Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis

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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*.[1] Despite *Casey*'s efforts to restructure a politically — and doctrinally — conflicted area of constitutional jurisprudence, the case has engendered confusion rather than clarity.[2] It is evident that the plurality opinion abandoned the strict scrutiny *Roe v. Wade*[3] had applied to the abortion right[4] in favor of a new "undue burden" standard of review, featuring a two-pronged "purpose and effects" inquiry that assesses the legitimacy of the state's interest and the severity of the statute's effects on women seeking abortion services.[5] However, the correct method of implementing that test remains murky. Consequently, courts have applied *Casey* inconsistently and unfaithfully,[6] creating a tangled body of abortion precedent and rendering the undue burden standard insufficient to protect women's reproductive autonomy.

In this Note, I argue that the *Casey* Court *intended* to create a standard of constitutional review strong enough to protect the abortion right. However, undue burden — the standard the Court *actually* created — is imperfectly equipped to vindicate that right. Even rational basis review, the most forgiving standard of constitutional scrutiny, nominally requires courts to establish as adequate the connection, or "nexus," between the state's legislative ends and its legislative means. Though purportedly as stringent as intermediate scrutiny,[7] undue burden wholly lacks such a nexus inquiry: under *Casey*, courts must analyze a statute's purpose and its effects, but need not

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[1] 505 U.S. 833 (1992).
[2] *See infra* Part I.C.
[3] 410 U.S. 113 (1973).
[4] *See id.* at 155–56.
[5] *See Casey*, 505 U.S. at 877–78.
[6] *See infra* Part IV.
[7] *See infra* Part I.C.

assess the relationship between the two. Because current abortion regulations frequently ill-serve the government's purpose, this shortcoming poses particular problems. Moreover, the *Casey* Court's explanation of undue burden is unclear and inconsistent. The Court's imprecise discussion of that test has led appellate courts to apply the test in ways that poorly safeguard women's reproductive choice.

This Note proposes an optimal method of applying the undue burden standard that vigorously protects the right to choose while remaining faithful to *Casey*. First, a stricter iteration of the traditionally toothless rationality review — known as "rational basis with bite"[8] — should act as a threshold inquiry for the purpose and effects test.[9] Rational basis with bite includes a searching nexus analysis that enables courts to invalidate challenged legislation. If the legislation survives heightened rationality review, the court should then assess the permissibility of its purpose and the severity of its effects. Should the legislation fail heightened rationality review, however, the court should invalidate the statute without proceeding to the purpose and effects test. Derived in equal measure from *Casey*'s text and *Roe*'s promise, this method aims to balance loyalty to precedent with advocacy for the abortion right.

In Part I, I argue that the Court intended undue burden analysis to be as rigorous as intermediate scrutiny. A review of abortion precedent, and an analysis of *Casey*, reveals that the Court imagined undue burden as a sturdy bulwark against assaults on the abortion right: less demanding than strict scrutiny, but also far less deferential than rational basis. Part II outlines a method of implementing undue burden that is better equipped to protect the abortion right, combining the strength inherent in the purpose and effects test with the additional vigor of rational basis with bite's nexus analysis. In Part III, I discuss Texas's recent ultrasound legislation to demonstrate how abortion regulations frequently fail to serve the state's interest, and analyze three circuit court decisions that implement undue burden according to my proposed method. Part IV's analysis of *Gonzales v. Carhart* and certain ap-

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[8] Victor Rosenblum, a professor at Northwestern University School of Law, appears to have originated the phrase "rational basis with teeth." *See* David O. Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112–14 (1985) (noting that Rosenblum "applauded" the Court's decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), and labeled the Court's approach "rational basis with teeth"). In his 1972 review of the Supreme Court's recent jurisprudence, 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." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972). In this Note, I use the terms "rational basis with bite" and "heightened rationality review" interchangeably.

