How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine

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by

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Introduction

The conventional understanding of fundamental rights in constitutional law recognizes three distinct conceptual issues. First, there is the question of whether a right exists. Second, it must be determined whether the right has been infringed. Third, there is the problem of whether any infringement can be justified.

Typically, each of these issues has its own frame of reference that requires an independent inquiry. In identifying a right and defining its scope, the inquiry is directed at the nature of (and, perhaps, the motive behind) the actions of the individual that constitute the exercise of the right. Thus, we ask whether a person has the right to distribute leaflets on a street corner1 or to ingest peyote during a religious ceremony.2 Resolving the question of whether particular behavior involves the exercise of a right is a complex undertaking involving historical, political, and philosophical analysis.

In determining whether a right has been infringed, the inquiry is directed at the state’s conduct and its effect. Accordingly, assuming we have initially decided that people have a right to express their political opinions, we ask whether a particular law prevents people

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1. See Lovell v. City of Griffin, 303 U.S. 444 (1938) (upholding the right to distribute leaflets).

from exercising this right. Finally, if an infringement exists and the state attempts to justify its conduct, the inquiry shifts to the state's purpose in taking the challenged action. We evaluate both the importance of the state's objective and the degree to which that objective is furthered by the state's conduct. Thus, in reviewing the law in the previous example, we might ask whether a content-based law banning political speech serves a compelling state interest and is narrowly tailored to accomplish that objective.

The convention of treating these issues as independent inquiries, however, may not accurately reflect the reality of the case law. Judicial inquiries regarding these categories of right, infringement, and justification often seem indistinct and intrinsically connected to each other. It is not simply that the categories merge together, but rather that they may in some basic sense be differing aspects of one unitary legal phenomenon. Thus, the case law generally reflects a behavior/state action/state purpose totality that the Constitution either permits or prohibits depending on how one describes the right/infringement/justification construct applied to it.

Some examples may clarify this point. Consider the free exercise of religion as interpreted in Employment Division, Department of Human Resources v. Smith. According to the holding of Smith, the protection of the Free Exercise Clause is limited to those situations in which the state prohibits individual or group practices "only when they are engaged in for religious reasons, or only because of the religious belief that they display." Thus, the purpose of the state's action—to suppress a religious practice—is not only relevant to the state's justification for its action, but also determines both the nature and scope of the right of religious freedom, and whether that right has been infringed in a particular instance.

6. Id. at 877.
7. Thus, the Smith case holds that when the state does not single out religious practice for discriminatory treatment, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribe).'" Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). Similarly, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993), the Court implicitly collapsed its analysis of the scope of plaintiffs' free
Alternatively, consider the right of privacy and personal autonomy as it applies to procreational freedom. How do we understand the distinction that constitutional doctrine seems to draw between contraception, early abortions, and late abortions?\(^8\) Does the woman's right change as her behavior progresses from pre-conception acts to decisions made much later in the gestation period?\(^9\) Is there less of an infringement of the woman's right when the state prohibits late abortions than when it prohibits early abortions or the use of contraceptives?\(^10\) Or does the woman's right remain constant throughout her pregnancy, with the state's interest becoming more compelling over time?\(^11\) More importantly, is the doctrinal rubric that is used to explain a court's holdings on this issue a matter of real significance, or is each inquiry an alternative way of looking at essentially the same question, but from a different perspective?

Thus, closely examining the way that courts determine whether a right has been infringed may be very relevant to defining the scope of the right and to evaluating the state's justification for impairing the right. Indeed, it may be an essential aspect of resolving these latter questions. At a minimum it will inform our understanding of them.

exercise rights with the issues of whether those rights were infringed by the challenged ordinance and whether that infringement could be justified. Thus, Justice Kennedy's majority opinion begins by stating, "The protections of the Free Exercise Clause [only] pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." \(\text{Id. at 2226.}\) Then Kennedy explains that a law discriminating against a particular religion infringes the free exercise rights of religious practitioners of the targeted faith. \(\text{Id. at 2226-27.}\) Finally, Kennedy concludes that a law that "restricts only conduct protected by the First Amendment and fails... to restrict other conduct producing substantial harm or alleged harm of the same sort" cannot meet strict scrutiny and must be struck down. \(\text{Id. at 2234.}\)

8. See Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (invalidating only those pre-viability abortion regulations that unduly burden a woman's decision to have an abortion); Roe v. Wade, 410 U.S. 113, 163-64 (1973) (upholding prohibition of third trimester abortions except for those situations in which an abortion is necessary to preserve a woman's life or health); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down restrictions on the distribution or use of contraceptives).

9. See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting) (arguing that the fundamental right to make childbearing decisions prior to conception does not extend to the decision to have an abortion after conception has occurred).

10. See Alan E. Brownstein & Paul Dau, The Constitutional Morality of Abortion, 33 B.C. L. Rev. 689, 749-59 (1992) (suggesting that a woman's interest in terminating her pregnancy and the value of her right to do so declines as pregnancy progresses).

11. Roe, 410 U.S. at 162-64 (holding that the state interest in protecting potential life increases as pregnancy progresses until such time as it outweighs a woman's right to privacy).
Moreover, in practical terms, the grounds for establishing that an infringement has occurred may be the determinative factors in adjudicating constitutional violations and protecting rights. Courts and litigators evaluate statutory language, state purposes, and the effects of state action to determine if these factors, either alone or in combination, constitute the infringement of a fundamental right. These are the doctrinal parameters that describe what the state cannot do, or, alternatively, what individuals are protected in doing, under the Constitution. In a very real sense, that doctrinal picture represents the practical definition of a constitutional right.

Perhaps surprisingly, in deciding and discussing constitutional cases, courts and commentators have directed their attention to the first and third of these inquiries, determining whether a right exists and, if it does, whether a state infringement is justified.\(^\text{12}\) With rare exceptions,\(^\text{13}\) the question of what constitutes an infringement of a right is treated as a secondary concern. The Court’s recent decision in Planned Parenthood v. Casey,\(^\text{14}\) however, departs from this tradition. A three-justice plurality viewed the issue of infringement as dispositive, determining the constitutionality of particular abortion regulations on the basis of whether or not the regulations imposed an “undue burden” on the right to an abortion.\(^\text{15}\) In response, dissenting

\(^{12}\) See, e.g., Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (limiting strict scrutiny review to laws that directly and substantially interfere with the right to marry, but failing to provide guidance as to how such regulatory burdens are to be distinguished from other restrictions on marriage that will not be subject to rigorous review); Shapiro v. Thompson, 394 U.S. 618, 634-38 (1969) (recognizing a right to travel and rejecting the state’s asserted justification for penalizing the exercise of that right without ever describing the nature or magnitude of the regulatory burden that will be found to constitute a penalty).

The nature of what constitutes a burden on the right to have an abortion was left so unclear after Roe that states were not even certain they could prosecute a person who performed abortions without any medical training. The Court had to formally rule in Connecticut v. Menillo, 423 U.S. 9, 11 (1975), that “prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution.” Similarly, the voluminous literature discussing the right to have an abortion focuses primarily on the question of whether a right to have an abortion exists or whether the state’s interest in protecting the potential life of the fetus justifies the prohibition of most, if not all, abortions. See generally Brownstein & Dau, supra note 10, and commentary cited therein.

\(^{13}\) For an example of one such relatively rare analysis, see Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933 (1989). As an introduction to his article, Lupu correctly notes, “One question upon which little attention has been focused, however, is the character of government activity necessary to constitute a ‘burden.”’ Id. at 934.


\(^{15}\) Id. at 2818-21.
justices vehemently challenged the plurality's reasoning as both unprecedented and unprincipled.16

The purpose of this Article is to examine the “undue burden” standard utilized in Casey and to use it as a prism through which the broader question of the nature of constitutional infringements can be analyzed. Initially, the “undue burden” standard set out in Casey’s plurality opinion will be evaluated to determine whether it is an unorthodox ploy, as its critics contend, or whether it is rooted at least implicitly in prior precedent. Given the intensity of this dispute on the Court and the importance of its resolution for the future of abortion rights, this relatively narrow issue deserves careful attention in its own right.

Resolving this ostensibly limited issue, however, cannot be accomplished without addressing the broader and more difficult question of how, as a general matter, the Court identifies an infringement of a fundamental right.17 As will be seen, often the Court does not isolate the issue of infringement, but rather implicitly subsumes it within an analysis that focuses on the scope of the right and the state’s justification for any purported impairment.18 Judicial opinions seldom directly identify whatever principles, or at least patterns, of decision making there are that might help explain why certain state action in-

16. See id. at 2855, 2866-67 (Rehnquist, C.J., concurring in part and dissenting in part); id. at 2873, 2876-80 (Scalia, J., concurring in part and dissenting in part). Although Justices Scalia and Rehnquist technically concur with the judgment of the plurality with regard to all but one of the provisions of the Pennsylvania abortion statute under review, they dissent from the plurality’s reasoning as it is applied throughout the joint opinion. For the sake of convenience and readability, I refer to Scalia and Rehnquist as dissenting Justices in the text, rather than repeatedly describing their more accurate but complicated status. Since the focus of this Article is on the plurality’s reasoning, not the specific conclusions of the joint opinion, it should be clear that when I refer to Scalia and Rehnquist as dissenting Justices, I am only alluding to their opposition to the plurality’s arguments and analysis in adopting the undue burden standard.

17. While the identification of any constitutionally protected right or interest as “fundamental” may be subject to debate, there is general agreement that the abridgment of a right determined to be fundamental requires serious judicial review. Thus, when Justice Scalia protests that the adoption of an undue burden standard in Casey places all constitutional rights at risk, see infra note 282 and accompanying text, he accepts arguendo the premise that there is a fundamental right to abortion despite his obvious disagreement with that conclusion. What makes the undue burden standard problematic to Scalia is that an inappropriate standard is being used to review laws that purportedly burden the exercise of a fundamental right. Scalia’s concern is that the undue burden standard will continue to be applied in cases involving other rights that, unlike the right to have an abortion, do deserve to be recognized as fundamental.

18. The ballot access cases are a good example of this lack of specificity, as are the durational residency cases. See infra notes 172-228 and accompanying text.
fringes a fundamental right in some circumstances and not in others.19 Thus, these principles and patterns, the potential roots of the “undue burden” standard, remain to be unearthed, and that can only be achieved through a careful study of how the Court has treated the problem of infringements of rights in a variety of contexts.

That is the task of this Article. Its thesis is fourfold: First, the “undue burden” standard of the Casey plurality is reflected in one form or another throughout the fundamental rights case law of the past forty years. Second, the only aspect of the plurality opinion in Casey that is unique and unprecedented is its forthrightness in confronting directly the issue of what constitutes an infringement and its explicit recognition that the resolution of this issue may be the dominant and controlling perspective in determining the scope of a fundamental right. Third, the undue burden standard helps to explain how the Court has used its resolution of the question of what constitutes an infringement of a constitutional right in order to define the scope of rights and to determine the standard of review to be applied to state attempts to justify right-impairing actions. Fourth, by recognizing distinctions among kinds of infringements, just as we routinely identify different rights and different standards of review of state justifications for impairing rights, the case law is significantly clarified.

Part I of this Article describes the Casey decision and the strong disagreement between the joint opinion and its critics on the Court as to the legitimacy of the undue burden test. This Part interprets and rationalizes the undue burden standard in terms of its definition and application in the joint opinion. Part II demonstrates that, contrary to the protests by the Casey dissenters, the undue burden test is firmly rooted in fundamental rights jurisprudence. In support of this contention, explicit and implicit frameworks developed by the Court for determining whether a right has been infringed are identified and compared to the undue burden standard. Part II also suggests how an analysis of what constitutes an infringement of a right can be used to explain, in doctrinal terms, both the result in Casey and a great deal of the Court’s fundamental rights case law that would otherwise appear to be unprincipled and inconsistent. This Article concludes, in Part III, by arguing that a focus on the infringement of rights is necessary to accommodate the movement toward a more expansive and inclusive definition of rights reflected in the case law of the last four de-

19. The case law does not explain, for example, why imposing a $1.50 poll tax infringes the right to vote, while much greater monetary burdens do not infringe free speech rights. See infra notes 231-246, 258-266, 344-353 and accompanying text.
cades. By carefully considering what constitutes an infringement of a particular right, courts can more precisely and effectively define the constraints imposed by the Constitution on state power and the protection provided by the Constitution to individual rights.

I. The "Undue Burden" Test

A. The Casey Debate—The Preliminary Conflict

In Planned Parenthood v. Casey, Justices O'Connor, Kennedy, and Souter authored a joint, plurality opinion for the Court in which they used an "undue burden" test to evaluate the constitutionality of various abortion regulations. In brief, the test requires the Court to invalidate only those regulations found to unduly burden the right to have an abortion. The "undue burden" standard appears to reflect

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21. Id. at 2818-21. In Casey, the plurality evaluated the following seven provisions of a Pennsylvania statute regulating abortion services:
   1. Informed consent regulations require that a patient seeking an abortion must be provided information relating to "the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'" Id. at 2822 (quoting 18 PA. CONS. STAT. § 3205 (1990)). The patient must also be provided information regarding "the availability of printed materials published by the State describing the fetus," medical assistance for childbirth, child support from the father, and adoption agencies. Id.
   2. Informed consent requires that a physician rather than an otherwise qualified member of a clinic's staff provide certain information to a woman seeking an abortion. Id. at 2824.
   3. There must be a 24-hour waiting period "between the provision of the information deemed necessary to informed consent and the performance of an abortion." Id. at 2825.
   4. A minor must obtain the informed consent of one parent or utilize a judicial bypass procedure before she can obtain an abortion. Id. at 2832.
   5. Physicians providing abortion services are required to comply with various recordkeeping and reporting requirements. Id.
   6. A married woman must sign a statement that she has notified her spouse of her decision to terminate her pregnancy before she can obtain an abortion. The spousal notification requirement can be avoided, however, if the woman signs an alternative statement certifying that she cannot locate her husband, that her husband is not the father of the fetus, that her pregnancy is the result of a reported spousal sexual assault, or that she believes that notifying her husband will provoke him or someone else to cause her bodily injury. Id. at 2826.
   7. The statute defines, in specific terms, a medical emergency that would permit the performance of an abortion without complying with the statute's substantive regulations. Id. at 2822.
22. Id. at 2818-21. Three of the Pennsylvania regulations at issue received relatively cursory attention. First, the plurality rejected the argument that the definition of a medical emergency was too narrow. Deferring to the construction of the statute provided by the court of appeals, the plurality interpreted the provision broadly to include any serious risk to the life or health of the mother. Under that construction, the substantive abortion regu-
lations would be waived whenever compliance would constitute a significant threat to the woman's health, and the medical emergency definition could be upheld as constitutional. *Id.* at 2822.

Second, with regard to the requirement that certain information relating to a woman's informed consent can only be provided by a physician, the plurality concluded that there was no evidence on the record before it that this regulation constituted a substantial obstacle to women seeking abortions. Accordingly, the requirement was upheld under minimum rationality review. *Id.* at 2824-25. The Court's prior holding to the contrary in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 448 (1983), was overruled. *Casey*, 112 S. Ct. at 2823, 2825.

Third, the recordkeeping and reporting requirements were also upheld. *Id.* at 2832-33. While these regulations might increase the cost of some abortions by a "slight amount," the plurality determined on the record before it that there was no basis for concluding that the provision imposed "a substantial obstacle to a woman's choice." *Id.* Of more significance, the joint opinion indicated that the collection of information relating to abortions served the state's general interest in health and medical research. *See infra* notes 51-55, 290-296 and accompanying text. In light of that legitimate goal, it could not be said "that the [recordkeeping] requirements serve no purpose other than to make abortions more difficult." Thus, the regulations were constitutional. *Casey*, 112 S. Ct. at 2833.

The four other regulations raised more substantial concerns. The informed consent requirements were found to be constitutional since the provision of "truthful, nonmisleading information" served the legitimate purpose of ensuring that a woman's decision to have an abortion is "mature and informed." *Id.* at 2823-24. The fact that the state expressed a preference for childbirth over abortion in mandating the communication of information did not by itself create a substantial obstacle to women seeking abortion or unduly burden their choice. *Id.* at 2824. Again, the holdings of prior cases—*Akron*, 462 U.S. at 444-45, and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762-65 (1986)—were overruled.

The plurality also had little difficulty in upholding the parental consent requirement on the authority of prior precedent. *Casey*, 112 S. Ct. at 2832. The fact that Pennsylvania required "informed" parental consent raised no additional issues not already addressed and dispensed with in the plurality's discussion of the more general informed consent requirements. *Id.*

The 24-hour waiting period was also upheld, although the plurality conceded that the issue was a "troubling" one. *Id.* at 2825. While the plurality found the purpose of the regulation to be reasonable in that "important decisions will be more informed and deliberate if they follow some period of reflection," it was apparent that the practical impact of this requirement would be burdensome to many women, as the district court had concluded. *Id.* Because a 24-hour waiting period often necessitated a second visit to a physician before an abortion could be performed, the regulation resulted in delaying an abortion and increasing its cost. It also exposed women to additional risks of harassment by anti-abortion picketers and made it more difficult for some women to maintain the confidentiality of their decision. *Id.*

The plurality responded to these findings by explaining that although the district court had determined that these consequences would be "particularly burdensome" for certain women, it did not find that the regulation created a substantial obstacle to women seeking an abortion. *Id.* at 2825. Without additional information on the magnitude of the burden falling on even those women who were most severely affected by the waiting period, the plurality was unwilling to conclude, on the record before it, that the regulation unduly burdened the right to have an abortion. *Id.* at 2825-26.

The only abortion regulation the plurality found unduly burdensome and unconstitutional was the spousal notification requirement. *Id.* at 2829-30. Because of the potential
Justice O'Connor's dissenting arguments in earlier abortion cases, but the plurality in *Casey* claims earlier and more extensive roots for its approach. Indeed, the joint opinion maintains it is conforming the judicial review of abortion regulations to the standards of review that are generally applied in other fundamental rights cases.

Justices Blackmun and Stevens challenged several of the joint opinion's conclusions. Blackmun, in particular, insisted that any regulation imposing more than a de minimis burden on the exercise of the right to have an abortion must receive strict scrutiny. Both of these Justices' criticisms of the joint opinion's position, however, were subdued and explicitly respectful.

The dissenting opinions of Chief Justice Rehnquist and Justice Scalia, in contrast, scathingly denounced the joint opinion's reasoning. Rehnquist wrote:

> While we disagree with [the standard applying strict scrutiny to abortion regulations], it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. . . .

risks of physical and psychological abuse, a woman in an abusive family relationship would often be afraid to either notify her husband of her decision to have an abortion or to inform the state of the reasons for her concern. Since women in this circumstance would be deterred from obtaining an abortion, the plurality reasoned, the spousal notification requirement would operate as a substantial obstacle to these women's choice. *Id.* at 2826-30. Moreover, the state purpose in imposing this burden on women could not be analogized to the state's goal in requiring parental consent before a minor obtains an abortion. *Id.* at 2830. Adult married women cannot be treated as subordinate wards of their husbands by being required to consult with their marital partners before they make important medical decisions on their own behalf. *Id.* at 2830-31.

23. See infra notes 37-43 and accompanying text.

24. *Casey*, 112 S. Ct. at 2818 ("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.").

25. See *id.* at 2838-43 (Stevens, J., concurring in part and dissenting in part); *id.* at 2843-55 (Blackmun, J., concurring in part and dissenting in part). Justices Blackmun and Stevens both rejected the plurality's reasoning and decision in upholding Pennsylvania's informed consent requirements and 24-hour waiting period. Both Justices also rejected the plurality's reasoning with regard to the parental consent requirements, but only Justice Blackmun disagreed with the plurality's decision to uphold this provision as constitutional.

26. *Id.* at 2846 (Blackmun, J., concurring in part and dissenting in part) ("Our predecessors and the joint opinion's principles require us to subject all non-de minimis abortion regulations to strict scrutiny.").

27. See *id.* at 2838 (Stevens, J., concurring in part and dissenting in part) ("The portions of the Court's opinion that I have joined are more important than those with which I disagree."); *id.* at 2843-44 (Blackmun, J., concurring in part and dissenting in part) ("Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle.").
behind the facade [of adhering to precedent], an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.\textsuperscript{28}

Justice Scalia's rejection of the joint opinion's approach was even more condemnatory. After criticizing the lack of clarity of the "undue burden" test,\textsuperscript{29} Scalia went on to argue:

The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. . . . The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for this case, to preserve some judicial foothold in this illgotten territory.\textsuperscript{30}

Thus far, the terms of the debate seem to be clearly set forth by the participants. The dissenters claim that the plurality opinion transgresses accepted norms of constitutional interpretation by foisting this new and bizarre mechanism for resolving fundamental rights litigation on the Court. O'Connor, Kennedy, and Souter contend that the "undue burden" test is not only appropriate for the review of abortion regulations, but it represents a generally accepted framework for evaluating laws that allegedly violate fundamental rights. Presumably, one group of Justices must be substantially in error. Either the "undue burden" standard is unprecedented and wholly artificial, or it is firmly grounded in the Court's traditional fundamental rights jurisprudence.

The clear dissonance between these apparently polar positions is muddied somewhat by a basic ambiguity in the dissenters' positions. While Scalia and Rehnquist clearly think that an "undue burden" test has no foundation in the case law, they do little to explain or identify the ostensibly correct line of authority from which the joint opinion supposedly deviates so dramatically. But without establishing that background, the propriety of the plurality's contentions cannot reasonably be evaluated. It is not clear, for example, that a single, uniform approach to reviewing alleged infringements of fundamental rights has ever commanded the Court's allegiance. Arguably, the current fundamental rights case law demonstrates a range of methodologies of judicial review that vary depending on the nature of the right that is at issue.\textsuperscript{31} If that is the case, an "undue burden" test might be distinct, but well within the range of permissible approaches. It might

\textsuperscript{28} Id. at 2866-67 (Rehnquist, C.J., concurring in part and dissenting in part).
\textsuperscript{29} Id. at 2876-78 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{30} Id. at 2878 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{31} See infra notes 82-256 and accompanying text.
be substantively analogous to several conventional standards; indeed, it might synthesize previously disparate case law into a more formal framework of review.

Justice Rehnquist says almost nothing about existing standards of review in his dissent, other than to recognize and reject the strict scrutiny standard of *Roe* and to endorse his own view. He argues that since abortion is not a fundamental right, abortion regulations that are reasonably related to a legitimate state interest must be upheld. At best, one may tentatively infer from this argument a commitment to a basic two-tier model under which all laws that burden fundamental rights to any extent are strictly scrutinized, while laws that regulate any other interests are upheld so long as they are rationally related to a legitimate state interest.

Scalia is marginally more helpful. He identifies one kind of a burden on fundamental rights that should not invoke strict scrutiny—an incidental burden on a right imposed by a law of general applicability. But Scalia does not contend, nor could he, that the Court has adopted this position as a general rule for all fundamental rights.

Scalia goes on to suggest that not all laws that "consciously and directly" regulate constitutionally protected conduct will be routinely upheld under deferential review simply because the magnitude of the burden they impose is nominal. But this is not a clear statement that all laws "consciously and directly" burdening any fundamental right must be strictly reviewed in all circumstances. Scalia's language may reflect the much more limited claim that prior precedent demonstrates that the Court will strictly scrutinize certain laws that directly but only

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32. *Id.* at 2858-60, 2867 (Rehnquist, C.J., concurring in part and dissenting in part).

33. *Id.* at 2878 (Scalia, J., concurring in part and dissenting in part).

34. Scalia states only that he has "forcefully urged that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right." *Id.* The Court accepted this principle as the basis for defining the scope of free exercise rights in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). *See supra* notes 5-7 and accompanying text. In *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), however, Justice Scalia urged the Court to adopt a similar approach for freedom of speech with regard to laws of general applicability that do not target expression, but only incidentally restrict conduct that is engaged in for expressive purposes. See *id.* at 2463-68 (Scalia J., concurring). Significantly, no other justice in *Barnes* endorsed Scalia's approach or joined his concurrence.

It is also worth noting that in the Court's most recent free exercise case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), Justice Souter forcefully urged the Court to reexamine the rule it had adopted in *Smith* that neutral laws of general applicability may incidentally burden religious practices without ever infringing free exercise rights. See *id.* at 2240-50 (Souter, J., concurring).

35. *Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part).
minimally burden the exercise of particular rights. Thus, the undue burden test cannot account for a discrete class of cases in which the Court will invalidate a law as an abridgement of a fundamental right despite the fact that the law does not substantially interfere with the exercise of the right. This criticism, that the “undue burden” standard cannot explain all of the Court’s prior fundamental rights decisions, however, is a far cry from establishing that the joint opinion’s analysis is manufactured out of whole cloth.

