⁹⁸ See Holoszyc-Pimentel, *supra* note 195, at 2107, citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). As the Court noted in *Eisenstadt*, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*

¹⁹⁹ See Holoszyc-Pimentel, *supra* note 195, at 2078-2117.

²⁰⁰ One additional case sometimes cited by commentators as an example of heightened rational review is *Quinn v. Millsap*, 491 U.S. 95 (1989), cited in Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 Ind. L. Rev. 357, 405-07 (1999). *Quinn* involved a land-ownership requirement for an individual to serve on a board to consider reorganization of government structures and responsibilities. 491 U.S. 96-97. The Court considered two conceivable interests, but neither were rationally related to the land-ownership requirement. The Court explained

IV. Minimum Rational Review, Not Any Form of 2nd-Order Review or Rational Review with Bite, in the Context of Standard Social or Economic Regulation Under Due Process Review

A. Issue of Identifying any Reasonably Conceivable Legitimate Purpose of the Law

Although few cases have raised the issue of whether any reasonably conceivable legitimate purpose was being advanced in a minimum rationality review case under the Due Process Clause, one case where the issue did get raised was in *Sensational Smiles, LLC v. Mullen*.²⁰¹ In this case, the court noted that there is a split among courts on whether “economic protectionism” can ever be a legitimate interest.²⁰²

B. Issue of the Required Correlation Between Classification and Purpose

In 1973, in *United States Department of Agriculture v. Murry*,²⁰³ the Court held that a rule denying a household food stamp benefits merely because a child over 18 in that household had been claimed as a dependent on someone else’s tax for the preceding year was not rationally related to preventing fraud in the food stamp program. The result in the case is similar to the conclusion of no rational relationship to preventing fraud when denying food stamps to unrelated individuals living together, but granting

that “an ability to understand the issues concerning one’s community does not depend on ownership of real property.” *Id.* at 108. Second, the Court noted a state “may not rationally presume” that persons who do not own real property have less of a “tangible stake in the long-term future of [the] area.” *Id.* at 1007-08. Because landowners were not a greater part of any problem, the law was (3)(a) “irrationally overinclusive” in burdening individuals for no rational reason. *See generally supra* text accompanying notes 61-66 (discussing equal protection “underinclusiveness” and “overinclusiveness” analysis).

²⁰¹ 793 F.3d 281 (2nd Cir. 2015) (regulation that only licensed dentist may shine light emitting diode (LED) lamp at mouth of consumer to whiten teeth rational).

²⁰² *Id.* at 286-88 (concluding that “economic protectionism” can be a legitimate interest), *citing, inter alia*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 & n.5 (9th Cir. 2008) (“mere economic protectionism” not a legitimate interest); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“protecting a discrete interest group from economic competition” not a legitimate interest); *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (“economic protectionism” constitutes a legitimate interest). *See also* *St Joseph Abbey v. Casstille*, 712 F.3d 215, 222-23 (5th Cir. 2013) (“economic protection” not a legitimate interest”). *See generally* *Metropolitan Life Insur. Co. v. Ward*, 479 U.S. 869, 882-83 (1985) (“promotion of domestic business by discriminating against nonresident competitors” and “encouraging investment in Alabama assets and securities in this plainly discriminatory manner [of discriminating against non-resident corporations]” are not legitimate interests). The mere fact that courts may have disagreed about this question does not mean they are applying any scrutiny higher than minimum rationality review, just as the failure to find reasonably conceivable interests in *Romer*, *Lawrence*, or *Windsor*, *see supra* text accompanying notes 124-60, does not mean those cases applied a review higher than minimum rationality review. For an argument that all these cases do involve a higher standard of review (“credibility-questioning” review rather than “deferential” review), *see* Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 Nw. U.L. Rev. 487, 498-510 (2017).

²⁰³ 413 U.S. 508 (1973).

food stamps to related individuals living together in *United States Dep't of Agriculture v. Moreno*.²⁰⁴ Consistent with due process, the precise holding was that the regulation did not (2)(b) rationally serve to advance the government's concern with fraud.²⁰⁵ The Court noted, "We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives It therefore lacks critical ingredients of due process" ²⁰⁶

In *Craigmiles v. Giles*,²⁰⁷ a federal district court held that requiring individuals to have a funeral director license to sell caskets and urns was not rationally related to health concerns. The court noted that there was no evidence that such a limitation was (2)(b) rationally related to any actual health concern.²⁰⁸ Another similar case is *St. Joseph Abbey v. Castille*,²⁰⁹ where a state law restricting the sale of intrastate caskets to state-licensed funeral directors and funeral parlors was held (2)(b) to bear no rational relationship to any legitimate state interest in public health, safety, or consumer welfare. This is minimum rationality review being applied, despite the fact that other courts have concluded there are rational reasons for similar regulations.²¹⁰

An additional example of standard minimum rationality review being applied to find a regulation unconstitutional under a due process clause analysis is *Cornwell v. Hamilton*.²¹¹ In *Cornwell*, a federal district court held it was (3)(b) an irrational burden to apply cosmetology regulations to a hair braider whose activities involved only a small overlap with subjects covered by the regulations.²¹² Different conclusions under the Due Process Clause in tax cases just reflects different views on whether the

²⁰⁴ See *supra* text accompanying notes 183-90.

²⁰⁵ 413 U.S. at 512-14.

²⁰⁶ *Id.* at 514.

²⁰⁷ 312 F.3d 220 (6th Cir. 2002).

²⁰⁸ *Id.* at 225-26. The court also noted that any interest in merely protecting funeral directors from competition was not a legitimate interest. *Id.* at 224.

²⁰⁹ 712 F.3d 215, 223-27 (5th Cir. 2013) (casket-making Benedictine abbey allowed to compete in selling caskets).

²¹⁰ See *Powers v. Harris*, 379 F.3d 1208, 1215-16 (10th Cir. 2004) (limiting sale of caskets for in-state customers to licensed funeral directors, not Internet sellers, valid under due process as protecting vulnerable casket purchasers, who may be dealing with grief and other emotions, from overreaching sales tactics of non-licensed funeral directors); *Heffner v. Murphy*, 745 F.3d 56, 85-86 (3rd Cir. 2014) (prohibiting serving food and alcohol in "funeral establishments" rational as "health" measure).

²¹¹ 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

²¹² *Id.* at 1105-08.

minimum rationality review test can be met.²¹³ In none of these cases is anything other than standard minimum rationality review being applied.²¹⁴

V. Cases Involving “2nd-order Reasonableness Balancing”

Despite the Supreme Court never explicitly acknowledging this fact,²¹⁵ the Court in fact uses a “2nd-order reasonableness balancing” approach, separate from minimum rationality review, in a number of constitutional areas: (A) less than substantial burdens on unenumerated fundamental rights; (B) economic rights cases involving special Court concern; (C) non-viewpoint discrimination in a government-owned non-public forum under free speech doctrine; and (D) procedural due process cases.

A. Less than Substantial Burdens in Unenumerated Fundamental Rights Cases

For unenumerated fundamental rights cases, the Court typically used strict scrutiny for substantial severe/undue burdens on those rights, but only “2nd-order reasonableness balancing” for less than substantial burdens on those rights.²¹⁶ This can be seen by considering four areas of unenumerated fundamental rights: (1) the right to vote and access to the ballot; (2) the right of privacy; (3) the right to travel; and (4) the right of access to courts.

²¹³ See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10-14 (1992) (Court upholding California Proposition 13, which limited real property taxes to 1% of assessed valuation as of 1975-76, and permitted reassessment only when sold; Proposition 13 was rationally related to conceivable legitimate purposes of allowing people to know their tax burden at the time of purchase, avoiding taxes on appreciation due to inflation, and encouraging stable neighborhoods by creating an economic disincentive to move); *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 343-46 (1989) (Court held that a county tax assessor valuing real property at 50% of its most recent sale price, no matter when that most recent sale occurred, did not (2)(b) rationally serve any legitimate state interest.).

²¹⁴ It can be noted that some state courts have interpreted a due process clause in their state constitutions to call for more vigorous review than currently used by the United States Supreme Court. For example, in 1952, in *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 422-25 (1952), the United States Supreme Court upheld a state statute requiring an employer to give employees four hours to vote on election day, without loss of pay. In 1955, in *Heimgaertner v. Benjamin Electric Manufacturing Co.*, 128 N.E.2d 691, 696-99 (Ill. 1955), the Supreme Court of Illinois declared a similar law invalid under its state constitution. Even at the state level, however, such heightened due process use is in decline today. See generally Anthony B. Sanders, *The “New Judicial Federalism” Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U.L. REV. 457 (2005).

²¹⁵ See generally Kelso, *supra* note 107, at 307-16; R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. CONST. L.J. 225, 230-33 (2002).

²¹⁶ The discussion in this section is a summarized version of R. Randall Kelso, *The Structure of Planned Parenthood v. Casey Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L. REV. 75, 97-111 (2015). For discussion of the “2nd-order reasonableness balancing” test, see *supra* text accompanying notes 79-96.

1. Right to Vote and Access to the Ballot

As stated in the ballot access case of *Timmons v. Twin Cities Area New Party*,²¹⁷ “Regulations imposing severe burdens on 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.’” For these lesser burdens, 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.”²¹⁸

As noted in a previous article,²¹⁹ while the Court used the phrase “important” regulatory interests in *Timmons*, the Court actually examines any “legitimate” interest in the right to vote/ballot access cases, making the *Burdick/Timmons* line of cases a pure example of reasonableness balancing review. This doctrine applies also in the right to vote cases involving voter ID laws like *Crawford v. Marion County Election Bd.*²²⁰

2. Right to Privacy Cases

The same structure of “substantial obstacles” triggering strict scrutiny, but “less than substantial obstacles” triggering a “reasonableness balancing” test higher than minimum rationality review applies for burdens on the fundamental right to privacy. This can be seen in four areas involving the right of privacy: (a) the right to marry,²²¹ (b) the right to establish a home,²²² (c) the right to raise children,²²³ and

²¹⁷ 520 U.S. 351, 358, 369 (1997). *See also id.* at 371-72 (Stevens, J., joined by Ginsburg & Souter, JJ., dissenting); *id.* at 382 (Souter, J., dissenting).