[9] One scholar agrees both that rational basis review should precede purpose and effect analysis and that rational basis with bite will best equip undue burden to assess the validity of challenged regulations. *See* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2081–84 (1994) (noting that, under her version 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").

pellate decisions, however, demonstrates how *Casey*'s progeny have misunderstood undue burden and have failed to apply it with the requisite rigor. Two persistent appellate errors — the omission of purpose prong analysis and the failure to preface undue burden with "nexus inquiry" — have led appellate courts to uphold unconstitutional regulations under *Casey*'s supposedly rigorous auspices and deprive undue burden of its "potential vigor and strength."[10]

Importantly, I do not argue that the undue burden standard is an ideal, or even appropriate, means of assessing abortion regulations; I believe that abortion is a fundamental right and should trigger the strictest constitutional scrutiny.[11] However, rather than add to the sizeable body of scholarship "detailing inherent defects in the undue burden standard,"[12] I seek to imbue the test with as much rigor as it can tolerate — using heightened rationality review to give *Casey* its own kind of "bite." This Note should be understood only as an effort to make the best of the Court's flawed opinion in *Casey*, emphasizing whatever stringency the undue burden test possesses and revealing the potential strength of its union with rational basis with bite. Only by reviving the sorely misconstrued *Casey* in this way will courts fulfill the Court's promise to uphold "the most central principle of *Roe*"[13] and preserve the right to reproductive autonomy.

I. A New Intermediate Scrutiny

The text of the plurality opinion in *Casey* will frustrate readers hoping to clarify the relationship between the undue burden test and traditional standards of constitutional review, or to determine an accurate definition of undue burden itself. Because the Justices relied on principles inherited from prior cases,[14] *Casey* is of limited use read in isolation. A contextual ap-

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[10] Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 Yale J.L. & Feminism 317, 353 (2006); *see also id.* at 353–85 (discussing inconsistent application of the *Casey* standard in lower courts). Other scholars have argued, like I do, that courts have misunderstood undue burden and applied it with insufficient strictness. However, none has done so explicitly through the lens of rational basis review, preferring instead to emphasize lower courts' failure to engage in thorough factfinding or their tendency mechanistically to apply *Casey*'s holdings to similar regulations. This Note seeks to echo and buttress these prior claims by examining *Casey*'s failure through another lens: its poorly understood relationship to traditional standards of review and its potentially fruitful relationship to "rational basis with bite." I do not contest most prior scholarship on *Casey*, but instead hope to reveal an as-yet ignored element of undue burden's inconsistent record and clarify the role rational basis ought to play within *Casey*'s prescribed analysis.

[11] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 917 (1992) (Stevens, J., concurring in part and dissenting in part) ("In my opinion, the principles established by this long line of cases [following *Roe*] . . . should govern our decision today.").

[12] Ruth Burdick, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split over the* Salerno *Test*, 23 Hastings Const. L.Q. 825, 840 (1996).

[13] *Casey*, 505 U.S. at 871 (plurality opinion).

[14] *See*, *e.g.*, Wharton et al., *supra* note 10, at 323 ("Prior to the *Casey* decision in 1992, 'undue burden' terminology had appeared in some of the Supreme Court's abortion opinions . . . .").

proach grounded in precedent and scholarship, however, makes clear that the Court intended to create a strong standard of review that would occupy a middle ground between rational basis review, the least stringent standard of constitutional scrutiny, and strict scrutiny, the most stringent.[15]

First, I outline the relevant standards of constitutional scrutiny: rational basis review and its heightened corollary, rational basis with "bite"; intermediate scrutiny; and strict scrutiny. The relationship between these standards is essential to *Casey*'s articulation of undue burden. Next, I review relevant abortion precedent: *Roe v. Wade*,[16] *City of Akron v. Akron Center for Reproductive Health* (*Akron I*),[17] *Thornburgh v. American College of Obstetricians and Gynecologists*,[18] and *Webster v. Reproductive Health Services*.[19] Although many scholars have described Justice O'Connor's initial conception of the undue burden standard and charted the evolution of that test, a brief and specific review is helpful. Finally, I discuss *Casey* in detail, and then propose a method of implementing the undue burden test that is best equipped to protect the abortion right.

A. Standards of Constitutional Review

The three traditional standards of constitutional scrutiny under the Equal Protection Clause are rational basis review, intermediate scrutiny, and strict scrutiny. Courts consider rational basis review the default standard.[20] To uphold state action under rational basis, a court must only determine that the challenged legislation is reasonably related to a legitimate state interest.[21] Because it is the most deferential standard of constitutional scrutiny, rational basis has traditionally functioned as a rubber stamp for legislation.[22] Typically, courts uphold legislation if any conceivable circumstance exists to jus-

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[15] *See* analysis in Part I.C *infra*.

