STUDENT WRITING PROPOSAL

Title: “Giving Casey Its Bite Back: The Role of Rational Basis In Undue Burden Analysis”

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ABSTRACT

No shortage of scholarship has attempted to decipher the “undue burden” standard of review for state regulations on abortion established by the Supreme Court’s 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey.¹ Despite its efforts to restructure a politically and doctrinally conflicted area of constitutional jurisprudence, Casey has engendered confusion rather than clarity. While it is evident that the Court abandoned the standard of strict scrutiny Roe v. Wade had applied to the abortion right² in favor of a new “undue burden” test, the correct method of implementing that test remains murky. For this reason, courts have applied Casey inconsistently and unfaithfully for nearly two decades, creating a tangled body of abortion precedent and rendering the undue burden standard insufficient to protect women’s reproductive autonomy. The failure of this standard of review was particularly egregious in 2011, a year whose devastating legislative sessions and renewed efforts to diminish the legacy of Roe left abortion litigators with little effective recourse.

Written to develop Planned Parenthood’s long-term litigation strategy, this article approaches Casey from three perspectives. First, it unravels Casey’s confused progeny, explaining how courts’ doctrinal mischaracterizations of undue burden analysis have resulted in unpredictable and inaccurate precedent. Second, the article more clearly defines the undue burden standard’s application and explains its relationship to a different standard of constitutional review known as “rational basis with bite.” Given its moniker by Northwestern School of Law Professor Victor Rosenblum and acknowledged by the Supreme Court in such seminal cases as Lawrence v. Texas, this heightened version of traditionally toothless rational basis review allows courts to actually invalidate the challenged legislation. Finally, the article proposes a new method for undue burden’s implementation that can better target the pervasive flaws of anti-abortion legislation: incorporating rational basis with bite as a threshold analysis. By making the best of a fundamentally flawed standard of review and articulating a new

² 410 U.S. 113 (1973).
approach to Casey that responds to current trends in abortion legislation, the article better equips advocates to litigate abortion cases to the fullest extent constitutional law currently permits.

SUMMARY OF ARGUMENT

Although the Supreme Court implied in Casey that undue burden was a stringent and effective replacement of Roe’s abortion analysis, the undue burden standard has, in practice, failed to protect the abortion right against an increasing number of regulatory and legislative efforts. This article contends, first, that undue burden is a new variety of intermediate review, more stringent than rational basis but more lenient than strict scrutiny. It further demonstrates, however, that courts have persistently misunderstood the undue burden standard and failed to apply it with vigor it requires. Although the Casey Court conceptualized the undue burden standard as stricter than the notoriously deferential rational basis, I argue, appellate decisions implementing undue burden have inverted this relationship: although regulations that survive undue burden analysis should necessarily survive the less stringent rationality review, courts have applied Casey so weakly that regulations surviving undue burden analysis might, strangely, fail to withstand the purportedly more lenient rational basis. This consequence, precisely the opposite of the Supreme Court’s intent, deprives the undue burden standard of what scholars have called its “potential vigor and strength.”

In Part II, a textual analysis of Casey reveals that the Court originally imagined the undue burden test as a sturdy bulwark against assaults on the abortion right: less demanding than strict scrutiny, to be sure, but also far less deferential than rational basis review. In Part III, I briefly summarize the history of the recent judicial trend towards “rational basis with bite,” a stricter

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iteration of the traditionally toothless rationality review that enables the Court to actually invalidate challenged legislation. Although the Supreme Court has yet to articulate precisely which factors trigger its implementation of rational basis with bite, I contend that both the language of *Casey* and the Court’s rational basis with bite jurisprudence demonstrate that undue burden was intended to be stricter even than heightened rationality review.

The selective analysis of appellate decisions in Part IV, however, demonstrates how the progeny of *Casey* have turned that case on its head: legislation that would fail to withstand rational basis review, perversely, often survives the purportedly stricter requirements of the undue burden standard. Courts that implement rationality review when applying *Casey*, I contend, better discern statutory flaws than courts that omit rational basis or purpose prong analysis. Doctrinal misinterpretations have thus led appellate courts to uphold unconstitutional regulations under the supposedly rigorous auspices of the undue burden standard.

Part V proposes a method of implementing the undue burden standard equipped to actualize its latent strength and render it stricter than heightened rationality review. The rigor of rational basis with bite lies primarily in its searching analysis of the nexus between the state’s regulatory means and ends – an inquiry conspicuously absent from *Casey*’s purpose and effects test. For this reason, I argue, courts should subject abortion regulations to rational basis with bite review before implementing the two-prong test. Legislation not rationally related to a legitimate state interest need not undergo undue burden analysis to be declared unconstitutional. Since current abortion legislation frequently fails nexus inquiry, preceding the purpose and effects test with heightened rationality review allows the undue burden standard to target the most problematic aspect of abortion regulations. Only by reviving the sorely misconstrued *Casey*, I
conclude, will courts fulfill the Supreme Court’s promise to uphold the “most central principle of Roe v. Wade”⁴ and preserve the right to reproductive autonomy.

PREEMPTION

Although Casey, in some respects, is well-trodden scholarly ground, the vast majority of relevant law review articles fall into one of two categories: first, those that seek either to debunk the standard and advocate for a return to Roe’s strict scrutiny, and second, those that unpack the constitutional origins of the undue burden test. This article seeks to echo and buttress these prior claims by examining Casey’s failure through another lens: its poorly understood relationship to more traditional standards of review and its problematic but potentially fruitful relationship to the current trend towards “rational basis with bite.” I intend neither to dismantle prior Casey scholarship nor add to the sizeable body of work “detailing inherent defects in the undue burden standard.”⁵ Instead, I hope to reveal an as-yet ignored element of undue burden’s unsatisfying track record, clarify the role rational basis review ought to play within Casey’s prescribed analysis, and imbue the test with the highest degree of rigor it can tolerate. This article should be understood only as an effort to make the best of the Court’s profoundly flawed opinion in Casey, emphasizing whatever stringency the undue burden test possesses and revealing the potential strength of its correct implementation. Any article examining undue burden will necessarily cross familiar territory; I hope to build on the substantial work done by prior scholarship while also addressing Casey from a different and more politically apropos analytical perspective.

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⁴ Casey, 505 U.S. at 871.
Some scholars have argued, like I do, that courts have misunderstood the undue burden test and have applied it with insufficient strictness; others have articulated, as I do, optimal implementations of the undue burden standard. However, this article differs from prior work in two important respects. First, little (if any) other scholarship has addressed Casey primarily through the lens of rational basis review or argued for the incorporation of rational basis with bite into undue burden as a threshold analysis. While Gillian Metzger\textsuperscript{6} incorporated rational basis with bite into her prescription for Casey’s proper implementation, for instance, we disagree over the role that standard of review ought to play in undue burden analysis: Metzger contends that rational basis with bite plays only a small role within the purpose prong, whereas I argue that rational basis with bite is properly understood as a threshold analysis to the undue burden test as a whole. Furthermore, Metzger’s 1994 article is increasingly outdated. Written only two years after Casey, the article necessarily omits from its analysis a substantial body of caselaw applying and explaining the undue burden standard.

Second, scholars have neither supplemented their research with the legislative case studies I intend to incorporate (see discussion below) nor examined the latent strength of rational basis’ nexus requirement in light of the particular characteristics of recent abortion regulations. While Linda Wharton’s 2006 assessment of Casey\textsuperscript{7} thoroughly analyzes certain important state and Circuit decisions applying undue burden, it does not supplement this analysis with an assessment of statutory trends or the capability of undue burden to effectively target current


abortion legislation. Similarly, although Elizabeth Schneider’s 1993 examination of *Casey*\(^8\) discusses the relationship between rational basis review and undue burden analysis, it neither addresses the nexus requirement of rational basis in particular nor recognizes how rational basis may be a blessing rather than a burden for courts applying *Casey*. While these three articles certainly do not exhaust the body of scholarship discussing *Casey* or even addressing its relationship to rational basis review, no prior analyses of *Casey* propose rational basis with bite as a threshold analysis, assess nexus inquiry as a potentially fruitful mechanism for targeting current abortion legislation, and analyze *Casey*’s progeny through these doctrinal lenses. This article situates itself within but does not reiterate previous undue burden scholarship. At bottom, the article is a unique addition to the preexisting body of abortion commentary because it combines prescriptive and descriptive methodologies in promulgating a litigation-oriented thesis. Concerned solely neither with how courts have applied the undue burden standard nor with how courts ought to apply that standard, this piece instead attempts to assess the failure of current judicial trends while also proposing specific and practical changes for the future.

**TIMELINESS**

The 2011 legislative session dealt severe blows to the abortion right, forcing progressive litigators to challenge an unprecedented variety and quantity of anti-abortion legislation. States such as South Dakota, Kansas, Arizona, and Ohio targeted the abortion right in unconventional and often insidious ways: contested legislation collapsed the important distinctions between medication and surgical abortion, required unprecedented delays between a woman’s request for an abortion and the abortion itself, and severely restricted the ability of physician’s assistants and

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nurse practitioners to perform certain abortion procedures. In the face of this frequently problematic legislation, however, the undue burden test promulgated by *Casey* has proven largely inadequate. Neither of *Casey’s* two prongs have risen to the task before them: while the purpose prong sets too high a threshold for showings of legislative intent, the effects prong demands an often infeasible amount of empirical data. For this reason, attorneys in Planned Parenthood’s Law and Litigation Department solicited this article to assist in the development of litigation strategies better equipped to tackle future efforts to diminish the right to choose.

Shifts in the discourse surrounding the abortion right, these attorneys argue, necessitate parallel shifts in approaches to future litigation. Most articles, as I discuss above, seek only to emphasize the inconsistencies in the *Casey* opinion and the shortcomings of the undue burden standard of review; little scholarship addresses abortion litigation under *Casey* from a practical as well as a doctrinal perspective. However, the inadequacy of current litigation demands precisely such integrative and outcome-based scholarship. Given the unlikelihood of new Supreme Court abortion precedent, this article seeks to supplement current practitioner methods with a trial-oriented approach to undue burden analysis and an assessment of how current abortion legislation tends to function.

**ANTICIPATED CHANGES**

I intend to make three basic structural and substantive changes to the current draft over the course of the editing process. First, I will drastically shorten and perhaps omit the lengthy exposition of “rational basis with bite” and the analysis of exemplary Supreme Court cases that accompanies it. My supervisor solicited this analysis to contextualize a legal standard with which she was unfamiliar; for this reason, the analysis in its entirety is not a necessary
component of my larger argument. Although I will retain the most overarching background information about the rational basis with bite standard, I will likely omit the more particular elements of that discussion. If the G-Board is looking to accept a shorter piece, mine is particularly susceptible to substantial edits in this section, and I’m more than happy to accommodate any length requirements as best I’m able.

Second, I will significantly expand my analysis of two Supreme Court cases: Lawrence v. Texas and Gonzales v. Carhart. Lawrence, for its part, is a substantial component of the Supreme Court’s developing rational basis with bite jurisprudence. I will therefore make more thorough use of Justice O’Connor’s dissent in my discussion of the role rational basis with bite ought to play in undue burden analysis. Specifically, I will argue that the more stringent approach to rational basis exemplified in Lawrence represents precisely the sort of searching analysis with which courts should begin their undue burden inquiry. Though the Court in Lawrence was unwilling to declare the right to consensual sexual conduct fundamental and thus deserving of strict scrutiny, it recognized the substantial importance of the right and thus used a more searching form of rational basis to overturn Texas’ sodomy law and overrule Bowers v. Hardwick. Similarly, even if the Court is unwilling to deem the abortion right fundamental, it should follow the Court’s approach in Lawrence and implement the undue burden standard in a way that renders it more searching than mere rational basis.