While the Rehnquist and Scalia dissents fail to document the unprecedented nature of the “undue burden” test or to explain the “correct” framework of review that the plurality has erroneously ignored, the joint opinion’s side of the argument presents comparable uncertainties. To answer the question of whether the undue burden standard is consistent with the case law, it is necessary to understand what the joint opinion means by an “undue burden.” Only then will it be possible to determine whether or not the criticism of the plurality’s analysis is justified.

B. Understanding the “Undue Burden” Test

(1) Undue Burdens—Threshold Inquiry or Constitutional Standard?

The description of the “undue burden” test in the joint opinion is, unfortunately, not free from ambiguity. The opinion states:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.36

This language raises several crucial questions of interpretation. To begin with, it is not clear whether the “undue burden” standard of the joint opinion reflects the same framework of review endorsed by Justice O’Connor in her prior dissents in abortion rights cases. In City of Akron v. Akron Center for Reproductive Health, O’Connor explained, “The ‘undue burden’ required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the

36. Id. at 2820.
Thus, the Court was directed to determine if the right to an abortion was unduly burdened in order to identify the correct level of review to apply to the challenged law. Laws that did not impose undue burdens would receive minimum rationality review; laws that did impose undue burdens would be evaluated under strict scrutiny.

The *Casey* opinion, however, suggests what at first glance appears to be a startling revision of O'Connor's prior position. Instead of using the "undue burden" test as a threshold inquiry to determine the appropriate standard of review to apply, the *Casey* plurality utilizes the undue burden test itself as an independent standard of review. Repeatedly, the plurality suggests that unduly burdensome laws are invalid while laws that do not impose undue burdens are constitutional. No further analysis involving either strict scrutiny or some form of rational basis test seems to be required. The Court's evaluation of the burden imposed on the right to an abortion is simply elevated to a formal standard of judicial review without explanation.

Despite its outward appearance, however, this formal modification of the undue burden standard may not represent a substantive departure from the earlier O'Connor dissents. There are good reasons to argue that the joint opinion's reasoning still reflects the core of O'Connor's original position. The descriptive content of abortion rights remains the same—it is only the doctrinal perspective that has shifted.

The substitution of the question of what constitutes an infringement on the right—that is, what constitutes an undue burden—as the operative inquiry in place of the more traditional standard of review is grounded on a particular substantive foundation. It is a result of the plurality's fairly rigid vision of the nature of abortion rights, the kinds of interests a state might assert in attempting to justify abortion regulations, and the weight to be assigned to those interests. It is this dis-

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38. *See Casey*, 112 S. Ct. at 2820 ("In our considered judgment, an undue burden is an unconstitutional burden."); id. at 2830 (describing the effect of the spousal notice requirement and concluding that "it is an undue burden, and therefore invalid").

39. For example, the plurality answers the question "whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional" without applying any standard of review. The opinion simply states, "The answer is no." *Id.* at 2820-21.
tinct understanding of the right/infringement/justification interrelation in the abortion context that permits the plurality to collapse and refocus the review of abortion regulations on the question of whether the right is unduly burdened.40

The critical language in this regard is the joint opinion's statement, "Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."41 This language implicitly recognizes that laws imposing undue burdens on the right to an abortion must be strictly scrutinized. However, because of the discrete and limited nature of the right to have an abortion, and the consequent restricted range of state interests that might reasonably be furthered by regulating abortions, the plurality is willing to conclude that no state objective furthered by pre-viability abortion restrictions could constitute the kind of compelling state interest that strict scrutiny requires. Accordingly, once a court determines that an undue burden exists, the law creating that burden must be invalid, since the plurality cannot imagine any sufficiently compelling

40. The joint opinion does clarify a fundamental ambiguity in O'Connor's earlier dissents, but this does not represent a change in O'Connor's position as much as it does a resolution of her uncertainty as to the scope of abortion rights. In her dissents in Akron and Thornburgh, O'Connor argued that the state had "compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'" Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting Akron, 462 U.S. at 461 (O'Connor, J., dissenting)).

In theory, the state's compelling interest in protecting potential life should permit the state to impose severe and undue burdens on women seeking abortions without violating the constitution, notwithstanding the strict scrutiny review O'Connor recognized that such laws must receive. Indeed, taken to its logical conclusion, a compelling interest in protecting potential life from the moment of conception should justify the complete prohibition of all abortions (or at least all nontherapeutic abortions).

O'Connor, however, never formally accepted that ostensibly logical consequence. Thus, she explained that "if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes 'necessary to apply an exacting standard of review' . . . the possibility remains that the statute will withstand the stricter scrutiny." Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting Akron, 462 U.S. at 467) (O'Connor, J., dissenting)). The ambivalence reflected in the use of the term "possibility" in this context left open the question whether O'Connor believed that egregiously burdensome laws restricting abortion should be upheld as constitutional.

The joint opinion in Casey answers that question explicitly: "The answer is no." Casey, 112 S. Ct. at 2821. By finally resolving the result of applying strict scrutiny to unduly burdensome abortion regulations in a way that invalidates such laws, however, O'Connor is not abandoning the basic principle expressed in her earlier dissents. That principle requires that laws that unduly burden the right to have an abortion, and only those laws, must receive close judicial scrutiny.

41. Casey, 112 S. Ct. at 2804.
state interest that would justify that level of interference with a woman's choice.\footnote{2}

(2) The Problems of Purpose and Effect

The plurality's analysis is slightly more complicated with regard to laws that do not impose an undue burden on the right to an abortion. Basically, the "undue burden" standard also subsumes the application of a rational basis standard of review to regulations that do not impose undue burdens. The direct application of the rational basis test is not necessary because the "undue burden" standard includes an analysis of the state's purpose in enacting any challenged law as well as an evaluation of the law's effect. In essence, the "undue burden" standard serves as a filter through which abortion regulations will be screened to identify and invalidate those laws serving impermissible purposes or producing unacceptable effects (or some combination of the two).\footnote{3} From the plurality's perspective, whatever remains—any law held not to be unduly burdensome—must necessarily survive minimum rationality review.

This point requires further elaboration because it underlies perhaps the greatest uncertainty and ambiguity in the joint opinion. Even if one agrees that the undue burden analysis effectively subsumes both the threshold inquiry of determining the appropriate standard of review and the application of that standard (collapsing these conceptually distinct questions into the language of "infringement" in the joint opinion), that still leaves open the question of how a court can identify an undue burden in the first place. On this issue, Justices Scalia and Rehnquist on the one hand profess to be entirely mystified by the plurality's reasoning, yet on the other seem to read the undue burden standard as nothing more than a simplistic effects test.\footnote{4}

One can have some sympathy for the former criticism, but the latter argument is difficult to accept as a good faith reading of the joint opinion. Any fair reading of the language in the joint opinion

\footnote{2. This conclusion is unremarkable. The plurality implicitly determined that neither the state's interest in protecting potential human life, nor its interest in protecting the health of the mother, justifies substantial interference with the right to have an abortion beyond the requirements of accepted medical practice. \textit{Id.} at 2821. Thus, to withstand rigorous review, a state law would have to further a more compelling interest than protecting fetal life or maternal health. The list of relevant state interests that might meet this requirement is very short.}

\footnote{3. \textit{See infra} notes 44-78 and accompanying text.}

\footnote{4. \textit{See Casey}, 112 S. Ct. at 2866 (Rehnquist, C.J., concurring in part and dissenting in part); \textit{id.} at 2876-80 (Scalia, J., concurring in part and dissenting in part).}
quoted earlier demonstrates that the “undue burden” standard does not simply require a reviewing court to evaluate the magnitude of a burden to determine if it is sufficiently heavy to be undue. Rather, the plurality is proposing a fluid and complex analysis in which both the purpose and the effect of the challenged law must be considered to determine if it is constitutional. The joint opinion’s use of the term “substantial obstacle” may have contributed to the dissenters’ confusion, since that expression would most typically be used to describe an effects test. Nevertheless, the repeated references to statutory purpose both within the joint opinion and in Justice Blackmun’s description of the plurality’s position make it difficult to understand the dissenters’ reluctance to grapple with this aspect of the “undue burden” standard.

45. See supra note 36 and accompanying text.

46. This approach may create obvious problems in its application. See infra notes 66-78 and accompanying text. Indeed, the dissenters may reasonably argue that the undue burden test not only lacks a foundation, but also lacks sufficient clarity of content to be reasonably administered by the lower courts. However, these two challenges must be kept separate. If the undue burden standard does not provide clear guidelines to the lower courts that will have to apply the test, it would hardly be the first constitutional standard to be vulnerable to that criticism. Vague and indeterminate standards may deserve to be condemned, but that failing does not make them unprecedented. In a strange sense, the dissenters profess not to understand what the undue burden test requires, but nonetheless are convinced that “whatever it is” it has no parallel in constitutional law.

47. Casey, 112 S. Ct at 2820 (describing as unduly burdensome any state law that has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion”). See infra note 53 and accompanying text for additional discussion regarding the confusion caused by the plurality’s use of the term “substantial obstacle” in discussing abortion regulations intended to serve an impermissible legislative purpose.


49. Id. at 2845 (Blackmun, J., concurring in part and dissenting in part).

50. Certainly, Justice Scalia, the author of the majority opinion in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990), can hardly claim to be unfamiliar with the idea that the state’s purpose in restricting the exercise of a right may determine whether state law will be held to impose a constitutionally cognizable burden on the right. See supra notes 5-7 and accompanying text. In his concurrence in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2239-40 (1993), Scalia rejects any analysis of legislative purpose in applying the Smith rule if such an inquiry relates to the subjective motives of lawmakers. While rejecting a purpose analysis, however, Scalia seems to endorse the Court’s examination of the “design, construction, or enforcement” of a challenged law as well as the “object” of a statute. Id. at 2239 (Scalia, J., concurring). This distinction suggests that Scalia’s primary concern is with the propriety of the evidence used to establish a law’s purpose, not with the consideration of purpose itself.

Even more ambiguously, Scalia argues that an analysis of legislative motive or purpose is unnecessary, since a law intended to target and suppress a religious faith that ineptly fails to accomplish its goal would not violate free exercise guarantees. Id. at 2240. Even if Scalia’s contention is correct, however, his argument certainly misses the point. The rationale for inquiring into legislative purpose and motive is to identify and invalidate laws that are intended to target and suppress the practice of a particular religion, but which
Recognizing that an undue burden standard requires an examination of a law’s purpose as well as its effect, however, tells us little about how these factors are to be considered either independently or together. Here, the joint opinion can be criticized for providing few guidelines or explanations. Thus, we are left with the unenviable task of determining the standard’s content by studying the way the joint opinion applies the test and inferring rules of decision from the plurality’s reasoning and holdings. What follows is an attempt to rationalize the plurality’s analysis by expanding on its argument and filling in missing premises and connecting principles.

(a) Reviewing Laws That Serve Presumptively Valid or Invalid Purposes

As an initial premise, the plurality suggests that some state purposes are presumptively invalid. Specifically, abortion regulations are presumptively unconstitutional if they are intended to make it substantially more difficult for women to choose to have abortions.\(^5\) It is critical to understand here that the plurality is extending an examination of the state’s purpose to include both the state’s goal and the means by which that goal is to be furthered. Thus, the state’s ultimate goal of protecting potential life, in the abstract, is a constitutionally legitimate one. However, the state cannot attempt to further that goal by substituting its choice favoring birth over abortion for the choice of the woman by deliberately hindering her ability to effectuate a contrary decision and obtain an abortion.\(^6\) Thus, a law requiring five doctors to be present during an abortion procedure for the purpose of dramatically increasing the cost of abortions would be struck down as unduly burdensome, despite the argument that it furthers the state’s legitimate purpose of protecting potential life.\(^7\)

\(^5\) Are drafted in sufficiently general terms that some unimportant secular activities are also prohibited. The issue is not whether a law is unconstitutional solely because of its motive. Rather, it is whether a law that burdens a fundamental right, enacted for that specific purpose, can escape constitutional scrutiny if the impact of the law falls upon unprotected as well as protected activities.

\(^6\) See Casey, 112 S. Ct. at 2820-21.

\(^7\) The plurality states this explicitly: “A statute with [the purpose of making it more difficult for women to obtain abortions] is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.” Id. at 2820.

\(^8\) This interpretation of the joint opinion is partially contradicted by the plurality’s use of the same “substantial obstacle” language to describe both the magnitude of an effect and the kind of a purpose that may be found to constitute an undue burden. It is difficult to understand, however, what this “substantial obstacle” language means in the context of evaluating the state’s purpose. Is the plurality suggesting that if a state’s primary (or exclusive) purpose in enacting a law is to discourage or hinder women from obtaining an abor-
Under this analysis, in theory, even a law imposing a minor burden on the ability of a woman to have an abortion may be struck down if it can be shown that its purpose is to hinder the exercise of this fundamental right. Such a purpose by itself may create an “undue burden” because the state’s interference with the exercise of the right is by definition unwarranted. In practice, however, it may be

that purpose will not be recognized as impermissible and the law struck down unless the state is intending to substantially hinder the exercise of the right? It cannot be that the goal of imposing an unnecessary and bothersome burden on the right to have an abortion will be upheld as legitimate as long as the state thinks the obstacles it is deliberately creating are not substantial.

Indeed, if the plurality had seriously intended to accept as legitimate the state objective of hindering women seeking abortions as much as possible without creating substantial obstacles to the exercise of the right, it is hard to understand why they bothered to consider the state’s purpose to be relevant to identifying an undue burden at all. Since state laws that have the effect of substantially interfering with the right to have an abortion would already constitute undue burdens, the plurality’s purpose inquiry would be largely redundant. The only circumstance in which a purpose inquiry would be useful would be when a state law was intended to create a substantial obstacle to women seeking abortions, but somehow failed to further this objective. That law would not technically produce an unduly burdensome effect, but could be invalidated on the grounds of its purpose alone. It is simply untenable to believe, however, that the authors of the joint opinion intended such an absurd result.

The more plausible interpretation of the joint opinion suggests that any law solely intended to prevent women from obtaining abortions by burdening their choice serves an impermissible purpose. The Court repeatedly refers to abortion regulations that serve a “valid purpose,” id. at 2819, to abortion restrictions that are not designed to “hinder” a woman’s choice, id. at 2820, and to “[u]nnecessary health regulations,” id. at 2821. This language serves as a counterweight to the “substantial obstacle” terminology and provides a sound basis for reading the joint opinion as rejecting any state goal of burdening the right of women to have an abortion in order to make that decision more difficult and less frequent.

Strong support for this conclusion can be found in the plurality’s evaluation of Pennsylvania’s recordkeeping and reporting requirements. The plurality notes that far from imposing a “substantial obstacle to a woman’s choice,” Pennsylvania’s requirements will only “increase the cost of some abortions by a slight amount.” Id. at 2833. Despite this conclusion, the joint opinion also explains that Pennsylvania’s reporting regulations further the state’s legitimate interest in medical research, “so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.” Id. The implication, of course, is that even a slight increase in the cost of having an abortion would be constitutionally problematic if the regulation causing that increase in cost had “no purpose other than to make abortions more difficult.”

The plurality essentially equates the terms “unwarranted” and “undue” in explaining the error of post-Roe abortion decisions that subjected virtually all restrictions on abortion to strict scrutiny. Thus, these earlier decisions departed from the original understanding in Roe that the right to an abortion was a right “to be free from unwarranted governmental intrusion” into procreational decisions. Id. at 2819 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). The plurality explained, “The very notion that the state has a substantial interest in potential life leads to the conclusion that not all [abortion] regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue.” Id. at 2820. From this foundation it can be easily
difficult to establish that a regulation that does not create a substantial obstacle to obtaining an abortion was adopted for the purpose of interfering with the exercise of this fundamental right. In many cases, the more minor the burden, the easier it will be to rationalize its imposition as serving legitimate state interests.

In addition to suggesting that some state purposes are presumptively invalid, the plurality also implies that some state purposes are presumptively valid. “Regulations designed to foster the health of a woman seeking an abortion” and regulations promoting the state’s interest in potential life by “inform[ing] the woman’s free choice” are of this character. These purposes are uniquely relevant to and consistent with the Court’s understanding of the nature of the right to have an abortion itself. Accordingly, the burden created by a law serving these purposes is not “undue” unless the actual effect of the law is to substantially interfere with a woman’s ability to obtain an abortion.

As was true of laws allegedly serving impermissible purposes in other contexts, there may be a connection between the effect of the challenged law and a court’s understanding of the law’s purpose. The mere recitation of a presumptively valid purpose should not be allowed to mask an impermissible state goal. Thus, a law requiring a

Inferred that a law serving no legitimate purpose (or a law serving an impermissible objective) imposes an unwarranted and, therefore, undue burden on the right to have an abortion.

56. Id. at 2821.
57. Id. at 2820.
58. The Court’s understanding of the nature of the right to have an abortion strongly influences its evaluation of regulations that are alleged to burden the exercise of the right. Thus, since the Court grounds the right to have an abortion in part on the woman’s interest in her health and bodily integrity, the right can be characterized as the woman’s interest in obtaining a safe abortion consistent with sound medical practice. Under that interpretation, abortion regulations that are intended to assure that abortions are provided by competent medical personnel may be viewed as promoting the right rather than interfering with its exercise. See Connecticut v. Menillo, 423 U.S. 9, 10 (1975).

The plurality in Casey appears to adopt a similar position with regard to laws that are alleged to inform the woman’s choice. The right to have an abortion is construed to be a woman’s right to make a deliberate, informed, and reflective choice about whether or not to terminate her pregnancy. See generally Brownstein & Dau, supra note 10, at 753-54 (suggesting that adequate time and information to make a careful and deliberate choice about abortion reinforces and protects a woman’s autonomy); Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should be Overruled, 59 U. Chi. L. Rev. 381, 408-11 (1992) (arguing that Roe does not forbid the states from encouraging responsibility in a woman’s decision). Accordingly, laws designed to further such decision making, in a sense, support the exercise of the right and are only invalid if the means selected to further this right enhancing objective severely limit a woman’s ability to effectuate her choice.
woman considering an abortion to consult with everyone in her neighborhood before making that decision could not be successfully justified as serving the purpose of informing the woman's free choice. Such a law not only creates a substantial obstacle to exercising the right to have an abortion; its egregious impact significantly undermines the state's credibility as to the law's asserted purpose.

The three substantively significant Pennsylvania provisions upheld in Casey—the twenty-four-hour waiting period,59 the informed consent requirement,60 and the parental consent requirement61—were all construed to have the particularly permissible purpose of informing the woman's choice, with special regard to her understanding of the value of the potential life inside her.62 While one may disagree with the joint opinion's evaluation of the purpose of these provisions,63 and even more strenuously challenge the conclusion that these restrictions do not create substantial obstacles to the exercise of the

59. Id. at 2825-26; see supra note 22.
60. Id. at 2822-25; see supra note 22.
61. Id. at 2832; see supra note 22.
62. See id. at 2824 (upholding informed consent provisions that ensure that a woman's decision to have an abortion is "mature and informed" even though the information provided "expresses a [state] preference for childbirth over abortion"); id. at 2825 (arguing that a 24-hour waiting period may reasonably result in "more informed and deliberate" decisions on the part of women seeking abortion); id. at 2821, 2832 (holding that parental consent requirements parallel informed consent requirements by ensuring that a woman's decision to have an abortion is properly informed regarding the life of the unborn).
63. In contrast to the plurality's conclusion that the Pennsylvania 24-hour waiting period and informed consent requirements were intended to inform the woman's decision, not to hinder it, Justice Blackmun, in describing a similar Pennsylvania statute, had argued: States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice. . . . The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. . . . Close analysis of those provisions . . . shows that they wholly subordinate constitutional privacy interests . . . in an effort to deter a woman from making a decision that . . . is hers to make. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986) (emphasis added) (striking down informed consent provision as unconstitutional interference with the woman's right to choose to terminate her pregnancy).

Similarly, the district court's opinion in Casey noted, "The hostility of Pennsylvania's legislature to the protection of a woman's right of privacy to choose abortion is apparent from the history of the legislation purporting to regulate abortion in Pennsylvania." Casey, 744 F. Supp. 1323, 1372 (E.D. Pa. 1990). One may certainly argue that such a history of hostility suggests a legislative purpose to hinder women and prevent them from obtaining abortions, rather than to inform women about the choices available to them in order to assist them in making a reflective and sound decision. See Linda C. McClain, The Poverty of Privacy?, 3 COLUM. J. GENDER & L. 119, 144 n.118 (1992) ("Pennsylvania's Abortion Control Act and similar acts have been regarded, certainly by pro-choice advocates but by other observers as well, as attempts by opponents of legal abortion to erode abortion rights
right to choose,64 the analysis used in the joint opinion to uphold these regulations seems clear. The state's purpose in adopting these regulations was presumptively valid, and, on the record before the Court, the impact of the regulations was found not to be sufficiently disruptive of a woman's rights to preclude the furthering of the state's objectives through the means it had chosen.65

(b) Evaluating Laws That Serve Legitimate Purposes

The plurality's invalidation of the spousal notice provision66 is more difficult to understand. If the spousal notice requirement was understood to serve the purpose of informing the adult woman's choice in the same way that the parental consent regulation was interpreted to inform the decision of a minor considering an abortion, it would be impossible to reconcile the plurality's conclusions that the spousal notice provision creates a substantial obstacle to obtaining an abortion while the parental consent rule does not. If anything, of the two regulations, the parental consent requirement probably creates a more substantial obstacle to the exercise of abortion rights. Certainly,
its impact is at least comparable to the spousal notice requirement. Yet, only the spousal notice requirement is struck down as an undue burden.

The implication of these contrasting evaluations is that the purposes of the two laws are different and that this difference is what accounts for the plurality's inapposite conclusions regarding these regulations. Whatever the Pennsylvania legislature's actual purpose might have been in adopting the spousal notice provision, the plurality would not accept this law as one designed to inform the woman's choice. Indeed, any such construction of this regulation would denigrate the woman's status as an equal and independent individual, and imply that she had a subordinate status in the family to that of her husband. In fact, if informing the woman's choice was the only objective of the spousal notice requirement, the law would be unconstitutional by virtue of the antiquated stereotypes underlying its alleged purpose even if it had a less than egregious effect on women's rights. The lengthy discourse in the joint opinion on the substantial consequences of the spousal notice rule would have been an unnecessary and redundant argument.

The spousal notice requirement could not be declared unconstitutional with such ease, however, because the state argued that it furthered the husband's interests as well as those of his spouse. In considering this alternative purpose, the plurality determined that the state's goals were, in some limited sense, legitimate. The joint opinion explicitly recognizes the husband's "deep and proper concern and in-

67. Justice Rehnquist is justifiably perplexed when he wonders why, "while striking down the spousal notice regulation, the joint opinion would uphold a parental consent restriction that certainly places very substantial obstacles in the path of a minor's abortion choice." Casey, 112 S. Ct. at 2866 (Rehnquist, C.J., concurring in part and dissenting in part); see also Note, The Supreme Court, 1991 Term—Leading Cases, 106 Harv. L. Rev. 163, 206-10 (1992) (arguing that the Court's conclusion that spousal notification, but not parental consent, imposes substantial obstacles is illogical).

68. See Casey, 112 S. Ct. at 2830-31. From the plurality's perspective, any attempt to justify the spousal notice requirement as an attempt to inform the woman's choice must be based on the impermissible assumption that the pregnant wife is a ward of her husband, having the comparable status of a child in need of adult advice. The state may not ground a constitutionally legitimate goal on such a suspect foundation.

69. An attenuated analogy might be drawn here to gender discrimination cases in which a relatively minor, or even benign, gender classification is invalidated because it is based on antiquated sex-role stereotypes. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that denying males entrance to a state-supported nursing school violates the Equal Protection Clause of the Fourteenth Amendment); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating federal law which paid social security benefits to a widower only if he received at least half of his support from his deceased wife).
terest ... in his wife’s pregnancy and in the growth and development of the fetus she is carrying.” Thus, the state’s objective of protecting the husband’s “concern and interest” in the fetus, while certainly not a presumptively valid purpose, would at least seem to be a barely permissible one. A statute is not unconstitutional solely because it affirms a husband’s interest in his wife’s pregnancy.

Accepting the furtherance of the husband’s interest in the fetus as a legitimate state interest does not conclude the constitutional evaluation of the spousal notice requirement, however. As we have seen, the state’s otherwise legitimate goal of protecting potential life becomes impermissible if the state attempts to further this goal by deliberately creating substantial obstacles to block women from choosing to have abortions. Accordingly, if the state is attempting to further the legitimate goal of protecting the husband’s interest in the growth and development of the fetus by adopting a regulatory scheme intended to substantially interfere with his wife’s ability to obtain an abortion, the state’s purpose would be constitutionally impermissible and the law serving that purpose struck down.