[16] 410 U.S. 113 (1973).

[17] 462 U.S. 416 (1982).

[18] 476 U.S. 747 (1986).

[19] 492 U.S. 490 (1989).

[20] *See* 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) (calling rational basis the "default level" of review); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011) ("Historically, rational basis review has operated as a residual category — that is, if a classification does not receive heightened scrutiny, it receives rational basis review.").

[21] *See* Johnson v. Robison, 415 U.S. 361, 374–75 (1974) ("A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced shall be treated alike." (citations and internal quotation marks omitted)).

[22] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579–80 (2004) (O'Connor, J., concurring) ("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.'" (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985))); Stewart, *supra* note 8, at 112 ("We've gotten used to the idea that if the test is rational basis, the legislation gets an automatic pass . . . ." (internal quotation marks omitted)) (quoting Victor Rosenblum of Northwestern Univer-

tify it,[23] and concoct statutory rationales if the state's proffered interest does not pass constitutional muster.[24] Rational basis applies to equal protection claims that do not implicate gender, suspect classifications, or fundamental rights;[25] it also applies in the due process context where no fundamental rights are implicated.[26]

Intermediate scrutiny requires that challenged legislation be substantially related to an important state interest.[27] As such, it is more stringent than rational basis review, demanding both a closer nexus between the legislature's means and ends and a more pressing justification for state action. Intermediate scrutiny applies to equal protection claims implicating gender or illegitimacy of birth.[28] Some scholars contend that intermediate scrutiny applies to equal protection claims involving the right to homosexual rela-

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sity School of Law); Yoshino, *supra* note 20, at 760 (noting that, historically, "ordinary rational basis review was tantamount to a free pass for legislation").

[23] *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 783 (1987).

[24] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (internal quotation marks and citations omitted)); Hanafin, *supra* note 20, at 462 ("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 23, at 783 ("When the state fails to present a sufficient factual basis to justify a statute, the Court supplies its own justification."); Yoshino, *supra* note 20, 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." (citations omitted)).

[25] *See* Pettinga, *supra* note 23, at 783 (noting that the Supreme Court applies rational basis review "[o]utside the areas of suspect classifications or fundamental rights"). 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. *See id.* at 784 (labeling gender and illegitimacy of birth "quasi-suspect classifications"); Dan Soleimani, Note, Plyler *in Peril: Why the Supreme Court's Decision in* Plyler v. Doe *is at Risk of Being Reversed — And What Congress Should Do About It*, 25 GEO. IMMIGR. L.J. 195, 200 (2010) (labeling the right to a free education "quasi-fundamental").

[26] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (applying rational basis review after determining that the right to physician-assisted suicide was not fundamental under the Due Process Clause).

[27] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). In *Craig*, the Court struck down an Oklahoma statute prohibiting the sale of certain beer to men under the age of twenty-one and women under the age of eighteen. *Id.* at 210. Because the connection "between gender and traffic safety [was] too tenuous," Justice Brennan wrote, the statute was insufficiently related to the state's interest and could not survive intermediate scrutiny. *Id.* at 204.

[28] Reed v. Campbell, 476 U.S. 852, 855 (1986) (applying intermediate scrutiny to an illegitimacy-based equal protection claim); *Craig*, 429 U.S. at 197 (applying intermediate scrutiny to a gender-based equal protection claim).

tionships or conduct.[29] However, the status of sexual orientation claims under the traditional tiers of scrutiny remains uncertain.[30]

Strict scrutiny requires that challenged legislation be narrowly tailored to serve a compelling state interest;[31] legislation must be the least restrictive means available to the government in serving that interest.[32] Strict scrutiny is more demanding than both rational basis review and intermediate scrutiny. Its punishing rigor led to the derisive moniker "strict in theory and fatal in fact,"[33] whereas rational basis review is "minimal . . . in theory and virtually non[existent] in fact."[34] Strict scrutiny applies to claims involving fundamental rights,[35] such as the right to vote[36] and the right to access the court system,[37] and suspect classifications, such as race,[38] national origin,[39] and religion.[40]

The transition from the Warren to the Burger Court in the late 1960s threw the Supreme Court's approach to constitutional scrutiny into flux.[41] The Warren Court had been notorious for its "rigid two-tier attitude" towards constitutional scrutiny, which encompassed only rational basis review and strict scrutiny.[42] Frustrated by these strict boundaries, the Burger Court developed intermediate scrutiny to protect a wider array of groups unfairly disadvantaged by legislation.[43] Yet, the Court's traditional discipline regard-

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[29] *See, e.g.*, Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (arguing that the Supreme Court "has in practice already" applied intermediate scrutiny to classifications based on sexual orientation).