Gonzales, even more significantly, is the Supreme Court’s most recent application of the undue burden standard. For this reason, I will confront the opinion’s significant ideological and doctrinal ramifications for my argument much earlier and in much greater detail. This final shift will further distinguish this article from earlier scholarship that analyzes Casey without the

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benefit and perspective of Gonzales. It is difficult to contend that Gonzales applies the undue burden standard with the same force that Casey did; Gonzales is widely cited as the first Supreme Court case to uphold an abortion regulation that does not contain an exception for the life or health of the mother. To the extent that Gonzales represents an inadvertent departure from the standard articulated in Casey, therefore, I will argue that the Supreme Court should return to its initial conception of the undue burden standard and should implement the test as a stringent form of near-intermediate scrutiny. To the extent, however, that Gonzales represents an intentional diminution of the test’s force and critical power, I will contend that normative considerations warrant the Court’s reexamination of the standard’s application in Carhart, and will argue that the Court’s original articulation of the undue burden standard better upholds the principles of Roe and better protects the abortion right itself.

Finally, I will add two statutory case studies from the 2011 legislative session to illustrate how the nexus analysis inherent in rational basis review would more effectively target the weaknesses of abortion regulations than the undue burden standard. I will examine, first, the legislative efforts of several states (most notably, Kansas and North Dakota) to ban the use of telemedicine in medical abortion cases. Second, I will discuss an Arizona requirement that even patients receiving medication, not surgical, abortion be subject to pelvic examinations prior to the procedure.10 By analyzing how this legislation lacks the necessary connection between its chosen legislative means and articulated ends, I will demonstrate how rational basis is in some ways better equipped to assess the vulnerabilities of anti-abortion legislation than the purportedly stricter undue burden standard.

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GIVING CASEY ITS BITE BACK:
THE ROLE OF RATIONAL BASIS IN UNDUE BURDEN ANALYSIS
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I. Introduction

No shortage of scholarship has attempted to decipher the “undue burden” standard of review for state regulations on abortion established by the Supreme Court’s 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey.11 Despite its efforts to restructure a politically and doctrinally conflicted area of constitutional jurisprudence, Casey has engendered confusion rather than clarity. 12 While it is evident that the Court abandoned the standard of strict scrutiny Roe v. Wade had applied to the abortion right13 in favor of a new “undue burden” test, the correct method of implementing that test remains murky. For this reason, courts have applied Casey inconsistently and unfaithfully,14 creating a tangled body of abortion precedent and rendering the undue burden standard insufficient to protect women’s reproductive autonomy.

This article contends, first, that undue burden is a new variety of intermediate review, more stringent than rational basis but more lenient than strict scrutiny. It further demonstrates, however, that courts have persistently misunderstood the undue burden standard and failed to apply it with vigor it requires. Although the Casey Court conceptualized the undue burden standard as stricter than the notoriously deferential rational basis, I argue, appellate decisions implementing undue burden have inverted this relationship: although regulations that survive undue burden analysis should necessarily survive the less stringent rationality review, courts have applied Casey so weakly that regulations surviving undue burden analysis might, strangely, fail to withstand the purportedly more lenient rational basis. This consequence, precisely the opposite of the Supreme Court’s intent, deprives the undue burden standard of what scholars have called its “potential vigor and strength.”15

In Part II, a textual analysis of Casey reveals that the Court originally imagined the undue burden test as a sturdy bulwark against assaults on the abortion right: less demanding than strict scrutiny, to be sure, but also far less deferential than rational basis review. In Part III, I briefly summarize the history of the recent judicial trend towards “rational basis with bite,” a stricter iteration of the traditionally toothless rationality review that enables the Court to actually invalidate challenged legislation. Although the Supreme Court has yet to articulate precisely which factors trigger its implementation of rational basis with bite, I contend that both the language of Casey and the Court’s rational basis with bite jurisprudence demonstrate that undue burden was intended to be stricter even than heightened rationality review.

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12 See infra, notes 116 -118 and accompanying text.
14 See analysis in Part IV, infra.
15 Linda J. Wharton, Susan Frietsche, Kathryn Kolbert, Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey, 18 Yale J.L. & Feminism 317, 353 (2006). Other scholars have argued, like I do, that courts have misunderstood the undue burden test and have applied it with insufficient strictness. However, none have done so explicitly through the lens of rational basis review, preferring instead to emphasize lower courts’ failure to engage in thorough fact-finding or the their tendency to mechanically apply Casey’s holdings to similar regulations. This article seeks to echo and buttress these prior claims by examining Casey’s failure through another lens: its poorly understood relationship to more traditional standards of review and its problematic but potentially fruitful relationship to the current trend towards “rational basis with bite,” discussed thoroughly in Part III.B. I do not contest most prior scholarship on Casey, but instead hope to reveal an as-yet ignored element of undue burden’s unsatisfying track record and clarify the role rational basis review ought to play within Casey’s prescribed analysis.
The selective analysis of appellate decisions in Part IV, however, demonstrates how the progeny of Casey have turned that case on its head: legislation that would fail to withstand rational basis review, perversely, often survives the purportedly stricter requirements of the undue burden standard. Courts that implement rationality review when applying Casey, I contend, better discern statutory flaws than courts that omit rational basis or purpose prong analysis. Doctrinal misinterpretations have thus led appellate courts to uphold unconstitutional regulations under the supposedly rigorous auspices of the undue burden standard.

Part V proposes a method of implementing the undue burden standard equipped to actualize its latent strength and render it stricter than heightened rationality review. The rigor of rational basis with bite lies primarily in its searching analysis of the nexus between the state’s regulatory means and ends – an inquiry conspicuously absent from Casey’s purpose and effects test. For this reason, I argue, courts should subject abortion regulations to rational basis with bite review before implementing the two-prong test. Legislation not rationally related to a legitimate interest need not undergo undue burden analysis to be declared unconstitutional. Since current abortion legislation frequently fails nexus inquiry, preceding the purpose and effects test with heightened rationality review allows the undue burden standard to target the most problematic aspect of abortion regulations. Only by thus reviving the sorely misconstrued Casey, I conclude, will courts fulfill the Supreme Court’s promise to uphold the “most central principle of Roe v. Wade” and preserve the right to reproductive autonomy.

Importantly, I do not argue that the undue burden standard is an ideal or even appropriate means of assessing state restrictions on abortion. Like Justices Stevens and Blackmun, I believe that abortion is a fundamental right triggering the strictest constitutional scrutiny. Rather than add to the sizeable body of scholarship “detailing inherent defects in the undue burden standard,” therefore, I seek to imbue the test with the highest degree of rigor it can tolerate. This article should be understood only as an effort to make the best of the Court’s profoundly flawed opinion in Casey, emphasizing whatever stringency the undue burden test possesses and revealing the potential strength of its correct implementation.

II. A New Intermediate Scrutiny

The text of the plurality opinion in Casey will frustrate any reader hoping to clarify the relationship between the undue burden test and more traditional standards of constitutional review, much less determine the accurate definition of undue burden itself. Because the Justices relied on principles and standards inherited from prior abortion cases, Casey is of limited use read in isolation. A contextual approach, however, makes clear that the Court intended to create

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16 Casey, 505 U.S. at 871.
17 Justices Stevens and Blackmun, concurring in part and dissenting in part in Casey, 505 U.S. at 917 (“In my opinion, the principles established by this long line of cases [following Roe] …should govern our decision today”); and at 930 (“The Roe framework [of strict scrutiny] is far more administrable, and far less manipulable, than the ‘undue burden’ standard adopted by the joint opinion”).
19 See, e.g., Wharton, supra note 5, at 323 (observing that “[p]rior to the Casey decision in 1992, ‘undue burden’ terminology had appeared in some of the Supreme Court’s abortion opinions”).
a strong standard that occupied a middle ground between rational basis review, the least stringent standard of constitutional review, and strict scrutiny, the most stringent.\(^{20}\)

Scholars agree that “the Casey version [of the undue burden standard] is different from any previously articulated,”\(^{21}\) but few clearly state how and to what extent Casey deviates from past methods of review. Since many scholars have described Justice O’Connor’s initial conception of the undue burden standard and charted the evolution of the test through the Court’s prior abortion jurisprudence, I will not rehearse that familiar history in full. However, a brief and specific review is helpful for my purposes, since lower courts often misunderstand the undue burden test precisely because they misconstrue the changes the Casey Court wrought upon Justice O’Connor’s older versions of that standard.

Two major changes are germane for my purposes, both of which strengthened the undue burden standard’s ability to protect the abortion right. First, the Casey Court elevated undue burden to an independent standard of judicial review, not merely a threshold analysis that triggered rational basis or strict scrutiny.\(^{22}\) This conception, however, departed from Justice O’Connor’s initial vision of the undue burden standard as articulated in her dissents in City of Akron v. Akron Center for Reproductive Health (Akron I)\(^{23}\) and American College of Obstetricians & Gynecologists v. Thornburgh.\(^{24}\) In those cases, Justice O’Connor implied that undue burden analysis was merely a precursor to more traditional methods of constitutional review. Burdens the Court deemed undue were then subject to the strictest of scrutiny, whereas burdens not deemed undue had only to survive rationality review.\(^{25}\) The Casey Court’s second departure from Justice O’Connor’s conception of the undue burden standard was subtler. Justice O’Connor, for her part, had defined an undue burden as an “absolute obstacle” or “severe limitation” on the right to an abortion.\(^{26}\) The plurality opinion, however, replaced O’Connor’s strong language with the less demanding “substantial obstacle.”\(^{27}\) Whereas for Justice

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\(^{20}\) See analysis in Part III.B, supra.

\(^{21}\) Burdick, supra note 9, at 841.

\(^{22}\) See, e.g., Alan Brownstein, How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine, 45 Hastings L.J. 867, 879 (1994) (noting that “the Court’s evaluation of the burden imposed on the right to an abortion is simply elevated to a formal standard without explanation”).


\(^{24}\) 476 U.S. 747 (1986).

\(^{25}\) Justice O’Connor, dissenting in Thornburgh, 476 U.S. at 828 (noting that “[j]udicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an ‘undue burden’ on the abortion decision….And 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” (citing her dissent in Akron, 462 U.S. at 461-63, 467, 473-74)).

\(^{26}\) Id. (noting that “[a]n undue burden will generally be found ‘in situations involving absolute obstacles or severe limitations on the abortion decision,’ not wherever a state regulation ‘may “inhibit” abortions to some degree’” (citing her dissent in Akron, 462 U.S. at 464)). See also Wharton, supra note 4, at 331 (noting that “the [Casey] plurality rejected the narrow formulation [of undue burden] in Justice O’Connor’s prior opinions”).

\(^{27}\) See Justice Scalia, dissenting in Casey, 505 U.S. at 989 (noting that “[Justice O’Connor’s] strong adjectives are conspicuously missing from the joint opinion, whose authors have for some unexplained reason now determined that a burden is ‘undue’ if it merely imposes a ‘substantial’ obstacle to abortion decisions”).
O’Connor only regulations that nearly banned abortion constituted undue burdens, therefore, the Casey Court implied that lesser impediments could also be invalidated.

With these important distinctions as a backdrop, it is now appropriate to examine the appropriate orientation of the undue burden standard along the spectrum of constitutional standards of review. Analyzed in concert, the plurality opinion, concurrences, and dissents in Casey all indicate that the Court understood undue burden as lying somewhere between the deferential rational basis and the punishing strict scrutiny. First, the plurality explicitly rejected the trimester framework that triggered Roe’s use of strict scrutiny, criticizing that infrastructure for “undervalu[ing] the State’s interest in potential life.” However, the vigor with which the plurality defended female autonomy and reproductive choice revealed its intent to establish a test rigorous enough to defend that autonomy. The Court’s sensitive analysis of Pennsylvania’s spousal notification provision emphasized that “a husband has no enforceable right to require a wife to advise him before the exercises her personal choices.” Such a requirement, the Justices pointed out, would be “repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.” This language reveals that the Court did not intend to beat a wholesale retreat from Roe’s stringency, hoping instead to construct a less strict but still vigorous standard capable of defending a woman’s independence and discretion.