Unfortunately, at this point in the analysis, the joint opinion seems to straddle two inconsistent rationales for its holding. On the one hand, the plurality argues that any attempt by the state to require a wife to advise her husband “before she exercises her personal choices” is a violation of her liberty. The implication is that a law of this kind would either be predicated on unconstitutional assumptions or directed at unconstitutional goals, and would therefore be invalid regardless of the actual degree of interference with the woman’s fundamental rights. Spousal notification requirements relating to reproductive choices are intrinsically unconstitutional under this reasoning.

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70. Casey, 112 S. Ct. at 2830 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976)).

71. While promoting or protecting the husband’s interest in the fetus his wife is carrying may be a permissible state objective, the plurality makes it clear that the state cannot use its regulatory power to further that interest at the expense of the woman’s superior privacy rights. Id. at 2830 (noting that when husband and wife disagree, view of wife prevails). Accordingly, there will be relatively few situations in which the state could act affirmatively to further the husband’s interest. One assumes, for example, that the state could provide information, education, and other assistance to husbands to enable them to aid their wives in obtaining adequate prenatal care. There may also be situations in which the wife is incapacitated and the husband’s interest in the fetus becomes relevant for medical purposes. Id. at 2831.

72. Under the plurality’s analysis, the state’s intent in selecting the means to further its goal is as relevant to a regulation’s constitutionality as the ultimate goal itself. See supra notes 51-53 and accompanying text.

73. Casey, 112 S. Ct. at 2831.
because of the distorted vision of family roles that such regulations reflect.\textsuperscript{74}

The problem with this argument is that it seems totally divorced from the empirical data the plurality reviewed in determining that a spousal notification requirement relating to abortion “will operate as a substantial obstacle” to a woman seeking to terminate her pregnancy. Under this approach, again, what appears to be the factual foundation of the plurality’s review of the spousal notice provision is, surprisingly, rendered irrelevant. If spousal notices are an inherently irrational or illegitimate means for furthering a husband’s interest in his wife’s pregnancy, nothing further needs to be said about the consequences of these requirements.\textsuperscript{75}

On the other hand, the plurality also seems to suggest that the real problem with the means adopted by the state to further the husband’s interest in the growth and development of the fetus is the effect of the spousal notice regulation, not its purpose. The implication is that it may be reasonable to support the husband’s desire to be informed about his wife’s decision to terminate her pregnancy, but the consequences of requiring this notification are unacceptable. The plurality recognized that the spousal notice provision would create a substantial obstacle for many women seeking an abortion since “[f]or the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife’s decision.”\textsuperscript{76}

This latter argument provides a more intellectually coherent foundation for the plurality’s holding since it is the only rationale that justifies the lengthy discussion of spousal abuse in the joint opinion. Under this approach, the spousal notice provision is understood to serve a permissible purpose in promoting the husband’s interest in the fate of the fetus. This state objective is not one of the presumptively valid purposes the plurality has identified, such as informing women

\textsuperscript{74} Id. (rejecting view of woman’s role in the family that is “reminiscent of the common law”).

\textsuperscript{75} The more general criticism of the spousal notice requirement may have been intended to provide a supplementary basis for invalidating Pennsylvania’s provision. Thus, the plurality may have had overlapping concerns relating to the spousal notice requirement, and included all of them in the joint opinion to strengthen its overall conclusion that the Pennsylvania provision is unconstitutional. What remains unclear, however, is whether these more general concerns would be an adequate basis for invalidating the spousal notice requirement if the more specific and empirical challenge relating to the provision’s effect had not been presented.

\textsuperscript{76} Id.
about the choices available to them. But the spousal notice provision also cannot be challenged as a deliberate attempt to hinder a woman's decision regarding abortion. Thus, the spousal notice law is found to have a purpose that is neither presumptively valid nor conclusively impermissible; its purpose is merely legitimate.

A regulation in this third purpose category is only unconstitutional if its effect creates a substantial obstacle to the exercise of the right to have an abortion. In the case of the spousal notification provision, the joint opinion concluded that such an effect existed and on that basis invalidated the regulation. The critical point here is that both the purpose and effect of a statute are relevant in determining whether the statute imposes an undue burden on the right to an abortion. Thus, the plurality will construe a less severe impact to be an undue burden if the purpose of the law creating that effect is of marginal legitimacy and importance, while a burden of greater magnitude will be held not to be undue if it is the result of a law that serves a particularly valid or compelling objective. Accordingly, since the objective of the spousal notice requirement was merely legitimate, perhaps only barely permissible, the plurality held that the effect of the law was undue and unconstitutional. However, it would accept and uphold a similar impact resulting from a regulation that furthers a presumptively valid goal.77 Thus, the plurality could uphold the parental consent provi-

77. The idea that certain state purposes are presumptively valid, other state objectives are presumptively invalid, while still other state goals are merely legitimate or permissible, may be analogized to dormant Commerce Clause doctrine.

It has long been recognized that state regulations designed to protect the public health and safety "carry a strong presumption of validity." Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959); see also Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 442-46 (1978) (noting that courts have long been deferential to state highway safety regulations). The presumption, however, is rebuttable; it can be overcome by a sufficiently strong showing that the law at issue unduly burdens interstate commerce. Thus, in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), Justice Powell, writing for a four-justice plurality, explained that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." Id. at 670.

While other state interests may be legitimate in the sense that they are not constitutionally impermissible, the Court extends less deference to regulations intended to further such merely permissible goals. In these circumstances, the Court is more willing to balance the resulting burdens on interstate commerce against the derived benefits and strike down the law. See, e.g., Kassel, 450 U.S. at 681 n.1 (Brennan, J., concurring) (noting the "heightened degree of deference" extended to safety regulations in comparison to the Court's willingness "to balance asserted burdens against intended benefits" in other regulatory areas); Pike v. Bruce Church, Inc. 397 U.S. 137, 143-46 (1970) (holding that the state's purpose of protecting the reputation of its cantaloupe growers is too insubstantial to justify the burden on interstate commerce created by the challenged regulation).
sion while striking down the spousal notice provision, despite the comparable burdens imposed by each law, because it attaches special value to the goal underlying the former regulation.\footnote{78}

The above model of fundamental rights review is both complicated and indeterminate. It requires a threshold inquiry as to both means and ends into the state’s purpose in adopting a challenged law, and then, depending on the nature of the state’s purpose, an evaluation of the impact of the law to see if it constitutes an “undue burden.” The complexity of this model cannot be blamed on the authors of the joint opinion, however, if the “undue burden” standard they utilize in \textit{Casey} accurately describes how the Court has been operating in deciding fundamental rights cases, or at least is substantively analogous to some accepted method of review. Determining if that is the case is the task of the second Part of this Article.

Finally, the Court recognizes that regulations serving a protectionist motive are presumptively invalid. \textit{See, e.g.}, Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep’t of Treasury, 490 U.S. 66, 75-76 (1989) (explaining the decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), to strike down a state tax exemption because it “was motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry”); \textit{see also} Kassel, 450 U.S. at 685-87 (Brennan, J., concurring) (noting that if the actual purpose of state regulation is protectionist in nature, the regulation is unconstitutional and must be struck down).

The reasoning and the objectives of dormant Commerce Clause cases do not relate directly to the burdening of fundamental rights, and, in that sense, these decisions do not provide a precedential foundation for the joint opinion’s analysis in \textit{Casey}. The approach used by the Court to resolve dormant Commerce Clause issues helps to explain the plurality’s opinion, however, by demonstrating in at least one context how the Court distinguishes among various state purposes in evaluating the effect of challenged regulations.

\footnote{78. Similar reasoning can be used to explain the apparent discrepancy between the plurality’s evaluation of the burden created by the 24-hour waiting period and the burden created by the spousal notice requirement. Justice Rehnquist, for example challenged the plurality’s willingness to uphold the 24-hour waiting period, despite the “particular burden” it imposed on certain women, while at the same time striking down the spousal notice requirement on the grounds that a significant “fraction” of women affected by the law would be substantially burdened. \textit{Casey}, 112 S. Ct. at 2866 (Rehnquist, C.J., concurring in part and dissenting in part).

The plurality’s decision with regard to these two provisions may depend more on the Justices’ evaluation of the purposes of the two regulations than on the provisions’ effects. Thus, because the 24-hour waiting period furthers the presumptively valid objective of informing the woman’s choice, the plurality will insist on particularly strong evidence of interference with a woman’s ability to obtain an abortion before it will hold that this regulation constitutes an undue burden. By contrast, because the spousal notice requirement serves a marginally permissible goal, the plurality will be less tolerant of burdens imposed on the right to have an abortion in furtherance of that objective.
II. What Constitutes an Infringement of a Fundamental Right?

The Constitution is not silent on the issue of infringement. There is textual language regarding enumerated rights that, in theory, might contribute to our understanding of the kinds of burdens on rights that courts must take seriously. Thus, in literal terms, freedom of speech is protected against abridgement, the free exercise of religion is shielded against prohibitions, religious freedom and equality are protected against state establishments, property cannot be taken without the payment of just compensation, and contract obligations cannot be impaired.\(^7^9\) One may argue that each of these terms has independent meaning that controls the review of laws that are challenged as violating specific constitutional guarantees. In fact, however, this textual language is rarely dispositive for enumerated rights, and there are, of course, no textual references to consider with regard to the infringement of non-enumerated rights. Instead, the Court, without regard to the terms of the text itself, has developed implicit or explicit frameworks for determining how the power of judicial review should be applied to laws that allegedly burden particular rights.

It is clear that in determining whether a right has been infringed, the Court examines the purpose and the effect of the challenged regulation or administrative action.\(^8^0\) A constitutionally cognizable infringement may be defined in terms of effect or purpose alone, or it may be identified less clearly on the basis of some combination of purpose and effect. While the process of defining infringements in terms of these factors often appears to be ad hoc, it is not entirely without pattern or principle.

As the next Subparts demonstrate, the Court's fundamental rights jurisprudence utilizes at least three different frameworks in applying some form of an undue burden standard. The first, and simplest, approach concentrates exclusively on the effect of state action. Under this framework, the Court applies a two-tier standard of review: strict scrutiny, if the burden on the right is found to be substantial, or minimum rationality review, if the resulting burden is of some lesser degree of severity. The second framework—the one that is most similar to the standard adopted by the \textit{Casey} plurality—evalu-
ates both the effect and the purpose of challenged laws. This infringement model adds a third, intermediate level of review, typically an ad hoc balancing test, to the more inflexible strict scrutiny and minimum rationality standards of review of the first framework. The third framework—which might be more accurately described as a corollary or subset of the first two models—is needed to explain those cases in which the burden on the exercise of a right is minimal, but the challenged regulation is nonetheless struck down. As will be seen, the primary reason for the invalidation of these minimally burdensome laws is that they are identified as serving impermissible state purposes.

A. The Substantial Effect Threshold—The Basic Two-Tier Model

The most basic framework for identifying infringements focuses solely on the effect of state action. Under this approach, the Court restricts its evaluation of effect to two possible conclusions. Either the burden on the right is sufficiently severe or substantial to warrant close scrutiny, or it is not, and the challenged state action receives only minimum rationality review.

Justice Rehnquist's and Justice Scalia's dissents in <i>Casey</i> interpret the "undue burden" standard of the joint opinion to be an effects test of this kind and argue that, as such, it is without precedential support. The dissents are in error on both counts. As explained previously, the "undue burden" test represents a more complex standard that requires consideration of purpose as well as effect in determining whether the right to have an abortion is infringed. Moreover, even a simple undue burden test directed solely at the severity of the burden on the right has significant precedential support in the case law. Even a cursory survey of Supreme Court case law examining such diverse areas as the right to marry, the right of political association, property rights, the free exercise of religion, freedom from the establishment of religion, and procedural due process demonstrates that the Court has

82. Neither Rehnquist nor Scalia explicitly state that they interpret the undue burden standard to be an effects test. However, that inference may be drawn from the language employed by both Justices in criticizing the undue burden standard. See <i>Casey</i>, 112 S. Ct. at 2866 (Rehnquist, C.J., concurring in part and dissenting in part); id. at 2876-80 (Scalia, J., concurring in part and dissenting in part). To be fair, the inferences can be more confidently drawn from Scalia's opinion, but neither Justice gives any indication that he considers the purpose of a law to be an important consideration in identifying an undue burden.
83. See supra notes 44-78 and accompanying text.
frequently employed a basic undue burden analysis to evaluate laws alleged to abridge a wide range of constitutionally protected interests.

(I) The Right to Marry

In *Zablocki v. Redhail*,\(^\text{84}\) the Court applied strict scrutiny to a Wisconsin law that prevented any "resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment" from marrying without court approval.\(^\text{85}\) A state court order permitting the marriage could not be issued unless the court affirmed that the prospective bride or groom had been meeting the requisite support obligation and that the children in question would not become public charges.\(^\text{86}\) Justice Marshall’s majority opinion invalidating this marital condition explicitly adopted a substantial obstacle approach to justify the application of strict scrutiny to the challenged law. Marshall reasoned that not “every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny;”\(^\text{87}\) only those that “interfere directly and substantially with the right to marry” would be strictly reviewed.\(^\text{88}\)

*Zablocki* is a particularly important precedent for the *Casey* plurality’s “undue burden” test for two reasons. First, there is no question that the majority opinion adopted a substantial burden threshold in this case. If the language in the majority opinion was not clear enough, Justice Powell’s concurrence criticizes the majority for predicking the appropriate level of review (strict scrutiny or mere reasonableness) on whether a regulation “substantially” or “significantly” interferes with the exercise of the right.\(^\text{89}\) An analytic model debated in fundamental rights case law in 1978 can hardly be fairly criticized as being invented out of whole cloth in 1992.

Second, *Zablocki* clearly focuses on the magnitude of the burden, not on its allegedly indirect or incidental nature. As Justice Powell noted with concern, most regulations of marriage “are direct in nature and operate as barriers to the exercise of the right.”\(^\text{90}\) Thus, the critical variable of the *Zablocki* test will necessarily be the degree of interference created by the challenged law.

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\(^{84}\) 434 U.S. 374 (1978).

\(^{85}\) *Id.* at 375.

\(^{86}\) *Id.*

\(^{87}\) *Id.* at 386.

\(^{88}\) *Id.* at 387.

\(^{89}\) *Id.* at 396 (Powell, J., concurring).

\(^{90}\) *Id.* at 397.
This latter point is confirmed by the way the Zablocki majority distinguished Califano v. Jobst, an earlier case in which the Court used a minimum rationality standard of review to uphold a provision of the Social Security Act that cut off a dependent disabled person’s benefits if he married someone not separately entitled to benefits under the Act. Clearly, a law eliminating benefits to which a person would otherwise be entitled upon their marriage directly burdens the exercise of the right to marry. The only reason for the more rigorous scrutiny applied in Zablocki is the fact that the burden on the right to marry in that case was more severe than it was in Califano.

(2) Rights of Political Participation

a. Anti-Raiding Primary Voting Requirements

In Rosario v. Rockefeller and Kusper v. Pontikes, the Court evaluated regulations on primary elections intended to prevent the members of one party from cross-registering and voting in the primary of the opposing party. These rules served the constitutionally permissible goal of preventing members of one party from unfairly influenc-
ing the candidate selection process of their political opponents.\textsuperscript{96} In \textit{Rosario}, the Court upheld a New York law that required voters to register in the party of their choice thirty days prior to a general election in order to vote in the subsequent primary election. In practical terms, this rule forced potential primary voters to declare their allegiance to a party some eight to eleven months before the primary election, a period during which they were effectively locked into that choice.\textsuperscript{97}

The majority opinion in \textit{Rosario} implicitly applied a deferential standard of review to this anti-raiding law on the theory that the state was not denying the franchise to anyone, but merely limiting the time period during which political party associational choices might be made.\textsuperscript{98} Justice Powell and three other Justices dissented from this characterization of the impact of the New York law, however. They argued that forcing individuals to defer their associational choices for a time period of almost a year was a "facially burdensome requirement" that constituted a substantial restriction on the right to vote.\textsuperscript{99} Accordingly, strict scrutiny, not deferential review, of the primary regulation was appropriate.\textsuperscript{100}

Any doubt that the majority in \textit{Rosario} had utilized something like an "undue burden" type of analysis in reaching its decision is eliminated by the Court's subsequent opinion in \textit{Kusper}. At issue was an Illinois statute that prevented an individual from voting in the primary of one political party if she had voted in the primary of any other party within the proceeding 23-month period.\textsuperscript{101} The Court struck down the Illinois law under strict scrutiny, distinguishing \textit{Rosario} in the process. The New York scheme, it explained, did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice as severely as the Illinois system did.\textsuperscript{102}

Justice Stewart, who wrote the majority opinion in both \textit{Rosario} and \textit{Kusper}, conceded that "administration of the electoral process is

\textsuperscript{96} See \textit{Rosario}, 410 U.S. at 760-62 (explaining that registration and party enrollment time limitations serve the "particularized legitimate purpose" of inhibiting "party raiding").

\textsuperscript{97} \textit{Id.} at 753-54, 760. The majority argued that the New York law did not "lock" a voter into his party affiliation from one yearly primary to the next, tacitly recognizing that the voter was locked into his party affiliation for at least an eight month period. \textit{Id.} at 759.

\textsuperscript{98} \textit{Id.} at 757-58, 761-62.

\textsuperscript{99} \textit{Id.} at 763-65 (Powell, J., dissenting).

\textsuperscript{100} \textit{Id.} at 767-68.

\textsuperscript{101} \textit{Kusper}, 414 U.S. at 52.

\textsuperscript{102} \textit{Id.} at 59-61.
a matter that the Constitution largely entrusts to the States."\textsuperscript{103} He also recognized, however, that "unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments."\textsuperscript{104} Statutes challenged in prior freedom of association cases, such as \textit{Bates v. Little Rock}\textsuperscript{105} and \textit{NAACP v. Alabama},\textsuperscript{106} had been found to involve a "substantial restraint" on and "significant interference" with the right to freedom of association.\textsuperscript{107} According to Stewart, the Illinois law in \textit{Kusper} constituted just such a substantial restriction on protected activity, while the New York law upheld in \textit{Rosario} did not.

The dissenting justices in \textit{Kusper}, who argued that the election laws before the court, like those in \textit{Rosario}, should be upheld, echoed Justice Stewart's analytic approach, although they disagreed with his conclusion. The dissenters opposed the application of strict scrutiny to the Illinois law because they did not understand it to impose an undue or substantial burden on associational freedom or the right to vote. To Justice Blackmun, the burden on the petitioner was no more than a "meager restraint,"\textsuperscript{108} a "limited statutory restriction"\textsuperscript{109} that "lightly brushes upon the right to vote and the right of association."\textsuperscript{110} In prior cases, "[t]he level of intrusion was markedly significant," while here, "the intrusion is so minor" that it does not merit denying the states the discretion they need to police the electoral process.\textsuperscript{111}

b. Ballot Access

The first ballot access case, \textit{Williams v. Rhodes},\textsuperscript{112} involved a challenge to various election statutes in Ohio that made it "virtually impossible" for a new political party to get on the presidential bal-

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 57.
\item \textsuperscript{104} \textit{Id.} (emphasis added).
\item \textsuperscript{105} 361 U.S. 516 (1960).
\item \textsuperscript{106} 357 U.S. 449 (1958).
\item \textsuperscript{107} \textit{Kusper}, 414 U.S. at 58.
\item \textsuperscript{108} \textit{Id.} at 61 (Blackmun, J., dissenting).
\item \textsuperscript{109} \textit{Id.} at 62.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.} Justice Rehnquist also wrote a dissent suggesting, at least implicitly, that anti-raiding restrictions of this kind should be reviewed under a more deferential standard of review than strict scrutiny. Rehnquist noted that the impact of the laws at issue in \textit{Rosario} and \textit{Kusper} were largely indistinguishable, that both laws "restrict voters' freedom to associate with the political party of their choice," and that there was only an imperfect fit between the laws' requirements and their objective. \textit{Id.} at 69 (Rehnquist J., dissenting). Given these acknowledgments, Rehnquist's conclusion that both laws should be upheld can only be based on the application of a deferential standard of review.
\item \textsuperscript{112} 393 U.S. 23 (1968).
\end{itemize}
Although the majority recognized that Ohio's election framework interfered with two overlapping fundamental rights, political association and the right to vote,\textsuperscript{114} \textit{Williams} was decided on equal protection grounds. Since Ohio permitted the established parties to obtain their ballot positions under far less onerous restrictions than the state imposed on a new party, the Court considered the state's electoral scheme to be invidiously discriminatory.\textsuperscript{115} Accordingly, it was reviewed under strict scrutiny and struck down.\textsuperscript{116}

Although it adopted an equal protection analysis in \textit{Williams}, the Court emphasized the "heavy burden"\textsuperscript{117} and "crippling impact"\textsuperscript{118} of Ohio's regulations in justifying the application of strict scrutiny to the state's election laws. The use of this terminology strongly suggested that less severe restrictions on ballot access would receive more lenient review. That expectation was realized three years later in \textit{Jenness v. Fortson}.\textsuperscript{119}

In \textit{Jenness}, the Court upheld Georgia's requirement that a candidate for office may only appear on the ballot if she either wins a party primary or obtains supporting signatures equal in number to five percent of the votes cast in the last general election for that office.\textsuperscript{120} Although the Court did mention that Georgia's law served an important state interest in requiring some preliminary showing of support before a candidate would be placed on the ballot, the majority opinion focused on the effect of the law. Georgia's regulations were far less burdensome than the "suffocating restrictions" condemned in \textit{Williams}.\textsuperscript{121} Accordingly, they did not violate constitutional guarantees.\textsuperscript{122}

This emphasis on the impact of electoral regulations was repeated in \textit{Bullock v. Carter},\textsuperscript{123} a case in which the Texas system of financing certain primary elections through the imposition of substantial filing fees on candidates was held to violate the Equal Protection Clause.\textsuperscript{124} The Court explained that not every burden on or barrier to a potential

\textsuperscript{113} Id. at 25.
\textsuperscript{114} Id. at 30.
\textsuperscript{115} Id. at 34.
\textsuperscript{116} Id. at 31.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 33.
\textsuperscript{119} 403 U.S. 431 (1971).
\textsuperscript{120} Id. at 432.
\textsuperscript{121} Id. at 438.
\textsuperscript{122} Id. at 438-40.
\textsuperscript{123} 405 U.S. 134 (1972).
\textsuperscript{124} Id. at 149.
candidate's access to the ballot would receive strict scrutiny. In some cases, rational basis review would be appropriate.\textsuperscript{125} To determine the correct level of scrutiny in a particular case, the Court must carefully examine "the extent and nature of [the challenged regulation's] impact on voters."\textsuperscript{126} In \textit{Bullock}, the burden on lower income voters was found to be not only substantial, but exclusionary in that a class of office seekers for all practical purposes was denied access to the ballot. Further, the impact of the law fell unequally on the poor. Accordingly, the fee system received strict scrutiny and was struck down.\textsuperscript{127}

While these ballot access cases do not explicitly use "undue burden" terminology in their reasoning, there can be little question that they utilize a two-tier effects test. The equal protection focus of the decisions requires the Court to evaluate the relative impact of the challenged laws as well as the degree to which the laws directly impair voting and associational rights. Nevertheless, the Court's primary concern is resolving whether the extent of the burden imposed on the disadvantaged group requires strict scrutiny review. This analysis would ultimately prove to be inadequate, and a different doctrinal approach to ballot access issues was adopted in more recent cases.\textsuperscript{128} As a matter of historical record, however, these early cases extend the precedential foundation for applying an undue burden standard to laws abridging fundamental rights.

(3) \textit{Free Exercise Rights}

The Supreme Court's decision in \textit{Employment Division, Department of Human Resources v. Smith},\textsuperscript{129} as noted previously, limited the application of the Free Exercise Clause to those laws that single out and suppress religious practices.\textsuperscript{130} Prior to this recent and radical transformation of free exercise rights, however, the Court recognized that facially neutral laws of general applicability might also violate the constitutional guarantee of religious liberty. Indeed, in these earlier cases, the Court used an undue burden standard of sorts to review general laws that incidentally interfered with religious practices to determine whether these laws should receive close scrutiny.