²¹⁸ 504 U.S. 428, 433-34 (1992), *quoting* *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). *Burdick* was discussed *supra* text accompanying notes 81-96.

²¹⁹ Kelso, *supra* note 216, at 98 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (“If the State has open to it a less drastic way of achieving its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.”)).

²²⁰ Kelso, *supra* note 216, at 101-02, discussing *Crawford*, 553 U.S. 181 (2008). Justice Stevens said that however slight the burden may appear, it must be justified by “legitimate state interests sufficiently weighty to justify the limitations.” *Id.* at 190. Underscoring the fact that these voter ID cases were not minimum rationality review, the plurality opinion noted the “hard judgment” that these cases entail. *Id.* at 191.

²²¹ *See* Kelso, *supra* note 216, at 103-04 (right to marry cases), *citing, inter alia*, *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1992) (“significant” burden on right to marry triggers strict scrutiny; “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may

(d) the right of access to abortion.²²⁴ For example, as indicated in *Zablocki v. Redhail*,²²⁵ government regulations that interfere “directly and substantially” with the right to marry trigger strict scrutiny. On the other hand, the Court noted in *Zablocki*, “[W]e 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.”²²⁶

legitimately be imposed”); *Turner v. Safely*, 482 U.S. 78, 94-99 (1987) (applying reasonableness test higher than minimum rationality review to restrictions on right to marry of prisoners).

²²² See KELSO & KELSO, *supra* note 38, at § 27.3.3.1.B, *citing, inter alia*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 (1977) (analogizing right to establish a home as similar to right concerning child rearing, including *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972), which applied strict scrutiny review for substantial burden on right to rear children).

²²³ See KELSO & KELSO, *supra* note 38, at § 27.3.3.1.C, *citing, inter alia*, *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 263-67 (1993) (court considered a condom-distribution program to children at public schools that did not have a voluntary opt-out provision for parents who wished their children not to have access to the program; faced with this greater burden on parental rights, the court applied a strict scrutiny approach to this burden on their fundamental right to raise their child); *C.N. v. Ridgewood Board of Educ.*, 430 F.3d 159, 182-85 (3rd Cir. 2005) (school distributed survey to students on sexual topics without parental consent constitutes some burden, but only a minor burden, on parent’s child-rearing right, and is constitutional balancing parent’s interest in “how to introduce their children to sensitive topics” against the school’s interest in collecting on an anonymous basis information on “influences surround[ing] middle and high school students”); *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 148 F.3d 260, 274-77 (3rd Cir. 1998) (condom distribution program had a voluntary opt-out provision for parents who did not wish their child to participate in the program; given opt-out provision, no burden on parental rights and minimum rationality review applied).

²²⁴ See Kelso, *supra* note 216, at 83-97, *citing, inter alia*, *Planned Parenthood v. Casey*, 505 U.S. 833, 877-78 (1992) (joint opinion of Justices O’Connor, Kennedy, and Souter) (using the phrase “undue burden”, but defining it as a “substantial obstacle” to abortion choice); Kelso, *supra* note 216, at 111-14, *citing, inter alia*, *Gonzales v. Carhart*, 530 U.S. 124, 165-67 (2007) (same). Regarding the right to abortion, see also *infra* text accompanying notes 227-48.

²²⁵ 434 U.S. 374, 386-87 (1992).

²²⁶ *Id.* at 386-87 (emphasis added), *citing* *Califano v. Jobst*, 434 U.S. 47, 55 (1977) (Social Security Act provision which provides for continuation of child’s insurance benefits for a disabled dependent child who marries someone eligible for social security benefits, but discontinues benefits if child marries person ineligible to receive social security benefits “reasonable for Congress” to adopt). See also *Greenberg v. Kimmelman*, 494 A.2d 294, 298, 304-05 (N.J. 1985) (“Although constitutionally based, the right to marry remains subject to reasonable state regulation”; ban on casino employment by “any member of the immediate family of any State officer or employee, or person [including] full-time member of the Judiciary” constitutional as “reasonable.”).

Regarding the right to abortion, the Court clarified in 2016 that the *Planned Parenthood v. Casey* “undue burden” doctrine involves two steps: (1) whether the regulation is a “substantial obstacle” on abortion choice, rendering it an “undue burden,” and (2) even if not, is the regulation “reasonably related” to a “legitimate” interest, balancing both benefits and burdens, a second-order review higher than minimum rationality review.²²⁷ This was implied in the joint opinion of Justices O’Connor, Kennedy, and Souter in *Casey*, which was the controlling opinion in that case. The joint opinion noted, “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.”²²⁸

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.²²⁹

It is also consistent with the language in *Casey*, which stated, “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.”²³⁰

The language in the next sentence of the opinion – “Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden”²³¹ – reflects, in this

²²⁷ See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2308-10 (2016). See generally Kelso, *supra* note 216, at 94-97, 111-14, 122-23 & n.240-41 (2nd-order reasonableness balancing should apply to less than undue burdens on abortion rights); *id.* at 90-94 (for undue burdens on abortion rights, *Casey* should be understood to require strict scrutiny to apply, not a categorical finding of unconstitutionality, a categorical test being the precise text and normal understanding of *Casey*).

²²⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.) (emphasis added). Admittedly, in his opinion in *Gonzales v. Carhart*, 530 U.S. 124, 158 (2007) (Kennedy, J., opinion for the Court), Justice Kennedy in isolated places phrased the doctrine as whether the state “has a rational basis to act, and it does not impose an undue burden.” But such isolated language is inconsistent with other passages in *Gonzales*, and with theme in *Gonzales* that no substantial deference to the legislative exists in these cases, and with *Gonzales*’ reliance on *Casey*. See Kelso, *supra* note 216, at 113-14.

²²⁹ 505 U.S. at 873-74, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Norman v. Reed*, 502 U.S. 279 (1992).

²³⁰ 505 U.S. at 878.

²³¹ *Id.*

view, that under a “reasonableness” balancing test the state will prevail unless the challenger is able to show an “undue burden.” This is similar to the concern with a “clearly excessive” burden under the *Pike v. Bruce Church* test for Dormant Commerce Clause review;²³² “grossly excessive” burden under the *BMW v. Gore* test for unconstitutionality of punitive damage awards;²³³ not “reasonable and necessary” under the *U.S. Trust v. New Jersey* test in Contract Clause review;²³⁴ goes “too far” and thus is not reasonable under the *Penn Central* test for Takings Clause review;²³⁵ or whether the state’s interests justify “reasonable, nondiscriminatory restrictions” under *Anderson v. Celebrezze*.²³⁶ In each of these cases, the Court balances the benefits of the government action against the burdens to determine whether “reasonable” or “excessive.”²³⁷ This approach is also consistent with Justice Kennedy’s majority opinion in *Gonzales v. Carhart* that courts have “independent constitutional duty to review factual findings” under *Casey*.²³⁸

Despite this analysis, lower courts have sometimes phrased the issue as a simple dichotomy between what they view as “undue burdens,” which are presumptively unconstitutional, versus not “undue burdens,” which are presumptively constitutional.²³⁹ Others have noted it is a two-step requirement, but if the regulation is not a “substantial obstacle” it only must be rationally related to a legitimate interest.²⁴⁰ The Court clarified in *Whole Woman’s Health v. Hellerstedt*, that the *Casey* “undue burden”

²³² See *infra* text accompanying notes 263-68.

²³³ See *infra* text accompanying notes 273-76.

²³⁴ See *infra* text accompanying notes 269-72.

²³⁵ See *infra* text accompanying notes 277-80.

²³⁶ See *infra* text accompanying notes 218.

²³⁷ See Kelso, *supra* note 216, at 125-26.

²³⁸ 550 U.S. 124, 165 (2007)

²³⁹ 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).

²⁴⁰ 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

standard does involve two steps: (1) whether the regulation is a “substantial obstacle” on abortion choice, and (2) even if not, is the regulation “reasonably related” to a “legitimate” interest, balancing both “benefits” and “burdens.”²⁴¹

Given this balancing of benefits and burdens, *Hellerstedt* adopted 2nd-order reasonableness review.²⁴² The Supreme Court returned to this issue in *June Medical Services L.L.C. v. Russo*²⁴³, a case involving a requirement in Louisiana that a doctor have admitting privileges within 30 miles of a hospital, similar to the 30-mile admitting privileges requirement in Texas in *Hellerstedt*. A 4-Justice plurality reaffirmed this understanding of *Casey* as stated in *Hellerstedt* of requiring an analysis of both “benefits and burdens.”²⁴⁴ Four Justices in dissent acknowledged *Hellerstedt* did adopt this “benefit and burdens” analysis, but said this was not consistent with *Casey* and, in any event, should not be adopted in future cases.²⁴⁵ This conclusion that *Hellerstedt* is inconsistent with *Casey* is odd, not only given the previous discussion above, but also given that Justice Kennedy, a co-author of *Casey*, joining the majority opinion in *Hellerstedt*, and presumably knew what he was doing.²⁴⁶

In his separate concurrence, Chief Justice Roberts said that he viewed *Casey* and *Hellerstedt* as asking only (1) whether the regulation is a “substantial obstacle” on abortion choice and (2) even if not, is the regulation “reasonably related” to a “legitimate” interest, but that determination only made by considering whether it is “reasonable” to think the law provides some benefits, not a balancing of benefits and burdens.²⁴⁷ Since in his view, the Louisiana admitting privileges law at issue in *Russo* was as

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”).

²⁴¹ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) (Texas requirement that doctors have admitting privileges at hospitals within 30 miles of their clinics, and clinics must meet “surgical center” standards, “undue burdens”) (court must consider both “burdens a law imposes on abortion access together with the benefits those law confer”), *citing* *Casey v. Planned Parenthood*, 505 U.S. 887-98 (1992) (performing this balancing with respect to spousal notification provision); *id.* at 899-901 (joint opinion of O’Connor, Kennedy & Souter, JJ.) (same balancing with respect to parental notification provision).

²⁴² *See* Kelso, *supra* note 216, at 85-102, 111-14, 117-21.