Justice Blackmun’s partial concurrence supports this assessment, emphasizing that undue burden’s abandonment of strict scrutiny did not render it entirely impotent. “Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman’s right to make her own reproductive decisions,” Justice Blackmun pointed out, implicitly acknowledging both that the majority had abandoned strict scrutiny and that undue burden would be less capable of protecting reproductive autonomy. However, he applauded the plurality’s holding that additional evidence might someday invalidate the challenged regulations and implied that the undue burden standard was facially adequate as the means for such invalidation: “I am confident,” he declared, “that in the future evidence will be produced to show that [the regulations] will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”

In his partial concurrence, Justice Stevens too seemed to advocate for the heightened scrutiny of abortion regulations. “The wisdom reflected in…Akron (and followed by the Court just six years ago in Thornburgh),” he noted, “should govern our decision today.” Since those cases affirmed Roe’s use of strict scrutiny, Justice Stevens’ reliance on their legitimacy reveals his preference for that standard. Like Justice Blackmun, however, Justice Stevens was hopeful that the undue burden standard would adequately protect the abortion right despite its flaws. “The

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28 See Justice O’Connor, dissenting in Akron I, 462 U.S. at 464 (arguing that a statute imposes an undue burden only if it imposes “absolute obstacles or severe limitations on the abortion decisions”).

29 See, e.g., Wharton, supra note 5, at 322 (noting “the expansive rhetoric of women’s equality in which [the Casey Court] couched the joint opinion” and arguing that the Court “indeed intended to preserve the core of Roe and not merely an empty shell”).

30 See Justice Blackmun, concurring in part and dissenting in part in Casey, 505 U.S. at 926.

31 Justice Stevens, concurring in part and dissenting in part in Casey, 505 U.S. at 917.
future may also demonstrate,” he hypothesized, “that [undue burden]...will provide a fully adequate framework for the review of abortion legislation.” Justices Blackmun and Brennan both imply that the undue burden standard is capable of invalidating abortion regulations despite its lenience when compared to Roe’s strict scrutiny.

It is Justice Rehnquist’s strident denunciation of the newly articulated undue burden test, however, that most clarifies its true nature. The standard, he remarked in his dissent, “leaves the Court in a position to closely scrutinize all types of abortion regulations” – a comment impossible to make about a standard no stricter than rational basis review, widely considered a “free pass” for legislation requiring little, if any, rigorous inquiry on the court’s part. Since the very nature of close scrutiny is divorced from the deference of rationality review, Justice Rehnquist’s denunciation of undue burden as an agent of such close scrutiny marked it as a stronger test than rational basis. Most conclusively, Justice Rehnquist stated decisively that “the Constitution does not subject state abortion regulations to heightened scrutiny.” As the standard whose use Rehnquist contests, therefore, undue burden must logically constitute some form of heightened scrutiny and cannot be as deferential as mere rational basis.

Scholarship also indicates that undue burden is a stricter test than mere rational basis review, one more strongly resembling a form of intermediate scrutiny. First, scholars contend generally that the Court conceived of undue burden as a vigorous test requiring searching judicial analysis. Linda Wharton, for instance, noted that the Court intended to replace Roe with a “rigorous standard” meant to provide “meaningful protection for women,” while David Meyer pointed out that undue burden “wasn’t as weak as some had supposed” – although less rigorous than strict scrutiny, he noted, “it wasn’t a pushover either.” Others still have noted that the undue burden standard strongly resembles the intermediate scrutiny triggered by Equal Protection claims implicating gender. Louis Bilionis, for example, argued that the Casey Court proceeded under the “auspices of a new intermediate standard of review.” Finally, yet other scholars have specifically situated undue burden between the poles of traditional standards of review, arguing that the plurality intended its new test to “allow a state action to infringe more on a fundamental right than strict scrutiny, but less than rational basis review.”

In sum, the very doctrinal rifts that render Casey so conflicted shed light on the true nature of the undue burden standard. It is precisely because that test is a form of intermediate review that Justice Blackmun expressed his preference for Roe’s strict scrutiny and Justice Rehnquist for

36 Id. at 920, FN6.
37 Justice Rehnquist, dissenting in Casey, 505 U.S. at 945.
38 See infra notes 55-60 and accompanying text.
39 See infra Part III.B.
40 Justice Rehnquist, dissenting in Casey, 505 U.S. at 966.
41 Wharton, supra note 5, at 331.
43 Louis D. Bilionis, The New Scrutiny, 51 Emory L. J. 481, 496 (2002). See also Deborah A. Ellis, Protecting “Pregnant Persons”: Women’s Equality and Reproductive Freedom, 6 Seton Hall Const. L. J. 967, 975-76 (1996) (“Casey’s undue burden standard, which upholds some restrictions and invalidates others, is remarkably similar to the intermediate scrutiny standard used for gender equality”).
Webster’s rational basis. Had the Court fashioned undue burden as a version of rational basis, on the one hand, Justice Rehnquist would neither have denounced undue burden as “created largely out of whole cloth” nor worried that the test would permit courts to invalidate abortion regulations with impunity. Had the Court intended undue burden to approximate strict scrutiny, on the other hand, Justice Blackmun would not have noted that “[t]oday, no less than yesterday,” the Constitution requires abortion restrictions to withstand “the strictest of judicial scrutiny.” Casey’s fragmented nature makes clear that undue burden was fundamentally a “constitutional compromise” between the most extreme standards of judicial review.

III. Casey, Confused: Rational Basis with Bite and Undue Burden

A. Rational Basis Language in an Undue Burden Opinion

Although the Casey Court made clear that undue burden analysis is more searching than rational basis, the substantive relationship between the two standards remains contested and poorly understood. As I argue in Part II, the Court explicitly rejected Webster’s application of rational basis review to abortion regulations. However, certain language in Casey implies that rational basis review does affect the implementation of the undue burden test. By intertwining familiar references to the state’s “valid interest” and “legitimate ends” with the newer phrase “substantial obstacle” but failing to elucidate its decision to do so, the court implied that rational basis ought play some role in undue burden analysis. It did not articulate, however, precisely what that role might be or how lower courts should distinguish between rational basis and undue burden.

The confusion begins with the Court’s reaffirmation of Roe’s statement “that the State has a legitimate interest in promoting the life or potential life of the unborn.” Although the plurality abandoned strict scrutiny, it nevertheless preserved Roe’s emphasis on the nature of the state’s interest. This doctrinal remnant perhaps inspired the Casey Court’s repeated use of terms like “legitimate interest” and “reasonable” or “rational relationship.” These terms first appeared in the Court’s definition of undue burden, which referenced the legitimacy of the state’s stake in abortion regulation: “A statute which, while furthering the interest in potential life or some other valid state interest,” the court noted, “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.” The terms “valid state interest” and “legitimate ends” strongly evoke rational basis, yet appear in the context of the new undue burden standard.

Equally perplexing are the references to rational basis that pepper the plurality’s implementation of the new undue burden test. In partially overruling Akron and Thornburgh, the court noted that requiring abortion providers to supply women with information about fetal development was a

45 Justice Rehnquist, dissenting in Casey, 505 U.S. at 966 (“We think that the correct analysis is that set forth by the plurality in Webster [v. Reproductive Health Services, 492 U.S. 490 (1989)],” a case advocating for the use of rational basis in the abortion context).
46 Id. at 946.
47 Justice Blackmun, concurring in part in Casey, 505 U.S. at 926.
48 Justice Rehnquist, dissenting in Casey, 505 U.S. at 945.
49 Casey, 505 U.S. at 870.
50 Id. at 877.
51 See analysis in Part III.B, infra, for a more detailed analysis of rational basis review.
“reasonable measure” to ensure that the woman’s choice be informed.\(^{52}\) Similarly, the Justices characterized Pennsylvania’s requirement that a physician, rather than a qualified assistant, provide this information as a “reasonable means” to attain the “legitimate goal of...ensuring a decision that is mature and informed.”\(^{53}\) Finally, the court deemed the 24-hour mandatory waiting period a “reasonable measure to implement the state’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.”\(^{54}\) The presence of rational basis in the Court’s analysis is as baffling as its appearance in the plurality’s definition of undue burden. On the one hand, the Court intended undue burden as stringent protection for a woman’s autonomous right to choose. On the other, however, the Court repeatedly referenced the lowest standard of review, subjecting Pennsylvania’s regulations to some form of rational basis even as it claimed to apply merely undue burden.

In a case purporting to establish a new standard of constitutional review, the familiar language of rationality review is, to say the least, striking. Some scholars remain “unclear whether Casey’s undue burden standard subjects abortion regulations to intermediate scrutiny, or merely rational basis review.”\(^{55}\) Justice Scalia’s dissent distilled this confusion with characteristic disdain: “The joint opinion further asserts,” he noted,

that a law imposing an undue burden on abortion decisions is not a ‘permissible’ means of serving ‘legitimate’ state interests. This description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness.\(^{56}\)

Scalia’s pointed critique of the plurality’s “confusing equation of the two standards”\(^{57}\) is, unfortunately, justified. It is not immediately apparent precisely why the Justices incorporated the language of rational basis into their opinion. Moreover, this decision is perhaps responsible for the dissolution of undue burden’s rigor and its persistent misinterpretation.\(^{58}\) Scholars who contend that “the Court in Casey made no mention of fundamental rights, strict scrutiny, or rational basis,”\(^{59}\) however, engage in relatively superficial analysis. Though the plurality opinion frustratingly left much implicit, its repeated references to the language of rational basis expressed an intention that was unmistakable if incompletely defined.

It is evident, first, that the plurality believed state regulations on abortion must further a legitimate state interest. Though they did not incorporate this inquiry explicitly into their articulation of the undue burden test, the language discussed above makes clear that the first component of traditional rational basis bears directly on the constitutionality of challenged

\(^{52}\) \textit{Casey}, 505 U.S. at 883.

\(^{53}\) Id. at 883, 85.

\(^{54}\) Id. at 885.

\(^{55}\) Samantha Harper, \textit{“The Morning After”: How Far Can States Go To Restrict Access to Emergency Contraception?}, 28 Colum. Hm. Rts. L. Rev. 221, 253 (2006). See also Burdick, supra note 9, at 831 (noting that the undue burden standard “reduce[ed] the level of review to something more akin to heightened scrutiny or rational basis review”).

\(^{56}\) Justice Scalia, dissenting in \textit{Casey}, 505 U.S. at 987.

\(^{57}\) Justice Scalia, dissenting in \textit{Casey}, 505 U.S. at 987.

\(^{58}\) Discussed further in Part IV, infra.

regulations. It is equally apparent that the Casey Court deemed crucial a thorough examination of the nexus between the state’s regulatory means and ends. The plurality opinion, as discussed above, did not limit its inquiry to whether the state’s interest was legitimate or its purpose permissible. Instead, it noted repeatedly that certain provisions of the challenged regulations were reasonable “means” of furthering an approved interest. Inherent in these statements is an analysis of the relationship between the state’s interest and its legislation. In sum, as several scholars have argued, rational basis is “already contained within the undue burden standard.”

B. Defining Rational Basis with Bite

Following in the footsteps of a court that “follow[ed] what the Supreme Court actually did – rather than what it failed to say,” courts should recognize that Casey clearly intended some form of rational basis review to imbue the implementation of the undue burden standard. To understand the Casey Court’s vision of undue burden more thoroughly, however, it is necessary to identify and explain a recent trend in the Court’s rationality review: a heightened version of traditional rational basis colloquially known as rational basis with “bite” or with “teeth.” Whereas the principles inherent in traditional rational basis have led the Court to uphold almost all statutes examined under its criteria, the heightened stringency of rational basis with bite allows the Court to actually invalidate the challenged legislation. Because the Court has been reluctant to identify the factors that trigger this enhanced review or even acknowledge its existence, however, the standard’s boundaries remain blurry and its true nature undefined.