\textsuperscript{125} \textit{Id.} at 142-43.
\textsuperscript{126} \textit{Id.} at 143.
\textsuperscript{127} \textit{Id.} at 143-44.
\textsuperscript{128} \textit{See infra} notes 198-228 and accompanying text.
\textsuperscript{129} 494 U.S. 872 (1990).
\textsuperscript{130} \textit{See supra} notes 5-7 and accompanying text.
Wisconsin v. Yoder\textsuperscript{131} is a particularly strong illustration of the pre-Smith Court's implicit commitment to an undue burden threshold requirement in the free exercise area. In defending the right of Amish parents to challenge a state law requiring them to send their children to public high school, Chief Justice Burger's lengthy opinion repeatedly emphasizes the magnitude of the burden that compulsory high school education laws imposed on the Amish faith.\textsuperscript{132} What was at stake, according to the Court, was the total undermining of the Amish way of life and the religious beliefs on which it was based.\textsuperscript{133} Only in such sensitive circumstances would courts be justified in intruding into a state's educational prerogatives in defense of the religious exemptions sought by one group of parents and children.\textsuperscript{134}

Sherbert v. Verner,\textsuperscript{135} another seminal free exercise case that was distinguished but not overruled in Smith, may also be characterized as supporting an undue burden approach although it does so far less directly than Yoder. In Verner, South Carolina refused to provide unemployment compensation benefits to a Seventh-Day Adventist who could not find work because she was unwilling to work on Saturday, her sabbath. The Court held this denial of benefits was unconstitutional on the grounds that petitioner could not be forced to choose between abandoning benefits to which she would otherwise be entitled and obedience to the obligations of her faith.\textsuperscript{136}

Although the majority opinion does not explicitly raise the issue, the magnitude of the temptation created by the threatened loss of unemployment benefits must be relevant to the Court's decision in Verner. There are simply too many governmental activities and decisions that incidentally encourage individuals to violate the sanctity of their sabbath or some other religious obligation for all such conflicts to be reviewed under strict scrutiny. Surely it is not always unconstitutional for the state to offer double time pay or other incentives to all employees including Christians who work on Sunday, or to schedule a popular public school program on a day that is a religious holiday for children of a minority faith. If the holding in Verner is to provide a manageable rule, courts must recognize that not every struggle be-

\textsuperscript{131} 406 U.S. 205 (1972). Yoder was distinguished but not overruled by Smith. See Smith, 494 U.S. at 881-82.
\textsuperscript{132} Id. at 209-13.
\textsuperscript{133} Id. at 211-13, 218-19.
\textsuperscript{134} Id. at 235.
\textsuperscript{135} 374 U.S. 398 (1963).
\textsuperscript{136} Id. at 403-06.
tween religious conscience and material benefit or convenience is sufficiently burdensome to warrant rigorous constitutional review.137

Other, more recent cases also provide support for the proposition that the Court utilized an undue burden threshold requirement in the free exercise area prior to its decision in Smith. In Hernandez v. Commissioner,138 for example, the Court described its general approach to freedom of religion claims by explaining, “The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”139 Similarly, in Jimmy Swaggart Ministries v. Board of Equalization,140 the Court held that subjecting the distribution of religious materials by the petitioner to generally applicable sales and use taxes would not ordinarily violate free exercise principles.141 Under the facts of the case, the resulting burden on petitioner of having less money available to support its religious activities was not constitutionally significant.142 However, the Court also noted that “a more onerous tax rate . . . might effectively choke off an adherent’s religious practices,” and would presumably raise a different and, perhaps, more difficult constitutional question.143

137. Verner implicitly utilizes an undue burden standard in another way. The doctrinal principle that strict scrutiny applies whenever the availability of a benefit is conditioned on the recipient’s willingness to forebear from engaging in constitutionally protected activity is not enforced uniformly for all fundamental rights. If an individual declined employment because it interfered with the novel they were writing or conflicted with the political campaign they were engaged in, and a state, accordingly, denied them unemployment compensation benefits, it is difficult to believe that the state’s decision would be invalidated as unconstitutional. See Alan E. Brownstein, Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution, 51 OHIO ST. L.J. 89, 132 (1990). But certainly, forcing a political activist to choose between losing benefits or not engaging in free expression in the context in which it may count the most, a pre-election political campaign, coerces her forbearance from engaging in protected activity in the same way that Mrs. Sherbert was coerced. Thus, Verner implicitly demonstrates that what constitutes a sufficient burden to invoke strict scrutiny vis-à-vis one right will not invoke serious review when some other right is similarly affected. The Court must be making a judgment on a right by right basis as to the nature and extent of the burdens it recognizes as substantial or undue.

139. Id. at 699.
141. Id. at 389-90.
142. Id. at 390-91.
143. Id. at 392. The Court expressed no view on this issue, since there was no evidence that the tax under review was so high that it would destroy the petitioner.
(4) Establishment Clause Rights—Primary Effects and Entanglements

There may be some debate about whether the Establishment Clause involves the protection of a fundamental right in the traditional sense. The right has amorphous content and might be loosely defined as a right against the state promoting religion in unacceptable ways. While the form of this right may be atypical, however, courts do recognize the standing of individuals to challenge Establishment Clause violations. Thus, some personal interest exists that the Establishment Clause shields from injury.\textsuperscript{144} Certainly, in specific situations, the right becomes more concrete. For example, the Establishment Clause protects a taxpayer's interest in not having tax revenues expended to subsidize religious institutions\textsuperscript{145} and the interest of a member of a minority religion in not suffering the stigmatic consequences or implicit coercion that result from the state's endorsement of the majority faith.\textsuperscript{146}

Equally problematic for our inquiry, the Court does not apply a traditional fundamental rights standard of review in Establishment Clause cases. Neither strict scrutiny nor a deferential rational basis standard is utilized; nor does ad hoc balancing occur. Instead, the Court commonly applies a complex three-pronged standard, referred to as the \textit{Lemon} test, the failure of any element of which is a sufficient basis for declaring a law unconstitutional without any opportunity for the state to justify its transgression.\textsuperscript{147} However, two of the compo-

\textsuperscript{144} The Court is not always explicit in describing the nature of the injury that gives the plaintiff standing to raise an establishment clause claim. \textit{See}, e.g., County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (containing no discussion of plaintiff's standing to challenge city's display of religious symbols). The injury on which plaintiff's claims are grounded, however, can usually be inferred from the Court's analysis. \textit{See infra} note 151.

\textsuperscript{145} \textit{See}, e.g., \textit{Flast} v. Cohen, 392 U.S. 83, 101-06 (1968).

\textsuperscript{146} \textit{See generally} \textit{Lee} v. \textit{Weisman}, 112 S. Ct. 2649 (1992). The actual situation in Weisman is slightly different than the statement in the text since the plaintiffs in that case objected to the generic event of a state-sponsored prayer at a high school graduation, without regard to the specific religion involved in the invocation and benediction or the faiths held by students and parents in the audience. Also, according to the majority, "[t]he injury caused by the government's action" resulted from the plaintiff's being "required [to participate] in a religious exercise." \textit{Id.} at 2659.

\textsuperscript{147} In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court summarized the criteria used in prior cases to review statutes alleged to violate the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" \textit{Id.} at 612-13 (quoting \textit{Walz} v. \textit{Tax Comm'n}, 397 U.S. 664, 674 (1970) (citation omitted)). The Court has frequently departed from the \textit{Lemon} test in particular cases and various Justices have criticized its continued application. \textit{See} Justice Scalia's concurrence in \textit{Lamb's Chapel} v. Center
nent elements of the Lemon test identify Establishment Clause violations primarily by examining the effects of state action. In that sense, Lemon seems to fit within the two-tier effects test model.

The Lemon test provides in part that laws which have the primary effect of advancing religion are unconstitutional. In attributing meaning to “primary effect,” the Court has directed its attention to particular consequences that it views as constitutionally problematic. Specifically, if the effect of state action is understood to involve the endorsement of a religious faith or the coercion of individuals into participating in religious practices, the state’s action is unconstitutional. What constitutes coercion or endorsement, however, is a matter of degree. Not all symbolic promotions of religion are constitutionally unacceptable endorsements, for example, since the sectarian message communicated by a religious display can often be diluted by the context in which it appears. Thus, it does not stretch Establishment Clause doctrine unreasonably to recognize a basic symmetry with the “undue burden” standard. When the Court concludes that a particular promotion of religion has a sufficiently coercive or endorsing effect that it must be struck down, the Court can be understood as saying that the offending law “unduly burdens” the individual interests the Establishment Clause protects.

Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993), in which he referred to the Lemon test as a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” Notwithstanding Scalia’s contention, six Justices joined the majority opinion in Lamb’s Chapel, which both employs the Lemon test and includes a footnote explicitly noting that Lemon has not been overruled. Id. at 2148 n.7.


149. See, e.g., Weisman, 112 S. Ct. at 2655-61; County of Allegheny, 492 U.S. at 593-97.


151. Thus, in County of Allegheny, Justice Blackmun determined that the display of a crèche in a county courthouse communicated a message of religious endorsement that the state “supports and promotes the Christian praise to God that is the crèche’s religious message.” County of Allegheny, 492 U.S. at 600. The continued display of the crèche was prohibited, since government promotion of religious symbols producing such an effect was held to violate the Establishment Clause. Conversely, however, Justice Blackmun concluded that the state’s display of a Christmas tree and Chanukah Menorah, along with an explanatory sign saluting liberty, communicated a more diffuse and secular message that was unlikely to be perceived as an endorsement of any faith or combination of faiths. Id. at 612-21. Thus, the display of these symbols did not violate Establishment Clause principles and was permitted to continue.

Obviously, however, by evaluating the extent to which the government promotion of a display relating to religion “endorses” a religious faith, the Court is, at the same time,
Another prong of the Lemon test requires the invalidation of laws that foster an “excessive entanglement” between church and state.\textsuperscript{152} The focus here is on whether government aid to religious institutions will require unacceptably intrusive monitoring of the recipient to determine that public funds are not being used to promote sectarian religious goals.\textsuperscript{153} This prong of Establishment Clause doctrine explicitly distinguishes “routine regulatory interactions” between the government and religious entities,\textsuperscript{154} which raise no constitutional difficulty, from “‘detailed monitoring and close administrative contact’” between the state and religious bodies, which is constitutionally problematic.\textsuperscript{155} Only those subsidy or regulatory arrangements in which government monitoring would “intrude unduly in the day-to-day operation of the religiously affiliated . . . grantees” are prohibited entanglements.\textsuperscript{156}

\textbf{(5) Takings, Contract Impairments, and Deprivations Without Procedural Due Process}

Certain constitutional guarantees, including the Takings Clause, the Contract Clause, and the procedural component of the Due Process Clause,\textsuperscript{157} protect interests that escape easy classification. These interests may receive only intermittent protection, or they may receive determining that the state is communicating a message of disapproval to non-adherents “of their individual religious choices.” \textit{Id.} at 597 (quoting \textit{School Dist. v. Ball}, 473 U.S. 373, 390 (1985)). It is this message of disapproval that constitutes the harm or burden that a plaintiff bringing an Establishment Clause claim to court is seeking to avoid. Similarly, it should be clear that a burden of this kind and magnitude, that is, a burden of constitutional significance, will not be found each time that a government activity might suggest support or approval of religious beliefs. Rather, the Court must review “a series of . . . fact patterns that fall along the spectrum of government references to religion” in order to determine when the burden is sufficiently likely and sufficiently severe to require judicial intervention. \textit{Id.} at 607.

The intensity of Justice Kennedy’s concurring and dissenting opinion in \textit{County of Allegheny}, \textit{id.} at 655-78 (Kennedy, J., concurring and dissenting), demonstrates that there is serious disagreement on the Court on the question of when the government’s display of religious symbols should be considered unduly burdensome to non-adherents of the faith being celebrated. Even under Kennedy’s analysis, however, a range of burdens is recognized that at some point becomes sufficiently substantial that they must be rejected as unconstitutional. \textit{See id.} at 659-63.

155. \textit{Id.} at 697 (quoting \textit{Aguilar}, 473 U.S. at 414).
157. U.S. Const. amend. V (Takings Clause); art. I, § 10 (Contract Clause); amend. XIV, § 1 (Due Process Clause).
only procedural safeguards. While they may be described using “rights” terminology, they can be conceptually distinguished from the kinds of fundamental rights previously discussed. Still, these are constitutionally recognized interests, and as such, the way the burdening of these interests is defined is relevant to an examination of the alleged artificiality of the “undue burden” standard. While one must be careful not to overstate the case, the Casey plurality receives some support from the fact that the Court uses some form of a two-tier effects test to at least some extent in protecting all of these interests.

In the Court’s Takings Clause jurisprudence, if the challenged state action involves a regulatory limitation on the use that an owner may make of her property, what is referred to as a regulatory taking, a pure effects test is applied. A taking only occurs if the regulation goes “too far” in limiting the owners interests. Thus, to receive just compensation under current case authority, the owner must demonstrate that she has been denied “all economically beneficial or productive use” of her land. In brief, she receives a constitutional remedy only by establishing that her property has been so unduly burdened that it is rendered valueless.

158. The Court also evaluates the “character” of the state’s action as well as the severity of its impact in adjudicating Takings Clause claims. See Penn Cent. Transp. Co v. New York City, 438 U.S. 104, 124 (1978). If property is physically invaded, appropriated, or destroyed, the Court routinely determines that a taking has occurred and just compensation is due. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871). This qualitative analysis is also a form of effects test, although it is distinct from the quantitative effects test described in the text, since the purpose of the state’s action in invading property is largely irrelevant to the Court’s determination that the property has been taken. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (stating that permanent invasion constitutes a taking “no matter how weighty the public purpose behind it”).


160. Lucas, 112 S. Ct. at 2893-94.

161. The Court has noted on occasion that a land use ordinance will be held to be a taking if law does not substantially advance legitimate state interests. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). This standard is rarely applied in takings cases, however, and even when it is applied, the Court defers to the legislature’s determination that a legitimate state interest is advanced by the challenged law. See id. at 260 (upholding without serious discussion a regulation limiting owner to the construction of one to five houses on a five acre parcel on the grounds that the restriction serves the legitimate purpose of protecting the community from the ill effects of “urbanization”); see generally Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (holding that Fifth Amendment requirement that property may only be taken for a public use is satisfied if taking is “rationally related to a conceivable public purpose”).
The constitutional prohibition against the impairment of private contracts, the Contract Clause, is rarely enforced today. As with the Takings Clause, however, an effects test determines the existence of a Contract Clause violation and the availability of a remedy. "Minimal alteration of contractual obligations" will be routinely upheld. However, particularly "severe disruption of contractual expectations," will require "a careful examination of the nature and purpose of state legislation" if the challenged statute is to be upheld. Again, only unduly burdened contract rights invoke serious constitutional attention.

There is also a strong historical foundation for looking to the impact of government action on an individual as the critical factor in determining whether procedural due process protection applies to an alleged deprivation of liberty or property. However, the current state of the law is equivocal at best on this point. For the last twenty years, most procedural due process cases have turned on the nature, not the magnitude, of the individual's injury. Only deprivations of those...


164. Id. at 245.

165. Id. at 247.

166. Id. at 245.

167. In earlier cases, the Court typically considered both the nature and the weight of the interest at issue in determining whether due process requirements applied to government action, but the emphasis seemed to be on the degree of harm suffered by the claimant. See, e.g., Greene v. McElroy, 360 U.S. 474, 496 (1959) (stating that immutable principle of American jurisprudence requires due process "where governmental action seriously injures an individual"); see also Goldberg v. Kelly, 397 U.S. 254, 260-65 (1970) (holding that a "crucial factor" in requiring a hearing before welfare recipient can be denied benefits is that the loss of welfare may leave the individual in a "desperate" situation lacking the "means by which to live"). The Court appeared to revise that priority in order to expand the scope of procedural due process protection in cases such as Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972). Thus, the limited value of the consumer goods being repossessed in that case did not justify the denial to a debtor of a due process hearing before the goods in his possession were reclaimed by creditors. The consumer goods were still "property," and their deprivation, however modest the injury might be, invoked due process.

In subsequent cases, however, the Court shifted direction and used this same principle to deny hearings to aggrieved individuals. The Court argued that it could ignore the weight of the claimant's interest and the severity of his loss on the grounds that the nature of the deprivation did not involve a loss of "liberty" or "property." The case of Paul v. Davis, 424 U.S. 693 (1976), in which the Court held that stigmatizing an individual by publicizing false accusations of criminal activity about him did not constitute a deprivation of "liberty" or...
interests recognized to be "liberty" or "property" under a narrow and formalistic interpretation of these terms invoke constitutionally mandated process requirements.168

Prior to the mid-1970s, however, the Court understood due process to have a different, more elusive meaning. Under the old rule, the magnitude of the individual's alleged deprivation seemed to play a more commanding role in the Court's decision as to what process if any might be due. Justice Frankfurter described this operating principle as "the right to be heard before being condemned to suffer grievous loss of any kind,"169 and this "grievous loss" standard was regularly applied in the case law.170 Identifying a grievous loss, of course, required a determination that the individual's interests were being substantially burdened by the state.

B. The Tempering of Significant Effects and Non-Invidious Purposes—The Three-Tier Model

It is tempting to conclude from the prior discussion that in the battle of precedent between the Casey plurality and its critics, the plurality's position is substantially vindicated. To coin a phrase, it seems as though the only thing "manufactured out of whole cloth" in the various Casey opinions is the exaggerated rhetoric of Justice Rehnquist's and Justice Scalia's comments. That temptation must be resisted, at least temporarily, however. While the use of a two-tier effects test in prior cases demonstrates that an "undue burden" approach to defining the infringement of constitutionally protected interests is neither new nor artificial, that precedent does not establish that the version of an undue burden test adopted by the joint opinion is supported by significant authority. The joint opinion's standard, as explained previously, involves a complex inquiry directed at both purpose and effect, not a straightforward evaluation of the magnitude of...


a burden. It remains to be seen whether this more intricate model is grounded in precedent.

An undue burden standard that evaluates both the purpose and effect of challenged regulations has support in the case law, but it reflects a three-tier model of analysis. Unlike the prior model, this approach provides for an additional level of scrutiny. In addition to strict scrutiny and minimum rationality review, there is an intermediate level of scrutiny that usually involves some form of balancing test.

In theory, the Court could elect to utilize a three-tier model of this kind while continuing to focus exclusively on the effects of state action. Laws imposing de minimis burdens would receive minimum rationality review, regulations resulting in a more substantial impact would be reviewed under an ad hoc balancing test, and strict scrutiny would be reserved for egregious restrictions such as total prohibitions on the exercise of a right. But judicial opinions reflect a different pattern in which the purpose of the challenged law seems to play an essential role in determining the standard of review to be applied. While the Court is not always clear or forthright in explaining how the purpose of a challenged regulation relates to the determination that a middle-tier balancing test should be utilized, two basic approaches are suggested by the case law.

(1) Significant Effects in the Context of Regulatory Legitimacy

The first approach is grounded on the premise that the glaring need for some governmental response to a problem, combined with the prudent and reasonable regulatory option that the state chooses to resolve its legitimate concerns, requires the application of a balancing test to review a right-infringing statute rather than strict scrutiny. In these cases, the Court recognizes that some significant, but not prohibitive, burden on the exercise of the right appears unavoidable.

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171. Strict scrutiny review involves balancing in the sense that only a “compelling” state interest is of sufficient weight to justify the substantial abridgment of a fundamental right. The determination of what constitutes a compelling state interest inevitably requires a value judgment by the reviewing court. The balancing intrinsic to strict scrutiny review, however, operates within a formal methodology of review. A heavy presumption of invalidity must be rebutted by the state if the challenged law is to be upheld. Not only must the law further a compelling state interest, it must also use the least burdensome means to accomplish that goal.

The ad hoc or indeterminate balancing utilized as the second tier of a three-tier infringement model is less rule-governed in its application. It provides greater discretion to courts charged with weighing the competing interests at issue. It also permits the legislature greater flexibility in selecting an appropriate regulatory approach to further legitimate state interests.
Further, in imposing that burden, the state is attempting to serve some legitimate governmental objective; it is not deliberately trying to discourage the exercise of the right. Accordingly, the Court elects to permit the legislature some limited flexibility in fine tuning its regulatory response. Since that kind of limited flexibility can seldom survive strict scrutiny, but may well be upheld under a balancing test, the Court utilizes a middle tier of review.

Probably the clearest examples of this approach are a series of decisions evaluating the constitutionality of durational residency requirements, although the Court has never adequately explained the standard of review it applies in these cases.

a. Durational Residency Requirements

i. The Right to Vote

In *Dunn v. Blumstein*, the Court invalidated Tennessee's state and county residency requirements for exercising the franchise on the grounds that the challenged laws burdened both the right to vote and the right to travel. Applying strict scrutiny, the Court recognized that the state's goal of obtaining accurate voting rolls and avoiding fraud were important and legitimate interests. However, a one-year residency requirement, or even a three-month requirement, was not a sufficiently tailored regulation to be accepted as a means for achieving these objectives. One year later, however, in *Marston v. Lewis* and *Burns v. Fortson*, the Court upheld similar fifty-day residency requirements for voting.

How are these latter cases to be understood? There is some language at the end of the per curiam opinion in *Lewis* that implies the fifty-day requirement withstands strict scrutiny. The Court does state that these requirements are "necessary" to promote the state's "important" interest in preparing adequate voting records. On the other hand, as Justice Marshall's dissent makes abundantly clear, the evidence before the district court demonstrated that a fifty-day requirement saved the state from no more than modest administrative

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173. Id. at 338-42.
174. Id. at 353.
175. Id. at 345.
176. Id. at 353-54. The challenged laws required one year of residency in the state and three months of residency in the county in which the voter would register. Id. at 331-33.
inconvenience and expense in comparison to a 30-day requirement.\textsuperscript{180} Thus, it is difficult to believe that the Court’s uncritical acceptance of the state’s administrative convenience justification constituted the same kind of rigorous review that the Court has applied in other fundamental rights cases.

More plausibly, \textit{Lewis} and \textit{Fortson} suggest that the Court did not find that a fifty-day residency requirement imposed a sufficiently undue burden on the right to vote. Accordingly, the challenged laws received a much more deferential standard of review. Indeed, the Court in \textit{Lewis} justified its decision by explaining that the state scheme at issue “stands in a different light” than the Tennessee law invalidated in \textit{Dunn} because “[t]he durational residency requirement is only fifty days, not a year or even three months.”\textsuperscript{181}

Moreover, the Court argued that a fifty-day residency requirement coincided with the state’s closing of general election registration fifty days prior to the election and seemed particularly defensible in light of other time-consuming registration and voting procedures utilized in the state.\textsuperscript{182} This analysis strongly implies that the modest scope of the burden, in conjunction with the prima facie legitimacy of the state’s interest, supports a lower level of scrutiny in cases of this kind. If the resulting burden does not substantially interfere with the exercise of the right, and the state is furthering presumptively reasonable concerns (a meaningful vote requires effective election procedures), then the Court will tolerate some range of legislative flexibility. It is only when the burden on the right is more pronounced or the connection between the challenged law and the state’s legitimate goals is so attenuated that it suggests inadequate respect for the protected activity that strict scrutiny is warranted.

\textit{ii. The Right to Travel}

Ever since the Court recognized the right to travel in \textit{Shapiro v. Thompson},\textsuperscript{183} a case invalidating a year-long residency requirement for the receipt of welfare benefits, it has struggled with the question of exactly what kind of a burden on the exercise of that right justifies strict scrutiny of the offending statute. \textit{Shapiro} itself left open the is-

\begin{footnotesize}
\begin{itemize}
\item[180.] Id. at 682-85 (Marshall, J., dissenting).
\item[181.] Id. at 680.
\item[182.] Id. at 680-81.
\item[183.] 394 U.S. 618 (1969).
\end{itemize}
\end{footnotesize}
issue of how residential waiting periods to obtain a license to hunt, fish, or even practice a profession in a state would be reviewed.184

In *Vlandis v. Kline*, 185 the Court suggested that, despite the holding of *Shapiro*, significant residency requirements for in-state tuition at state universities would be constitutional.186 Still later, in *Memorial Hospital v. Maricopa County*, 187 the Court invalidated a one-year waiting period for non-emergency subsidized medical care for indigent persons. In reaching that decision, however, the Court admitted that the uncertainty of *Shapiro* remained unabated: "The amount of impact required to give rise to the compelling-state-interest test was not made clear" in recent cases.188 On balance, however, the majority concluded that access to medical care was more like the welfare payments denied petitioners in *Shapiro*, a necessity of life, than the more minor deprivations, such as delay in obtaining reduced tuition at state universities, evaluated in *Kline*.189

Justice Rehnquist's dissent in *Maricopa County* is notable for the clarity with which it seems to insist on the application of an "undue burden" or "substantial obstacle" test before strict scrutiny should be applied. Rehnquist writes:

> It seems to me that the line to be derived from our prior cases is that some financial impositions on interstate travelers have such indirect or inconsequential impact on travel that they simply do not constitute the type of direct purposeful barriers struck down in . . . *Shapiro*. . . . I would think that this standard is not only supported by this Court's decisions, but would be eminently sensible and workable. . . . [T]he Court should examine, as it has done in the past, whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote.190

184. *Id.* at 638 n.21; see also *id.* at 627, 632-33.
186. *Id.* at 452-53. The Court invalidated a Connecticut requirement that anyone applying to a state university who had an out-of-state address during the preceding year had to be classified as a non-resident subject to higher tuition fees. The law violated due process because it created "a permanent and irrebuttable presumption of nonresidence." *Id.* at 452. The Court explained, however, that its decision was not intended to deny states the right to impose "a reasonable durational residency requirement" to limit the availability of preferential tuition rates. *Id.* A one-year residency requirement was explicitly noted with approval. *Id.* at 452 n.9.
188. *Id.* at 256-57.
189. *Id.* at 259-60.
190. *Id.* at 284-85 (Rehnquist, J., dissenting).
Despite Rehnquist's use of the terms "indirect" and "incidental" in his dissent, it should be clear that he is not describing a category of laws deserving lenient review that can be defined by some formal characteristic, for example, laws of general applicability that make participation in a variety of activities, including the exercise of fundamental rights, more difficult. The line between Shapiro and Maricopa County, to Rehnquist, seems to be one based on purpose and effect, not facial neutrality. Only laws erecting real barriers to travel, or which are intended to accomplish that impermissible result, should be rigorously reviewed.191

Justice Rehnquist had the opportunity to implement his own approach to right-to-travel cases in Sosna v. Iowa,192 a decision upholding a one-year residency requirement for obtaining a divorce. In reaching its conclusion, the Court applied a balancing test, an indeterminate but clearly less rigorous standard of review than the strict scrutiny of Shapiro and Maricopa County.193 Rehnquist justified this lower standard of review with two related arguments. First, the state's interest in seeking to avoid becoming a "divorce mill" was so transparently legitimate that it could not plausibly be inferred that it concealed an invidious motive to discourage the migration of new residents.194 Second, the burden on newcomers was of a different kind and magnitude than that of prior cases. Here, petitioner "was not irretrievably foreclosed from obtaining some part of what she sought."195

191. The forms of the laws challenged in Shapiro and Maricopa County are essentially indistinguishable. The only difference involves the nature and purpose of the deprivation as it relates to the distinction between welfare benefits and non-emergency medical care.