[30] *See* Yoshino, *supra* note 20, at 778 (calling the Court's presentation of sexual orientation scrutiny in *Romer v. Evans*, 517 U.S. 620 (1996), "opaque").

[31] Plyler v. Doe, 457 U.S. 202, 217 (1982) (noting that strict scrutiny requires "the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest").

[32] Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.").

[33] Gunther, *supra* note 8, at 8 (internal quotation marks omitted).

[34] *Id.*

[35] *Plyler*, 457 U.S. at 216–17 ("[W]e have treated as presumptively invidious those classifications that . . . impinge upon the exercise of a 'fundamental right.' ").

[36] *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (deeming an Indiana voter photo identification statute justified by "sufficiently strong" state interests to survive strict scrutiny).

[37] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19–20 (1956) (holding that criminal defendants may not be denied their right to an appeal because they are unable to afford trial transcripts).

[38] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all racial classifications must be examined under strict scrutiny).

[39] *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (noting that classifications based on national origin trigger strict scrutiny); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (same).

[40] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972).

[41] *See, e.g.*, Gunther, *supra* note 8, at 12; Pettinga, *supra* note 23, at 784.

[42] Gunther, *supra* note 8, at 8.

[43] *Id.* (noting the Court's "[i]ncreasing dissatisfaction with the two-tiered equal protection system of strict scrutiny and the rational basis test"); Pettinga, *supra* note 23, at 784.

ing constitutional scrutiny began to break down.[44] As early as 1972, the Court's three-tiered regime expanded yet again: the Court selectively applied a form of rational basis stringent enough to invalidate legislation that failed to further reasonably a legitimate state interest.[45] 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.[46]

Whereas courts applying traditional rational basis presume legislative legitimacy and require only a superficial nexus between the state's regulatory means and ends, courts employing rational basis with bite scrutinize the actual nature of the state's interest and thoroughly assess its relationship to the challenged statute.[47] Traditional rational basis has led the Court to uphold almost all statutes examined under its auspices.[48] Rational basis with bite, on the other hand, allows courts to invalidate the challenged legislation.[49] Rational basis with bite differs in three primary ways from traditional rationality review: the "bite" renders courts less deferential to the legislature, less tolerant of over- or under-inclusive classifications, and less open to state experimentation.[50] Importantly for my purposes, both traditional rational basis review and rational basis with bite contain nexus analysis. Courts implementing traditional rationality review merely invoke, but do not in fact apply, nexus analysis. Courts implementing rational basis with bite, on the other hand, actually examine the relationship between state means and ends.

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[44] *Cleburne*, 473 U.S. at 451–52 (Stevens, J., dissenting) ("Cases 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.").

[45] *See, e.g.*, Gunther, *supra* note 8, at 12; Pettinga, *supra* note 23, at 784.

[46] Yoshino, *supra* note 20, at 762.

[47] Hanafin, *supra* note 20, 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, e.g.*, *id.* at 468 (noting that rational basis with bite is "not equivalent to intermediate scrutiny"). Some early scholarship, however, understood rational basis with bite as merely a covert application of intermediate scrutiny. *See, e.g.*, Pettinga, *supra* note 23, at 802.

[48] *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (upholding the 1974 Railroad Retirement Act's grandfather clause as not "patently arbitrary or irrational," because "[w]here . . . there are plausible reasons for Congress' action, our inquiry is at an end"); Pettinga, *supra* note 23, at 783–84 ("[W]hen the Court applied the rational basis test, it almost always upheld the statute."); Yoshino, *supra* note 20, at 755–56 ("[R]ational basis review generally results in the validation of state action.").

[49] *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (invalidating social legislation regulating "hippies" as impermissibly based on a "bare congressional desire to harm a politically unpopular group"); Pettinga, *supra* note 23, at 779 (noting that rational basis with bite allowed the Court to "find[ ] . . . regulations . . . unconstitutional under rational basis review"); Yoshino, *supra* note 20, at 760 (noting that sometimes "the Court has invalidated legislation under rational basis review, suggesting a newer rational basis with bite standard").