Rational basis review applies to equal protection claims not implicating gender, suspect classifications, or fundamental rights, and requires only that legislation be reasonably related to a legitimate state interest. Because it is the lowest and most deferential standard of constitutional scrutiny, rational basis has traditionally functioned as a rubber stamp for

60 Gillian E. Metzger, Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence, 90 Colum. L. Rev. 2025, 2089 (1994). See also Brownstein, supra note 13, at 881 (noting that undue burden ‘subsumed the application of a rational basis standard of review to regulations that do not impose undue burdens”).
61 Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995).
62 Scholars tend to cite Victor Rosenblum, a professor at Northwestern University School of Law originally quoted in Stewart’s, A Growing Equal Protection Clause? 71 A.B.A. J. 108, 112-14 (1985), as the origin of the phrase “rational basis with teeth.” In his 1972 review of the Supreme Court’s recent jurisprudence, however, Gerald Gunther referred to the trend as “equal protection bite without ‘strict scrutiny,’” and the phrase most frequently used today is “rational basis with bite.” See Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 12.
63 See, e.g., Smith, infra note 75, at 2770 (noting “the Supreme Court’s failure to articulate its more searching form of rational basis review”); Gayle Lynn Pettinga, Rational Basis With Bite: Intermediate Scrutiny by Any Other Name, 62 Ind. L.J. 779, 802 (1987) (observing that “the Court does not explain which factors trigger heightened scrutiny under the label ‘rational basis’”). But see Justice O’Connor’s concurrence in Lawrence v. Texas, 123 S.Ct. 2472, 2485 (2004) (noting with unusual frankness that the Court has repeatedly “applied a more searching form of rational basis review” either when a law displays an animus towards a particular group of disadvantaged persons or when it implicates personal relationships).
64 Traditionally, equal protection claims implicating gender equality trigger intermediate scrutiny, whereas suspect classifications or fundamental rights trigger strict scrutiny. Also falling within the ambit of intermediate review are “quasi-suspect” classifications or “quasi-fundamental” rights insufficient to merit the highest standard of review but too significant for mere rational basis.
Doctrines of judicial deference and institutional competence discourage courts from engaging in a searching analysis of legislative intent, allowing nearly any statute to survive the court’s most lenient inquiry. Typically, courts uphold legislation if any single conceivable set of circumstances exists to justify it, and frequently concoct statutory rationales if the state’s proffered interest does not pass muster. Rational basis has therefore been indispensable for a Court reluctant to question legislative integrity and wary of judicial activism.

As early as 1972, however, the Court has selectively applied a more vigorous form of rational basis stringent enough to actually invalidate legislation that fails to reasonably further a legitimate state interest. Whereas courts applying traditional rational basis premise legislative legitimacy and require only a minimal nexus between the state’s regulatory means and ends, courts implementing rational basis with bite scrutinize the actual nature of the state’s interest and thoroughly assess its relationship to the challenged statute. Scholars have observed three primary differences between rational basis with bite and traditional rationality review: when implementing the bite, courts are less deferential to the legislature, less tolerant of over- or under-inclusive classifications, and less open to state experimentation.

Although Court’s unprecedented approach to rationality review was initially perplexing, the evolution of the Court’s composition sheds at least a modicum of light on the origins of rational basis with bite. Most scholars understand rational basis with bite as a result of the transition expansion of equal protection jurisprudence that characterized the transition from the Warren to

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66 Pettinga, supra note 54, at 783.

67 Justice O’Connor, concurring in Lawrence v. Texas, 123 S.Ct. 2472, 2484 (2004) (“Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since ‘the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes’” (citing City of Cleburne, Texas v. Cleburne Living Center, infra note 54 at 440)). See also Pettinga, supra note 54, at 783-4 (“Until recently, when the Court applied the rational basis test, it almost always upheld the statute”).

68 Pettinga, supra note 56, at 783.

69 See Yoshino, supra note 56, at 760 (“In post-1937 cases, the Court stated it would uphold state action if it could imagine any possible rationale for the state’s action. In other words, even if the legislature had provided no rationale or an inadequate rationale, the state action would be upheld so long as the Court could supply one. Because judges could imagine many things, ordinary rational basis was tantamount to a free pass for legislation” (citations omitted)); Sarah Finnane Hanafin, Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny, 40 Stetson L. Rev. 435, 462 (2011) (“Rational basis scrutiny requires only a conceivable basis for the law’s enactment – the true objective need not be rationally related to the legislative classification so long as there could be a rationally related reason for the law”); Pettinga, supra note 54, at 783 (“When the state fails to present a sufficient factual basis to justify a statute, the Court supplies its own justification”).

70 Hanafin, supra note 60, at 466 (noting that rational basis with bite is stronger than traditional rational basis because the Court examines “an actual rational governmental purpose as opposed to a conceivably rational purpose”). Most recent scholarship posits that rational basis with bite is stronger than the toothless rationality review but weaker than intermediate scrutiny. See Hanafin at 468, noting that “rational basis with bite…is not equivalent to intermediate scrutiny”. Some early scholarship, however, understood rational basis as merely a covert application of intermediate scrutiny. See, e.g., Pettinga, supra note 44, at 802.

71 Gunther, supra note 53, at 20.
the Burger Court. The Warren Court was notorious for its “rigid two-tier attitude” towards constitutional scrutiny. If the Court deemed a right fundamental, it applied the highest level of scrutiny, which was frequently criticized for being strict in theory but fatal in fact. If the right was not fundamental, the Court applied the vastly less demanding rational basis, conversely doomed as “minimal in theory and virtually nonexistent in fact.” Dissatisfied with these strict boundaries, however, the Burger Court developed intermediate scrutiny to protect a wider array of groups unfairly disadvantaged by certain legislation. Although this three-tiered system did expand the ambit of the Equal Protection Clause, the Court remained restless. Out of the Court’s belief that “there is no…mathematical formula…to find groups deserving of judicial protection” came the uniquely “gestalt” analysis of rational basis with bite.

C. The Bite in Action

Three paradigmatic examples of the Supreme Court’s implementation of rational basis with bite are City of Cleburne, Texas v. Cleburne Living Center, Plyler v. Doe, and Romer v. Evans. In Cleburne, which invalidated a Texas ordinance requiring group homes for the mentally retarded obtain special-use permits, the Court denied that mental retardation constituted a quasi-suspect classification that would ordinarily trigger intermediate scrutiny. Reasoning that “substantive judgments about legislative decisions” were inapposite in the context of mental retardation, the Court presumed that certain legislative classifications were generally valid. However, the Court went on to note that rational basis did not “leave [the mentally retarded] entirely unprotected from invidious discrimination.” Although legislative deference would ordinarily prevent the Court from overturning legislation under rational basis, the Cleburne Court invalidated the ordinance for its “irrational prejudice.” Because the City’s stated interests in fire hazards and public safety “[fail]rationally to justify singling out” homes for the retarded, the Court held, the ordinance failed rational basis’ nexus inquiry. Justice White’s thorough inquiry, far more rigorous than ordinary rational basis, belied what scholars have called the Court’s “conscious desire to avoid heightened scrutiny.” Indeed, Justice Marshall’s dissent noted pointedly that the majority had “most assuredly not” used traditional rational basis.

72 See, e.g., Gunther, supra note 53, at 12; Pettinga, supra note 54, at 784.
73 Gunther, supra note 53, at 8.
74 Id.
75 Id.
76 See, e.g., Hanafin, supra note 60, at 465 (noting that “[r]ational basis with bite was born out of the idea that strict adherence to the traditional levels of judicial scrutiny was undesirable”).
77 Pettinga, supra note 54, at 784.
78 Justice Stevens, dissenting in Cleburne, 105 S.Ct. 3249 (1985) (noting that “[c]ases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or – as in this case – mental retardation, do not fit well into sharply defined classifications”).
79 Yoshino, supra note 56, at 762.
81 105 S.Ct. at 3257.
82 Id. at 3257-8.
83 Id. at 3260.
84 Pettinga, supra note 54, at 795.
85 Justice Marshall, dissenting in Cleburne, 105 S.Ct. at 3264.
Similarly covert in its use of heightened scrutiny was Plyler v. Doe, which struck down a statute barring undocumented children from learning in public school classrooms.\(^ {86}\) While the Court purported to apply only traditional rational basis review just as it would do in Cleburne, Justice Brennan in fact analyzed the challenged statute more closely than traditional rational basis would permit. The Court concluded under San Antonio Independent School District v. Rodriguez that education was not a fundamental right entitling the plaintiffs to heightened scrutiny, foreshadowing its contention in Cleburne that the mentally retarded were not a suspect class. Despite its avoidance of intermediate scrutiny, however, the Court went on to employ a “heightened, amorphous rendition” of rational basis whose strength allowed Justice Brennan to reject each of the state’s arguments.

Most recently, the 1996 Romer v. Evans invalidated a Colorado constitutional amendment repealing an ordinance prohibiting discrimination on the basis of sexual orientation.\(^ {89}\) Although the Court denied that homosexuals constituted a suspect class or that homosexuality was a fundamental right, they nevertheless deemed the statute impermissible for its animus towards homosexuals. Because the Court did not view such animus as a legitimate state interest, it invalidated the statute under mere rational basis review. Justice Kennedy echoed the Court’s distaste for “irrational prejudice” in Cleburne and declared that “a bare…desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”\(^ {90}\) Although the unpopular group in question did not qualify as a quasi-suspect class triggering intermediate scrutiny, Justice Kennedy implied, the state may never legislate based solely on an intent to harm or discriminate. In the most recent addition to its sexual orientation jurisprudence, the Court used a similarly heightened analysis in Lawrence v. Texas to invalidate a Texas ban on sodomy and overturn the infamous Bowers v. Hardwick.\(^ {91}\)

D. Triggering the Bite: Applying Heightened Rational Basis in an Abortion Context

Despite its increasing reliance on rational basis with bite, the Court has yet to define which factors trigger its implementation.\(^ {92}\) Cleburne, Plyler, and Romer indicate, however, that the Court uses rational basis with bite when it is reluctant to formally elevate the status of a constitutional right or a vulnerable classification but still perceives “the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment.”\(^ {93}\) This analysis comports with scholarship documenting two primary triggers for heightened rational basis: first, classifications that are targeted if not “quasi-suspect,” and

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88 411 U.S. 1 (1973). The Plyler Court did, however, note that education played a “fundamental role in maintaining the fabric of our society,” 457 U.S. at 221, supporting my contention that rational basis with bite often acknowledges the heightened or elevated status of rights not formally declared quasi-fundamental or fundamental.
90 Justice Kennedy in Romer, 517 U.S. at 634, quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).
92 Hanafin, supra note 60, at 468 (noting that “the triggering mechanism for rational basis with bite is elusive”); see also Smith, supra note 54, at 2770 (criticizing the “Supreme Court’s failure to articulate its more searching form of rational basis review”).
93 Justice Marshall, dissenting in Cleburne, 105 S.Ct. at 3271.
second, rights that are significant if not “quasi-fundamental.” One scholar outlined the benefits of rational basis with bite with particular clarity: it “allows the Court to examine the relationship between the classification and the state's interest more critically, where important (but not fundamental) rights are denied to vulnerable (but not suspect or quasi-suspect) populations.”

For this reason, rational basis with bite appears to be an instinctive but illicit response to discriminatory legislation the Court is reluctant to examine under formal intermediate scrutiny. The test’s vulnerability to political or ideological bias, therefore, might prevent its application to abortion regulations. A recent assessment of equal protection jurisprudence predicted that “the Court’s rational basis with bite protection will ground out at a certain point” because “one person’s prejudice is another’s principle.” Since rational basis with bite “will still require the Court to privilege some groups over others,” triggering the bite may prove no less judicially fraught than declaring certain classifications “suspect” for the purposes of intermediate scrutiny.