192. 419 U.S. 393 (1975).

193. While the majority opinion in Sosna does not explicitly state the standard of review it applies, the analysis presented seems to involve a balancing of interests. The Court explains that durational residency requirements in prior cases were "struck down" because the states' "budgetary or recordkeeping [justifications] . . . were held insufficient to outweigh the constitutional claims of the individuals." Sosna, 419 U.S. at 406. The opinion then goes on to discuss why the State's justification in Sosna is stronger and the burden on the claimant less onerous, thereby justifying a different result. Id. at 406-09. Justice Marshall's dissent characterizes this standard as "an ad hoc balancing test." Id. at 419 (Marshall, J., dissenting).

194. Id. at 406-09.

195. Id. at 406. The burden of delay in obtaining a divorce, as opposed to a complete denial of benefits, not only distinguished Iowa's law from the residency requirements struck down in prior cases, it also distinguished Iowa's law from the statute invalidated in Boddie v. Connecticut, 401 U.S. 371 (1971), which imposed an administrative fee on indigents attempting to file for divorce. The law in Boddie, Rehnquist concluded, involved a "total deprivation," not mere delay, and therefore merited more serious review. Sosna, 419 U.S. at 410.
The majority in *Sosna* never explicitly states that the Court is applying an "undue burden" test. Nonetheless, it is difficult to imagine any other explanation for the reduced level of review utilized by the Court given the limited doctrinal discussion in Justice Rehnquist's opinion. Certainly, Justice Marshall had no doubts on this point when he argued in dissent, "The Court cannot mean that Mrs. Sosna has not suffered any injury by being foreclosed from seeking a divorce in Iowa for a year. It must instead mean that it does not regard that deprivation as being very severe."196

b. Ballot Access Cases Revisited

As discussed previously, the Court's initial reaction to ballot access issues was to apply a two-tier model under which a challenged law received either strict scrutiny if its effect was particularly burdensome or discriminatory, or rational basis review if the law was found to have a less severe impact.197 These early decisions focused primarily on the magnitude of the burden imposed by the challenged law. The purpose of the law only became relevant after the Court determined the standard of review to be applied and began to evaluate the state's justification for its statutory scheme. In a series of cases beginning with *Lubin v. Panish*,198 that approach began to change, although the full extent of the change would not become clear for several years.

In *Lubin*, the Court's attention shifted from its initial, almost exclusive, interest in the impact of a challenged law to a more immediate threshold examination of the state's purpose in adopting the regulation. At issue was California's requirement that all candidates pay a $700 filing fee in order to obtain a ballot position in an election for county supervisor.199 Rather than viewing the filing fee solely as an impediment to the exercise of a fundamental right, the Court recognized that this "burden" also facilitated the achievement of "an effective, representative political system."200 Too many candidates of doubtful seriousness on the ballot "would make rational voter choices more difficult"201 and could, ultimately, "undermine the process of giving expression to the will of the majority."202 Thus, the goal of in-

197. *See supra* notes 112-128 and accompanying text.
199. *Id.* at 710.
200. *Id.* at 714.
201. *Id.* at 715.
202. *Id.* at 714.
creased ballot access had to be reconciled with the need to protect "the integrity of the electoral system."203

In light of this conflict between the state’s uniquely legitimate need to restrict ballot access and the intrinsic burdens such regulations imposed on voting and political association rights, the Court began to shift its orientation away from monitoring the effect of ballot access barriers. The critical question was not simply the magnitude of the impact of the law on ballot access, although that remained an important consideration. The Court also focused its attention on whether a regulation “unfairly or unnecessarily” burdened a candidate’s electoral opportunities.204 Pursuant to that dual inquiry, California’s filing fee requirements were not only of dubious constitutionality because they limited the ballot access of indigent candidates. California also infringed the right to vote because its decision to rely exclusively on a financial test, effectively denying indigent persons any alternative mechanism to demonstrate that they were not spurious candidates, such as obtaining a substantial number of signatures on a nominating petition, did not further the state’s legitimate interests in maintaining the integrity of its ballot.205

This shift in orientation seemed to collapse the question of whether a right was being burdened or infringed and the question of whether any purported infringement could be justified. It is hardly surprising, therefore, to note that the standard of review applied in *Lubin* was unclear. Certainly the Court utilized something other than traditional strict scrutiny to reach its conclusion. California’s filing fee requirements were struck down because they were not “reasonably necessary to the accomplishment of the State’s legitimate election interests,” an obvious departure from the compelling state interest and least drastic means standard strict scrutiny required.206

The defining importance of the state’s purpose, initially recognized in *Lubin*, continued in *Storer v. Brown*.207 Unfortunately, so did the Court’s apparent indecision and uncertainty as to the appropriate standard of review to apply. In *Storer*, the Court considered both First Amendment and equal protection challenges to a variety of California electoral regulations, including one that denied ballot access for the general election to any independent candidate who had a registered
affiliation with a qualified political party within one year prior to the immediately preceding primary.\textsuperscript{208}

The petitioners challenging California’s regulations, citing \textit{Williams v. Rhodes}\textsuperscript{209} and other precedent, argued for the application of the traditional two-tier model. Under this authority, they claimed, all “substantial burdens” on the right to vote and political association must receive strict scrutiny.\textsuperscript{210} The Court, however, explicitly rejected this contention. Not “every substantial restriction on the right to vote or to associate” could be invalidated per se, since “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”\textsuperscript{211}

This conclusion left open the question of how a regulation imposing substantial burdens on ballot access should be reviewed. The Court’s answer involved a mixture of strict scrutiny and a more indeterminate balancing test. Decisions in this context were described as “very much a ‘matter of degree’... very much a matter of ‘consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.”\textsuperscript{212} After considering the purposes and effects of California’s electoral requirements, the Court used this analytic framework to determine that the one-year disaffiliation provision was constitutional. The state’s ultimate interest in the stability of its political system was considered to be “not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.”\textsuperscript{213}

Subsequent cases did little to clarify the standard of review applied to ballot access restrictions. Indeed, one case, \textit{Clements v. Fashing},\textsuperscript{214} added to the doctrinal confusion. \textit{Clements} involved an equal protection challenge to two Texas constitutional provisions that effectively prevented an individual serving in one elected office from run-

\begin{itemize}
  \item \textsuperscript{208} Id. at 726-27.
  \item \textsuperscript{209} 393 U.S. 23 (1968).
  \item \textsuperscript{210} \textit{Storer}, 415 U.S. at 729.
  \item \textsuperscript{211} Id. at 729-30.
  \item \textsuperscript{212} Id. at 730 (quoting Dunn \textit{v. Blumstein}, 405 U.S. 330, 335, 348 (1972), and \textit{Williams v. Rhodes}, 393 U.S. 23, 30 (1968)).
  \item \textsuperscript{213} Id. at 736. The ambiguous nature of the standard of review applied is demonstrated by the Court’s use of the term “compelling,” which suggests strict scrutiny, in conjunction with other language indicating that the state’s interest outweighs that of the plaintiffs, a conclusion that suggests the outcome of a conventional balancing test.
  \item \textsuperscript{214} 457 U.S. 957 (1982).
\end{itemize}
ning for another office prior to the expiration of his term. The state's objective in *Clements* did not involve the kind of critical, First Amendment-related interests that states had attempted to serve in prior ballot access cases. Texas simply did not want office holders to get caught up in election campaigns and neglect their duties, a legitimate but hardly commanding goal.215

Justice Rehnquist, writing for the majority, upheld both provisions under rational basis review. Ballot access restrictions should only receive heightened scrutiny as a matter of course, he argued, if they create either of two particularly problematic kinds of burdens. Only laws that fall with disproportionate severity on lower economic classes and laws that burden small or new parties or non-establishment candidates clearly merit close scrutiny.216 Since the constitutional requirements at issue did not fall in either category, and did not significantly limit a candidate's access to the ballot, they need only be examined under a highly deferential standard of review.217

These issues were finally clarified in two cases, *Anderson v. Celebrezze*,218 which invalidated an early filing deadline for independent candidates, and *Burdick v. Takushi*,219 which upheld Hawaii's determination not to permit or tabulate write-in votes. Both cases evaluated ballot restrictions from a First Amendment rather than an equal protection perspective. More importantly, both decisions endorsed and relied on a three-tier model: strict scrutiny for severely burdensome restrictions, a balancing test for less problematic laws serving particularly legitimate objectives, and rational basis review for other regulations.220 Although the Court did not use the exact language of an undue burden standard, there is a marked similarity in approach between these cases and the joint opinion in *Casey*.221

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215. *Id.* at 959-61, 968.
216. *Id.* at 964-65.
217. *Id.* at 963-68. It is unclear why Justice Rehnquist believes that requiring a potential candidate to wait up to two years before he can run for the office he seeks constitutes a "de minimis" burden on the candidate's "political aspirations." *Id.* at 967. One suspects that Rehnquist is not simply evaluating the magnitude of the burden but is also considering the context in which it is imposed as well as the state's purpose in creating this barrier to candidates seeking office. From that perspective, the burden on a person currently holding office, in being asked to complete his or her term before seeking another position, does not seem to be an excessive demand by the state.
220. *Anderson*, 460 U.S. at 788-89; *Burdick*, 112 S. Ct. at 2063-64.
221. Indeed, the joint opinion in *Casey* explicitly refers to the ballot access cases and *Anderson* in making the point that "not every law which makes a right more difficult to
The discussion of Justice White, writing for the majority in *Bur-\n\n\ndick*, is especially revealing. White first builds on prior authority to argue that the state must burden voting and associational rights if it is to provide equitable and efficient elections. Further, the state's ability to further these goals would be hamstrung if all of its regulatory choices had to withstand close scrutiny.2\2\2 Accordingly, a more flexible standard that considers both the purpose and effect of election statutes must be employed. Under this distinct standard, White explains,

the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . [W]hen those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."2\2\3

Justice White's analysis thus far directly parallels an undue burden standard. Moreover, as in *Casey*, the distinguishing characteristic of the undue or severe burden is not defined by the magnitude of the law's effect alone. The nature and purpose of the burden must also be considered. Thus, in describing the second tier of review, White states that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."2\2\4

The important distinction here is between "severe" restrictions on the one hand, and "reasonable, nondiscriminatory restrictions," as opposed to insubstantial restrictions, on the other. The unacceptably burdensome election regulation that invokes strict scrutiny is not determined solely by measuring the impact of the law. That level of review is also reserved for laws that serve impermissible (i.e., discriminatory) goals or that burden rights beyond the state's legitimate need to manage the conduct of elections. Of course, identifying laws that must receive strict scrutiny in this way makes the result of the application of that standard of review a foregone conclusion. All severely or unduly burdensome laws by definition will fail strict scrutiny and be struck down, just as all unduly burdensome abortion regu-
lations in the joint opinion in *Casey* are declared to be unconstitutional.

The balancing test Justice White describes as a second tier of review permits the Court to evaluate the close cases in which the state’s law further legitimate electoral concerns (and, accordingly, does not discriminate against the poor or against new or non-establishment parties or candidates), but also burdens ballot access to some significant degree. The majorities in *Anderson* and *Burdick* suggest that laws furthering the state’s recognized regulatory interest in maintaining the integrity and stability of its election system will usually be upheld under this level of review, even if they significantly burden voting and political association rights.225 By analogy to *Casey*, such laws are not unduly burdensome, just as state laws directed at informing women about the nature and ramifications of abortion decisions are not unduly burdensome despite their impact on access to abortion services.226

In theory, this second tier of review should be limited to laws serving some uniquely important interest, such as the special goals of electoral equity and efficiency. Laws serving nonelection-related interests that substantially burden ballot access fall within the first tier of review and presumably will continue to be evaluated under strict scrutiny.227 To complete the picture, the third tier of review will routinely uphold laws imposing minor burdens on ballot access that serve permissible objectives of any kind.228

225. *Id.* at 2063-67; *Anderson*, 460 U.S. at 788-89.
226. *Casey*, 112 S. Ct. at 2818-19 (describing ballot access cases and concluding that 
   “[*t*he abortion right is similar”)
227. It is important to recognize that a court’s evaluation of the burden created by a
   law under this analysis will vary because it is dependent, in part, on the state’s purpose in
   enacting the law. What constitutes a substantial burden will be determined in light of the
   state’s objective. Laws imposing very severe burdens on rights will receive strict scrutiny
   regardless of the state’s goal. Laws resulting in significant but lesser burdens are reviewed
   under a balancing test if they further important electoral interests. Laws resulting in the
   same significant but lesser burden in the service of some more modest state interest will be
   identified as substantially burdening voting and associational rights and will receive strict
   scrutiny review. *See infra* notes 252-254 and accompanying text.
228. *See supra* notes 214-217 and accompanying text. Dissenting in *Clements* v. Fashing, Justice Brennan argued that the burden created by the challenged regulation was not de minimis, and should therefore be analyzed under an intermediate standard of review in order to strike the proper “balance” between the interests of the state and its current office holders. *Clements*, 457 U.S. at 977 n.2, 987 (Blackmun, J., dissenting). Since Justice Brennan believed “that the State has a vital interest in ensuring that public officeholders perform their duties properly . . . and that a State requires substantial flexibility to develop both direct and indirect methods of serving that interest,” *id.*, his analysis is consistent with
(2) Significant Effects in the Context of Regulations Serving Benign Purposes

The second type of case in which a three-tier approach is adopted involves a more explicit doctrinal framework. In this context, the Court concludes that the core of the right, the kind of infringement that the constitutional guarantee most directly forbids, is defined by the state's impermissible purpose in regulating the exercise of the right. Accordingly, strict scrutiny is reserved exclusively for state action serving that prohibited purpose. Laws that substantially interfere with the exercise of the right, but are intended to further a different purpose, are reviewed under a balancing test. Again, the Court does not claim to be applying an "undue burden" standard in these cases, but the reasoning of its opinions demonstrates clear consistencies with that approach.²²⁹

a. Freedom of Speech: Content-Neutral, Content-Discriminatory, and Viewpoint-Discriminatory Laws

Free speech cases are not generally thought of as applying an undue burden standard, but a strong argument can be made that they do so in many circumstances. Certainly, there is no dispute that all laws directly impacting on an individual's freedom of speech do not receive the same level of review. The Court reserves strict scrutiny for laws that discriminate on the basis of the content or viewpoint of the message being conveyed.²³⁰ In contrast, a content-neutral law regulating the time, place, and manner of speech is subject to a reduced standard of review, a multifactor balancing test. Under this more deferential standard, the Court considers whether the challenged law (1) serves a substantial state interest; (2) is narrowly tailored to serve that interest; and (3) leaves open ample alternative avenues of communication.²³¹

²²⁹ This framework is different from the three-tier infringement cases discussed previously, see supra notes 172-228 and accompanying text, in that the balancing test in the ballot access and durational residency cases was reserved for laws that serve uniquely legitimate purposes. Here, the balancing test is reserved for laws that do not serve uniquely impermissible or invidious objectives. Laws subject to the balancing test in the former framework serve goals of special value; laws subject to the balancing test in the current context serve benign goals of diverse importance.


Moreover, there should be no question that this latter category of speech regulations, described as content-neutral laws or time, place, and manner restrictions, includes laws that "consciously and directly" regulate protected activity. These are not the kind of incidental restrictions on the exercise of fundamental rights that Justice Scalia exempts from his criticism of the "undue burden" standard in *Casey.* While the words "indirect" and "incidental" are subject to a range of interpretations, it is difficult to argue that laws banning or substantially regulating loud speakers, demonstrations, signs, leafleting, or even spoken speech itself (as in a quiet zone in a library) do not directly regulate expression. Laws of this kind are not rules of general applicability that happen to make expressive activity more difficult. These laws directly regulate and control expressive activity as the means to accomplish some legitimate state objective. Similarly,

232. *Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part) (distinguishing a law of general applicability that only incidentally burdens a fundamental right and, therefore, does not infringe that right from a law that "consciously and directly" burdens a fundamental right, which will typically be struck down).


236. See *Schneider v. New Jersey*, 308 U.S. 147, 153-59 (1939) (invalidating law prohibiting the distribution of leaflets).

237. See, e.g., *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (invalidating regulation purporting to ban all expressive activity in airport including talking and reading a newspaper); *Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (noting by analogy in upholding noise ordinance sharply restricting expressive activity near schools in session that “[a]lthough a silent vigil may not unduly interfere with a public library, . . . making a speech in the reading room almost certainly would”).

238. The Court distinguishes between the regulation of conduct that is commonly associated with expression (or is conventionally or inherently expressive) and the regulation of conduct that might be related to expression in a particular instance but is commonly nonexpressive. Thus, in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Court explained why licensing regulations governing the location of newsracks used to distribute newspapers raised a much more serious First Amendment issue than the licensing of typically nonexpressive activities such as constructing buildings or selling soda pop: [L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as means of censorship. . . . [Similarly, n]ewspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to soda; therefore
some of the provisions under review in Casey might be characterized as time, place, and manner restrictions on abortion services, but they nonetheless directly regulate the exercise of the right to have an abortion.239

Given this variation in the level of review that the Court applies to laws that directly regulate speech, can it be argued that content- or viewpoint-discriminatory laws are in some sense “unduly burdensome” to free speech rights while content-neutral laws are not? Such an argument cannot be predicated on the relative magnitude of the laws’ effects on speech. Viewpoint-discriminatory laws do not necessarily burden more speech than content-neutral rules; indeed, the contrary result is often the case. Thus, if the magnitude of the effect is the critical concern, a law banning the distribution of all leaflets interferes with expressive activity to a greater degree than does a law prohibiting the distribution of communist leaflets.240

The Court’s aversion to laws directed at the communicative impact of speech is based not on the effect of the regulation but on the

preventing it from installing its machines may penalize unrelated speech, but will not directly prevent that speech from occurring.

Id. at 760-61.

Justice Scalia used essentially the same argument to defend his conclusion in Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (Scalia, J., concurring), that a general ban on public nudity applied to nude dancing did not violate the First Amendment. Scalia noted:

It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called “inherently expressive” and what I would prefer to call “conventionally expressive”—such as flying a red flag. I mean by that phrase (as I assume the Court means by “inherently expressive”) conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits that description. But even if it does, this law is directed against nudity, not dancing. Nudity is not normally engaged in for the purpose of communicating an idea or an emotion.

Id. at 2466 n.4 (Scalia, J., concurring) (citation omitted).

239. To take the most obvious example, requiring a woman to wait 24 hours before she can obtain an abortion is a form of time regulation roughly analogous to a law requiring parade permit applicants to submit their permit request at least 24 hours before the demonstration is to take place. Alternatively, a hypothetical law requiring that all applicants for a parade permit must be read a statement describing some of the problematic effects that a demonstration can have on the surrounding neighborhood could be described as a time, place, and manner speech regulation corresponding in form to Pennsylvania’s informed consent provision.

240. See Carey v. Brown, 447 U.S. 455, 473-75 (1980) (Rehnquist, J., dissenting) (arguing that by subjecting ban on residential picketing to strict scrutiny because it allegedly exempts labor picketing, the Court encourages city to adopt a “more restrictive” law that burdens even more speech).
presumptively unacceptable purpose of such legislation.\textsuperscript{241} The constitutional guarantee of freedom of speech prohibits government from deliberately suppressing particular messages—at least without some compelling justification for doing so—without regard to the severity of the law’s effect. The analogy here is to the implicit argument in \textit{Casey} that laws adopted for the purpose of hindering a woman’s choice are by their nature unduly burdensome to the exercise of women’s rights and will be held invalid despite their limited effect.\textsuperscript{242}

A content-neutral law, on the other hand, might be adopted for the invidious purpose of making communication more difficult, but the state will typically be able to assert a non-speech-related objective to justify the law.\textsuperscript{243} Accordingly, these content-neutral laws, ostensibly serving legitimate state interests, cannot easily be identified as unduly burdensome with regard to their purpose. Rather, they must be evaluated as to their effect to determine if they “unduly constrict the flow of information or ideas.”\textsuperscript{244} The Court also considers whether the law at issue is so poorly tailored that “a substantial portion of the burden on speech does not serve to advance [the state’s] goals,” and, therefore, is unwarranted.\textsuperscript{245}

The burden imposed by a content-neutral law, however, no matter how egregious it may be, is always balanced against the state interest being furthered by the restriction on speech. The determination

\textsuperscript{241} The Court has stated on occasion that content discriminatory laws must be reviewed under strict scrutiny even when the state’s purpose is not the illicit censorship of ideas. \textit{See}, e.g., Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991). This assertion is hardly surprising. Denying the state the power to regulate speech on the basis of its content, regardless of the state’s actual or asserted purpose, may operate effectively as a prophylactic rule to prevent the suppression of ideas. The principle underlying the rule against content discrimination, however, remains focused against the suppression of information, messages, and ideas. The essence of the First Amendment is that “government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness.” \textit{Tribe, supra} note 168, § 12-2, at 790.

\textsuperscript{242} \textit{Casey}, 112 S. Ct. at 2820-21.

\textsuperscript{243} In \textit{Frisby v. Schultz}, 487 U.S. 474 (1988), for example, one might argue that the purpose of the law under review was to control the expressive activity of anti-abortion groups, but the Court determined that the law was intended to serve the neutral purpose of protecting residential privacy. \textit{Id.} at 484-88; \textit{see also} \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 791-92 (1989) (holding that regulation is content neutral even if it affects some speakers and messages more than others as long as it is justified on grounds that are unrelated to the content of speech).

\textsuperscript{244} \textit{Tribe, supra} note 168, § 12-2, at 791. For instance, denying speakers the only practical opportunity to communicate their message is a constitutionally unacceptable impact. \textit{See} \textit{Frisby}, 487 U.S. at 482-84.

\textsuperscript{245} \textit{Ward}, 491 U.S. at 799.
that a law substantially burdens expression without more is not a sufficient basis for invalidating the law. Even a complete ban on demonstrations or a prohibition against most speech (as may sometimes be required in schools, libraries, or hospitals) will be upheld in appropriate circumstances. This balancing test represents the second tier of review.

The third level of review applies to laws regulating non-speech-related conduct that are not intended to restrict expression. The enforcement of such conduct regulations only raises a First Amendment issue in the atypical situation in which the regulated conduct happens to be engaged in for expressive purposes. While the language of older Supreme Court decisions suggests that laws restricting expressive conduct of this kind should receive serious review, the Court's reasoning and holdings in recent cases belies that implication. Conduct restrictions not designed to suppress speech are generally upheld under very deferential review. A ban on sleeping in parks, for example, will be upheld, even when it is applied to expressive slumber, under far more lenient scrutiny than the Court directs at laws banning the distribution of leaflets in a park.