²⁴³ 140 S. Ct. 2103 (2020).

²⁴⁴ *Id.* at 2212-13 (plurality opinion of Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ.).

²⁴⁵ *Id.* at 2153-54 (Alito, J., joined by Thomas, Gorsuch & Kavanaugh, JJ., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

²⁴⁶ For previous discussion of *Casey* and *Hellerstedt*, *see supra* text accompanying notes 227-44. For Justice Kennedy joining the majority opinion in *Hellerstedt*, *see* 136 S. Ct. at 2299.

²⁴⁷ *Id.* at 2135-39 (Roberts, C.J., concurring in the judgment).

much a “substantial obstacle” as the Texas admitting privileges law at issue in *Hellerstedt*, he voted with the plurality to strike it down under the (1) “substantial obstacle” part of the *Casey* test.²⁴⁸

3. Fundamental Right to Travel Cases

In 1969, in *Shapiro v. Thompson*,²⁴⁹ 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 travel. Budgetary and administrative justifications were held not compelling, and were not necessary because less burdensome means were available.²⁵⁰ 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*,²⁵¹ 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. On the other hand, less than substantial or less than severe burdens on the fundamental right to travel have triggered “reasonableness review” analysis.²⁵²

²⁴⁸ *Id.* at 2139-41. For further discussion supporting the *Russo* plurality’s understanding of *Casey*, and rejecting Chief Justice Roberts’ view as inconsistent with less-than-substantial burdens on fundamental rights generally, see Kelso, *supra* note 8, at Part VI.B nn.337-48.

²⁴⁹ 394 U.S. 618, 621-27 (1969).

²⁵⁰ *Id.* at 634-38. Dissenting in *Shapiro*, Justice Harlan stated it was a return to the “superlegislature” days of due process review in *Lochner v. New York*, 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 662 (Harlan, J., dissenting), *citing* *Lochner v. New York*, 198 U.S. 45 (1905). At least since *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the Court has continually rejected Justice Harlan’s view and applied an unenumerated fundamental rights analysis under the Due Process Clause.

²⁵¹ 415 U.S. 250, 253-70 (1974). Justice Rehnquist, dissenting, said that the right to travel was only remotely affected by the state’s durational residence requirement for non-emergency hospital service, and this was not an “urgent need” for the necessities of life or a benefit funded from current revenues to which the claimant may have contributed. *Id.* at 283-88 (Rehnquist, J., dissenting). See also *Dunn v. Blumstein*, 405 U.S. 330, 336, 351-54 (1972) (no need to show actual deterrence of travel; it is enough that a law penalize exercise of the right; a one-year durational residence law on voting “completely bar[s]” exercise of the fundamental right to vote, and even if a goal were compelling, like 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.”); *id.* at 363-64 (Burger, C.J., dissenting) (one-year residency rule, like being required to wait until 18 to vote, should be valid; strict scrutiny should not apply).

²⁵² For example, in *Vlandis v. Kline*, 412 U.S. 441, 452 n.9 (1973), *citing* *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn.1970), *aff’d summarily*, 401 U.S. 985 (1971). 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

This structure provides a way to understand right to travel cases, such as *Zobel v. Williams*, *Williams v. Vermont*, and *Hooper v. Bernalillo*, which some commentators have alleged applied some form of heightened rational.²⁵³ While the Justices deciding the cases said they were merely apply normal rational review,²⁵⁴ in fact these cases should have involved a choice between strict scrutiny for substantial burdens on travel rights or 2nd-order reasonableness balancing.

A good case for this structure is *Attorney General of New York v. Soto-Lopez*.²⁵⁵ In *Soto-Lopez*, the Court split on whether strict scrutiny should be applied. 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 strict scrutiny should be used because “even temporary deprivations of very important benefits and rights can operate to penalize migration.”²⁵⁶ Chief Justice Burger and Justice White, in separate concurrences, found that the law failed even rational basis, as in *Zobel* and *Hooper*.²⁵⁷

As in *Zobel* and *Hooper*, the Court did not 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, it should be reasonableness balancing. As Chief Justice Rehnquist has admitted, these “right to travel”

immediate and pressing need for preservation of life and health of persons unable to live without public assistance. In *Sosna v. Iowa*, 419 U.S. 393, 404-10 (1975); *id.* at 418 (Brennan, J., joined by Marshall, J., dissenting), 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. For the majority, Justice Rehnquist explained that this law was “reasonably 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) have a greater interest, and protecting judgments from collateral attack. *Id.* at 406-09. He said that unlike the situation in *Shapiro, Dunn*, and *Memorial*, the plaintiff was not “irretrievably foreclosed” from obtaining some part of what she sought. *Id.* at 405-06.

²⁵³ See, e.g., *Holoszy-Pimentel*, *supra* note 195, at 2111-14, citing *Zobel v. Williams*, 457 U.S. 55 (1982); *Williams v. Vermont*, 472 U.S. 14 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985).

²⁵⁴ See *Zobel*, 457 U.S. at 64-65; *Williams*, 472 U.S. at 23-28; *Hooper*, 472 U.S. at 618-24.

²⁵⁵ 476 U.S. 898 (1986).

²⁵⁶ *Id.* at 899-900, 907 (plurality opinion of Brennan, J., joined by Marshall, Blackmun & Powell, JJ.). 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. *Id.* at 907-12.

²⁵⁷ *Id.* at 912-16 (Burger, C.J., concurring in the judgment); *id.* at 916 (White, J., concurring in the judgment). Justice 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. *Id.* at 918-25 (O'Connor, J., joined by Rehnquist & Stevens, JJ., dissenting).

cases are similar to “voting rights” cases like *Rosario v. Rockefeller*, which have applied an “onerous burden” standard in a right to vote case, consistent with “reasonableness balancing.”²⁵⁸

4. 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.*,²⁵⁹ 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.²⁶⁰

In contrast, “less than substantial” burdens on the right of access to courts trigger “reasonableness review.” For example, in 1996 in *Lewis v. Casey*,²⁶¹ the Court considered a case involving complaints by prisoners that the prison law library was not adequately maintained, and noted that the proper standard of review was whether the prison practice was “reasonably related to legitimate penological interests,” citing *Turner v. Safley*’s reasonableness balancing approach. Similarly, in other access to court cases involving less than substantial burdens on access rights, the court has not applied the strict scrutiny of *M.L.B.*, but rather a reasonableness balancing approach.²⁶²

²⁵⁸ *Saenz v. Roe*, 526 U.S. 489 (1999) (Rehnquist, C.J., dissenting), *citing* *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973). Admittedly, the majority opinion in *Saenz v. Roe*, 526 U.S. 489, 502-07 (1999), 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 trigger, under the 14th Amendment Privileges or Immunities Clause, perhaps strict scrutiny, and more likely, an absolute categorical bar. 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 the strength of *Shapiro*. *Id.* at 506-07. 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 14th Amendment Privileges and Immunities Clause as unnecessary *dicta* in *Saenz*, not required to decide the case.

²⁵⁹ 519 U.S. 102, 106-07 (1996).

²⁶⁰ *Id.* at 116-17 (citations omitted).

²⁶¹ 518 U.S. 343, 361-64 (1996), *citing* *Turner v. Safely*, 482 U.S. 78, 87-91 (1987). For discussion of “reasonableness balancing” in *Turner*, see *infra* notes 271-72.

²⁶² See, e.g., *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973). In both *Kras* and *Ortwein*, while there is no fundamental right to bankruptcy (*Kras*) or to receive welfare benefits (*Ortwein*), and thus a modest fee requirement to file a case is not a substantial burden on access to

B. Special Economic Rights Cases

The “reasonableness balancing” approach is used not only by the Court in “less than substantial burden” on fundamental rights, but in a number of special economic rights cases. These include: (1) Dormant Commerce Clause review; (2) Contract Clause review; (3) review of punitive damages awards under the Due Process clause; and (4) Takings Clause review.

1. Dormant Commerce Clause Review

The Court uses a “reasonableness balancing” test in deciding whether a burden is “clearly excessive” under the *Pike v. Bruce Church, Inc.* test for Dormant Commerce Clause review.²⁶³ Under *Pike v. Bruce Church*, 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.²⁶⁴

This mirrors exactly the balancing of benefits, burdens, and consideration of less burdensome alternatives in *Burdick v. Takushi*: “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate [burdens]” against “the precise interests put forward by the State as justifications for the burden imposed by its rule [benefits],” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights” [consideration of less burdensome alternatives].²⁶⁵ Whether given this

courts, there is still some burden on the fundamental right of access to courts. Thus, under standard fundamental right analysis, *Kras* and *Ortwein* should trigger a reasonableness balancing approach. Language in both Court opinions in *Kras* and *Ortwein* support this analysis. In *Kras*, the Court stated that “the *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, 11 U.S.C. § 110(a)) from the claims of then-existing obligations. *Kras*, 409 U.S. at 448 (citations omitted) (emphasis added). Similarly, in *Ortwein*, the Court balanced the extent of the burden on the individual against the state interests in defraying some of the costs of administering the system by the imposition of modest fees. *Ortwein*, 410 U.S. at 659-60. Having said this, both the precise language in *Kras* and *Ortwein*, and the Court’s decision in *M.L.B.*, indicated only minimum rationality review was being applied. *M.L.B.*, 519 U.S. at 114-17, *citing*, *United States v. Kras*, 409 U.S. 434, 445 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973). This *dicta* in *M.L.B.* is in error. The actual analysis in *Kras* and *Ortwein* did a full benefit versus burden reasonable balancing analysis, and in both cases, while not involving a fundamental right such as child rearing at issue in *M.L.B.*, there is still some burden on the fundamental right of access to court, suggesting some higher than minimum rationality review should apply. *See generally*, Kelso, *supra* note 216, at 109-10.

²⁶³ 397 U.S. 137, 142 (1970).