As I discuss further in Part V, some form of rational basis review must precede a court’s inquiry into the purpose and effects test of the undue burden standard to preserve the stringency of Casey’s analysis. Given the ambiguous nature of heightened rationality review and the equally complex relationship between rational basis and undue burden, however, it is difficult to predict whether courts will preface undue burden analysis with a heightened or deferential version of rational basis review. Scholars arguing that the Court should include rational basis with bite in the undue burden standard have failed to confront the Court’s unpredictable application of heightened rationality review or to justify the use of such enhanced scrutiny in the context of abortion. It is important, however, to examine why the Court might apply rational basis with bite to abortion regulations and to assess the likelihood of its doing so. Two factors could justify applying rational basis with bite to abortion regulations: first, the Court could recognize abortion providers or women seeking abortions as comprising a vulnerable or targeted class, and second, the Court could deem the abortion right substantial or heightened.

In all likelihood, only the latter approach will prove fruitful. It is difficult to contend legally that abortion providers or women seeking abortions are denied equal protection simply because abortion services are subject to unique regulations, however empirically true the claim might prove. The Fourth Circuit has emphasized that “abortion services are rationally distinct from

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94 Justice O’Connor, too, noted in Lawrence, 123 S.Ct. at 2485, that rational basis with bite has most often been triggered “when a law exhibits…a desire to harm a politically unpopular group” or when the law “inhibits personal relationships.”

95 Nina A. Kohn, Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus, 44 U.C. Davis L. Rev. 213, 264 (2010). See also Pettinga, supra note 54, at 801 (arguing that rational basis with bite “is used to review legislation that burdens an important right of a group at least approaching quasi-suspect status”).

96 Yoshino, supra note 56, at 763.

97 Yoshino, supra note 56, at 763.

98 Metzger, supra note 51, at 2084 (“In the second stage of the new methodology, the separate provisions are reviewed to ensure that they are rational. The type of rationality review applied is the rationality-with-bite approach”). Metzger cites to several articles documenting the history and evolution of the rational basis with bite standard, yet in proposing a new formulation of the undue burden standard conspicuously ignores the fact that the Court will not simply apply rational basis with bite in reviewing any sort of legislation whatsoever. Metzger’s conception of undue burden is appealing, but remains insufficiently persuasive absent more detailed analysis into the Court’s past use of rational basis with bite and the likelihood of its application to abortion regulations.
other routine medical services," and the frequently unsuccessful abortion equal protection claims indicate a general judicial skepticism towards such arguments. Furthermore, the Court is reluctant even to regard a class as vulnerable; scholars indicate that only a true state animus will justify heightened rationality review. Even if many state legislatures are actually motivated by just such animus towards abortion itself or those providing such services, it will be an uphill battle for litigators to demonstrate the requisite level of irrational discrimination or illicit distaste. Scholars who urge the Court to apply rational basis with bite to certain disadvantaged groups such as the homeless, finally, have emphasized those groups’ “stature in society,” “political powerlessness,” and “harmful criminalization.” None of these factors applies on its face to abortion providers or women seeking abortion, who endure much slyer forms of legislative discrimination that are difficult to affirmatively demonstrate in court.

Substantially more promising is the argument that the importance of the abortion right itself justifies the application of rational basis with bite. To be sure, the status of the abortion right is contested in the wake of Roe. Although that case deemed the right fundamental, subsequent precedent has either explicitly declared the right less than fundamental or implicitly downgraded its status by implementing less than the strictest of scrutiny. However, both the principles and the language of the Court’s abortion jurisprudence indicate that abortion is, at the very least, an extremely substantial right that deserves a heightened level of review.

First, it is possible that the abortion right remains fundamental despite the fact that it no longer triggers strict scrutiny. For its part, the Casey Court does not directly address whether the abortion right is fundamental, and it remains contested whether that silence implicitly rejected Roe’s categorization of abortion as a fundamental right, implicitly accepted that holding, or slightly downgraded the status of the abortion right while leaving it formally undefined. If the right is, indeed, fundamental, rational basis with bite indisputably applies. Countless scholars have denounced the Court’s abandonment of strict or even intermediate scrutiny in the abortion context, condemning undue burden as an impermissibly deferential mechanism for assessing
restrictions on a right of the highest order.\textsuperscript{107} If the abortion right indeed remains fundamental, therefore, rational basis with bite is an eminently reasonable standard to demand that courts apply. Though still an unprecedented departure from the formally heightened scrutiny afforded other important rights, the Court’s use of rational basis with bite in the context of undue burden would certainly be preferable to its use of traditional rationality review.

Even if the abortion right is less than fundamental after \textit{Casey} and its progeny, it is still substantial enough to merit rational basis with bite. The plurality opinion describes the right to reproductive autonomy in unambiguous and impassioned language: “The liberty of the woman [to abort],” the Court wrote, “is at stake in a sense unique to the human condition.”\textsuperscript{108} The state could not, the Court went on, fully control a woman’s right to terminate her pregnancy; the decision to abort “must be shaped to a large extent on [the woman’s] own conception of her spiritual imperatives and her place in society.”\textsuperscript{109} This language clearly reveals the Court’s intent to give the abortion right “some real substance”\textsuperscript{110} and indicates its heightened status.

Furthermore, the Court refers to the state’s interest in language traditionally associated with intermediate or even strict scrutiny: twice, the plurality opinion deems the state’s interest “substantial” rather than merely “legitimate,”\textsuperscript{111} twice cites Roe’s description of that interest as “important,”\textsuperscript{112} and once calls the interest “profound.”\textsuperscript{113} That the Court describes the state’s interest as stronger than mere “legitimacy” can be understood as an acknowledgement that only heightened interests may infringe upon substantial rights. If this is so, the Court would be more than justified in deeming the right to abortion analogous to the right to homosexuality in \textit{Romer} and \textit{Lawrence} and the right to education in \textit{Plyler}. If it deemed the abortion right insufficiently protected by mere rational basis, the Court could apply rational basis with bite in order to leave the right’s formal status undefined but still recognize its substantiality and significance.

E. \textit{The Purpose Prong as a Substitute for Rational Basis with Bite}

Given the \textit{Casey} Court’s contention that “abortion is a unique act” that is “unique to the law,” the Court may decline to apply rational basis with bite to restrictions on abortion. Scholars often characterize rational basis with bite as a response to judicial perceptions of inequality or injustice, but current courts are unlikely to deem abortion legislation contraventions of the principles of the Fourteenth Amendment.\textsuperscript{114} However, even should the court preface its implementation of the purpose and effects test with traditionally deferential rationality review, that test in itself may suffice to invalidate problematic legislation. Understanding how this is so requires teasing out certain similarities between rational basis with bite and the purpose prong.

\textsuperscript{107} See, e.g., Schneider, infra note 117, at 1037, 1030-31 (“The undue burden standard flies in the face of twenty years of precedent and reduces protection of abortion to the whims of individual judges,” and a “return to strict scrutiny is the only reliable way to safeguard a woman’s right to decisional autonomy and bodily integrity”).
\textsuperscript{108} \textit{Casey}, 505 U.S. at 852.
\textsuperscript{109} Id. at 852.
\textsuperscript{110} Id. at 869.
\textsuperscript{111} \textit{Casey}, 505 U.S. at 876.
\textsuperscript{112} Id. at 871, 875.
\textsuperscript{113} Id. at 879.
\textsuperscript{114} See analysis of abortion equal protection claims at part III.D, infra.
As discussed above, traditional rationality review encourages courts to construct legitimate legislative rationales as replacements for the state’s actually illicit interest. Under both rational basis with bite and purpose prong analyses, however, the court may only examine the legislature’s actual interest or purpose in enacting the challenged statute. Whereas ordinary rational basis has been branded “perfunctory judicial hypothesizing” that permits the court to engage in speculation and fabrication,\(^{115}\) therefore, purpose prong and rational basis with bite analyses are strictly fact-specific inquiries that require courts to assess the legislature’s actual purpose.\(^{116}\) Under those stricter forms of review, the court may only evaluate the legislature’s true interest or purpose to establish whether it was permissible as actually conceived. Since scholars derive rational basis with bite’s strictness from its searching assessment of the state’s actual interest,\(^{117}\) it is appropriate to read a similar strictness into the same element of the purpose prong. Even should courts apply a toothless version of rational basis in its undue burden analysis, therefore, the purpose prong’s unique strength and its similarity to rational basis with bite may permit courts to examine the state’s regulatory interest with at least some rigor.

Importantly, however, the purpose prong and rational basis review are distinct. Although the legitimacy of the state’s interest and the permissibility of its purpose are closely related, they are not identical; had the Court intended rational basis to comprise the primary substance of the purpose prong, it was more than capable of saying so explicitly.\(^{118}\) Furthermore, the integrity of the purpose and effects prong – clearly delineated by the plurality opinion’s language – requires that rational basis be implemented separately. The plurality opinion is unambiguous about the nature of the purpose prong: a valid statute “must be calculated to inform the woman’s free choice, not hinder it.” On its face, this definition mandates a searching inquiry into legislative motivation, but in no way triggers the application of conventional rational basis.

It is helpful to note that the distinction between traditional rational basis and the purpose prong is borne out by Casey’s use of the word “purpose” rather than “interest” when referring to the state’s regulatory ends. Although some courts have misinterpreted the purpose prong as merely a version of rational basis review, conflating the legitimacy of the state’s interest with the permissibility of its purpose, the purpose prong is distinct from rational basis analysis. Most importantly, the notion of the state’s “purpose” is different in the abortion context from ordinary references to the state’s “interest.” Whereas under rational basis a state’s interest is assessed in light of all the state’s traditional police powers, Casey requires a regulation to have been motivated by a permissible purpose in the context of abortion. The appropriate analysis, the plurality made clear, is whether the state’s purpose was to hinder autonomous reproductive choice rather than simply inform that choice, not whether the challenged legislation was reasonably related to any conceivably legitimate state interest. A generally unobjectionable interest in protecting maternal health, for instance, might be illicit under Casey if the legislature’s purpose was to hamper a woman’s ability to terminate her pregnancy.

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\(^{115}\) Gunther, supra note 53, at 21.

\(^{116}\) See Brownstein, supra note 13, at 885 (“The mere recitation of a presumptively valid purpose should not be allowed to mask an impermissible state goal [under Casey]”).

\(^{117}\) See, e.g., Pettinga, supra note 54, at 801 (noting that under rational basis with bite the Court “refuse[s] to supplant the state’s goal with goals it considered legitimate” and “look[s] more closely at the relationship of the classification to achieving the state’s goal”).

\(^{118}\) [Final draft will include citation to the general proposition that courts are presumed capable of saying what they mean and meaning what they say]
Since the purpose prong may play an important role in ensuring the rigor of Casey, it is important to emphasize its indispensability to the undue burden standard. Despite the misinterpretations of appellate courts discussed supra in Part IV, Casey is properly understood as a two-prong test: either an impermissible purpose or an unduly burdensome effect in itself may invalidate an abortion regulation. This much is clear from the text of the plurality opinion:

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 nonviable 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.\(^\text{119}\)

This description makes clear that either an impermissible purpose or an impermissible effect is sufficient to render a challenged regulation unconstitutional. The court first notes that a “statute with this [impermissible] purpose is invalid,” and then separately notes that a “statute which…has [the same impermissible] effect” is similarly inappropriate. Nowhere does the court imply that a statute must have both an impermissible purpose and an impermissible effect to be unconstitutional, instead indicating that a failure of either prong will suffice for invalidity.

Despite Casey’s clarity regarding the two-prong test, however, the Supreme Court’s later decision in Mazurek v. Armstrong\(^\text{120}\) left some courts with the impression that the purpose prong could never itself invalidate a challenged regulation. The Court in Mazurek did not accept the Court of Appeals’ premise – “that a legislative purpose to interfere with the constitutionally protected right to abortion without the effect of interfering with that right…could render the…law invalid” – but instead merely “assum[ed] the correctness” of that premise for the purposes of its opinion.\(^\text{121}\) This noncommittal dicta has led lower courts to ignore Casey’s plain language and neglect rigorous purpose prong analysis.\(^\text{122}\) One thorough analysis of Casey’s progeny noted that lower courts have “misconstrue[ed] Mazurek” as the death of the purpose prong, though it ought not and cannot properly be understood in that manner.\(^\text{123}\)

In sum, therefore, the purpose prong properly applied may be an imperfect but reasonably effective substitute for rational basis with bite. One scholar, notably, has even characterized rational basis with bite using language familiar from Casey itself: the heightened standard of review allows the court to “invalidate the challenged law after a close examination of the law’s purpose and effects.”\(^\text{124}\) Although this scholar likely did not intend to draw a deliberate parallel

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\(^{119}\) Casey, 505 U.S. at 845.