[50] *See* Gunther, *supra* note 8, at 20.

Exemplary of rational basis with bite are *Plyler v. Doe*[51] and *City of Cleburne v. Cleburne Living Center*.[52] *Plyler* struck down a statute barring undocumented children from learning in public school classrooms.[53] While the Court purported to apply only traditional rational basis review,[54] Justice Brennan in fact analyzed the challenged statute under a "heightened, amorphous rendition of rational basis."[55] Brennan began by noting that undocumented aliens are not a suspect classification and that education is not a fundamental right,[56] analysis that implicitly invokes traditional rational basis. However, Brennan then applied a heightened standard: "In determining the rationality of [the challenged statute]," he wrote, "we may appropriately take into account its costs to the Nation . . . ."[57] Consequently, he concluded, the statute could not be considered rational unless it furthered a "substantial" state goal.[58] In dissent, Chief Justice Burger decried the "special solicitude under the Equal Protection Clause" Justice Brennan had afforded undocumented children,[59] labeling the majority opinion a "prime example" of an "unabashedly result-oriented approach."[60]

Similarly covert in its use of heightened scrutiny was *Cleburne*, which invalidated a municipal ordinance requiring group homes for the mentally retarded to obtain special-use permits.[61] Although the Court denied that mental retardation constituted a quasi-suspect classification that would ordinarily trigger intermediate scrutiny,[62] Justice White invalidated the ordinance under an inquiry stricter than ordinary rational basis.[63] White acknowledged that the mentally retarded were "different from others not sharing their misfortune."[64] However, he went on to analyze each of the city's purported statutory rationales in great detail[65] and ultimately concluded that the statute appeared to "rest on an irrational prejudice against the mentally retarded."[66] As such, the city lacked "any rational basis for believing"[67] that a group

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[51] 457 U.S. 202 (1982).
[52] 473 U.S. 432 (1985).
[53] 457 U.S. at 230.
[54] *See id*. at 226 (requiring that the legislation be "reasonably adapted" to the state's ends); Soleimani, *supra* note 25, at 199 ("[T]he Court's opinion pretended to be applying a straightforward rendition of the rational basis text [sic].").
[55] Soleimani, *supra* note 25, at 200.
[56] *Plyler*, 457 U.S. at 223.
[57] *Id.* at 223–24.
[58] *Id.* at 224.
[59] *Id.* at 244 (Burger, C.J., dissenting).
[60] *Id.*
[61] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).
[62] *Id.* at 442 ("[T]he Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded social and economic legislation.").
[63] *Id.* at 450.
[64] *Id.* at 448.
[65] *Id.* at 448–50 (discussing the four factors the city council cited in passing the ordinance).
[66] *Id.* at 450.
[67] *Id.* at 448.

home for retarded persons would "pose any special threat to the city's legitimate interests."[68] Because of this searching analysis, Justice Marshall's dissent noted pointedly that the majority had "most assuredly not" used traditional rational basis.[69] Instead, Marshall stated, the Court had invalidated the ordinance after using "precisely the sort of probing inquiry associated with heightened scrutiny."[70]

Because the Court has been reluctant to acknowledge overtly the existence of rational basis with bite, much less identify the factors that trigger such enhanced review,[71] the standard's boundaries remain blurry. Yet, scholars have identified a number of factors that appear to prompt the implementation of heightened rationality review. As I will argue in Part II.B, several of these factors render rational basis with bite appropriate for use in the abortion context.

B. Roe*'s Progeny: From Strict Scrutiny to Rational Basis Review*

Although this Note argues that rational basis with bite should apply to the abortion right, the Supreme Court first understood that right as triggering strict scrutiny. *Roe v. Wade* remains the seminal abortion precedent and the lodestar for a Court navigating the politics and doctrine of reproductive rights. *Roe*, which invalidated a Texas statute proscribing abortion except to save the life of the mother, is best known for its emphatic holding that a mother's right to privacy encompasses the fundamental right to terminate a pregnancy, a right triggering strict scrutiny.[72] However, the Court constrained this bold declaration, noting that the right to an abortion is "not unqualified":[73] limiting the mother's interest in independence are the state's interests in the health of the mother and the life of the fetus, which exist from conception.[74] Consequently, the Court established a trimester framework within which lower courts were to weigh these competing interests.[75] During the first trimester, the mother's interest in reproductive autonomy is at its zenith and abortion restrictions are presumptively invalid. The state's