²⁶⁴ *Id.*

²⁶⁵ 504 U.S. 428, 433-34 (1992), *quoting* *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

balance, the burden is “clearly excessive” under *Pike* or “reasonable” under *Burdick* reflects the same basic level of scrutiny.²⁶⁶

Lower federal courts are split over whether bare economic protectionism, without some independent public justification, can constitute a legitimate government interest.²⁶⁷ While the Supreme Court has not provided clear guidance on this issue, in cases involving Dormant Commerce Clause review the Court has strongly implied that simple economic protectionism cannot be used to justify a state law burdening interstate commerce.²⁶⁸

2. Some Contract Clause Review

Under modern Contract Clause review, the Court applies minimum rationality review for standard state regulation substantially burdening Contract Clause rights.²⁶⁹ In contrast, for government regulations burdening the government’s own contracts, the Court applies a “reasonableness balancing” approach in determining whether a regulation is not “reasonable and necessary,” as in *U.S. Trust v. New Jersey*.²⁷⁰ Under *U.S. Trust* – given the three-part factor balancing of the state’s “legitimate” interest; the statute’s means, including whether the benefits of the statute could be served “equally well” by an “evident and more moderate course”; and the “burden” on individual contract rights – the challenger has the burden to establish the regulation was not “reasonable and necessary” given the statute’s benefit.”²⁷¹ This “reasonableness balancing” test also applies under the Contract Clause for cases where a narrow range

²⁶⁶ See generally KELSO & KELSO, *supra* note 38, at § 20.3.2.1.D (discussing *Pike v. Bruce Church*, 397 U.S. 137 (1970); § 20.3.2.2 (discussing post-1986 Dormant Commerce Clause doctrine); Kelso, *supra* note 5, at 519-20 (Dormant Commerce Clause doctrine of *Pike v. Bruce Church* as reflecting a 2nd-order reasonableness balancing approach)

²⁶⁷ See *supra* text accompanying notes 201-02; Berliner, *supra* note 4, at 383-85, and cases cited therein.

²⁶⁸ See, e.g., R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court’s Approach to the Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 16-18 (1995), discussing, *inter alia*, *Oregon Waste Systems v. Oregon Dep’t of Env’tl. Quality*, 114 S. Ct. 1345, 1354 (1994) (both “economic protectionism” and “resource protectionism” are illegitimate governmental interests under Dormant Commerce Clause analysis).

²⁶⁹ See *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 & n.14 (1986) (when a state is not a contracting party “[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”). Note that under modern Contract Clause review, even this minimum rationality kind of review is only triggered if the state regulation is a “substantial burden” on Contract Clause rights. In the absence of a “substantial burden” there is no Contract Clause review at all, *id.* at 411-12, although there would naturally be the kind of minimum rationality review analysis under equal protection and due process for general social or economic regulation, as discussed *supra* text accompanying notes 41-76.

²⁷⁰ 431 U.S. 1, 22, 31 (1977).

²⁷¹ *Id.*

of contract actors are being regulated, and thus normal social interest group bargaining during the legislative process does not apply, as in *Allied Structural Steel Co. v. Spannaus*.²⁷²

3. Review of Punitive Damage Award under Due Process

The Court also applied a “reasonableness balancing” approach in determining whether there is a “grossly excessive” burden under the test for the unconstitutionality of punitive damage awards stated in *BMW v. Gore*.²⁷³ Under *BMW v. Gore*, 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 excessive.”²⁷⁴ This follows the same structure as reasonableness balancing, with the Court balancing the degree of reprehensibility of the conduct [benefit of punitive damage award], the ratio between the punitive damage award and the compensatory damage award [amount of burden given size of punitive damage award], and sanctions for comparable misconduct in the law [consideration of alternative means to regulate the behavior].²⁷⁵ While the language is not precisely the same, the “grossly excessive” language of *BMW* reflects the same kind of reasonableness balancing as the “clearly excessive” language of *Pike*, “reasonable and necessary” language in *U.S. Trust*, and “reasonable” language in *Burdick*.²⁷⁶

4. Takings Clause Review

A similar “reasonableness balancing” test applies in determining whether a regulation goes “too far” and thus is not “reasonable” under the test for Takings Clause review articulated in *Penn Central Transportation Co. v. City of New York*.²⁷⁷ Under *Penn Central*, the Court balances the burden on the individual in terms of the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action, including whether it leaves the individual with a reasonable rate of return on the investment.²⁷⁸ As the Court recognized in *Palazzolo v. Rhode Island*,²⁷⁹ the Court balances under *Penn Central* the burden on the individual in

²⁷² 438 U.S. 234, 242-44 (1978). On the issue of Contract Clause review sometimes being 2nd-order reasonableness balancing, see Kelso, *supra* note 5, at 520-21.

²⁷³ 517 U.S. 559, 575-85 (1996).

²⁷⁴ *Id.*

²⁷⁵ See KELSO & KELSO, *supra* note 101, at § 17.4 n.66.

²⁷⁶ Compare tests at *supra* text accompanying note 254 (*BMW*) with text accompanying notes 218 (*Burdick*); 244 (*Pike*); 250-51 (*U.S. Trust*).

²⁷⁷ *Penn Central*, 438 U.S. 104, 123-38 (1978) (no takings because zoning law permitted “reasonably beneficial use” of the property), *citing, inter alia*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (regulation went “too far.”).

²⁷⁸ 438 U.S. at 124-25, 130-38.

²⁷⁹ 533 U.S. 606, 617 (2001), *citing, inter alia*, *Penn Central*, 438 U.S. at 124.

terms of “the economic impact of the regulation [and] its interference with reasonable investment backed expectations [burdens], the character of the government action [government action in light of alternatives] and the benefits of the government action [benefits].” The issue then turns on whether given this balance the burden represents a “substantial burden” on Takings Clause rights similar to “clearly excessive” burden under *Pike* or “grossly excessive” burden under *BMW v. Gore*.²⁸⁰

C. Non-Viewpoint Discrimination in Government-Owned Non-Public Forum

Under First Amendment free speech doctrine, the Court applies strict scrutiny review for content-based regulations in a public forum.²⁸¹ For content-neutral regulations, the Court applies intermediate review.²⁸² In government-owned nonpublic fora, however, while viewpoint discrimination government regulations trigger strict scrutiny,²⁸³ in other cases of government regulation in a nonpublic forum, the Court uses a “reasonableness balancing” standard of review.²⁸⁴ This can be seen from four areas of government-owned non-public fora: (1) military bases; (2) prisons; (3) state-run transportation; and (4) school curriculum or other school-sponsored events.

1. Military Bases

Military bases are classic examples of government-owned property not open to the public.²⁸⁵ Thus, for speech on military bases, a reasonableness standard applies. For example, in *Greer v. Spock*²⁸⁶ the Court upheld as reasonably related to the legitimate interest of maintaining “a politically neutral military establishment” regulations banning on military bases speeches and demonstrations of a political nature and prohibiting distribution of literature without approval of post headquarters. In *Brown v. Glines*,²⁸⁷

²⁸⁰ Compare test at text accompanying notes 244 (*Pike*) with text accompanying note 254 (*BMW*). See generally KELSO & KELSO, *supra* note 101, at § 24.1 (the *Pike v. Bruce Church* test for Dormant Commerce Clause review, discussed at *id.* at § 13.3.4; “grossly excessive” under the *BMW v. Gore* test for unconstitutionality of punitive damage awards, discussed *id.* at § 17.4; not “reasonable and necessary” under the *U.S. Trust v. New Jersey* test in Contract Clause review, discussed *id.* at § 18.2; or goes “too far” and thus is not “reasonable” under the *Penn Central* test for Takings Clause review, discussed *id.* at § 18.3.3.).

²⁸¹ See Kelso, *supra* note 107, at 293-96.

²⁸² *Id.* at 296-300.

²⁸³ *Id.* at 303-04.

²⁸⁴ *Id.* at 307-09.

²⁸⁵ *United States v. Apel*, 134 S. Ct. 1144 (2014) (portion of a military base that contained a protest area and easement for a public road still a military nonpublic forum).

²⁸⁶ 424 U.S. 828, 836-40 (1976).

²⁸⁷ 444 U.S. 348, 354-58 (1980), *relying on Greer v. Spock*, 424 U.S. 828, 840 (1976). The Court did make a reference in *Brown* to *Procunier v. Martinez*’s adoption of intermediate review, 444 U.S. at 354, which

the Court similarly upheld Air Force regulations relating to the circulation of petitions on air force bases based on the ground that the regulation was “reasonable” in light of the desire to keep a “non-politicized” military. In *Goldman v. Weinberger*,²⁸⁸ the Court held that the United States military could apply its uniform dress regulation to deny an Orthodox Jewish service member the right to wear a yarmulke while on duty.

2. Prisons

In *Beard v. Banks*,²⁸⁹ a majority of the Supreme Court extended the reasonableness balancing test used in *Thornburgh v. Abbott*²⁹⁰ and *Turner v. Safley*,²⁹¹ to a case involving burdening a prisoner’s access to newspapers, magazines, and photographs while in the prison’s long-term segregation unit. Such reasonableness review involved standard means/end reasoning 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 burden placed on the prisoner to establish that the government’s regulation was unreasonable.²⁹²

3. Other Cases of Nonpublic Forum Analysis

In other cases involving nonpublic fora, the Court applies a reasonableness balancing approach.²⁹³ For example, in *International Society for Krishna Consciousness v. Lee*,²⁹⁴ a Court majority applied a “reasonableness” test to regulations in an airport terminal, with the controlling vote in the case, Justice

has since been limited to outgoing correspondence since it raised public forum, not nonpublic forum, issues, and was unnecessary to decide the case. See *Thornburgh v. Abbott*, 490 U.S. 401, 412-19 (1989).

²⁸⁸ 475 U.S. 503, 505-10 (1986).

²⁸⁹ 548 U.S. 521, 524-530 (2006) (plurality opinion of Breyer, J., joined by Roberts, C.J., and Kennedy & Souter, JJ).

²⁹⁰ *Thornburgh v. Abbott*, 490 U.S. 401, 412-19 (1989).

²⁹¹ *Turner v. Safley*, 482 U.S. 78, 89 (1987); *id.* at 542-43 (Stevens, J., joined by Ginsburg, J., dissenting).

²⁹² 548 U.S. 521, 528-35 (2006). Of course, if the concern is with outgoing correspondence, and thus First Amendment rights of non-prisoners are involved, the Court will apply public forum standards, typically intermediate review, based on a content-neutral concern with security and public safety, as was applied in *Procunier v. Martinez*, 416 U.S. 396 (1974).