\(^{121}\) 117 S.Ct. at 1867. See also Wharton, supra note 5, at 344, noting that the Mazurek Court “flirted with the suggestion that an unconstitutional purpose standing alone would not suffice to invalidate an abortion restriction.”

\(^{122}\) See, e.g., Karlin v. Foust, 188 F.3d 446, 493 (7th Cir. 1999) (noting that “the Court’s later decision in Mazurek v. Armstrong suggest[s] that [a purpose] challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose”).

\(^{123}\) Wharton, supra note 5, at 346.

between undue burden and rational basis with bite, it is not insignificant that a “close examination of the law’s purpose” seemed an apt phrase to define the nature of heightened rational basis review. Both the purpose prong and rational basis with bite, at bottom, require the Court to engage in a legitimate and searching analysis not clouded by legislative deference or judicial speculation.

IV. Casey’s Failed Implementation and the Power of the Bite

Courts are well aware that, in applying Casey’s undue burden test, they enter contested constitutional territory. Numerous appellate courts assessing the constitutionality of a state abortion regulation have noted the conflict and confusion Casey engendered.125 Scholars, too, continually emphasize that rifts between Casey’s articulation of undue burden and its own application that test have rendered lower courts unable to interpret the plurality consistently.126 Even the Casey Court itself, “splintered” as to the correct standard of review, acknowledged undue burden’s inadequacy.127 This well-documented confusion has led courts to misconstrue and misapply Casey in an almost astonishing array of ways: some fail to engage in independent

125 See Barnes v. Mississippi, 992 F.2d 1335, 1337 (5th Cir. 1993) (“Despite the recent efforts of a three justice plurality of the Supreme Court, passing on the constitutionality of state statutes regulating abortion after Casey has become neither less difficult nor more closely anchored to the Constitution”); Planned Parenthood of Southern Arizona v. Lawall, 180 F.3d 1022, 1025 (9th Cir. 1999) (“There is much debate over the meaning of Casey); Planned Parenthood of the Rocky Mountains Services, Corporation v. Owens, 287 F.3d 910, 931 (10th Cir. 2002) (“[T]he Justices have struggled to articulate meaningful [abortion] standards for lower courts to apply”); Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996) (“[T]he standard applicable to previability regulations after Casey is a matter of some dispute”); Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997) (“Subsequent to Roe, no one standard of review [for abortion regulations] has secured a solid majority of the Court...[T]he difficulty presented to lower federal courts following Casey lies in the fact that only three justices – Justices O’Connor, Kennedy, and Souter – have specifically adopted this undue burden standard”); Boggs, Circuit Judge, dissenting in Women’s Medical Professional Corporation v. Voinovich, 130 F.3d 187, 212 (6th Cir. 1997) (“Some [reproductive] choices, however, remain within the state’s legislative power. [But] [t]hese choices have not always been well delineated by the Court”); Wood, Circuit Judge, dissenting in A Woman’s Choice – East Side Women’s Clinic v. Newman, 305 F.3d 684,714 (7th Cir. 2002) (“The difficulty here is that there is no single independent variable that will show ‘undue burden’”); Karlin v. Foust, 188 F.3d 446. 480 (8th Cir. 1999) (“The difficulty lies, however, in determining what exactly is meant by an ‘undue’ burden”).

126 See, e.g., Wharton, supra note 5, at 323 (noting that the Court “stumbled in its efforts to adequately clarify the contours of the undue burden standard”). See also Elizabeth A Schneider, Workability of the Undue Burden Test, 66 Temple L. Rev. 1003, 1004 (1993) (“The discretionary nature of the undue burden test renders it unworkable. It is a standard which cannot be applied by state courts consistently, predictably, and without prejudice...Casey is a splintered opinion, confusing abortion law”); Burdick, supra note 9, at 826 (“Although one of the explicit purposes of the Casey joint opinion in promulgating the undue burden standard was to provide clarification to the lower courts, these courts today remain largely confused about the standard’s requirements and application”); Borgmann, supra note 96, at 681 (“Casey’s standard lacks content, which makes it both difficult to apply and susceptible to manipulation”); Alan I. Bigel, Planned Parenthood of Southeastern Pennsylvania v. Casey: Constitutional Principles and Political Turbulence, 18 U. Dayton L. Rev. 733, 756 (1993) (“The joint majority [in Casey] endeavored to preserve the right to abortion but did not satisfactorily explain how it is constitutionally protected”); Brownstein, supra note 13, at 878 (“The description of the ‘undue burden’ test in the joint opinion is, unfortunately, not free from ambiguity”).

127 Justice Rehnquist, dissenting in Casey, 505 U.S. at 945 (“The state of our post-Roe decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court’s decisions, the reexamination undertaken today leaves the Court no less divided than beforehand”). See also Justice Scalia, dissenting in Casey, 505 U.S. at 986, 987 (calling the standard “amorphous” and positing that “the standard is inherently manipulable and will prove hopelessly unworkable in practice” because it “has no principled or coherent legal basis”).
fact-finding or reflexively apply Casey’s holdings after cursory analysis, while others rely on biased moral premises or mistake apply undue burden as a threshold analysis rather than an independent standard of constitutional scrutiny. As discussed below, mistakes regarding rational basis and the purpose prong also proliferate. Some courts mimic Casey’s use of rational basis language but fail to articulate the role rationality review plays within undue burden, while others construe the purpose prong as a merely rational basis in disguise. More problematically, courts also omit nexus analysis, neglecting the most likely means of invalidating the challenged regulation, while the most egregious omit rational basis or purpose prong analysis at all.

This section reviews only certain appellate (and one Supreme Court) decisions applying the undue burden test to state regulations on abortion, and analyzes those cases only through the lens of rational basis with bite and its problematic but potentially fruitful role in undue burden analysis. I demonstrate that while courts implementing some form of stringent rational basis review are better able to invalidate problematic restrictions on abortion, courts that neglect or misapply rational basis or purpose prong analysis improperly uphold unconstitutional legislation. Nexus analysis – that is, a searching assessment of the sufficiency of the relationship between the state’s regulatory means and ends – is crucial to effective undue burden analysis because it targets the most frequently problematic element of abortion regulation. Omitting this nexus analysis denies Casey its rightful bite, since regulations without unduly burdensome purposes or effects may still fail to reasonably further a legitimate state interest. By revealing that a more rigorous analysis of the state’s interest and its relationship to the challenged regulation may invalidate legislation otherwise upheld, I will demonstrate the power of rational basis with bite and its critical role in an effective implementation of Casey’s central principles.

A. Correct Implementation of Rational Basis and Purpose Prong Analyses

The Seventh and Eighth Circuits have correctly recognized the distinction between rational basis review and the purpose prong. In Planned Parenthood of Greater Iowa, Inc. v. Atchison, recognized by many scholars as a rare example of correct and vigorous purpose prong analysis, the Eighth Circuit invalidated a statute requiring family planning clinics to obtain certificates of need for proposed new clinic construction. Because the statute had the “intended effect of impeding or preventing access to abortions,” the court found, it contravened Casey’s mandate that abortion regulations not seek merely to reduce the incidence of abortion or make it more difficult for women to obtain abortion services. However, the court preceded its purpose prong inquiry with an analysis that strongly resembled rational basis, declaring that “CON laws in general have been recognized as a valid means of furthering a legitimate state interest.” Only after establishing that the challenged regulation survived rational basis review did it proceed to the separate but equally necessary question of whether that regulation had been promulgated in service of a permissible legislative purpose. Although Atchison’s rational basis inquiry was deferential rather than searching, it demonstrated how a rigorous purpose prong analysis can compensate for inadequate rationality review as discussed above in Part III.E, supra.

128 See Wharton, supra note 4, at 385 for a thorough list of lower courts’ errors in implementing Casey.
129 126 F.3d 1042 (8th Cir. 1997).
130 Id. at 1049.
131 126 F.3d at 1048.
Whereas Atchison invalidated a statute with an impermissible purpose after finding that statute to have survived rational basis analysis, one year later Judge Posner of the Seventh Circuit seemed to strike down a statute under rational basis analysis without ever having to reach the purpose or effect components of undue burden. In Planned Parenthood of Wisconsin v. Doyle, the court granted a preliminary injunction against the enforcement of Wisconsin’s partial birth abortion statute, noting that “the constitutional right to an abortion carries with it the right to perform medical procedures that many people find distasteful or worse.”132 The opinion begins with the language of Casey and observes that the challenged regulation “impermissibly burdens the constitutionally recognized right to an abortion.”133 However, Judge Posner went on to invalidate the statute by means of an inquiry much more akin to rational basis review. “Even if the standard for judicial review of state abortion laws...were merely that of rational relation to a legitimate state interest,” the Judge pointed out, “Wisconsin’s partial birth statute would be in trouble.”134 Because the statute was not “rationally designed to protect fetal life” nor “rationally related” to any other articulated interest, the court held, a preliminary injunction was justified to prevent the implementation of legislation that was “arbitrary to the point of irrationality.”135 Judge Posner, therefore, exemplified how a statute’s failure to pass even rationality review can negate the need to engage in purpose or effect prong analysis. Since Wisconsin’s statute failed rational basis’ nexus requirement in that it failed to reasonably further any proffered state interest, even a finding that its purpose and effects were not unduly burdensome could not save the statute from constitutional invalidity. Moreover, Judge Posner almost certainly implemented a form of rational basis with bite. Not merely deferring to legislative wisdom as is conventional under rationality review, the Judge instead rigorously analyzed the actual relationship between the state’s purported regulatory ends and the means it chose to further them. Too, the court assessed the legislature’s motives skeptically, questioning “how a rational legislature” could distinguish between the abortion method forbidden by the statute and other methods left unregulated.136 Both Atchison and Doyle were correct, in sum, to separate rational basis analysis from purpose analysis and to engage in rational basis review before examining the statute’s purpose or effect. That these courts both deemed the challenged legislation unconstitutional, furthermore, demonstrates that rational basis with bite and the purpose prong, applied correctly, can render Casey a rigorous tool of judicial scrutiny.

B. Incorrect Implementation of Rational Basis and Purpose Prong Analyses

Most difficult to analyze (and most insidious for precedential purposes) are those cases that confuse the distinction between rational basis review and purpose prong analysis, either importing rational basis into undue burden inquiry at the expense of independent purpose prong analysis or using the language of both tests simultaneously while applying neither rigorously. The Seventh Circuit’s 1999 decision in Karlin v. Foust exemplifies how courts have misconstrued the admittedly convoluted relationship between the two properly separate inquiries. Karlin is particularly frustrating because the court correctly articulates the nature of rational

133 Id. at 466.
134 Id. at 470.
135 162 F.3d at 471.
136 Id. at 470.
basis’ relationship to undue burden analysis: an abortion regulation can only survive a purpose
challenge, explained the court, “if it is a reasonable measure designed to further the state’s
legitimate interest...provided it cannot be shown that the legislature deliberately intended the
regulation to operate as a substantial obstacle to women seeking abortions.”137 Although the
language of rational basis is somewhat intertwined with the language of purpose, the court
appears to understand that the reasonableness of a regulation’s relationship to the state’s interest
is separate than the legislature’s specific intent to make abortions more difficult to procure.