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246. See supra notes 234, 237.
247. See Spence v. Washington, 418 U.S. 405, 409 (1974) (noting that when an individual expresses an idea through activity other than print or the spoken word, the Court must “determine whether his activity is sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments”); United States v. O'Brien, 391 U.S. 367, 376 (1968) (assuming arguendo that communicative element in conduct of burning a draft card may be “sufficient to bring into play the First Amendment”).
248. See Spence, 418 U.S. at 411 (explaining that Court “must examine with particular care the interests advanced by [the state] to support its prosecution” of individual engaged in expressive conduct); O'Brien, 391 U.S. at 376-77 (describing the quality of the government interest the state must assert to justify the regulation of conduct engaged in for expressive purposes as “compelling; substantial; subordinating; paramount; cogent; [and] strong”).
250. This conclusion requires some explanation because the Court has suggested in recent cases that the test it applies to laws regulating expressive conduct is similar to the standard of review applied to content neutral, time, place, and manner restrictions. See, e.g., CCNV, 468 U.S. at 298-99; see also Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991). Given the extraordinarily deferential analysis used by the Court to uphold restrictions on expressive conduct, such as sleeping in a park in CCNV, or nude dancing in Barnes, it is difficult to accept the contention that these standards are, or should be, equivalent. If the Court's analysis in CCNV was applied to an anti-leafletting law, for example, the law would be upheld on the grounds that if the state can ban the distribution of noncommunicative litter in the public streets, it can ban the distribution of leaflets there as well. That argument, of course, would turn traditional First Amendment doctrine on its
The three-tier model described above, which the Court applies to certain durational residency statutes, to ballot access regulations (under recent case law), and to laws restricting speech, bears a rough correspondence to the joint opinion's "undue burden" analysis in *Casey*. But it is not clear that the similarities outweigh the differences. The joint opinion shares common ground with free speech cases with regard to the evaluation mechanisms that the Court employs to determine how a challenged law should be reviewed. Thus, in *Casey*, as well as conventional free speech doctrine, the Court directly invalidate or applies strict scrutiny to state law that serves an impermissible purpose—the deliberate creation of substantial obstacles to obtaining an abortion in the former context and the deliberate suppression of the communicative impact of expression in the latter.

Further, under both the *Casey* standard and the balancing test applied to content-neutral regulations, laws that serve permissible goals are evaluated as to their impact on the exercise of fundamental rights to determine if they are excessively burdensome.

A parallel doctrinal resemblance exists between both the durational residency and ballot access regulation decisions and the undue burden analysis in *Casey*. In all three cases, when the state's purpose...
is particularly legitimate, the Court demonstrates a greater tolerance of laws that impose significant burdens on the exercise of fundamental rights. Even substantial obstacles to the exercise of rights may not be unduly burdensome if they further uniquely appropriate objectives.\textsuperscript{253} That same substantial burden, however, might justify invalidating a law serving a different purpose on the grounds that an effect of that magnitude was undue in light of the state’s merely permissible goals.\textsuperscript{254}

Despite the strength of these comparisons, there is a critical distinction between the joint opinion and the durational residency, ballot access, and free speech cases. In \textit{Casey}, the joint opinion proposes a two-tier system of review: Laws that unduly burden abortion rights because of their purpose or effect are struck down; other abortion-specific laws, the purpose or effect of which are less problematic, are routinely upheld as minimally rational. The free speech, durational residency, and ballot access lines of authority recognize the presumptive unconstitutionality of unduly burdensome laws, but do not relegate all other claims of infringement to a bottom-tier, highly deferential standard of review. Instead, some form of balancing test is applied to laws that serve permissible, or even particularly valid, state objectives while significantly burdening the exercise of fundamental rights.\textsuperscript{255}

\textsuperscript{253} \textit{See supra} notes 59-65, 192-196, 222-226 and accompanying text. This argument may also be used to justify certain time, place, and manner restrictions on speech. Without some mechanism for controlling access to, and the use of, public forums for expressive purposes, the resulting confusion inherent in an unregulated forum might result in far fewer opportunities for expression than would be available in a fairly regulated forum. \textit{See infra} notes 344-345 and accompanying text.

\textsuperscript{254} Thus, the one-year residency requirement for obtaining a divorce upheld in \textit{Sosna v. Iowa}, 419 U.S. 393 (1975), \textit{see supra} notes 192-196 and accompanying text, would be struck down if it was imposed merely to further administrative convenience goals such as more efficient record keeping.

The Court’s decision in \textit{Clements v. Fashing}, 457 U.S. 957 (1982), seems inconsistent with this analysis, since the barrier to ballot access at issue in that case was \textit{upheld} despite the fact that the challenged law did not serve the presumptively legitimate objective of maintaining an effective and meaningful electoral process. The law’s objective was the permissible, but hardly exceptional, goal of keeping officeholders focused on performing their current job, rather than seeking the greener horizons of higher office. \textit{Clements} can be reconciled with the analysis in the text, however, since the Court interpreted the burden of delay imposed by the law to be insignificant. \textit{See supra} note 217. Laws imposing de minimis burdens will be routinely upheld under all the lines of authority discussed in the text.

\textsuperscript{255} With regard to free speech doctrine, it is possible that a law would burden speech to such an extent that most courts would strike it down on the basis of its effect alone without directing serious attention to the goal the law is intended to serve.
This discrepancy between the joint opinion’s analysis of the infringement of abortion rights and the framework under which the Court evaluates the infringement of other fundamental rights does not establish that the “undue burden” standard is artificial and without support. But it does indicate a substantial gap in the joint opinion’s reasoning that requires further explanation and justification. There is substantial precedent on which to ground a simple two-tier effects test that invalidates or strictly scrutinizes unduly burdensome laws and routinely upholds minor impairments of protected interests. That precedent, however, suggests a narrow and limited concept of infringement. The plurality in *Casey* is clearly proposing a more complex standard that examines a challenged law’s purpose as well as its effect.

There are other established lines of authority that consider a law’s purpose and effect in determining whether rights are infringed and the appropriate level of review to apply if cognizable infringements exist. These lines of authority, however, recognize a flexible, intermediate level of review for laws that significantly interfere with the exercise of rights but are not so unduly burdensome as to warrant invalidation or strict scrutiny. These cases share the joint opinion’s attention to the intermingling of purpose and effect in defining what constitutes an infringement of a right. They differ with the joint opinion, however, with regard to its willingness to uphold the creation of

For a content neutral speech regulation to receive this kind of cursory review, however, it would have to impose a unique and egregious burden on expressive activity. A law prohibiting the distribution of all written communication might be an example. A law that merely created a substantial obstacle to expression would not be unconstitutional per se. Many content neutral speech restrictions, including limitations on picketing, posting signs, or the use of loudspeakers, can be reasonably characterized as substantial interferences with expression. Nonetheless, such laws are subject to a multi-factor balancing test. They would not be struck down solely because of their effect, as a law that creates a substantial obstacle to obtaining an abortion would be.

The difference between free speech and abortion doctrine is even clearer with regard to laws that do not create substantial barriers to the exercise of a right. The joint opinion suggests that an abortion regulation that significantly interferes with a woman’s ability to obtain an abortion, but does not create a substantial obstacle to obtaining an abortion, will be upheld as long as the law serves a permissible goal. No balancing of costs against objectives or matching of means and ends is required. In contrast, a content neutral speech regulation imposing any significant burden on expressive activity will be subject to a multi-factor balancing test, a standard of review that requires at least some precision in tailoring to ensure that speech opportunities are not unnecessarily restricted.

See *supra* notes 172-228 and accompanying text for a detailed description of the durational residency and ballot access cases regarding the different standards of review applicable to unduly burdensome laws and to laws that significantly burden fundamental rights, but are not unduly burdensome.

256. See *supra* notes 192-196, 198-226, 243-246 and accompanying text.
significant, but not unduly burdensome, obstacles to the exercise of a right without any balancing of the state and the individual’s respective interests.

This lack of uniformity in identifying and reviewing the infringement of different rights does not completely undermine the joint opinion’s reasoning (and it certainly provides very limited support for the criticisms of the joint opinion by Justices Rehnquist and Scalia). It does, however, demand additional analysis. To be fair, one must recognize that the Court generally has failed to provide any adequate explanation for the differences that exist among rights. Our understanding of what constitutes an infringement of the right to marry and the standard of review applicable to infringements of that right bears little resemblance to accepted freedom of speech doctrine or even to right to travel cases. No justification for these differences exists in the case law.

Given the controversy surrounding abortion rights, however, this kind of explanatory failure cannot be tolerated. The undue burden standard of the *Casey* plurality is within the range of accepted constitutional doctrine, but that hardly makes the reasoning or the conclusions of the plurality persuasive.

If the level of review applied to laws that are not unduly burdensome varies depending on the nature of the right that is allegedly abridged, then the joint opinion must justify its conclusion that abortion rights should be grouped in the category of rights to which the plurality in *Casey* assigned it. The joint opinion provides no support for its conclusion that a law interfering with the exercise of abortion rights must either be invalidated as unconstitutional if it is unduly burdensome or upheld under implicit minimum rationality review if it is not. Since the review of laws burdening other rights, such as freedom of speech, includes a mid-level balancing test, the failure to recognize an intermediate standard for abortion rights must be substantively defended. That defense has not yet been presented.

If the constitutional adjudication of fundamental rights cases is more complex and indeterminate than the joint opinion suggests, that failing can be cured at least theoretically by further elaboration of the “undue burden” framework. The plurality’s model fits within the range of approaches recognized by the Court, but its place in that doctrinal continuum requires a stronger foundation than the joint opinion provides. On the other hand, the reality that the standard of review in fundamental rights cases varies according to the right at issue and the nature and magnitude of the burden imposed by a challenged law
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raises unavoidable and perhaps insurmountable problems for the criticism directed at the joint opinion by Justices Scalia and Rehnquist.

C. The Limited Effect Infringement—Minor Burdens and Minimal Obstacles

While Justices Scalia and Rehnquist’s contention that prior fundamental rights cases do not support the use of an “undue burden” standard either directly or by analogy is demonstrably unjustified, important concerns raised by the dissenting opinions still remain unresolved. Justice Scalia argues emphatically that some laws imposing only minor burdens on rights must receive rigorous scrutiny and be declared unconstitutional. To prove his case, he uses the example of a twenty-four-hour waiting period for, or a one-cent tax on, the purchase of religious books. These restrictions on rights, Scalia suggests, would not be characterized as unduly burdensome, but they would be evaluated under rigorous scrutiny and declared unconstitutional.257

Scalia is certainly correct that the laws he cites as examples raise serious constitutional questions. Further, the discussion of the two- and three-tier models above does not adequately explain how laws of this kind should be evaluated. The two-tier model only evaluates the effect of a law and requires that minor interferences with the exercise of a right should be routinely upheld. There is no basis under the model (other than the exceedingly rare rejection of a law on the grounds that it is not even minimally rational) for rigorously reviewing or invalidating a law that only imposes a minor burden on a right. The three-tier model defines the infringement of rights more expansively and considers both the purpose of a law as well as its effect. That permits the Court to apply a balancing test as a second tier of review to laws serving presumptively (or at least ostensibly) legitimate purposes that have significant, but not egregious, effects on the exercise of a right. Without additional discussion, however, this broader understanding of the infringement of rights does not justify the rigorous review or per se invalidation of a one-cent tax on religious worship.

There is nothing in the three-tier model, however, that precludes the Court from rigorously reviewing or presumptively invalidating certain laws that impose only minor burdens on rights, but those decisions would have to be defended and explained. Why should some laws that only marginally interfere with the exercise of a right receive

257. Casey, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part).
lenient, bottom-tier review while other laws producing the same magnitude of burden are struck down directly or receive strict scrutiny under the highest tier of review? In what sense can these limited impact laws be determined to be unduly burdensome? Clearly, in order to resolve whether the undue burden analysis in *Casey* can be extended to cover these constitutional challenges, additional analysis of what constitutes an infringement of a fundamental right is required.

(1) The Burdening of "Equality" Rights—The Right to Vote

In *Harper v. Virginia Board of Elections*, Virginia's annual $1.50 poll tax, a tax that operated as a precondition to voting eligibility, was declared unconstitutional. The proceeds of this flat tax were used to support legitimate local governmental activities, including public education. While the Court relied on an equal protection analysis to reach its conclusion, *Harper* and its progeny are currently accepted as protecting the fundamental right to vote. That "the right to vote is too precious, too fundamental to be so burdened or conditioned" is the controlling mandate of the case.

If there were any doubts as to the validity of Justice Scalia's minor burden examples, *Harper* demonstrates that such doubts are unfounded. Even a one-dollar burden on the exercise of a right can violate constitutional guarantees. *Harper* is a better illustration of the problem of minor burdens on rights than it is a solution to it, however. The difficulty with the majority opinion in *Harper* is that it never clearly explains why a fee of only $1.50 is so readily found to be a constitutionally cognizable burden. Certainly, not every regulation that incrementally increases by $1.50 the cost of engaging in other protected activities, such as obtaining a marriage license or publishing a book, will receive strict scrutiny. What distinguishes a poll tax from minor burdens on other rights?

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259. *Id.* at 666.
260. While the Court in *Harper* was clearly bothered by the explicit wealth discrimination and implicit racial discrimination of the tax, *id.* at 666 n.3, 668-69, neither of those concerns would justify invalidating a poll tax enacted today for ostensibly benign reasons. Current equal protection doctrine does not support the rigorous review of wealth classifications, see, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), nor does it permit the application of strict scrutiny to facially neutral laws that disproportionately burden racial minorities unless the law can be proven to be invidiously motivated, see, e.g., Washington v. Davis, 426 U.S. 229 (1976). Thus, the continued vitality of the holding in *Harper* must be grounded on a right to vote analysis.
Harper may be explained by two rationales that limit its scope. First, regulations that serve no purpose other than the raising of revenue from the exercise of specific fundamental rights may be presumptively invalid. That principle will be discussed in more detail shortly. It is sufficient to note at this point that it is not totally inconsistent with the undue burden analysis in Casey. The joint opinion recognizes that certain purposes are unacceptable grounds for restricting the exercise of rights. The corollary conclusion—that a law is unconstitutional if it serves an impermissible purpose, even if it only minimally burdens a right—is never explicitly stated in Casey, but it follows reasonably enough from the plurality's analysis of unconstitutional objectives.

Second, as demonstrated by the ballot access cases, voting may be a right with a particularly strong equality dimension to it. Thus, laws that have the effect of discouraging (or encouraging) particular groups from exercising the franchise and, thereby, skewing the results of elections, are suspect and must be rigorously examined. Given the constitutional objective of obtaining a universal and equal franchise so that elected officials may truly represent their constituents, even low financial barriers to voting may be unduly burdensome. This explanation is also, arguably, consistent with the Casey plurality's analysis. There is nothing in the idea of an "undue burden" standard that precludes significant variation among rights as to what might constitute an undue burden. The right to vote, because of the uniquely egalitarian nature of its function, may be more sensitive to pecuniary burdens that discourage its exercise by the poor than less equality-oriented rights such as freedom of speech or the right to an abortion.

262. See infra notes 332-340 and accompanying text.
263. See supra notes 52-55 and accompanying text. If a law may be struck down as unconstitutional because it serves the impermissible purpose of deliberately hindering women from obtaining an abortion, as the plurality recognizes, it is a short conceptual leap to the conclusion that a law serving an impermissible purpose is unconstitutional regardless of the magnitude of its impact.
264. See supra notes 112-127, 198-225 and accompanying text.
266. While commentators have strongly argued that the Court's interpretation of the First Amendment should reflect basic principles of equality, see, e.g., Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975), the case law does not reflect that commitment. Instead, under First Amendment doctrine, speech opportunities that are particularly useful for poor people can be more easily restricted than speech opportunities that are usually only available to the wealthy. Thus, a law prohibiting the posting of signs on utility poles receives a very deferential standard of review, see City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), while restrictions on
(2) **Unduly Burdensome Laws That Serve an Invalid Purpose**

Not all minor burdens on fundamental rights that invoke strict scrutiny can be explained as easily as the invalidation of the poll tax in *Harper*. Consider Justice Scalia's example of a twenty-four-hour waiting period before religious books can be purchased.\(^{267}\) A twenty-four-hour waiting period does not run afoul of the Court's apparent opposition to direct taxes on the exercise of rights. Further, even if one assumes that an implicit equality dimension to free exercise rights exists,\(^{268}\) it is not clear that a twenty-four-hour waiting period before religious materials may be sold threatens to skew an individual's, or the community's, choice among religious faiths or secular philosophy the way a poll tax distorts electoral decisions. The stronger and more generally applicable explanation for the strict scrutiny of a twenty-four-hour waiting period before religious books can be sold is the Court's suspicion that the law is intended to further a constitutionally impermissible purpose. That suspicion alone, regardless of the magnitude of the burden imposed by the law, is a sufficient predicate for strict scrutiny review.\(^{269}\)

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\(^{267}\) See Casey, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part).


\(^{269}\) One of the primary reasons for subjecting a facially discriminatory law to strict scrutiny is to determine whether the law is invidiously motivated, as its discriminatory language suggests, or whether it furthers some important state interest that could not be advanced through some less suspicious means. This rationale for strict scrutiny review is described succinctly in John Hart Ely's classic work *Democracy and Distrust*. Ely's explanation is directed at the review of suspect classifications, but it is equally applicable to strict scrutiny review of a law that is allegedly designed to discourage the exercise of a fundamental right:

The goal the classification in issue is likely to fit most closely, obviously, is the goal the legislators actually had in mind. If it can be directly identified and is one that is unconstitutional, all well and good: the classification is unconstitutional. But even if such a confident demonstration of motivation proves impossible, a
a. Classifications Reflecting Impermissible Objectives

   i. Post-Smith Free Exercise Rights

   As noted previously, the Supreme Court decided in Smith to restrict the scope of strict scrutiny review under the Free Exercise Clause to only those laws that deliberately burden the practice of religion. Neutral regulations of general applicability that incidentally disrupt religious practices would be routinely upheld under a deferential standard of review. The Court did not indicate in Smith whether the magnitude of a burden specifically and exclusively directed at a religious practice would affect the standard of review to be applied in such a case. And, indeed, there is virtually no precedent on the question. One assumes, however, as Justice Scalia’s example in Casey suggests, that almost any burden that is narrowly (and presumably purposefully) directed at religious practices would be strictly scrutinized.

classification that in fact was unconstitutionally motivated will nonetheless find itself in serious constitutional difficulty. For an unconstitutional goal obviously cannot be invoked in a statute’s defense. That means, where the real goal was unconstitutional, that the goal that fits the classification best will not be invo-
cable in its defense, and the classification will have to be defended in terms of others to which it relates more tenuously. Where the requirement is simply the Court’s standard call for a “rational” relation between classification and goal, that will seldom matter: even if the goal the classification fits best is disabled from invocation, there will likely be other permissible goals whose relation to the classification is sufficiently close to be called rational. The “special scrutiny” that is afforded suspect classifications, however, insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit that closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of “flushing out” unconstitutional motivation . . .

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980).

Of course, if a discriminatory law can only be understood to serve one purpose, and that is an impermissible one, strict scrutiny would seem to be unnecessary. The law should be struck down without further analysis. See infra note 275.

270. Smith, 494 U.S. at 877-79.

271. Id.

272. The Court’s recent opinion in Church of the Lukumi Babalu Aye strongly supports this assumption. Although the burden on plaintiffs’ religion in that case was substantial, the language used by the Court in striking down the ordinances imposing that burden emphasized the purpose of the offensive laws rather than their effect. Church of the Lukumi Babalu Aye, 113 S. Ct. at 2222. Thus, Justice Kennedy, writing for the majority, declared that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” Id. at 2227 (citation omitted).
The likely irrelevance of the magnitude of the burden in post-
Smith free exercise cases is, in part, a necessary consequence of the
distinct nature of the right of religious freedom. Unlike many other
fundamental rights, religious liberty does not protect a particular kind
of activity, such as voting, marriage, travel, or abortion, from state
interference. Rather, freedom of religion protects any activity that is
performed for a particular reason—that is, when the activity is an ex-
pression of the actor's religious beliefs. There is nothing intrinsically
religious about many activities we recognize to be religious practices.
For instance, the personal decision to fast on a particular day may be
either religious or secular, and it is the individual's motive that brings
this dietary decision within the Constitution's coverage.277

For rights that are defined by the nature of the activity that con-
stitutes the exercise of the right, the government will typically regulate
the protected activity in order to avoid or promote certain conse-
quences. Accordingly, laws that restrict the exercise of these rights
can always be justified in terms of the activity's effects. Moreover, at
least some activities that constitute the exercise of virtually any right
can be performed in unacceptable circumstances (hence the recog-
nition that no right is absolute). This means that there is almost always
a potentially legitimate basis for regulating the exercise of any activ-
ity-defined right. Judicial review of such regulations will inevitably
involve some form of balancing even if, under close scrutiny, the eval-
uation is heavily weighted in favor of upholding the right.278

The free exercise of religion is different because the protection it
provides is directed at the individual's motives, not her actions. Thus,
a law directed at a religious practice (as opposed to a law directed at a
practice whether or not it is religious) is a law directed at the individ-
ual's religious motives and beliefs. But religious beliefs, unlike ac-

Indeed, Kennedy repeated this admonition several times, explicitly warning that "[a] law
burdening religious practice that is not neutral or not of general application must undergo
the most rigorous of scrutiny . . . [and it] will survive strict scrutiny only in rare cases." Id.
at 2233.

273. Id. at 2227 (condemning laws directed at practices "because of their religious
motivation").

274. While strict scrutiny review does not directly call for a weighing or balancing of
interests, it is difficult to avoid the conclusion that some balancing is implicit in the applica-
tion of this standard. Obviously, the inquiry into whether a state interest is compelling
involves an evaluation of the state's concerns to determine if they outweigh the constitu-
tional right at issue. The requirement of narrow tailoring also helps the Court to determine
the importance of the state's objective in that underinclusive laws, by their nature, under-
mine the state's claim that it is attempting to advance an interest of the highest order. See
Church of the Lukumi Babalu Aye, 113 S. Ct. at 2232-33.
tions, are absolutely protected by the Constitution, or at least are as close to being absolutely protected as anything gets. Indeed, it is difficult to imagine a legitimate interest that a state could assert to justify the prohibition of an activity only when the activity is engaged in for religious purposes. Thus, laws purposefully directed at religious practices are understood to reflect animus and hostility toward the underlying religious faith. Since these are the only kinds of laws subject to Free Exercise Clause review after Smith, and virtually all such laws involve invidious, anti-religious purposes, the effect of these laws will rarely need to be considered by a reviewing court. Not even minimal burdens can be justified by religious hatred and intolerance.

Understood in this way, the Smith framework for reviewing free exercise challenges is not inconsistent with the "undue burden" standard endorsed in Casey. The joint opinion in Casey can be read to suggest that a law intended solely to prevent women from exercising their right to choose whether to have an abortion or not is unduly burdensome and unconstitutional notwithstanding the limited impact of the law. The burdens imposed by such laws do not further a legitimate state interest and as such are unwarranted and unjustified. Simi-

275. The Court seems reluctant to accept this conclusion, although the reasons for its hesitancy are unclear. In the free exercise area, for example, it is accepted doctrine that "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." McDaniel v. Paty, 435 U.S. 618, 626 (1978). Accordingly, a law that directly infringes a person's right to hold a religious belief is unconstitutional per se without any additional inquiry or analysis. Id. at 626-27. It would seem to logically follow from these premises that a law enacted for the purpose of punishing or discouraging a religious belief is also categorically unconstitutional, particularly when the law serves its illicit purpose by singling out a religious practice for prohibition. Yet in Church of the Lukumi Babalu Aye, the majority opinion distinguishes between a law that targets religious beliefs, which is "never permissible," and a law that restricts practices "because of their religious motivation," which must be subjected to strict scrutiny. Church of the Lukumi Babalu Aye, 113 S. Ct. at 2227.

It is difficult to understand the reasoning behind this distinction. If a law restricts an activity that is performed for religious reasons because the activity is performed for religious reasons, then the law can only be understood as one that targets religious beliefs and it should be unnecessary to evaluate the state's justification for the law before striking it down. Leaving aside the unique circumstance in which a state may argue that it must restrict religiously motivated conduct in order to comply with the Establishment Clause, there can be no constitutionally permissible justification for prohibiting an activity because it is performed out of religious conviction.

To be fair, the Court acknowledges that a law targeting activities because they are religiously motivated can only survive strict scrutiny "in rare cases." Id. at 2233. One can only wonder, however, what such a rare case might look like. See generally McDaniel, 435 U.S. at 629-42 (Brennan, J., concurring).

276. See generally Church of the Lukumi Babalu Aye, 113 S. Ct. at 2233; supra notes 272, 275.
larly, a law designed to prohibit people from engaging in an activity solely when the activity is performed for religious reasons serves no legitimate state purpose and may be characterized as unduly burdensome regardless of the magnitude of its effect.