²⁹³ See generally Kelso, *supra* note 107, at 303-11.

²⁹⁴ 505 U.S. 672, 677-83 (1992); *id.* at 686-92 (O’Connor, J., concurring in the judgment). Four Justices in the case concluded the airport terminal was a public forum, and thus applied intermediate review applicable to content-neutral regulations in a public forum. *Id.* at 693-702 (Kennedy, J., joined by Blackmun, Stevens & Souter, J., concurring in the judgments).

O'Connor, concluding that regulations banning solicitation of funds in terminal was reasonable, while banning handing out of leaflets to plane travelers was not reasonable and unconstitutional. In *Minnesota Voters Alliance v. Mansky*,²⁹⁵ the Court held a prohibition of solicitation and display of political material within 100 feet of polling place was not "reasonable in light of the purpose reserved by the forum" because banned any "political" message and "unmoored use" of that term could extend to a "button or T-shirt merely imploring others to "Vote." Another example is *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation (SMART)*,²⁹⁶ where the Sixth Circuit held that a state transportation agency's refusal to display an anti-jihad advertisement on city buses was a reasonable and viewpoint-neutral based on its general policy against political advertisements; the ban was thus upheld under a reasonableness balancing approach, since the bus system was a nonpublic forum.

4. School Regulations as an Example of Non-Public Forum Analysis

Although the initial set of cases involving the government as educator did not use precise strict scrutiny, intermediate review, or reasonableness review terminology, cases involving free speech regulations in the school context have been decided consistent with "reasonableness review" being applied where the regulation involved an aspect of school life viewed as occurring in a non-public forum, such as government control over school classrooms or school auditoriums, while for regulations involved an aspect of school life on playgrounds or in a school lunchroom, which are viewed more as places designated for free speech, and thus public fora, content-neutral regulations have been subjected to intermediate scrutiny, and content-based regulations have triggered strict scrutiny.²⁹⁷

Where school cases involve activities focused more on curricular matters or school-sponsored events, a reasonableness balancing approach is applied. For example, in 1986, in *Bethel School District No. 403 v. Fraser*,²⁹⁸ the Court held that the First Amendment does not prohibit a school district from disciplining a high school student for a "lewd" speech at a high school assembly because it was "appropriate" for the school to prohibit the use of vulgar terms in public discourse, particularly in an assembly where students as young as 14 were in attendance. Similarly, in *Hazelwood School District v. Kuhlmeier*,²⁹⁹ the Court noted that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are

²⁹⁵ 138 S. Ct. 1876, 1886, 1888 (2018).

²⁹⁶ 698 F.3d 885, 890-92 (6th Cir. 2012), relying on *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299-302 (1974) (city transit vehicles nonpublic fora). The court distinguished cases which had held that the exterior of city buses were designated public forums, as in *New York Magazine v. Metropolitan Transit Authority*, 136 F.3d 123, 129-30 (2nd Cir. 1998), because in such cases the city accepted commercial and political ads.

²⁹⁷ See generally Kelso, *supra* note 107, at 311-15, discussing, *inter alia*, *Tinker v. Des Moines, Indep. Sch. Dist.*, 393 U.S. 503 (1969) (example of intermediate review with *Tinker's* focus on "substantial disruption" mirroring "substantial government interest" to regulate under intermediate review).

²⁹⁸ 478 U.S. 675, 683-86 (1986).

²⁹⁹ 484 U.S. 260, 270-73 (1988).

reasonably related to legitimate pedagogical concerns.” Consistent with the analysis of *Fraser* and *Hazelwood*, the Supreme Court indicated in *Morse v. Frederick*³⁰⁰ that reasonableness review would be applied to student speech made in the context of the non-public forum of a “school-sanctioned and school-supervised” event – here, students being led out of the classroom to watch the Olympic Torch Relay pass by their school – and the school had a legitimate interest in regulating speech “at a school event, when that speech is reasonably viewed as promoting illegal drug use.”

D. Procedural Due Process Cases

“Reasonableness balancing” also applies in other areas, such as procedural due process balancing under *Mathews v. Eldridge*.³⁰¹ Under *Mathews v. Eldridge*, the Court considers the same three kinds of considerations as under *Burdick* and the other 2nd-order reasonableness balancing tests to determine whether the process given the individual was adequate/reasonable or inadequate/unreasonable: (1) “the government’s interest” or ends in the case; (2) the means by which existing procedures achieve the government’s ends, including “the risk of an erroneous deprivation through present procedures and the probable value, if any, of additional or substitute procedures”; and (3) “the private interest” that will be burdened.³⁰²

VI. Heightened Reasonableness Balancing or 3rd-order Reasonableness Review

Sometimes under “reasonableness balancing” the burden shifts to the government to justify its action, rather than the challenger having to prove the burden was unreasonable, as in all the cases cited above in Part V. Because in such cases placing the burden on the government will mean the government will have a harder time justifying its action, these cases can be called “heightened reasonableness balancing” or “3rd-order reasonableness review.” This kind of balancing can occur in certain kinds of economic cases under the Takings Clause and Dormant Commerce Clause, under the First Amendment, under the Fourth Amendment, and under congressional enforcement of § 5 of the Fourteenth Amendment.

³⁰⁰ 551 U.S. 393, 396-400, 403 (2007). A concurrence by Justices Kennedy and Alito, whose votes were critical to make up the *Morse* majority, indicated that where the speech is not so connected to the school curriculum, and is student generated, even if in conflict with the “educational mission” of the school, the *Tinker* test would still apply. *Id.* at 422-23 (Alito, J., joined by Kennedy, J., concurring). For discussion of school cases struggling with whether to invoke *Tinker*’s intermediate standard of review, or the reasonableness balancing approach of *Fraser/Hazelwood/Morse*, and how to apply each to various fact patterns involving regulations of the school curriculum or school-sponsored events, see CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3: THE FIRST AMENDMENT, § 3.4.4 nn.36-48 (2019 Orig. Ed. 2014) (available at: <http://libguides.stcl.edu/kelsomaterials>).

³⁰¹ 424 U.S. 319, 335 (1976).

³⁰² *Id.* See generally KELSO & KELSO, *supra* note 38, at § 27.4.3.2 (discussing *Mathews v. Eldridge* balancing as a 2nd-order reasonableness balancing test); T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943, 965 (1987) (discussing *Mathews v. Eldridge* procedural due process doctrine as a kind of balancing approach).

A. Economic Cases

1. Dolan v. Tigard and the Takings Clause

One example of “heightened reasonableness balancing” occurs under the Takings Clause. In *Dolan v. City of Tigard*,³⁰³ for a regulation that “singled out” the individual for regulatory treatment, the Court required the government to establish a “rough proportionality” between the government’s burden on the individual and the individual’s burden on society. As the Court noted in *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.³⁰⁴

2. Maine v. Taylor and Dormant Commerce Clause Review

Another example of 3rd-order reasonableness balancing involves cases under the Dormant Commerce Clause where the regulation facially discriminates against interstate commerce, such as *Maine v. Taylor*.³⁰⁵ In these cases, 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 is “excessive.”³⁰⁶

B. First Amendment Cases and Heightened Reasonableness Balancing

1. The Pickering Test for Government Workers Speaking on Matters of Public Concern

In 1968, the Court held in *Pickering v. Board of Education of Will County, Illinois*,³⁰⁷ that a public employee’s right to speak on matters of public concern must be balanced against the government’s right

³⁰³ 512 U.S. 374, 388-91 (1994).

³⁰⁴ See *id.* at 391. On fourth amendment search and seizure doctrine as representing a 3rd-order reasonableness balancing test, see *infra* text accompanying notes 305-08; Aleinikoff, *supra* note 302, at 965 (describing cases in modern doctrine that use balancing under Fourth Amendment search and seizure doctrine). On the *Dolan* test representing 3rd-order rational review, see KELSO & KELSO, *supra* note 101, at § 18.3.4 (discussing *Dolan v. Tigard* for Takings Clause review).

³⁰⁵ 477 U.S. 131 (1986).

³⁰⁶ *Id.* at 138. On *Maine v. Taylor* representing 3rd-order rational review kind of test, see KELSO & KELSO, *supra* note 101, at § 13.3.1.D & § 13.3.2 (discussing the *Maine v. Taylor* test for Dormant Commerce Clause review). For discussion that *Maine v. Taylor* does not represent strict scrutiny or any *per se* rule of invalidity, see also KELSO & KELSO, *supra* note 38, at § 20.3.2.2.A.

³⁰⁷ 391 U.S. 563, 568, 572 n.4 (1968) (when considering the right of government workers to speak on matters of public concern, the government has the burden to establish 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 teacher” in free speech; (3) including whether the government could act with more “narrowly drawn grievance procedures.”).

as employer to make employment decisions based on whether the speech is disruptive to office efficiency or morale, or otherwise harms the government workplace. As developed in cases after *Pickering*, to establish a claim of unlawful First Amendment retaliation a public employee must show that he or she suffered an adverse employment action that was causally connected to participation in a protected activity, *i.e.*, speaking out on an issue of public concern.³⁰⁸ Once the employee satisfies this initial burden, the burden shifts to the government employer to show a legitimate nondiscriminatory reason for the action, *e.g.*, that the interest of the government in the efficient delivery of its services outweighs the interest of the employee in speaking out, or that the adverse action would have been taken even without the employee's speech having been made.³⁰⁹ If the government meets this burden, the burden shifts back to the employee to show that the employer's actions were in fact a pretext for illegal retaliation.³¹⁰

Because the government has the primary burden under *Pickering* of defending its decision once the plaintiff has established a *prima facie* case, this kind of reasonableness balancing reflects a higher standard of review than that used for non-viewpoint discrimination in a non-public forum.³¹¹ *Pickering* is nonetheless a form of reasonableness balancing because "legitimate/permissible" interests can be used by the government to justify the regulation,³¹² rather than the "significant/substantial/important" interests required under intermediate review,³¹³ or "compelling/overriding" interests required under strict scrutiny.³¹⁴

2. The Zauderer Test for Potentially Misleading Statements Under Commercial Speech Doctrine

In 1985, the Court decided in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*³¹⁵ that where the government could show the "possibility of consumer confusion or deception," even

³⁰⁸ See *Duffy v. McPhillips*, 276 F.3d 988, 991 (8th Cir. 2002). If the individual is speaking on a matter related to office duties or responsibility, and thus not on a matter of public concern, there is no free speech protection. Thus, *Pickering* balancing does not apply. See *Garcetti v. Ceballos*, 547 U.S. 410, 419-25 (2006).