However, the Karlin court did not make good on its accurate restatement of Casey. The Court
ultimately held that, “absent some evidence demonstrating that the stated purpose is pretextual,
our inquiry into the legislative purpose is necessarily deferential and limited.”138 Although the
Karlin court misconstrues Casey and Mazurek to have dictated a high level of legislative
deferece in the purpose prong analysis, this error is not the opinion’s most severe. Far more
egregious is that the court omitted any nexus analysis despite acknowledging the significance of
rational basis review. Although the court repeatedly suggests that regulations must be
reasonably designed to further the state’s interest, nowhere in its opinion does it assess whether
Wisconsin’s informed consent statute fulfilled that criterion. Whether the Karlin court merely
assumed that the statute reasonably furthered the state’s purpose or neglected to apply that
component of rational basis most likely to invalidate the statute, nexus analysis may well have
revealed the statute’s true flaws and rendered it invalid under Casey.

In a similar fashion, the Fifth Circuit in Barnes v. Mississippi conflated the purpose prong and
erational basis, inquiring into the importance of the Mississippi’s interest in its parental consent
statute but neglecting to engage in any nexus analysis whatsoever.139 The court waxed poetic
about the significance of parental involvement in a minor’s decision to have an abortion, noting
that such interests are “deeply rooted in our Nation’s history and tradition.”140 However, as in
Karlin, the court did not ask whether the particular terms of the consent statute furthered the
state’s interest in safeguarding the well being of the minor in question. By replacing purpose
prong analysis with a diatribe about the state’s important interest and omitting nexus analysis
entirely, Barnes deprived Casey of its proper application.

Likewise, the Eighth Circuit in the 1999 case Planned Parenthood of Mid-Missouri and Eastern
Kansas, Inc. v. Dempsey upheld a statute denying abortion service providers state family
planning funds. Although the court confronted an Equal Protection claim that ordinarily would
have triggered rational basis review and its attendant nexus requirement, the Court noted that
“any constitutional right of clinics to provide abortion services, however, is derived directly from
women’s constitutional right to choose abortion.”141 Since Casey established a new standard for
assessing legislation implicating the right to abortion, the court reasoned, undue burden analysis
was appropriate even in the face of an Equal Protection claim. However, the court did not
recognize the need to engage in preliminary rational basis analysis, and made only a cursory
inquiry into the state’s purpose: “nothing in the record demonstrates such a[n impermissible]

137 Karlin v. Foust, 188 F.3d at 494.
138 Id. at 496.
140 Id.
141 Dempsey, 167 F.3d at 464.
motive,” the court held tersely. Both Barnes and Dempsey omit the nexus analysis so essential to rational basis review, neglecting the inquiry most equipped to assess legislation.

C. Incorrect Omission of Rational Basis or Purpose Prong Analyses

Exemplary of this category is The Fourth Circuit’s recent decision in Richmond Medical Center for Women v. Herring, which upheld a Virginia statute criminalizing conduct it labeled “partial birth infanticide.” Tellingly, the Court cited language from Gonzales v. Carhart that implicated the purpose prong of the undue burden test: “The government may use its voice and its regulatory authority,” the Court quoted, “to show its profound respect for the life within the woman.” Despite this implicit acknowledgement that the undue burden test involves an examination into the state’s purpose in enacting abortion regulations, the Court went on to note only that the challenged statute “creates no barrier to, or chilling effect on, a woman’s right to have a standard D&E.” Simply because the statute created no unduly burdensome effects, the Court ultimately held, it was not facially unconstitutional under the Casey standard.

Conspicuously missing from its analysis, however, was any inquiry into the State’s purpose in criminalizing certain abortion procedures or whether the challenged statutes furthered a legitimate interest. After finding that the statute’s effects were permissible under Casey, the Court should have gone on to examine legislative history and other indicia of the State’s purpose in order to ensure that the statute was not invalid under the second prong of the undue burden test or even preliminary rational basis analysis. Had it done so, it may well have found that the State was motivated solely by a desire to reduce abortion services or that the criminalization of certain procedures was an insufficiently reasonable means of achieving even a legitimate interest.

Similarly deficient was the Sixth Circuit’s decision in Women’s Medical Professional Corporation v. Taft, which upheld a similar Ohio statute banning “partial birth” abortion procedures. The Taft court included language from Casey acknowledging the two-prong nature of the undue burden test, noting that “according to Casey, an ‘undue burden’ exists when ‘a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’” The court went on to note correctly that the undue burden standard was intended not merely to weigh the severity of a regulatory burden on women, but to examine that burden in conjunction with the State’s various interests in curtailing abortion. Despite this apparent recognition of the purpose prong’s existence and significance, however, the court engaged in no analysis of the State’s purpose whatsoever, focusing solely on the effects of the statute’s health exception and the scope of its definitions. The court’s ultimate holding is as conclusory as Herring’s: “because the Act does not restrict the most commonly used procedure for second trimester abortions,” the Court stated, “we conclude that it does not impose an undue burden.” Like in Herring, the challenged statute is analyzed only in terms of its

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142 167 F.3d at 464.
143 570 F.3d 165, 171 (2009).
144 Id. at 179, citing Gonzales v. Carhart, 550 U.S. 124, 157-7 (2007).
145 570 F.3d at 179.
147 Id. at 445, citing Casey, 505 U.S. at 877.
148 Id. at 447.
effects on a woman’s right to an abortion, and the State’s purpose in enacting the statute and the relationship of that statute to the State’s interest are left entirely unexamined.

This truncated analysis problematically reduces the undue burden standard to a single-prong test that merely gauges the intensity or degree of an abortion regulation’s effects, a distortion of the *Casey* plurality’s intentions as well as its language. Even assuming arguendo that a statute criminalizing the most common procedure for second trimester abortions imposes no unduly burdensome effects on women seeking abortions, it is entirely possible that the legislature’s purpose was impermissible or that the statute was an inadequate means of furthering even a legitimate state interest.

Like both Herring and Taft, the Sixth Circuit in Memphis Planned Parenthood, Inc. v. Sundquist simultaneously acknowledges the existence of the purpose prong and fails to inquire into the State’s purpose or assess the relationship between the state’s regulatory means and ends. Sundquist, which upheld all challenged provisions of a Tennessee Parental Consent statute, began by correctly recognizing the underpinnings of the purpose prong: under *Casey*, the court pointed out, “a state may not erect procedural hurdles in the path of a woman seeking an abortion simply to make it more difficult for her to obtain an abortion.”\(^{149}\) Despite its accurate reading of *Casey*, however, the court proceeded to ignore the purpose prong entirely, neglecting the requirements of its own language by failing to inquire whether the State was motivated by an impermissible desire to impede free reproductive choice or whether the means chosen furthered some legitimate interest. Indeed, in a footnote, the Court declared that its “responsibility is to determine which procedures are so onerous as to be ‘undue,’”\(^{150}\) a formulation of the undue burden standard that implicitly encompasses only the effects prong. Whether the Sundquist Court assumed that the state’s legislative purpose was permissible and that the statute reasonably furthered a legitimate interest or simply declined to consider those matters at all, it failed to give real effect to both prongs of *Casey*’s analysis.

The Eighth Circuit’s *Fargo Women’s Health Organization v. Schafer*, which upheld all challenged provisions of North Dakota’s Abortion Control Act, misconstrued purpose prong analysis in yet another fashion. *Schafer* correctly identified the undue burden standard as comprised of both a purpose and an effect prong, but limited its purpose prong analysis to the following conclusory and unsupported statement: “We have no hesitation in concluding that under these circumstances there is no state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”\(^{151}\) To fully illuminate the inadequacy of this holding with regard to the purpose prong, it is necessary first to point out its location in a paragraph that analyzes only the burdensome *effects* of the challenged regulation. The state’s purpose appears nowhere in the opinion, much less in proximity to this sentence. The Schafer Court’s reliance solely on effects is further apparent in its repeated references to the physical obstacles presented by the statute’s twenty-four hour waiting period and mandatory phone call and clinic visit.\(^{152}\) On its face, it appears that the Schafer court merely inserted *Casey*’s obligatory language into its decision without engaging in any of the independent fact-

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\(^{149}\) 175 F.3d 456, 461 (1999).

\(^{150}\) Id. at 463.

\(^{151}\) 18 F.3d 526, 533 (1994).

\(^{152}\) 18 F.3d 526,
finding or review that is the true core of the plurality opinion. Simply asserting that the state’s purpose is permissible, Schafer makes clear, is an insufficiently rigorous analysis under Casey.

Finally, the Seventh Circuit’s decision in A Woman’s Choice – East Side Women’s Clinic v. Newman is noteworthy for its omission of the purpose prong and rational basis from an otherwise extensive and fact-oriented undue burden analysis. Like the cases discussed above, Newman includes an obligatory citation to Casey’s “purpose or effect” language, but declines to fulfill the promise of that two-prong language. Newman’s language reveals its fundamental misunderstanding of the undue burden test’s correct application: since Casey established the undue burden standard, the court pointed out, “only two kinds of statute have flunked the test.” 153 This analysis misconstrues the nature of the undue burden test, which is not designed to invalidate particular kinds of abortion regulations but instead designed to strike down only those regulations, whatever their variety, promulgated with an impermissible purpose or creating an impermissible effect. By neglecting to engage with the two-prong nature of the undue burden standard, the Newman court succumbed to the common temptation to apply Casey by rote, looking at past statutes courts have invalidated for guidance rather than applying the test on its face to the record at hand.

Newman’s holding emphasizes its exclusive focus on the effects of the challenged statute: “Indiana,” the Court found, was “entitled to put its law into effect and have that law judged by its own consequences.” 154 Yet, under Casey, a law is not judged merely by its “effects” or “consequences” but also by the legislative purpose for which it was promulgated. In omitting the purpose prong from its analysis, Newman joins Herring, Taft, and Sundquist in illicitly truncating the proper implementation of the undue burden standard and upholding regulations that a more searching inquiry may have invalidated.

Even the Supreme Court’s most recent abortion jurisprudence, the 2007 Gonzales v. Carhart, misconstrues the nature of the purpose prong by merely understanding it as an assessment of the legitimacy of the state’s interest. 155 By simultaneously declining to inquire whether the state’s actual, underlying purpose was permissible and neglecting to engage in substantial nexus analysis, the Gonzales Court omitted those very analyses that would have proved most dangerous to the statute at hand. In her dissent, Justice O’Connor pointedly noted the absence of nexus analysis in the majority opinion. Although the Court claimed to assess whether the Partial Birth Abortion Act furthered the state’s legitimate interest in protecting fetal life, she noted, in fact “[t]he Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion.” 156 Justice O’Connor thus concisely identifies the central flaw in Carhart. Merely examining the legitimacy of the state’s interest, at bottom, suffices neither as purpose prong analysis or rational basis review. Without accompanying such an inquiry with nexus analysis that assesses the relationship of a challenged statute to the state’s interest, courts ignore the very test most likely to invalidate legislation.

154 305 F.3d at 693.
155 550 U.S. 124 (2007). See also Meyer, supra note 33, at 83 (noting that “the [Gonzales] Court underscored the deferential nature of its review by infusing its opinion with the language of rational-basis review”).
156 Justice O’Connor, dissenting in Gonzales v. Carhart, 550 U.S. 124, 181. Justice O’Connor further criticized the majority for allowing moral bias to taint its impartiality, noting pointedly that “the concerns expressed [by the majority] are untethered to any ground genuinely serving the Government’s interest in preserving life.”
D. Correct Omission of Rational Basis or Purpose Prong Analyses

Though integral components of the undue burden standard, rational basis and the purpose prong need not and do not appear in every decision correctly applying Casey. Three cases exemplify the one appropriate way to forego purpose prong and rational basis analysis: where a court has found that the effects of a challenged regulation are unduly burdensome in themselves, those effects alone render the regulation unconstitutional and negate the need for an inquiry into legislative purpose. In Jane L. v. Bangerter, for example, the court criticized the district court’s failure to recognize that “under Casey, a law is invalid if either its purpose or effect is to place a substantial obstacle in the path of a woman seeking to abort a nonviable fetus.”157 Because the Court went on to invalidate the statute as having both an impermissible purpose and impermissible effects, there was no need for it to engage in any rational basis analysis. The statute’s failure of the purpose and effect prongs necessitated its failure of mere rational basis.