In his dissent in *Casey*, Justice Scalia implies that *Smith* and *Casey* cannot be reconciled when he argues that a law imposing a tax of only one penny or a twenty-four-hour waiting period on the sale of religious books would be unconstitutional. While that conclusion will almost always be true for laws deliberately burdening religious activities and is much less likely to be true for laws deliberately regulating abortion services, the comparison is one of apples and oranges. Singling out religiously motivated expression (or any religiously motivated practice) for taxation or regulation is unconstitutional regardless of the magnitude of the burden imposed, because of the obvious invidious purpose behind such a classification. Regulating the right to marry, the right to vote, or the right to have an abortion raises different inferences because these activities each have particular characteristics that may legitimately require specific regulatory attention.

The more important difference between the "undue burden" standard of the joint opinion and the narrow scope of free exercise protection adopted by the Court in *Smith* is that some laws indirectly interfering with religious practices may be invalidated under an "undue burden" standard while they would be upheld under *Smith*'s holding.277 Admittedly, this might not often be the case. Since *Sherbert v. Verner*278 was decided in 1963, the Court ostensibly committed itself to review all laws that unduly burden free exercise rights under strict scrutiny.279 In the great majority of free exercise cases reaching the Court, however, the claims of petitioners have been rejected.280 Thus, despite the lip service paid to strict scrutiny protection for religious freedom in judicial opinions, the Court's actual behavior suggests that

277. For example, the military's uniform dress requirement, upheld against a free exercise challenge in *Goldman v. Weinberger*, 475 U.S. 503 (1986), constitutes a neutral law of general applicability. Accordingly, the enforcement of such laws to prevent an Orthodox Jew serving in the military from wearing a yarmulke would not raise a free exercise issue under *Smith*. If an undue burden standard was explicitly applied to free exercise claims, however, there can be little doubt that Justice O'Connor, who dissented in *Goldman*, id. at 528 (O'Connor, J., dissenting), would invalidate this application of the military dress code on the grounds that it unduly burdened the religious freedom of military personnel of the Jewish faith.


279. See *Smith*, 494 U.S. at 892-903 (O'Connor, J., concurring).

280. Id. at 888-89.
it was seldom willing to conclude that an incidental restriction on religious practices was unduly burdensome.281

There is a significant difference, however, between seldom and never. An undue burden standard provides that all the laws subject to strict scrutiny under Smith will receive rigorous review, as will certain other laws that have an unacceptably egregious effect or suspicious purpose. Thus, the implication by Justice Scalia in his dissent in Casey that the plurality's standard provides too little protection to fundamental rights282 seems embarrassingly misdirected. Not only is the scope of the protection provided by the undue burden standard broader than Scalia recognizes, but it extends constitutional protection well beyond the limits of the doctrinal model Scalia himself embraces in Smith and other cases.

ii. Content- and Viewpoint-Discriminatory Speech Restrictions

The review of content- and viewpoint-discriminatory speech restrictions suggests the same kind of analogies to an undue burden analysis as the review of religion-specific regulations. In the overwhelming majority of cases, laws that classify on the basis of the content or viewpoint of speech are directed at the communicative impact of expression.283 That objective—to restrict or suppress the message being communicated by expressive activity—is usually impermissible and always suspect.284 Under accepted First Amendment doctrine, freedom of speech is sufficiently sensitive a right that all laws serving such a purpose are, in a sense, unduly burdensome. Even if the im-

281. Id. at 876-85.
282. Justice Scalia chastises the plurality for arguing that the “undue burden” standard is a generally applicable principle, not limited to abortion. In doing so, Scalia contends, the authors of the joint opinion “show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the ‘central holding in Roe.’” Casey, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part). The adoption of an “undue burden” standard as the basis for identifying laws that infringe certain rights, however, does not preclude the Court from recognizing a different framework for other rights. Nor does it limit the Court’s discretion in identifying particular kinds of right-burdening regulations as presumptively undue. More importantly, the only alternative to the undue burden standard apparently endorsed by Justices Rehnquist and Scalia as a way to avoid placing “all constitutional rights at risk” would deny the existence of many rights and dramatically reduce the scope of the few rights that remain. It is at least an open question whether applying the undue burden standard to an expansive array of inclusively defined rights provides less protection to personal liberty than does a constitutional model that provides rigorous protection to a constricted range of narrowly defined rights. See infra notes 355-363 and accompanying text.
284. Id.
impact on a particular message is relatively light, a law that singles out and deliberately burdens the content or viewpoint of speech will receive the same strict scrutiny the Court applies to laws that discriminate on their face against a specific religious faith.285

The parallel between the constitutional protection provided to speech, religion, and abortion rights is limited, however. First Amendment doctrine recognizes that a law serving unacceptable purposes may infringe freedom of speech or freedom of religion despite the law's limited effect on the exercise of the targeted right. As the Casey plurality implies, laws furthering impermissible objectives are unduly burdensome to the right to have an abortion.286 Past that doctrinal point, the speech, religion, and abortion analogy ends abruptly.

Free speech doctrine requires courts to consider the effect of speech regulations even if the law is not directed at the communicative impact of expression. Laws serving legitimate state interests can infringe free speech rights if their negative effect on expression outweighs the state's justification for restricting protected activity. As noted previously, the scope of this protection is more extensive than the protection provided abortion rights by the joint opinion in Casey.287 Content-neutral laws that do not substantially burden expression may still be unconstitutional if they are poorly tailored and further unimportant objectives.288 Under the plurality's analysis in

285. See Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395, 2404-05 (1992) (stating content discriminatory tax on expression is unconstitutional even though the amount of the tax is minimal).
286. See infra notes 293-296 and accompanying text.
287. See supra notes 255-256 and accompanying text. Despite this significant difference between speech and abortion rights, both of these doctrinal frameworks recognize that laws can infringe rights solely in terms of their effect. A regulation may not be intended to suppress the communicative impact of expression nor designed to hinder women seeking abortions. Such a law may be intended to serve clearly permissible goals. Nevertheless, the effect of the law may be so egregiously burdensome to the exercise of the right that, at a minimum, some serious standard of review must be applied to determine if a burden of that magnitude is justified. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 797-800 (1989) (stating that speech regulation need not be least restrictive alternative, but government cannot burden more speech than is necessary to advance its interests); Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979) (stating that neutral state licensing requirements may be unconstitutional if they unduly burden right to have an abortion). Free exercise rights are distinct from these other protected interests under current law in that the right can only be infringed by deliberate and invidious burdens directed at religious practices. The effect of a law, without that singular purpose, cannot infringe the right and needs no justification.
288. In United States v. Grace, 461 U.S. 171, 180-81 (1983), for example, the government argued that a law prohibiting the display of banners or the distributing of leaflets on the grounds of the Supreme Court in Washington was constitutional because the restrictions had "only a minimal impact on expressive activity." There were more than "suffi-
**Casey**, in contrast, all laws that do not substantially interfere with the right to an abortion will be routinely upheld as long as the law serves a permissible purpose. Unlike the three-tier model of free speech doctrine, an abortion regulation is either unduly burdensome and unconstitutional or it is valid. There is no opportunity for balancing state interests against real, but not sufficiently substantial, burdens imposed on the right.  

b. Direct Inquiry Into Legislative Purpose

i. Neutral and Ambiguous Laws Serving Unconstitutional Objectives

In many instances, a law is challenged not because it employs a problematic classification, strongly suggesting that the law serves an impermissible purpose, or because its effect on the exercise of fundamental rights is too severe, but solely because of evidence that the legislature that enacted the law did so to further a constitutionally unacceptable objective. In these situations, adequate proof of the legislature’s intent may establish the infringement of a right and require the invalidation of the law. Indeed, in some cases no balancing or other form of scrutiny should be required. The law is unconstitutional even if it imposes a comparatively minor burden on protected interests.

The plurality in *Casey* seems to suggest such an approach when it states that “a law which serves a valid purpose, one not designed to constituent alternative areas” within the general vicinity to allow speakers ample opportunity to communicate their views to the public. *Id.* at 180. In striking down the challenged speech restrictions, the Court did not contest this contention. The prohibition was unconstitutional, despite its limited impact on expressive opportunities, because the restrictions limited more speech than was necessary to further the state’s interests in preserving order and decorum. *Id.* at 182.

289. Even if one agreed with the joint opinion that the 24-hour waiting period does not constitute a substantial obstacle to women obtaining an abortion, one might argue that the emotional, economic, and medical burdens imposed by this regulation far outweigh whatever purported benefit an additional opportunity for reflection allegedly provides. Whatever the merits or weaknesses of this argument may be, the important point is that courts are not required to resolve this issue under the undue burden standard. The determination that an abortion regulation does not constitute an undue burden ends the Court’s inquiry.

290. A law that discriminates on its face against the content or viewpoint of expression, for example, is directed at the communicative impact of speech. It is presumed to serve the unacceptable purpose of silencing the speaker's message or ideas.

291. *See*, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (stating that even if a law is arguably neutral on its face, if the object of a law is to restrict an activity because the practice is performed for religious reasons, the law is invalid unless it meets strict scrutiny). *See generally* Brownstein, *supra* note 80.

292. *See infra* notes 298-305 and accompanying text.
strike at the right itself," will be upheld as long as it does not substantially interfere with the exercise of the right to have an abortion.\textsuperscript{293} Similarly, the plurality indicates that the state's interest in protecting potential life cannot serve as a generally legitimate purpose foreclosing any further inquiry into legislative goals. Any attempts to further the state's interest in potential life "must be calculated to inform the woman's free choice, not hinder it."\textsuperscript{294} The clear implication of such language is that "unnecessary" regulations that are solely intended to frustrate the ability of a woman to exercise her decision to have an abortion are unduly burdensome and, therefore, unconstitutional.\textsuperscript{295} The application of such a principle could not be tested in \textit{Casey}, however, since all of the regulations reviewed in that case explicitly and exclusively regulated the provision of abortion services and did so for what the Court determined to be legitimate purposes.\textsuperscript{296}

Using the purpose analysis suggested in \textit{Casey} as a basis for examining the legislature's intent in adopting facially neutral abortion regulations (or laws that directly burden abortion services for uncertain reasons) would hardly be a unique undertaking. Despite the Court's repeated admonitions about the problems inherent in conducting inquiries into legislative intent,\textsuperscript{297} the case law has recognized this approach to identifying infringements on rights in particular circumstances. For example, in interpreting and applying the Establishment Clause, the Court has determined that some state objectives regarding religion are presumptively invalid. If the purpose of a law is exclusively or predominately to promote religion or a particular religion, it violates the Establishment Clause and is unconstitutional.\textsuperscript{298}

The Court has applied this secular purpose standard to the setting aside of a moment of silence for prayer or meditation in a public school,\textsuperscript{299} to the posting of a copy of the Ten Commandments (with a secular disclaimer in small print) in a public school classroom,\textsuperscript{300} and to a statutory requirement prohibiting the teaching of evolution unless

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\textsuperscript{293} \textit{Casey}, 112 S. Ct. at 2819.
\textsuperscript{294} \textit{Id.} at 2820.
\textsuperscript{295} \textit{Id.} at 2821; see \textit{supra} notes 51-55 and accompanying text.
\textsuperscript{296} See \textit{supra} notes 21-22, 59-78 and accompanying text. As noted previously, the plurality's description of the object of Pennsylvania's abortion regulations can be disputed.
\textsuperscript{297} See Brownstein, \textit{supra} note 80, at 44-52.
\textsuperscript{298} Edwards v. Aguillard, 482 U.S. 578, 590-94 (1987). The Court often describes this requirement using negative terms. Thus, a law is said to violate the Establishment Clause if it lacks a secular purpose.
\end{flushleft}
it is accompanied by instruction in "creation science." In each case, purported secular benefits of the state's action could not justify the challenged activity. While the effect of the state's action might be disputed, the dominant religious purpose of the law was a sufficient basis for finding an Establishment Clause violation.

Another line of authority in which courts determine that a constitutional guarantee is infringed by examining the legislature's purpose involves the review of alleged pre-condemnation downzoning under the Takings Clause. State and federal courts regularly hold that local governments cannot enact zoning laws to restrict the uses of property available to an owner in order to depress the condemnation price the state will ultimately have to pay when it acquires the land. These zoning laws do not constitute a regulatory taking in terms of their effect, since the owner is not denied all economically viable uses of his property. However, the use of state power for the illicit purpose of reducing the market value of property to avoid the payment of just compensation can constitute a taking, or a deprivation of property in violation of due process, in its own right.

While there are a variety of other examples of circumstances in which illicit purpose alone is sufficient to define the infringement of a constitutionally protected interest, the judicial review of laws based

301. Edwards, 482 U.S. at 578.
302. See, e.g., Edwards, 482 U.S. at 604 (Powell, J., concurring) (stating that creation science law is unconstitutional because, "[w]hatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief"); Wallace, 472 U.S. at 56 ("[N]o consideration of the [effects or entanglements criteria of the Lemon test] is necessary if a statute does not have a clearly secular purpose."); Stone, 449 U.S. at 45-46 (Rehnquist, J., dissenting) (arguing that majority ignores secular benefits resulting from study of Ten Commandments in holding that posting of Ten Commandments serves exclusively religious purpose).
303. See Brownstein, supra note 80, at 68 nn.202-203 and cases cited therein.
304. Id.
305. See, e.g., Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that school board's action violates First Amendment if disapproval of teacher's protected expression is found to be "motivating factor" in board's decision to dismiss him).

It is an open question whether the Court would accept evidence that the legislature's intent was to target or suppress a religious faith as the sole basis for applying strict scrutiny to a facially neutral law challenged on free exercise grounds. The Court uses evidence of the legislature's intent in Church of the Lukumi Babalu Aye to determine that the city's anti-ritual slaughter ordinances, far from being neutral, were directly aimed at suppressing the Santeria religion. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2230-31 (1993). However, that evidence does not stand alone. The Court also points to the language used in the challenged ordinances, their design, and their discriminatory application to establish that the law unconstitutionally targets a particular religion. Id. at 2227-30.
on direct inquiries into legislative intent has serious limitations. As a practical matter, judicial concerns relating to comity, the potential adverse impact on the candor of legislative deliberations, and the difficulty of determining the institutional intentions of a deliberative body discourage courts from accepting proof of impermissible purpose as the primary basis for invalidating a law. From a conceptual perspective, however, it is relatively simple to justify striking down a law that serves an unconstitutional objective, particularly if one adopts an undue burden standard. All the negative effects resulting from a law designed to accomplish an unconstitutional goal are unwarranted and are, in that basic sense, undue.

ii. Neutral Laws Serving Objectives That Invoke Strict Scrutiny—The Problem of Symbolic Speech

The previous discussion demonstrates that a facially neutral statute imposing a relatively minor burden on the exercise of a right may be challenged on the grounds that the law was adopted to serve an impermissible purpose. Proof of such a problematic purpose will sometimes, but not always, require the invalidation of the statute. Indeed, the appropriate standard of review to be applied in this situation will probably vary depending on the nature of the constitutional right that is at issue. An examination of the way that laws burdening symbolic speech are evaluated illustrates the uncertain consequences of this kind of purpose-based constitutional challenge.

Laws of general applicability that on their face regulate conduct, not speech, may be challenged as violating the First Amendment if the person engaged in performing the prohibited conduct claims to have been doing so to communicate a message. In reviewing what are ostensibly conduct regulations in this circumstance, the Court purportedly conducts a three-step inquiry. The law will be upheld “if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that in-
terest.\textsuperscript{308} If the second step of this test is answered in the affirmative, however, as we have seen, the Court adopts a very deferential stance in applying the remaining steps of this standard.\textsuperscript{309} This is the bottom rung, the lowest level of review under the three-tier model.

For our immediate purposes, however, the more interesting question is what occurs if the second step is answered in the negative; that is, if the governmental interest is found to be related to the suppression of free expression. Indeed, what happens if the suppression of expression is determined to be the law's primary purpose? While a law serving this kind of presumptively invalid purpose must be rigorously reviewed, it is not clear that the purpose of suppressing speech always requires the law's invalidation. Rather, it may be argued that a finding that the challenged law is intended to suppress the communicative impact of the regulated conduct should result in strict scrutiny, not per se invalidation.\textsuperscript{310}

Strict scrutiny is applied because freedom of speech is not absolute. It is recognized that some communications can cause so much damage to the public interest that they must be suppressed. Thus, for example, a law prohibiting anyone from encouraging prospective conscripts to resist the draft must be evaluated to determine if it furthers the arguably compelling interest of facilitating the state's need for military personnel and is narrowly tailored to accomplish that goal.\textsuperscript{311} The need to evaluate the state's justification for restricting this message continues regardless of whether the message is communicated through speech or conduct. Accordingly, if the courts determine that the legislature designed a law prohibiting people from burning their draft cards to silence the draft resistance message communicated by this symbolic act, it still remains to be determined whether the prohibition of that message can withstand strict scrutiny.\textsuperscript{312} The importance of the state's interest and the degree of tailoring of the challenged law remain to be addressed.

\textsuperscript{309} See supra notes 247-250 and accompanying text.
\textsuperscript{310} See, e.g., Texas v. Johnson, 491 U.S. 397, 410-12 (1989) (stating that since a statute prohibiting flag burning regulates expressive conduct "because of the content of the message [being] conveyed," it must be subject to "the most exacting scrutiny").
\textsuperscript{311} See United States v. Spock, 416 F.2d 165 (1st Cir. 1969).
\textsuperscript{312} The Court did not reach this issue in United States v. O'Brien because it determined that the federal statute prohibiting the willful and knowing destruction of one's draft card was unrelated to the suppression of expression. United States v. O'Brien, 391 U.S. 367, 375 (1968).
Thus, the constitutional case law appears to distinguish between unacceptable purposes that require the invalidation of the challenged law and problematic purposes that require a law to be reviewed under strict scrutiny. An exclusively religious purpose requires the invalidation of a law under current Establishment Clause doctrine. Determining that no secular purpose for the law exists ends the court’s inquiry. In reviewing laws that restrict symbolic speech, however, a finding that the challenged law is intended to suppress the message being communicated by the regulated conduct leads to rigorous scrutiny.

The undue burden standard in *Casey* appears to parallel Establishment Clause doctrine more closely than it does most symbolic speech cases. If the legislature enacts an abortion regulation, not to inform the woman’s choice, or to promote her health, or to serve any other permissible objective, but only to hinder and deter women from having an abortion, the law is unduly burdensome and unconstitutional. No further inquiry or review is necessary. The limited nature and specificity of the right at issue, the right to have an abortion, and the correspondingly limited goals that the state can reasonably assert as being furthered by restrictive abortion laws, allow the Court to equate an infringement of the right with constitutional invalidity. While the joint opinion only endorses this approach for abortion-specific laws, since those are the only kind of regulations at issue in the case, the plurality’s emphasis on state purpose strongly suggests that the same analysis should apply for facially neutral, but invidiously motivated laws.

313. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (noting that if a statute violates any of the three principles of the *Lemon* test, including the requirement that the law must have a secular purpose, it will be struck down).

314. There is an obvious counter-intuitive aspect to this distinction. One would not ordinarily assume that the government purpose of suppressing the content of speech is less violative of constitutional values than the government purpose of promoting religion. This comparison, however, misses the point of the distinction. Religious purposes are not more invidious than the goal of suppressing speech; they are, however, more difficult to justify in secular, that is, constitutionally acceptable terms.

Justifying a law that serves only a religious purpose is a particularly complicated proposition. Ultimately, it requires the conclusion that the values of the religion or religions that the law is intended to promote deserve support either as a matter of recognized religious conviction or because those religious tenets coincide with the faith of the majority of the community. Since the Establishment Clause prohibits government from determining matters of religious faith and truth, or favoring one faith over another, the analysis eventually becomes circular and the justification must ultimately fail.

315. *See supra* notes 51-55 and accompanying text.
There is one symbolic speech context, however, that tracks, and indirectly affirms, the Casey plurality's purpose analysis. If symbolic speech is being suppressed for absolute as opposed to instrumental reasons, then strict scrutiny is not required. In this circumstance, the restricted expression is not prohibited because it will cause some derivative harm, but rather because the speech is intrinsically harmful. It is allegedly immoral, unaesthetic, or offensive in and of itself. The clearest examples of this kind of symbolic speech restrictions are the flag burning cases, Texas v. Johnson and United States v. Eichman. In striking down laws prohibiting flag burning, the Court determined that one of the goals of such statutes was to prevent a communicative symbol, the flag, from being used to express a disagreeable and offensive message—that the ideals of nationhood and national unity typically represented by the flag are false and without foundation.

When symbolic speech is suppressed because the message being communicated is immoral or offensive, the question of purpose is directed at the state's ultimate objective. If the goal of prohibiting this kind of "bad" speech is constitutionally permissible, as it is with regard to obscene expressive conduct, the challenged law will be upheld. Conversely, if the state's purpose is impermissible, as was true in the flag burning cases, the law will be invalidated. When speech is suppressed because its very expression is immoral, concerns about precise tailoring and the compelling nature of the state's interest are either irrelevant or are subsumed within the question of the legitimacy of the state's purpose. The limited nature of the symbolic expression and the narrow range of justifications for suppressing it make the issue of the legitimacy of the state's purpose dispositive.

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318. Johnson, 491 U.S. at 413. It can be argued that the statutes challenged in the flag burning cases, particularly the statute at issue in Johnson, discriminated on their face against offensive expression and as such they are not strictly relevant to the analysis of neutral laws in the text. The law under review in Eichman, however, demonstrates that legislators will at least attempt to draft neutral statutes to suppress expressive conduct that communicates an offensive message, Eichman, 496 U.S. at 315, even if they are not always successful in doing so.
319. The Court in Johnson concluded that the Texas flag burning statute at issue in the case was content based and must be subject to strict scrutiny. The application of that standard, however, never progresses past the initial question of the legitimacy of the state's interest. Texas, and those Justices who dissented to the majority's decision, in essence viewed flag burning as an intolerable act of political blasphemy—the desecration of a sacred symbol. See, e.g., Johnson, 491 U.S. at 432 (Rehnquist, C.J., dissenting). Since the First Amendment generally prohibits the suppression of expression because society deems
The nature of the right to have an abortion and the essential justifications for prohibiting abortions are similarly limited. Many laws are proposed to hinder, prohibit, or criminalize abortions to further the goal of discouraging what some legislatures believe to be intrinsically and egregiously immoral conduct. When the decision to have an abortion is prohibited on that ground, the only remaining question for the Court is to decide whether or not that state purpose is a constitutionally adequate basis for restricting the exercise of the right. Once the plurality in *Casey* determined that it was not, no further scrutiny of laws intended to serve that purpose would be required.

(3) **The Arbitrary Burden—Nominal Taxes, Flat Taxes, and Administrative Fees**

As the above discussion demonstrates, Justice Scalia's dissent in *Casey* correctly recognizes that a law may directly and consciously impose relatively minor burdens on the exercise of fundamental rights and still be invalidated as unconstitutional. Laws that burden rights having a significant equality dimension to them and laws that serve impermissible purposes may be struck down despite the limited magnitude of their effect. Scalia's error is his assumption that such results

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322. *Id.* at 2878 (Scalia, J., concurring in part and dissenting in part).
must be inconsistent with the use of an undue burden standard to identify the infringement of rights.

There remains one other circumstance, however, in which the Court may invalidate even a one-penny burden on the exercise of a right. While Justice Scalia uses the narrow example of a one-cent tax on the sale of religious books—a burden that immediately suggests impermissible if not invidious purposes—the problem of the "nominal" tax extends far beyond free exercise rights. Governments directly and consciously impose taxes or fees on a variety of activities involving the exercise of rights. A modest tax on secular speech, for example—a fee that must be paid as the precondition to obtaining a parade permit—is an obvious example. If Scalia’s free exercise example in his dissent was intended to be read expansively and to represent the common understanding of how all fundamental rights cases are to be reviewed, a nominal tax on obtaining such a permit should be easily recognized by all courts as unconstitutional regardless of the amount of the exaction. Yet the one thing that is clear on this issue is that there has been no reasoned consensus on how permit taxes of this kind are to be reviewed.323

Indeed, the same term in which the Court decided Casey, it granted certiorari in Forsyth County v. The Nationalist Movement324 to resolve “[w]hether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum.”325 Further, the judgment of the Court in Forsyth County was roundly criticized by a dissent that claimed the majority opinion failed to authoritatively decide the basic question before it.326 Justice Rehnquist wrote the dissent in which Justice Scalia and two other Justices joined.