³⁰⁹ *Duffy*, 276 F.3d at 991.

³¹⁰ *Id.*

³¹¹ See *supra* text accompanying notes 281-300.

³¹² Under *Pickering*, the government's interests used to justify adverse employment decisionmaking, such as office efficiency, staff morale, and public perception, only have to be legitimate interests. See, *e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 384-92 (1987). Recent applications of the *Pickering* test by the Supreme Court and Circuit Courts of Appeal are discussed in more depth in *Kelso & Kelso, supra* note 300, at § 8.3.4, particularly pages 430-31.

³¹³ See *supra* text accompanying note 102 (level of interests required at intermediate review).

³¹⁴ See *supra* text accompanying note 106 (level of interests required at strict scrutiny).

³¹⁵ 471 U.S. 626, 651 (1985).

though the commercial speech could not be proven to be unlawful, false, or misleading, the government could require “uncontroversial, factual disclosures” as long as they were “reasonably related to the state’s interest in preventing deception of consumers” because “disclosure requirements trench much more narrowly on an advertiser’s interest than do flat prohibitions on speech.” As phrased in *Zauderer*, this was an example of a standard 2nd-order reasonableness balancing test, as the Court phrased the issue as whether the challenger could show the government regulation was unreasonable.³¹⁶

In contrast, in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,³¹⁷ the Court placed the burden on the government not only to show the “possibility of consumer confusion” to trigger the *Zauderer* test, which is appropriate,³¹⁸ but also to prove the disclosure requirement was “reasonable.”³¹⁹ The Court did not acknowledge in *NIFLA* this shift in burden from *Zauderer*, and cited *Ibanez v. Florida Dep’t of Business and Professional Regulation, Bd. of Accountancy*, which cited *Edenfield v. Fane*, to support placing the burden on the government, despite both *Ibanez* and *Edenfield* being cases of regular commercial speech review where the burden is properly on the government, as is usual under intermediate review.³²⁰

Despite being a departure from pre-existing doctrine, and not following the usual approach under reasonableness review where as part of some deference to government the challenger must prove the regulation is unreasonable,³²¹ this *NIFLA* reasonableness balancing test, with the burden on the government to prove reasonableness, may well reflect the Court’s current view. This level of review is an example of 3rd-order reasonableness review, since review is slightly more rigorous than 2nd-order reasonableness review.³²²

³¹⁶ *Id.* at 651 n.15.

³¹⁷ 138 S. Ct. 2361, 2376-77 (2018).

³¹⁸ *Id.* at 2377. See R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 Ind. L. Rev. 355, 374-75 (2019) (discussing that when the government is seeking an exception from standard first amendment doctrine, such as in the case of arguing it is government speech, or advocacy of illegal conduct, or true threat, or fighting words, or obscenity, the burden is on the government to establish the exception should apply). But see *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015) (adopting deferential “substantial evidence” standard, not de novo review, to review FTC’s finding statements are “deceptive and misleading”).

³¹⁹ 138 S. Ct. at 2377. Some other lower courts had similarly so ruled. See *CTIA-The Wireless Association v. City of Berkeley, Cal.*, 854 F.3d 1105, 1117-19 (9th Cir. 2017) (placing the burden on the government).

³²⁰ 138 S. Ct. at 2377, citing *Ibanez*, 512 U.S. 136, 142-46 (1994) (applying standard commercial speech doctrine of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980), which is a form of intermediate review, see Kelso, *supra* note 107, at 370-73) & citing *Edenfield*, 507 U.S. 761, 767-70 (1993) (applying standard *Central Hudson* analysis).

³²¹ See *supra* text accompanying notes 86-93 (discussing level of deference to government typically given in 2nd-order reasonableness review cases).

³²² For discussion of that increased scrutiny, see KELSO & KELSO, *supra* note 300, at § 9.4. For discussion of 3rd-order reasonableness as a slightly higher level of review than 2nd-order reasonableness, see

C. 4th Amendment Search and Seizure Doctrine

Another example of this 3rd-order reasonableness balancing occurs in cases of analyzing the “reasonableness” of a search and seizure under the 4th Amendment.³²³ Under long-standing and current doctrine, once the plaintiff has established that a search has occurred,³²⁴ the government has the burden to establish that the search was reasonable.³²⁵ In making this determination, the Court weighs the government’s interests and needs in law enforcement against individual privacy interests and the availability to the government of less burdensome means of operation.³²⁶

generally KELSO & KELSO, *supra* note 38, at § 7.2.1. A similar case of a court increasing scrutiny from 2nd-order reasonableness balancing to 3rd-order reasonableness balancing occurred in *NAACP v. City of Philadelphia*, 834 F.3d 435, 441-42 (3rd Cir. 2016) (access to advertising space at Philadelphia International Airport examined under nonpublic forum analysis, as the city had not opened up advertising for all kind of messages; in applying its analysis, the Third Circuit departed from normal nonpublic forum analysis and placed the burden on the city to show “reasonableness”).

³²³ The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV.

³²⁴ 488 U.S. 445, 451-52 (1989) (White, J., plurality opinion, joined by Rehnquist, C.J., and Justices Scalia & Kennedy, JJ.) (“there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent’s claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude.”; thus, the observation of an individual’s greenhouse by the police from a helicopter was not constitutionally a “search” or “seizure” because the defendant had not shown that the greenhouse was not in “plain view.”); *id.* at 455 (O’Connor, J., concurring in the judgment), *citing* *Jones v. United States*, 362 U.S. 257, 261 (1960) (similarly placed the burden of proof on the defendant to establish that a “search” had occurred because the greenhouse was not in “plain view.”).

³²⁵ *See, e.g., Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). On the issue of burdens of proof in the criminal justice system concerning defendant’s rights, *see* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 342-45 (1980); John C. Jeffries, Jr. & Paul Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

³²⁶ *See, e.g., United States v. Knights*, 534 U.S. 112, 118-20 (2001) (search of probationer’s apartment supported by reasonable suspicion and authorized by his probation reasonable); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (probable cause to search a car justifies search of passengers’ belongings that could conceal object of the search); *Winston v. Lee*, 470 U.S. 753, 760-66 (1985) (surgical intrusion to recover bullet from suspect’s chest fired by victim unreasonable); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (blood extraction from drunk driving suspect reasonable).

D. Fourteenth Amendment Enforcement Clause: Boerne

*City of Boerne v. Flores*³²⁷ involved a limitation on Congress power regarding what are “appropriate” remedies for constitutional violations. In *Flores*, Justice Kennedy said that the line between congressional measures that remedy or prevent unconstitutional actions and measures that make a substantive change is not easy to discern, but “there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”³²⁸ Although the Court has not definitively resolved the issue, it appears the burden is on Congress to establish the requisite “congruence and proportionality” in these cases.³²⁹ If so, that would make the *Boerne v. Flores* test a species of 3rd-order reasonableness review.

Numerous commentators have criticized this aspect of *Flores*.³³⁰ One author has acknowledged that *Flores* represents a higher standard of scrutiny than minimum rational review, and has properly related it to the “rough proportionality” adopted in *Dolan v. Tigard*,³³¹ but has argued that this heightened rational review is consistent with *McCulloch v. Maryland*, although *McCulloch* is usually viewed as requiring only minimum rationality review for standard social or economic regulation.³³² One commentator has called the *Flores* approach a species of “strict scrutiny,”³³³ but this understanding is

³²⁷ 521 U.S. 507 (1997).

³²⁸ *Id.* at 519-20; *id.* at 545-46 (O’Connor, J., dissenting on other grounds, but agreeing with the Court’s analysis of the Congress’ § 5 enforcement power).

³²⁹ The Court stated in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 639 (1999) (“[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”). The burden also seems to be placed on Congress in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001), where the Court stated, “Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States.” See generally KELSO & KELSO, *supra* note 38, at § 21.2.4.3 nn.105-12.

³³⁰ See, e.g., William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 Tulane L. Rev. 519, 520-28 (2005); Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1129-47 (2001). See also Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (adopting minimum rationality review to test Congress’ power under § 5 of the 14th Amendment by adopting “appropriate legislation” language from *McCulloch v. Maryland*, 17 (4 Wheat.) 316, 421 (1816), used in *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879)).

³³¹ See *supra* text accompanying notes 303-04 (*Dolan* represents 3rd-order reasonableness balancing).

³³² John T. Valauri, *McCulloch and the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 857, 865-73 (2004), citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For discussion of *McCulloch* as representing minimum rationality review, see Araiza, *supra* note 330; Caminker, *supra* note 330.

³³³ Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court’s “Strict Scrutiny” of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091 (2001).

likely the product of a similar misunderstanding among those who call the *Maine v. Taylor* under dormant commerce clause review a “strict scrutiny” approach.³³⁴

VII. Justice Thomas’ Specific Examples of Inconsistency

A. *Fisher v. University of Texas – Austin* versus *Whole Woman’s Health v. Hellerstedt*

One criticism made by Justice Thomas in *Hellerstedt* was that it was “easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions [in *Fisher v. University of Texas – Austin*] than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test [in *Whole Woman’s Health v. Hellerstedt*].”³³⁵ This criticism is in error. While the State was able to satisfy strict scrutiny in *Fisher* and was not able to satisfy the “undue burden” standard in *Hellerstedt*, that is because the facts of the cases are different. In *Fisher*, the affirmative action program was justified by a compelling government interest in the educational advantages of a diverse student body.³³⁶ While Justice Thomas, and other conservative Justices, have stated their belief that such educational advantages do not constitute a compelling government interest,³³⁷ long-standing Supreme Court doctrine has viewed advancing such educational advantages as compelling interests.³³⁸ This has been backed by a range of corporate, military, and other establishment

³³⁴ See *supra* note 306 and accompanying text.