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[68] *Id.*
[69] *Id.* at 458 (Marshall, J., dissenting).
[70] *Id.*
[71] *See, e.g.*, Pettinga, *supra* note 23, at 802 ("[T]he Court does not explain which factors trigger heightened scrutiny under the label 'rational basis . . . .'"); Smith, *supra* note 29, at 2770 (noting "the Supreme Court's failure to articulate its more searching form of rational basis review"). *But see* Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring) (noting with unusual frankness that the Court has repeatedly "applied a more searching form of rational basis review" either when a law displays animus towards a particular group of disadvantaged persons or when it implicates personal relationships).
[72] Roe v. Wade, 410 U.S. 113, 153 (1973).
[73] *Id.* at 154.
[74] *Id.* at 159.
[75] *Id.* at 162–63.

interests, however, grow compelling by the third trimester, trumping the right of the mother.[76]

Ten years after *Roe* was decided, *City of Akron v. Akron Center for Reproductive Health* (*Akron I*)[77] invalidated five provisions of an Akron, Ohio, abortion ordinance.[78] In doing so, the Court made clear that it had "reaffirm[ed]" *Roe* and its trimester-based analysis.[79] However, Justice O'Connor's dissent argued that "sound constitutional theory" could not "accommodate an analytical framework that varies according to the 'stages' of pregnancy."[80] O'Connor noted that the Court's "recent cases indicate that a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion."[81] As such, she suggested that the "'unduly burdensome' standard" be applied to regulations at any stage of pregnancy.[82] Though O'Connor did not fully define the undue burden standard, she implied that it was stricter than mere rational basis review: if a regulation was *not* unduly burdensome, it need only be rationally related to a legitimate state interest.[83]

Three years later, in *Thornburgh v. American College of Obstetricians and Gynecologists*,[84] the Court confronted a statute similar to the one at issue in *Akron I*. In an opinion penned by Justice Blackmun, the Court invalidated five provisions of the Pennsylvania Abortion Control Act.[85] Echoing *Roe*, the Court noted that the challenged provisions "wholly subordinate constitutional privacy interests."[86] Justice O'Connor filed another dissent.[87] She accused the Court's abortion precedent of "work[ing] a major distortion in the Court's constitutional jurisprudence," lamenting the "institutionally debilitating effect" *Roe* and its progeny had on the Court's institutional legit-

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[76] *Id.* at 163–64.

[77] 462 U.S. 416 (1982).

[78] *Id.* at 422–26. The Court deemed unconstitutional a set of provisions requiring that: (1) all second- and third-trimester abortions be performed in a hospital, (2) parents receive notifications and provide their consent before abortions are performed on unmarried minors, (3) physicians make particular statements to a woman to ensure her informed consent before she procures an abortion, (4) women wait twenty-four hours after signing a consent form before any abortion may be performed, and (5) fetal remains be disposed of in a particular way. *Id.*

[79] *Id.* at 420.

[80] *Id.* at 452 (O'Connor, J., dissenting).

[81] *Id.* at 453 (internal quotation marks omitted).

[82] *Id.*

[83] *Id.*

[84] 476 U.S. 747 (1986).

[85] *Id.* at 758–71. The Court held that five provisions were unconstitutional: requirements that (1) women be advised of the availability of medical assistance, (2) the father be financially responsible for the child, (3) the physician inform women of all medical risks and detrimental psychological effects of abortion, and provisions (4) governing the degree of care for post-viability abortions, and (5) requiring the presence of a second physician during the procedure, but lacking a medical emergency exception if the mother's health were endangered by that second physician's potentially delayed arrival. *Id.*

[86] *Id.* at 759.