Prior to this decision, in confronting the issue of parade permit fees, lower federal courts had struggled to interpret two antiquated and ambiguous cases from the 1940s. Cox v. New Hampshire327 upheld a license fee intended to reimburse the city for the cost of administering a permit system and supervising the orderly conduct of demonstrations. Murdock v. Pennsylvania,328 on the other hand, in-

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325. Id. at 2405 (Rehnquist, C.J., dissenting).
326. Id. at 2406-07.
327. 312 U.S. 569 (1941).
328. 319 U.S. 105 (1943).
validated the application of a general solicitation license fee to evangelical missionaries disseminating religious messages and materials. The Court in Murdock distinguished this "flat license tax" from the fee upheld in Cox on the grounds that the latter was a regulatory measure to defray expenses imposing a fee of a nominal amount. In light of this precedent, some federal courts concluded that any permit or license fee reflecting a city's attempt to offset its legitimate administrative expenses would be constitutional, while other courts insisted that only a nominal fee might be imposed for this purpose.

The Court's opinion in Forsyth County did not entirely eliminate this confusion. The specific licensing scheme at issue was invalidated because it conferred too much discretion on administrators in fixing the amount of the fee, and it impermissibly allowed applicants expressing unpopular messages to be charged higher fees because of the added costs of maintaining order at their events. The majority opinion and the dissent can also be read to agree, albeit indirectly and in dicta, that a flat tax on the exercise of constitutional rights such as freedom of speech would be unconstitutional, even if it was nominal in amount, but neither opinion states this principle explicitly.

The majority opinion comes closest to doing so. Justice Blackmun explained that "[t]he tax at issue in Murdock was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size." This conclusion strongly implies that arbitrary (flat) taxes on the exercise of fundamental rights for revenue enhancement purposes are unacceptable. Justice Rehnquist's dissent more ambiguously characterizes Murdock as condemning "a flat tax on protected religious expression." Since the tax in Murdock was one of general applicability that covered all soliciting, the focus of Rehnquist's interpretation must be on the nature of the tax, not on its direction.

329. Id. at 116.
330. See, e.g., Stonewall Union v. City of Columbus, 931 F.2d 1130, 1136 (6th Cir.), cert. denied, 112 S. Ct. 275 (1991) (holding that greater than nominal fees permitted if reasonably related to legitimate administrative expenses); Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1521-23 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986) (holding that only nominal fee permitted). See generally Neisser, supra note 323, at 258 n.3.
331. Forsyth County, 112 S. Ct. at 2400-04.
332. Id. at 2405.
333. Id. at 2406 (Rehnquist, C.J., dissenting).
335. Since Justice Rehnquist supports the majority holding in Smith, he presumably does not think the tax in Murdock is unconstitutional because it incidently burdens reli-
There was a less clear consensus on whether an administrative or regulatory user fee would be constitutional, even if it imposed a substantial burden on potential speakers. The four dissenting Justices concluded, on the authority of Cox, that such fees were acceptable if they were applied in a fair and nondiscriminatory manner. The majority did not reach this issue, but it did reject the contention that Murdock had established the principle that “only nominal charges are constitutionally permissible.”

What can we infer from this decision and its precedent with regard to the propriety of an “undue burden” test? It appears that even a nominal flat tax on the right to worship or the right to speak or, perhaps, the right to engage in any constitutionally protected activity will be invalidated. That conclusion may not have been obvious before Forsyth County was decided, but it seems to be supported by a majority of the Court today. What is far less certain is that this conclusion undermines the “undue burden” analysis of the joint opinion.

The constitutional defect of a flat tax can be described in a variety of ways. One reason that even a nominal flat tax on protected activity is unconstitutional is that it serves an impermissible purpose—using the individual’s commitment to the exercise of constitutional rights as a way to raise revenue for the state’s treasury. That objective may be presumptively invalid, and as such the tax itself is, by definition, unduly burdensome. Alternatively, one can say that the burden of a tax of this kind serves no legitimate or reasonable purpose. There is no connection between the existence or amount of the tax and the
nature of the right that is subject to taxation. Thus, the tax is arbitrary and capricious and, therefore, constitutes an undue burden.340

A strong argument can be made that both of these kinds of constitutional failings, an impermissible purpose or an arbitrary and capricious governmental decision, would be subsumed under the undue burden standard as it is set out in *Casey*, although the joint opinion may fairly be criticized for not being explicit on this point. As noted previously, the plurality causes considerable confusion when it defines the purpose aspect of the undue burden standard in terms of the intent to create a substantial obstacle in the path of women seeking abortions. By using substantial obstacle language in its discussion of legislative purpose, the plurality leaves itself vulnerable to the challenge that even invidiously motivated or clearly capricious laws will be upheld since the unwarranted or deliberately obstructionist burdens they impose are not “substantial” enough.341

Notwithstanding this failure in exposition, the substance of the “undue burden” standard can easily accommodate the invalidation of capricious, unwarranted, or impermissible burdens no matter how minor they may be. None of the abortion regulations upheld in *Casey* are the equivalent of an arbitrary flat tax (or an irrational twenty-four-hour waiting period on the sale of religious books for that matter). There is no direct conflict between the plurality’s defense of a twenty-four-hour waiting period before a woman can obtain an abortion and the constitutional consensus that an arbitrary tax on protected expression would be invalid. The twenty-four-hour waiting period upheld in *Casey* may be controversial, both because of its impact and because it implies that women seeking abortions have not already given in-

340. See Forsyth County, 112 S. Ct. at 2405; see also supra note 332 and accompanying text.

341. See supra note 53 and accompanying text. If the repeated references to unacceptable purposes in the joint opinion are to have any real meaning, however, and if the undue burden standard is to withstand the criticism directed against it, an undue burden cannot be so narrowly defined. Virtually any significant burden on a right may be undue, even if it is too small to create a substantial obstacle to the exercise of the right, if the burden serves no legitimate or relevant purpose. The choice is between a reading of the joint opinion that is analytically sound, but, on occasion, imperfectly written and a reading of the joint opinion that is all but senseless. Reading the opinion in its entirety, the position of the plurality is sufficiently clear that abortion regulations are unduly burdensome and will not be upheld if they exist primarily to hinder the exercise of abortion rights and for no other relevant reason. See supra notes 51-55 and accompanying text.
formed and serious attention to their decision, but it can be justified on regulatory grounds.

Similarly, the review of regulatory or user fees in Forsyth County is also consistent with the analytic approach of the joint opinion in Casey. Unlike the disfavored flat tax, this kind of an offsetting expense fee serves an obvious and legitimate state interest in financing the administrative framework that is necessary for the streets and parks to be efficiently used for both expressive and nonexpressive purposes. While these fees clearly burden access to traditional pub-

342. See, e.g., Sylvia A. Law, Abortion Compromise—Inevitable and Impossible, 1992 U. Ill. L. Rev. 921, 940 (1992) ("The twenty-four-hour waiting requirement sends a powerful message that is degrading, condescending, and paternalistic . . . [because] [i]t assumes that women make rash decisions, and . . . imputes women's competence as moral and practical decision-makers."); Linda C. McClain, The Poverty of Privacy?, 3 Colum. J. Gender & L. 119, 143-45 (1992); Barbara Milbauer & Bert N. Obrentz, The Law Giveth: Legal Aspects Of The Abortion Controversy 300-01 (1983) (arguing that waiting period increases cost and inconvenience of abortions but the "real" costs of such requirements are "psychological and physical"); Nancy A. Nolan, Comment, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick. L. Rev. 373, 390-92 (1983) (describing lower court decisions invalidating waiting periods); Lawrence H. Tribe, Abortion: The Clash of Absolutes 203-04 (1990) ("Apart from their value as propaganda, laws imposing such waiting periods seem to be written in the belief that they may pass constitutional muster where an outright prohibition would not, while at the same time they will act as an absolute obstacle for at least some women who might otherwise obtain legal abortions.").

343. See Dworkin, supra note 58, at 408-11. Dworkin argues that it does not violate the Constitution for a state to adopt abortion regulations that promote the goal of moral responsibility. Regulations of this kind operate to encourage citizens to "treat decisions about abortion as matters of moral importance, . . . [to] recognize that fundamental intrinsic values are at stake in their decision, and . . . [to] decide reflectively, not out of immediate convenience but out of examined conviction." Id. at 408. The state is prohibited, however, from coercing a woman not to have an abortion before the third trimester, either directly through outright prohibitions or indirectly by adopting burdensome regulations that preclude her from making or exercising her own choice. Id. at 410. While Dworkin leaves open the issue of whether a 24-hour waiting period constitutes so severe a burden that it must be struck down as unconstitutionally coercive, his analysis strongly suggests that there is at least a legitimate regulatory objective on which waiting periods can be grounded.

The fact that a waiting period can be justified by reference to legitimate regulatory objectives, however, does not mean that the offered justification is persuasive, that it outweighs the burden the requirement imposes on many women, or that the waiting period should be upheld as constitutional. A court might accept as rational the state's attempt to ensure that the decision to have an abortion is careful and deliberate, but still strikes down waiting period requirements because of their impact on women. See, e.g., Akron Ctr. For Reprod. Health v. City of Akron, 651 F.2d 1198, 1208 (6th Cir. 1981), aff'd in relevant part, 462 U.S. 416, 449-51 (1983).

344. See Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941); see also Neisser, supra note 323, at 347-49 (arguing that permit fees are more like taxes than user fees but recognizing that they are consistent with the First Amendment if they are carefully limited to cover only administrative expenses).
lic forums, there is even an argument that they are presumptively valid in that without reasonable time, place, and manner constraints, and the money needed to enforce them, the utility of the streets and parks for expressive purposes might be significantly reduced.

Administrative fees serving a legitimate, and perhaps preferred, state purpose can nevertheless be invalid if they unduly burden freedom of speech. A fee structure that requires higher payments from groups creating greater security risks by espousing unpopular causes may unduly restrict the access of these groups to traditional public forums and requires more stringent review. Similarly, it may be argued that very high fees based on gratuitous and unnecessary expenses (particularly those that make no exception for groups with limited financial resources) create substantial obstacles to free expression and warrant serious review even if they are content-neutral in their application.

The multi-factor balancing test the Court applies to content-neutral regulations requires that ample alternative avenues of communication be available before such restrictions on speech may be upheld. The majority's statement in Forsyth County that the Murdock decision does not hold that "only nominal charges are constitutionally permissible" in the setting of permit fees should not be taken out of context. There is no basis for concluding that it supports a more lenient standard of review for permit fees than would be ap-

345. The Court makes this point in both general and specific terms in Cox v. New Hampshire, 312 U.S. 569 (1941). From the broadest perspective, 

[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

Id. at 574.

More specifically, the Court quoted with obvious approval the observations of the state court that licensing regulations served the laudable purpose of preventing the confusion caused by "overlapping parades or processions." Id. at 576. Obviously, if two different demonstrations attempt to use the same route at the same time, the resulting chaos is likely to detract from the message each group is trying to communicate.

346. See Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395, 2404 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

347. See Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523-24 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); Neisser, supra note 323, at 313-16, 335.


349. Forsyth County, 112 S. Ct. at 2405.
plied to other content-neutral regulations that burden free speech rights.\textsuperscript{350}

Despite the apparent ease with which the review of user fees for parade permits can be explained under an undue burden standard, the constitutionality of user fees is likely to vary significantly depending on the fundamental right that is burdened. The general applicability of the undue burden standard does not suggest uniform conclusions as to whether these fees will be upheld. While flat taxes on the exercise of fundamental rights may be consistently problematic, user fees are more like regulatory burdens and require a right-by-right evaluation.

It must be reiterated that what constitutes an undue burden on the exercise of one right may not constitute an undue burden on the exercise of a different right. In part, this is simply a consequence of considering a law's purpose as well as its effect in determining whether a law unduly burdens the exercise of a right. What are legitimate and rational regulations vis-à-vis one right may be irrational or invidious restrictions on a different right.

There is no obvious analogy, for example, between user fees for parade permits and a similar financial burden imposed on women seeking abortion services at private medical facilities. Presumably the state could license all medical clinics, including those that provide abortion services, and review their quality under a system that charges the clinic a fee to reimburse the state for its administrative expenses. The clinic would probably pass this cost on to its clients.\textsuperscript{351} It is unlikely that a fee directed at the women seeking abortions themselves, however, could be justified as a user fee as opposed to an arbitrary tax.\textsuperscript{352}

\textsuperscript{350} Indeed, it may be argued that alleged user fees should be more rigorously reviewed than time, place, and manner regulations. See Neisser, \textit{supra} note 323, at 286-87, 292-300, 329-51.

\textsuperscript{351} See generally Baird v. Department of Pub. Health, 599 F.2d 1098 (1st. Cir. 1979) (upholding licensing statute applicable to abortion clinics); Birth Control Ctrs. v. Reizen, 508 F. Supp. 1366, 1381-85 (E.D. Mich. 1981), \textit{aff'd in part and vacated in part}, 743 F.2d 352 (6th Cir. 1984) (upholding licensing statutes applied to abortion clinics despite contention that cost of compliance will increase cost of abortion services); Westchester Women's Health Org. v. Whalen, 475 F. Supp. 734, 740-41 (S.D.N.Y. 1979) (holding that regulations of abortion clinics that may increase the cost of an abortion are not unconstitutional).

\textsuperscript{352} A comparison cannot easily be drawn between parade permit fees based on a city's administrative expenses and an administrative overhead fee charged at a public hospital that provides abortion services. While the state must allow its streets and parks to be used as public forums for expressive purposes, the state may prohibit its public hospitals from providing abortion services. See Webster v. Reproductive Health Servs., 492 U.S. 490, 507-11 (1989). If prohibiting all abortions services at public hospitals is neither unduly
Inconsistencies and uncertainty in the application of the undue burden standard are unavoidable because there is no common foundation underlying the various rights that the Constitution protects. Thus, for example, while a license fee to cover the city’s administrative costs may be a rational imposition on the right to speak in a traditional public forum, allocating the costs of running elections to each voter through a poll tax or electoral user fee would almost certainly be unconstitutional even if the amount of the tax was still only $1.50. Despite the fact that both rights are instrumental to the effective operation of democratic self government, the right to vote has a stronger equality dimension to it than is recognized in free speech jurisprudence. Thus, fees that may discourage less wealthy persons from exercising the franchise will receive more rigorous scrutiny than comparable fees that have the effect of discouraging poor people from engaging in expressive activities in a traditional public forum.

III. The Nature of Constitutional Infringements and the Scope and Meaning of Fundamental Rights

The analysis of what constitutes an infringement of a fundamental right described above is complex and indeterminate. I offer it for three reasons. First, and least important, it is a necessary foundation for the joint opinion’s holding in Casey with regard to abortion rights. The virtue of that rationale depends on one’s own judgement as to whether the position of the joint opinion in Casey is worth defending. If it is, some attempt must be made to ground the plurality’s reasoning in traditional fundamental rights jurisprudence. This Article does that. The argument that the undue burden standard is artifi-

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353. See supra note 266.

354. Obviously, one may endorse some form of undue burden standard for abortion rights in theory and still reject the way that the joint opinion in Casey defines and applies that standard. As a doctrinal matter, the plurality’s conclusion that significant, but not substantial, burdens on the right to have an abortion will be upheld as long as they rationally serve some legitimate state interest can be challenged on the grounds that all significant burdens on the exercise of a fundamental right should be balanced against the weight of the state’s interest to determine if the burden is justified. See supra notes 255-256 and accompanying text.

With regard to the specifics of the Casey decision one may argue, for example, that the plurality understates the impact of the 24-hour waiting period requirement and that this provision should be struck down as an undue burden. See supra note 342 and accompanying text.
cial and without precedential support is demonstrated to be erroneous.

Second, and more important, the undue burden standard and the analytic framework supporting it help to explain a great deal of case law that is otherwise difficult to understand in doctrinal terms. With regard to this second point, I respectfully urge the reader who is justifiably disturbed by the fluid and ad hoc nature of the analysis presented here not to make the mistake of shooting the messenger. The complexity of existing fundamental rights case law is neither my fault, nor for that matter is it the fault of the authors of the joint opinion. The question before us is whether an undue burden standard, directed at both the purpose and the effect of the challenged law, adequately (and usefully) describes how the Court has been operating when deciding fundamental rights cases. If the answer to that question is “yes,” as I think it is, responsibility for whatever faults there are in that approach is going to be fairly widespread.

Of course, in one sense, my answer to this question is a highly qualified “yes.” I have taken a certain amount of license in interpreting what the plurality in *Casey* means by a undue burden standard, and in extending the plurality’s reasoning to resolve issues never mentioned in the joint opinion. I have no way of knowing whether what I have written is what the authors of the joint opinion intended.

What is certain, however, is that an undue burden standard *can* be used to resolve the specific issues about abortion rights addressed in the joint opinion in *Casey*. Further, the doctrinal roots of that standard, or at least one interpretation of that standard, can be firmly grounded in the fundamental rights case law. The standard is malleable. The nature of what constitutes a constitutionally cognizable burden varies among the fundamental rights. Moreover, different levels of review apply to laws that regulate but do not impose undue burdens on the exercise of rights. What is constant, in determining what constitutes the infringement of a right, is the lack of constancy—the recognition that for each right certain purposes and effects are unacceptable, while other purposes and effects are either routinely upheld or subjected to some form of open-ended balancing test. The “undue burden” standard does not explain how this framework will operate for each right, but it does forthrightly acknowledge that the Court is regularly making these kinds of choices in reviewing laws that are challenged as abridging rights.

The third and primary reason for recognizing, and even defending, an undue burden standard is that there may be no other approach
that provides sufficient protection to the rights guaranteed by the Constitution without unreasonably preventing the other branches of government from performing their constitutionally assigned functions. The inescapable reality of the last forty or fifty years of constitutional litigation is that it is in the nature of rights that they pull the courts in opposing directions. On the one hand, rights should be defined categorically, and violations of rights should be subject to a rigorous standard of justification. That kind of principled rights jurisprudence promotes important values of certainty, uniformity and predictability. On the other hand, the complexity of human society makes it extraordinarily difficult to describe those interests that should be insulated from majoritarian decision making in such a structured way.

The broader the range of interests the Constitution is interpreted to protect, the more acute this problem becomes. As the scope of constitutional rights becomes more inclusive, as the nature of "religion" that the Free Exercise Clause protects is defined more expansively, and as courts are pressed to disregard tradition in defining rights of privacy and personal autonomy, the conflict between state action and the exercise of rights becomes more common and less avoidable. Given the scope of activity for which constitutional protection is sought, courts are understandably reluctant to define rights as generic classes of behavior that can only be the subject of regulation in the most compelling of circumstances. The conventional understanding that all conflicts between rights-related activity and state action must be resolved under strict scrutiny review simply immunizes too large an area of human activity from democratic deliberation and regulation.

355. The value of rigorous bright line rules in protecting freedom of speech, such as the requirement that viewpoint based restrictions on speech must receive strict scrutiny, is particularly well established. See Melville B. Nimmer, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.03 (1984) (explaining the benefits of definitional or categorical balancing over an ad hoc or contextual balancing approach); Tribe, supra note 168, § 12-2, at 792-94. As the Court has recognized, the use of "broad rules of general application" avoids "unpredictable results and uncertain expectations." Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1974).

356. See, e.g., Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (explaining that Free Exercise Clause is not limited to persons who adhere to "a tenet or dogma of an established religious sect"); Welsh v. United States, 398 U.S. 333, 344-67 (1970) (Harlan, J., concurring) (limiting exemption from military service to only those conscientious objectors who worship a supreme being violates Establishment Clause).

In blunt terms, the adjudication of rights requires more flexibility than the categorical definition of rights protected by strict scrutiny review provides. One way of dealing with the problem is to identify and prioritize sub-classes of rights and to apply a more lenient standard of review to those laws that abridge what are designated as lesser or less valuable rights. Thus, for example, a separate standard of review has been applied to laws that restrict commercial speech. This approach is useful in certain circumstances, when the nature of the right is susceptible to being fragmented and broken down into sub-categories of activity.

For many rights, however, such as the right to marry or the right to have an abortion, the nature of the right is unitary. With regard to other rights, such as freedom of speech, even after we have identified all the categories of lesser and unprotected speech that merit reduced First Amendment protection, the scope of what remains as fully protected expressive activity is intolerably broad. At least, it is intolerably broad if all laws that limit such speech must receive strict scrutiny. In these and other cases some framework of review more sensitive to reasonable regulatory concerns must be implemented.

Ultimately, it seems clear that one way to achieve the necessary flexibility that an expansive rights jurisprudence requires is to focus on what constitutes an infringement of a right. By examining the purpose and effect of the state’s action that burdens the exercise of the right, and determining whether particular burdens require rigorous review, ad hoc balancing, or, perhaps, no review at all, the Court can most carefully craft the scope of constitutional guarantees. Using this

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358. It should be emphasized that an expansive interpretation of fundamental rights doctrine does not preclude the use of strict scrutiny to protect particular rights against specific forms of infringement. The point is that strict scrutiny cannot be relied on to resolve all claims relating to the abridgment of rights. Other, more flexible approaches must also be utilized.


360. The right of freedom of speech has been broken down to include various categories of lesser protected speech, see, e.g., Central Hudson, 447 U.S. 557 (1980) (commercial speech); FCC v. Pacifica Found., 438 U.S. 726 (1978) (indecent speech); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamatory speech). There is considerable dispute, of course, as to the identity, value, and legitimacy of each of these categories of expression and the specific standards of review applied within each category.

361. See, e.g., Tribe, supra note 168, at 794 (noting that “when government does not seek to suppress any idea or message . . . there seems little escape from [the] quagmire” of ad hoc balancing).
approach, the process of defining what the Constitution protects can be accomplished with considerable precision.

Moreover, by recognizing that constitutional infringements must be identified and described by looking at both the purpose and effect of a law, the Court's understanding of what a right is changes significantly. Instead of a one-dimensional view of rights that is discussed solely as an individual interest, rights are defined, from the perspective of infringement, in terms of the interaction between the individual and the state. The motives and actions of both the state and the individual set the parameters of what the Constitution protects. Rights become more intrinsically social and collective in their interpretation. 362

Despite these virtues, the adoption of an expansively applied undue burden standard is hardly a panacea for the protection of fundamental rights. It contains more than its fair share of risks and problems for people who support an expansive and inclusive recognition of constitutionally protected interests. Judicial flexibility in identifying what constitutes an infringement can substantially reduce the scope of rights, as the joint opinion in Casey itself demonstrates. Even the modification of an undue burden standard to include the balancing of significant, but not "substantial," burdens against the state's interests to determine if the burdens are justified leaves rights vulnerable to unnecessary restriction. Ad hoc and subjective balancing is far more conducive to judicial deference to the legislature than are categorical rules of review. 363

362. See Dworkin, supra note 58, at 405-11 (describing how collective values of the community relating to the sanctity of human life may justify abortion regulations that encourage reflection and deliberation in reaching the decision to terminate a pregnancy).

363. See supra note 355. The risk that ad hoc balancing will inevitably result in excessive deference to the legislature is illustrated by Justice Frankfurter's concurrence in Dennis v. United States, 341 U.S. 494, 521, 524-25 (1951):

The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. . . . Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. . . . Their judgment is best informed, and therefore most dependable, within narrow limits.
The alternative to an undue burden approach, however, may even be more limited and restrictive. If the only choice is between protecting the exercise of a right against all burdens under strict scrutiny review or interpreting the interest at stake as something other than a right and providing it no constitutional protection at all, the latter option may be selected in far too many circumstances. It may be implicit in the framework offered by the critics of the "undue burden" standard that rights are rarely recognized, although they receive aggressive protection in those few circumstances when they are found to exist.\textsuperscript{364} That approach may be successful if a very limited regime of rights is all that one believes the Constitution protects. If one aspires to a more open-ended and expansive vision of rights, however, it may be that the price to be paid to implement that vision is a commitment to judicial flexibility in determining what constitutes the infringement of a right.

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Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.

364. In an important sense, a case like \textit{Smith} represents the classic danger of subordinating the question of when a right is infringed to a commitment to strict scrutiny review. Confronted with the inherent difficulty of applying a strict scrutiny standard of review to all laws that burden the practice of any person's religious faith, the Court in \textit{Smith} chose to maintain the exclusive applicability of strict scrutiny review by reducing the protection provided by the Free Exercise Clause to those few situations in which a religious faith is targeted for suppression. The Court defined the right by identifying those circumstances in which strict scrutiny review was unquestionably appropriate, when no real balancing of interests would be necessary.

The problem with this approach is not only that it sharply reduces the protection provided to freedom of religion. \textit{Smith} is an inadequate response to the real problems created by an expansive definition of rights because it determines the scope of constitutional guarantees by using criteria that are unrelated to the needs of individuals and the value of personal liberty. A court adopting an undue burden standard or some other flexible model of review, in contrast, might still limit the scope of a right, but it would reach that decision by examining the impact of a challenged law on the individual seeking to exercise the right and the state's purpose in enacting that regulation. \textit{Smith} sacrifices the rights of individuals to promote a vision of the proper role of constitutional courts. Whatever defects there are in an undue burden standard, it correctly recognizes that the role of the courts must be determined by the nature of the rights that the Constitution protects and not the other way around.