³³⁵ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2327 (Thomas, J., dissenting), *citing* *Fisher v. University of Texas – Austin*, 136 S. Ct. 2198 (2016).

³³⁶ *Fisher*, 136 S. Ct. at 2210 (“the compelling interest that justifies consideration of race in college admissions is . . . as a means of obtaining ‘the educational benefits that flow from student body diversity.’”); *id.* at 2211 (“the University identifies the educational values it seeks to realize through its admission process: the destruction of stereotypes, the ‘promot[ion of] cross-racial understanding,’ the preparation of a student body ‘for an increasingly diverse workforce and society’ and the ‘cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’” . . . [T]he university explains that it strives to provide ‘an academic environment’ that offers a ‘robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.’ All of these objectives, as a general matter, mirror the ‘compelling interest’ this Court has approved in its prior cases.”).

³³⁷ *Id.* at 2223-24 (Alito, J., joined by Roberts, C.J., & Thomas, J., dissenting); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725-33 (2007) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., as to Part III(B)).

³³⁸ See, e.g., *Fisher v. University of Texas – Austin*, 570 U.S. 297, 308-09 (2013); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *Grutter v. Bollinger*, 539 U.S. 306, 322-36 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265, 269-72, 311-20 (1978) (Powell, J., opinion, announcing the judgment of the Court).

entities.³³⁹ The affirmative action program in *Fisher* was then upheld as constitutional only because the University of Texas used the “least burdensome effective alternative” to advance this interest by not adopting an automatic point preference for minority applicants, but only used race as one factor in a holistic decision based on reading each individual’s file.³⁴⁰

In contrast, in *Hellerstedt* the burden caused by the “admitting privileges” requirement would have shut down over half the abortion clinics in Texas.³⁴¹ So, too, the “surgical equipment” requirement that an abortion facility meet the “minimum standards . . . for ambulatory surgical centers” under Texas law.³⁴² Not surprisingly, the Court majority viewed each as a “substantial obstacle” to abortion choice.³⁴³ Under the precise language of *Planned Parenthood v. Casey* that made the requirements “undue burdens” and thus unconstitutional.³⁴⁴ Under a better understanding of *Casey* that such “substantial obstacles” should merely trigger the strict scrutiny approach of *Roe v. Wade*, not a categorical finding of unconstitutionality,³⁴⁵ there is no compelling interest to the “admitting privileges” or “surgical-centers” requirement because the benefits of the requirements are so minimal.³⁴⁶

³³⁹ See, e.g., *Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Fisher v. University of Texas – Austin*, 2015 WL 6735839 (Nov. 2, 2015); *Brief of Lt. Gen. Julius W. Becton, Jr. [and Thirty-Five other former Military Leaders] as Amici Curiae in Fisher v. University of Texas – Austin*, 2015 WL 6774556 (Nov. 2, 2015); *Brief for Amicus Curiae Association of American Law Schools in Fisher v. University of Texas – Austin*, 2015 WL 6690035 (Nov. 2, 2015).

³⁴⁰ *Fisher*, 136 S. Ct. at 2207 (“race is but a ‘factor or a factor or a factor’ in the holistic review calculus”); *id.* at 2214 (“In short, none of petitioner’s suggested alternatives – nor other proposals considered or discussed in the course of this litigation – have shown to be ‘available’ or ‘workable’ means through which the University could have met its educational goals.”).

³⁴¹ *Hellerstedt*, 136 S. Ct. at 2312 (“The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to 20.”).

³⁴² *Id.* at 2316 (“The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth.”).

³⁴³ *Id.* at 2313, 2318.

³⁴⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992)

³⁴⁵ See *Kelso*, *supra* note 216, at 90-94, 97-102.

³⁴⁶ 136 S. Ct. at 2311-12 ([W]hen directly asked at oral argument whether Texas know of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States’ similar admitting-privileges laws.”) (citations omitted); *id.* at 2315 (“There is considerable evidence in the record supporting the District Court’s findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary.”).

Even if the “admitting privileges” and “surgical-center” requirements were not “substantial obstacles” to abortion rights, the best understanding of *Casey* is that less than substantial obstacles trigger “reasonableness review.”³⁴⁷ Given the minimal benefit that the admitting privileges or surgical-center requirements advance,³⁴⁸ virtually any burden on abortion rights would be viewed as “excessive” or “unreasonable” under that standard. The requirement in *Hellerstedt* that a court always consider potential benefits in abortion cases³⁴⁹ underscores that the *Casey/Hellerstedt* doctrine is not exclusively about whether the amount of the burden is a “substantial obstacle.” The fact that the amount of the benefit could be “medically debated,” as Justice Thomas noted in his *Hellerstedt* dissent,³⁵⁰ might be enough to show the law is rationally related to a legitimate interest under minimum rationality review. Given that the Court has never overturned the conclusion in *Roe* that there is a fundamental right to abortion choice,³⁵¹ a level of review higher than minimum rationality review – the 2nd-order reasonableness review standard – is appropriate and supports the majority’s conclusion in *Hellerstedt*.³⁵²

B. Williams-Yulee v. Florida Bar versus United States v. Windsor

A second criticism made by Justice Thomas in *Hellerstedt* is that “it is now easier for the government to restrict judicial candidates’ campaign speech than for the Government to define marriage – even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review.”³⁵³ Again this criticism is in error.

In cases involving campaign speech by judges, the Court usually does apply strict scrutiny, since the regulations usually are content-based regulations of speech in a public forum which under standard free speech doctrine triggers strict scrutiny review.³⁵⁴ In many cases, this leads to a conclusion that the

³⁴⁷ See Kelso, *supra* note 216, at 87-90, 94-97.

³⁴⁸ See *supra* note 346 and accompanying text.

³⁴⁹ *Hellerstedt*, 136 S. Ct. at 2309-10.

³⁵⁰ *Id.* at 2328 (Thomas, J., dissenting).

³⁵¹ See *Casey*, 505 U.S. at 878-79 (upholding the “central holding of *Roe v. Wade*”).

³⁵² *Hellerstedt*, 136 S. Ct. at 2309 (“it is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty interest with the less strict review applicable where, for example, economic regulation is at issue” when applying *Casey*’s test of whether a regulation is “reasonably related to . . . a legitimate state interest”); *id.* at 2310 (“The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court’s case law. [Under *Casey*] the ‘Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.’”), *citing* *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (emphasis added).

³⁵³ *Hellerstedt*, 136 S. Ct. at 2328 (Thomas, J., dissenting).

³⁵⁴ See, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765, 773-74 (2002).

regulation is unconstitutional.³⁵⁵ However, sometimes the government can meet strict scrutiny review.³⁵⁶ *Williams-Yulee v. Florida Bar*³⁵⁷ is such a case. As the Court majority noted, in judicial campaign speech cases there is a compelling interest in preserving both actual “impartiality” and the appearance of “impartiality” of judges.³⁵⁸ Preventing judges from actively soliciting funds was viewed by the Court majority as “directly related” to advancing those interests.³⁵⁹ It also was the “least burdensome effective alternative,” since direct soliciting had to be banned, but a campaign committee on behalf of the judge was still allowed to solicit funds on the judge’s behalf.³⁶⁰

In contrast, as noted earlier in this article,³⁶¹ in *United States v. Windsor* there did not seem to be any reasonably conceivable interest in the federal government refusing to recognize valid state marriage licenses independent of the illegitimate interest in animus toward gays and lesbians. This made the government regulation unconstitutional even under minimum rationality review.³⁶² The fact that some Justices in *Williams-Yulee* disagreed with the majority that the government met strict scrutiny does not mean strict scrutiny is somehow “easier to meet” than less stringent standards of review.³⁶³ Minimal

³⁵⁵ *Id.*; *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1228-32 (D. Kan., 2006), *citing, inter alia*, *Family Trust Foundation of Kentucky, Inc v. Wolnitzek*, 345 F. Supp. 2d 672, 697, 702 n.12 (E.D. Ky., 2004); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1038-42 (D. N.D., 2005); *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 2d 1080, 1082-83 (D. Alaska, 2005).

³⁵⁶ *See, e.g.*, *Wersel v. Sexton*, 674 F.3d 1010 (8th Cir. 2012) (7-5 *en banc*), applying strict scrutiny, the Eighth Circuit upheld as constitutional provisions prohibiting judicial candidates from publicly endorsing or opposing candidates for a different public office, soliciting funds for political candidates or organizations, and personally soliciting campaign funds, viewing provisions as narrowly tailored to serve compelling interests in judicial impartiality and appearance of impartiality. *But see* *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014) (Arizona provisions banning judicial candidates from giving speeches on behalf of other candidates invalid under strict scrutiny, disagreeing with *Wersel*).

³⁵⁷ 575 U.S. 433 (2015).

³⁵⁸ *Id.* at 445 (“We have recognized the ‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges.’”) (citations omitted).

³⁵⁹ *Id.* at 449-50 (“The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates.”)

³⁶⁰ *Id.* at 452-55 (discussing why the ban on personal solicitation by judges or candidates for judicial office is “narrowly tailored” and no “less restrictive means” would effectively advance the compelling interest in judicial impartiality.).

³⁶¹ *See supra* text accompanying notes 153-56.

³⁶² *See supra* text accompanying notes 157-58.