Similarly, the Ninth Circuit’s Planned Parenthood of Southern Arizona v. Lawall158 and the Eighth Circuit’s Little Rock Family Planning Services v. Jegley159 invalidated statutes solely for their impermissible effects, recognizing the sufficiency of an unduly burdensome effect to strike down challenged legislation. In contrast to the cases discussed above that uphold legislation without unduly burdensome effects absent any purpose prong or rational basis analysis, Bangerter, Lawall, and Jegley properly invalidate laws based only on their impermissible consequences and demonstrate the distinction between illicitly omitting purpose prong and rational basis analyses and correctly recognizing them as extraneous.

V. Toward the Best Casey: Restoring the “Bite” of Undue Burden

More than a few scholars have viewed the Court’s incorporation of rational basis analysis in Casey as no more than an illicit method of downgrading the right to abortion.160 Indeed, some view Casey’s rationality language as affirmative evidence that the court had abandoned even intermediate scrutiny for abortion regulations.161 Little, if any, scholarship, however, has considered the ways in which rational basis review might strengthen undue burden analysis, lending the test the vigor and stringency the Casey Court clearly intended that it have. This dearth is surprising in light of the caselaw discussed above in Part IV, which indicate that rational basis analysis and its attendant nexus inquiry are excellent tools for lending Casey some much-needed vigor. Yet, the admittedly complex relationship between rational basis review and the undue burden standards requires courts and scholars alike to proceed with caution when interpreting and implementing Casey. The undue burden standard will not retain its integrity unless rational basis analysis is properly situated beside, rather than within, the two prongs of

157 102 F.3d at 1116, FN5.
158 180 F.3d 1022 (9th Cir. 1999).
159 192 F.3d 794 (8th Cir. 1999)
160 Cf. Schneider, supra note 117, at 1030 (arguing that “[i]t is neither traditional nor reasonable for a court to approach review of a fundamental right by first looking at the state’s interest, and then selecting the standard of review which matches that interest”).
161 See, e.g., Metzger, supra note 51, at 2032-33 (noting that although some have viewed Casey as a form of intermediate scrutiny, “[t]his conclusion seems unlikely given the court’s use of rationality review to examine regulations imposing burdens not considered to be substantial obstacles”).
that test. Courts must thus recognize that the purpose and effects tests are distinct inquiries that relate to but do not actually incorporate rational basis review.

In conclusion, therefore, I will outline what I believe to be the correct method for implementing the undue burden standard and analyze a case, Tucson Women’s Clinic v. Eden, correctly articulating that method. Framed concisely, the undue burden standard should be applied as follows: first, some form of rational basis review – ideally, as discussed above in Part III.B, rational basis with bite – should act as a threshold inquiry for the purpose and effects test.\textsuperscript{162} If the challenged legislation survives rational basis review, the court should then go on to assess the permissibility of its purpose and then of its effects. If, however, the legislation fails even rationality review, the court should invalidate the statute without proceeding to the purpose and effects test. By allowing rational basis to provide the nexus analysis absent from the purpose and effect prongs, this method is most capable of giving \textit{Casey} its proper and necessary bite.

This formulation inherently requires that courts potentially subject legislation to both rational basis \textit{and} purpose-and-effects analysis. The undue burden’s two prongs do not somehow incorporate or include rational basis review. Instead, they are preceded by it. It is the combined force of the purpose and effects test and rational basis review that ultimately renders the undue burden standard stricter than mere rational basis. Although either an impermissible purpose or an unduly burdensome effect is enough, in itself, to invalidate a regulation, a regulation may never survive the undue burden test simply by surviving rational basis review. While the Court left its references to rational basis sorely unexplained, the fundamental structure of the purpose-or-effect test remained clear. Courts ought not, therefore, understand the Court’s use of certain language as a signifier that they intended undue burden as no more than rational basis by another name. Instead, they should distinguish between the undue burden standard’s purpose-and-effects test and the threshold inquiry of rational basis, implementing both standards but maintaining the distinctions between them.

\textit{A. Tucson Woman’s Clinic v. Eden: \textit{Casey}, Correctly}

Although flawed in certain regards, the Ninth Circuit’s opinion in Tucson Woman’s Clinic v. Eden is noteworthy for its correct understanding of the structure of the undue burden test. The Court began with a section titled “When the Undue Burden Standard is Triggered,”\textsuperscript{163} demonstrating an unusual concern for preliminary analysis that most other courts fail to notice. The Circuit judges first correctly noted the limitations inherent in merely mimicking \textit{Casey}’s application of the undue burden standard when faced with other regulations. “[B]ecause \textit{Casey} largely dealt with a law aimed at promoting fetal life,” the Court pointed out, “its application of the ‘undue burden’ standard is not often extendable in obvious ways to the context of a law purporting to promote maternal health.”\textsuperscript{164} Already, the Court had avoided a common pitfall: by

\textsuperscript{162} Other scholars agree both that rational basis review should precede purpose-and-effect analysis and that rational basis with bite will best equip the undue burden standard to assess the validity of challenged regulation. See Metzger, supra note 51, at 2084 (noting that, under her construction of undue burden, “the type of rationality review applied is the rationality-with-bite approach, which requires that the regulations actually serve to foster their stated aim”).
\textsuperscript{163} 379 F.3d 531 (9th Cir. 2004).
\textsuperscript{164} Id. at 539.
realizing that Casey’s analysis is not automatically apropos in all contexts, the Circuit judges correctly declined to apply the plurality opinion’s results mechanically to the regulations at hand.

Furthermore, in distinguishing between fetal life and maternal health, the Eden court engaged in a sophisticated and accurate analysis of rational basis’ role in the undue burden standard. On the one hand, the court reasoned, any obstacle a law seeking to promote fetal life places in a woman’s path will serve that interest by preventing some women from obtaining abortions. On the other hand, however, a law seeking to promote maternal health “that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions and fail to serve the purported interest very closely, or at all” (emphasis added). Inherent in this observation is the fact that nexus analysis, an inquiry into whether and to what degree a regulation furthers the state’s interest, is at least somehow involved in undue burden analysis. Whereas the ordinary purpose prong interest makes no assessment of the regulation’s relationship to the state’s purpose, the Eden court correctly asked instead the question posed by rational basis: are the state’s ends reasonably furthered by its means?

The Court went one step further, however, and clarified precisely how the rational basis test – that is, the means by which nexus analysis becomes involved in the undue burden standard – related to the application of Casey. “The undue burden standard is not triggered at all,” the Court accurately remarked, “if a purported health regulation fails to rationally promote an interest in maternal health on its face.” This understanding of Casey – namely, that a challenged regulation must withstand ordinary rational basis review before being scrutinized under the purpose and effects prongs – more effectively distills the undue burden standard than any piece of text generated by the Supreme Court itself.

The Eden court’s understanding of Casey, moreover, makes good logical sense given the tension between the Supreme Court’s intention that undue burden be more stringent than rational basis and its unexplained reliance on the language of rationality review. By interpreting rational basis as a threshold analysis whose failure negates the need for further review, the Ninth Circuit correctly recognized that any statute that fails rational basis review must necessarily also fail undue burden. If a statute fails to rationally promote a legitimate state interest, it is always and already invalid as having failed even the Court’s most deferential standard of review. No additional analysis of purpose or effects is necessary to overturn such flawed legislation.

Some scholars and courts invert the Eden Court’s approach, applying rational basis review only to those statutes whose purpose and effects are not unduly burdensome. Although rational basis’ more deferential nature makes it more appropriate as a threshold analysis, recognizing that a statute must necessarily pass rational basis review in addition to surviving the requirements of the undue burden standard is fundamentally correct. Although the plurality opinion does not make clear whether it intended rational basis analysis to precede or follow undue burden analysis, some scholars have nevertheless argued that the opinion “clearly states that all regulations not found to impose an undue burden will only be subjected to rationality review.”

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165 379 F.3d at 540.
166 379 F.3d at 540.
167 Id.
168 Metzger, supra note 51, at 2088.
Ultimately, although the Eden court’s approach is exemplary, it is less significant whether courts apply rational basis before or after undue burden than whether it applies that standard of review at all. At bottom, courts must recognize the necessary and central role nexus analysis plays in the implementation of the undue burden standard.

Perhaps Casey’s largest failure is that it is emphatically not a balancing test, despite its purported intention to acknowledge and weigh both a woman’s liberty and a state’s interest. The Court initially characterized the abortion question as implicating both a woman’s right to terminate her pregnancy on the one hand and the state’s interest “in the protection of potential life” on the other. The Court’s duty, it noted, was “resolving this tension.” Furthermore, the court stated explicitly that the undue burden standard was deliberately intended to consider both sides of the equation: the new standard was, the court noted, “an appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”

Despite the fact that the Casey Court so prized an adequate weighing of the state’s interest, therefore, it perversely constructed a standard incapable of any searching inquiry into that interest. A more genuine translation of the plurality opinion’s language would have been not merely the undue burden standard, a two-prong test that fails to weigh competing interests against one another, but instead a rigorous balancing test more reflective of the Court’s carefully established “tension” between the state’s stake in fetal life and the mother’s reproductive liberty. In the absence of such a standard, however, a correct understanding of rational basis’ role within the undue burden test and a rigorous implementation of that standard of review becomes particularly essential to giving Casey the stringency it requires.

In his partial concurrence in Casey, Justice Stevens acknowledged the plurality’s lack of clarity. He also, however, hoped that courts would nonetheless both comprehend and apply faithfully the heart of the undue burden test: “The future may also demonstrate,” he remarked, “that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.” Though footnoted, Justice Stevens’ comment distills undue burden to its essence: at bottom, Casey asks lower courts to engage in a rigorous two-prong test, satisfied neither by a mere analysis of a regulation’s burdensome effect nor a sole examination of its underlying purpose. Instead, Justice Stevens makes clear, the undue burden standard tests both the weight of the burden and the legitimacy of the state’s regulatory purpose. A regulation that fails either component of the test is an unconstitutionally undue burden on the right to abortion.

169 Id. at 2033-34 (noting the “absence of any balancing in the abortion undue burden test … [d]espite … jurisprudential precedent and linguistic implication”).
170 505 U.S. at 871.
171 Id.
172 Casey, 505 U.S. at 870.
173 See Borgmann, supra note 96, at 691 (“The Casey joint opinion thus initially appeared to balance the state’s and the woman’s competing interests…not surprisingly, however, the joint opinion failed to rein in the conflict it set up between the state’s and the woman’s interests”).
174 Justice Stevens, concurring in Casey, 505 U.S. at 920, FN6.
Lower courts have failed, however, to give equal weight to both prongs of the undue burden test, much less to incorporate the threshold nexus analysis of rational basis. By neglecting the purpose prong and misconstruing the role of rational basis within undue burden analysis, these courts have left Casey’s true promise unfulfilled and Justice Stevens’ optimism unjustified. The lack of “authoritative articulation” in any single court opinion has proven insurmountable for lower courts attempting to implement Casey’s analysis. One scholar, writing only one year after Casey was decided, noted that “several more years of litigation may be necessary before there is a final word on the contours of the ‘undue burden’ standard.” Nearly two decades have passed, however, and no such final word is in sight.

To restore Casey’s intended vigor and make good on the Casey Court’s promise to defend the abortion right from encroaching state regulations, courts should alter their approach to undue burden analysis in the following two ways: first, any adequate application of the undue burden standard should begin with the searching inquiry of rational basis with bite. By examining the sufficiency of the relationship between the state’s proffered interest and the challenged legislation, courts can scrutinize the most problematic aspects of current abortion regulations. Second, courts must recognize that purpose prong analysis is an integral component of the undue burden standard and must engage in rigorous purpose prong inquiry. The failure to implement one of the test’s two prongs violates the facial requirements of Casey and denies undue burden its appropriate strength. Only by recognizing undue burden’s proper orientation along the spectrum of constitutional scrutiny and adhering honestly to the standard’s requirements can courts combat the inconsistent and inaccurate results for which Casey is currently responsible.