³⁶³ 575 U.S. at 453, 464-69 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 474 (Kennedy, J., dissenting); *id.* at 479 (Alito, J., dissenting).

burdens to advance compelling interests, as in *Williams-Yulee*, are a different case than massive burdens that advance no legitimate interests as in *Windsor*.³⁶⁴

In any event, as noted earlier, perhaps *Windsor* foreshadowed the Court's decision two years later in *Obergefell v. Hodges* that the fundamental right to marriage can be extended to same-sex marriages.³⁶⁵ If so, then the substantial burden placed on same-sex couples by the government regulation in *Windsor* would properly be a strict scrutiny case and unconstitutional on that grounds, as noted earlier.³⁶⁶

C. Nixon v. Shrink Missouri Government PAC versus Lawrence v. Texas

A third criticism made by Justice Thomas in *Hellerstedt* was that "more recent decisions reflect the Court's tendency to relax purportedly higher standards of review for less-preferred rights" with "no effect to justify its deviation from the tests we traditionally employ"³⁶⁷ while "the Court selectively applies rational-basis review" with "formidable toughness" in some cases.³⁶⁸

The criticism concerned with a "tendency to relax purportedly higher standards of review" is accurate if applied to a few particular cases. However, the development of the Court's doctrine over time does tend to end up clarifying whatever deviation has occurred. For example, in the 2000 case cited by Justice Thomas, *Nixon v. Shrink Missouri Government PAC*,³⁶⁹ the Court majority did not do a good job distinguishing the review applied to "caps on political contribution" from the strict scrutiny applied to "campaign expenditures."³⁷⁰ However, in 2003, the Court in *McConnell v. Federal Election Commission*,³⁷¹ the Court noted that "contribution" cases should only trigger intermediate review, while

³⁶⁴ In other words, it is just the factual differences in the two cases that supports the difference in results, not any misapplication in the standards of review.

³⁶⁵ See *supra* text accompanying note 160.

³⁶⁶ See *supra* text accompanying note 159.

³⁶⁷ *Hellerstedt*, 136 S. Ct. at 2328 (Thomas, J., dissenting).

³⁶⁸ *Id.*

³⁶⁹ *Id.*, citing 528 U.S. 377, 421 (2000) (Thomas, J., dissenting).

³⁷⁰ The majority indicated in *Shrink Missouri* that the standard of review for contribution limitations in the foundation case for campaign finance laws of *Buckley v. Valeo*, 424 U.S. 1, (1976) (per curiam), was less than strict scrutiny, but higher than standard intermediate review, but did not clearly indicate the exact standard of review. *Shrink Missouri*, 528 U.S. 377, 386-89 (2002). As the majority noted, "Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley* per curiam opinion." *Id.* at 386.

³⁷¹ 540 U.S. 93, 134-42 (2003). The intermediate scrutiny standard of review used in *McConnell* for limitation on campaign contributions was confirmed three years later in *Randall v. Sorrell*, 548 U.S. 230, 247-48 (2006) (defining the *Buckley* standard of review for contribution limitations in terms of "sufficiently important interests" and "closely drawn", intermediate kind of review, see *supra* notes 101-

“expenditure” cases should trigger strict scrutiny, because in “contribution” cases there is the content-neutral concern with corruption and the appearance of corruption caused by large donations made directly to a candidate’s campaign. In 2005, the Court indicated in *John Doe No. 1 v. Reed*³⁷² that campaign “disclosure” cases should also only trigger intermediate review, not strict scrutiny, since disclosure requirements are also about the content-neutral concern with “preserving the integrity of the political process” and “fostering government transparency and accountability.” One might disagree with those explanations, as Justice Thomas does,³⁷³ but that does not make the distinctions drawn by the court mere “policy preferences.”³⁷⁴

With respect to Justice Thomas’s criticism that “the Court selectively applies rational-basis review” with “formidable toughness” in some cases, Part III.A of this article noted the concern of some commentators and Supreme Court Justices that rational-basis scrutiny has sometimes been applied with “formidable toughness” without adequate justification.³⁷⁵ As discussed in Part III.B & Part IV, under equal protection and due process doctrine the Court has in fact consistently applied minimum rational basis scrutiny.³⁷⁶

D. United States v. Carolene Products Co. versus Roe v. Wade

A fourth point made by Justice Thomas in his dissent in *Hellerstedt* is that the problem of the “tiers of scrutiny” and their being “an unworkable morass of special exceptions and arbitrary applications” began not with *Roe v. Wade* in 1983, but rather in 1938 in *United States v. Carolene Products Co.*, following the Supreme Court’s rejection of *Lochner v. New York* in 1937 in *West Coast Hotel v. Parrish*.³⁷⁷ For Justice

04, 109-10 and accompanying text, rather than the “compelling government interest” and “least restrictive alternative” analysis of strict scrutiny, *see supra* notes 105-08 and accompanying text.).

³⁷² 561 U.S. 186, 195-97 (2010) (standard of review requiring only a “substantial relation” to a “sufficiently important” government interest, an intermediate standard of review, *see supra* notes 101-04 and accompanying text).

³⁷³ *McConnell*, 540 U.S. at 264 (Thomas, J., concurring in part and dissenting in part) (“strict scrutiny” should apply to contribution limitations); *Sorrell*, 548 U.S. at 265-66 (“strict scrutiny” should be applied to contribution limitations); *John Doe No. 1*, 561 U.S. at 228, 231 (Thomas, J., dissenting) (strict scrutiny’s least restrictive means” test – “our most rigorous standard” -- should be applied to disclosure requirements).

³⁷⁴ *Hellerstedt*, 136 S. Ct. at 2328 (Thomas, J., dissenting). For general discussion that content-neutral concerns used to justify a government regulation in a public forum should trigger intermediate review, not strict scrutiny, *see Kelso, supra* note 107, at 293-98.

³⁷⁵ *See supra* text accompanying notes 111-23.

³⁷⁶ *See supra* text accompanying notes 124-200 (equal protection analysis); *supra* text accompanying notes 201-14 (due process analysis).

³⁷⁷ *Hellerstedt*, 136 S. Ct. at 2328 (Thomas, J., dissenting), *citing* *Roe v. Wade*, 410 U.S. 113 (1973); *Carolene Products Co.*, 304 U.S. 144, 152-53 & n.4 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379, 386-87 (1937); *Lochner v. New York*, 198 U.S. 45 (1905).

Thomas, “Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.”³⁷⁸

This line of criticism is really about what Justice Thomas perceives as the malleability in selecting which standard of review to adopt: “it is largely up to us which test will be applied in each case.”³⁷⁹ As such, proper treatment of this issue will be addressed in a forthcoming related article cited earlier.³⁸⁰ It is true that footnote 4 of *Carolene Products* did create one kind of tiers of review scheme, typically referred to as supporting a representation-reinforcing model of judicial review.³⁸¹ However, since *Roe v. Wade* the main battleground on the Court has been between a “Living Constitution” mode of judicial review, which tends to be supported by politically liberal Justices,³⁸² versus a “static/fixed” mode of review associated with conservative Justices like Justices Scalia and Thomas.³⁸³ Contra Justice Thomas, the better view is that a version of the “Living Constitution” model of judicial review represents the true original intent of the Framers and Ratifiers of the Constitution³⁸⁴ and that the current tiers of scrutiny are both better than a single-standard of review³⁸⁵ and they provide a rational, principled doctrinal structure that can be applied in a non-policy-driven fashion.³⁸⁶

VII. Conclusion

The article has addressed the issues of the nature of the standards of review and possible selective application of rational basis scrutiny. In responding to Justice Thomas’ criticism in *Whole Woman’s Health v. Hellerstedt*³⁸⁷ of the lack of “scientific nature” of the standards of review, Part II of this article

³⁷⁸ *Id.* at 2330.

³⁷⁹ *Id.* at 2327.

³⁸⁰ See Kelso, *supra* note 8 (“Justifying the Standards of Review”).

³⁸¹ See generally Brian Boynton, *Democracy and Distrust After Twenty Years: Ely’s Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 398-407 (2000), reviewing JOHN HART ELY, *DEMOCRACY AND ITS DISCONTENTS* (1980); *id.* at 398 n.3 (noting that *Carolene Products* footnote 4 “gave birth to process theory”), citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

³⁸² For an example of a “Living Constitution” model, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

³⁸³ On this “static/fixed” Constitution, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

³⁸⁴ See generally R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIAMI L. REV. 112, 129-56 (2017).

³⁸⁵ See generally R. Randall Kelso, *United States Standards of Review Versus the International Standard of Proportionality: Convergence and Symmetry*, 39 OHIO NORTHERN U.L. REV. 455, 487-97 (2013).

³⁸⁶ Kelso, *supra* note 8, at Parts II-VII.

³⁸⁷ 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting).

discussed the differences between (1) rational basis review, sometimes called “minimum rationality review,” used for review of standard social or economic regulation under the Equal Protection Clause and Due Process Clause; (2) a higher level of scrutiny used by the Court under the Due Process Clause and in many other cases, called in this article “reasonableness balancing”; and (3) the structure of “higher levels” of review, such as (a) intermediate review and (b) strict scrutiny.³⁸⁸ Parts III and IV of this article then addressed the criticism about selective application of rational basis review. The argument in Part III was that, despite the argument of Justice Thomas and some commentators to the contrary,³⁸⁹ in cases involving standard social or economic regulation under the Equal Protection Clause or the Due Process Clause the Supreme Court has been careful since 1937 to use only “minimum rationality review,” not any form of “heightened” rational review or “reasonableness balancing.”³⁹⁰ Part IV made the same point about cases under the Due Process Clause.³⁹¹

Part V of this article then described those areas of the law where the Court does use a higher level of “reasonableness balancing” review, also called in this article “2nd-order reasonableness review.”³⁹² Part VI of the article then addressed the fact that in some “reasonableness balancing” cases the Court has shifted the burden from the challenger to prove the government action is “unreasonable” to requiring the government to prove the action is “reasonable,” a higher level of review this article called “3rd-order reasonableness review,” or “heightened reasonableness balancing.”³⁹³ Part VII of this article responded to Justice Thomas’ specific examples in *Hellerstedt* where he questioned whether the Court had been predictable and principled in applying the standards of review.³⁹⁴

³⁸⁸ See *supra* text accompanying notes 31-110.

³⁸⁹ See *supra* text accompanying notes 111-23.

³⁹⁰ See *supra* text accompanying notes 124-200.

³⁹¹ See *supra* text accompanying notes 201-14.

³⁹² See *supra* text accompanying notes 215-302.

³⁹³ See *supra* text accompanying notes 303-32.

³⁹⁴ See *supra* text accompanying notes 333-86. A summary of all the seven basic standards of review discussed in this article appears in Kelso, *supra* note 8, at Appendix A. A summarized categorization for where all these standards of review apply appears in that article at Appendix B: Tables 1 & 2.