[87] *Id.* at 814 (O'Connor, J., dissenting).

imacy.[88] As in *Akron I*, O'Connor argued that abortion regulations need only to survive rational basis scrutiny unless the regulation imposed an undue burden on a woman's right to choose.[89] In other words, only if the state *had* imposed such a burden should the Court subject the regulation to *Roe*'s strict scrutiny.[90]

Akron I and *Thornburgh* were noteworthy for having struck down numerous challenged provisions under the strictest scrutiny.[91] In *Webster v. Reproductive Health Services*,[92] however, the Court upheld the challenged legislation under mere rational basis review.[93] *Webster* involved a statute that, inter alia, prohibited government-employed doctors from aborting viable fetuses and forbade the use of state funds to perform abortions except to save a woman's life.[94] "The Missouri testing requirement here," Chief Justice Rehnquist wrote, "is reasonably designed to ensure that abortions are not performed where the fetus is viable — an end which all concede is legitimate — and that is sufficient to sustain its constitutionality."[95] The Court threatened the holding of *Roe*, openly noting that it sought to "modify and narrow *Roe* and succeeding cases."[96] Over the course of only thirteen years, the Court had examined the abortion right under the polar ends of the spectrum of constitutional scrutiny.

C. Casey*'s Scrutiny*

The polarized approaches of *Akron I/Thornburgh* and *Webster* rendered the status of the abortion right poorly understood.[97] The Supreme Court was aware of this confusion when it handed down *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which partially overturned *Akron I* and *Thornburgh*,[98] but purported to uphold the essential principles of *Roe*.[99]

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[88] *Id.*
[89] *Id.* at 828.
[90] *See id.*
[91] *See, e.g.*, Rachel D. King, *A Back Door Solution:* Stenberg v. Carhart *and the Answer to the* Casey/Salerno *Dilemma for Facial Challenges to Abortion Statutes*, 50 EMORY L.J. 873, 877 (2001) (noting that "[a]fter *Roe*, the Supreme Court invoked strict scrutiny in reviewing state regulations on abortion" and citing *Akron I* and *Thornburgh* as primary examples).
[92] 492 U.S. 490 (1989).
[93] *Id.* at 520.
[94] *Id.* at 501.
[95] *Id.* at 520.
[96] *Id.* at 521.
[97] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned." (citations omitted)); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675 (2004) (noting that, while anticipating *Webster*'s results, "[w]omen in the United States waited anxiously to see whether the Court would end the brief and besieged era of the constitutional right to abortion," but also that *Webster* ultimately "ducked the question").
[98] *See Casey*, 505 U.S. at 882.
[99] *Id.* at 846.

Casey confronted five provisions of the Pennsylvania Abortion Control Act of 1982: Section 3205, requiring that women give informed consent after receiving information no less than twenty-four hours prior to the abortion; Section 3206, requiring the informed consent of one parent before a minor's abortion, but providing for judicial bypass; Section 3209, requiring spousal notification prior to abortions; Section 3203, defining a "medical emergency" that could justify noncompliance; and Sections 3207(b), 3214(a), and 3214(f), imposing reporting requirements on abortion facilities.[100]

The opinion of the Court, jointly authored by Justices O'Connor, Kennedy, and Souter, began with a lengthy exegesis on *stare decisis* and *Roe*'s import as precedent.[101] Because the consequences of overturning such a weighty decision would be untenable, they concluded, "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[102] The Court affirmed three elements of *Roe*: the right of a woman to procure an abortion before viability, the state's power to restrict abortion after viability, and the state's legitimate interests throughout pregnancy in protecting the health of the woman and the life of the fetus.[103]

However, the Justices found that *Roe*'s trimester-based analysis gave short shrift to the state's various interests.[104] In order to vindicate *Roe*'s principles, but better protect the state's interests, the opinion, speaking only for a plurality of the Court, promulgated the "undue burden" standard of review for state regulations on abortion.[105] Under this standard, regulations imposing an "undue burden" on women seeking abortion services are unconstitutional. Burdens are undue when they place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[106] The undue burden standard consists of two primary parts. First, as discussed below in section C.1, courts must subject regulations to the valuable nexus analysis of rational basis with bite. Next, as discussed below in section C.2, they must apply the two-pronged purpose and effects test, which asks whether abortion regulations have *either* the purpose *or* the effect of placing a substantial obstacle before a pregnant woman seeking to obtain an abortion.

Under the undue burden standard, the Court upheld all but the spousal notification provision. It began with Pennsylvania's definition of medical emergency, which the Court of Appeals had construed so as to avoid constitutional problems.[107] Absent this construal, petitioners had argued, the definition was so narrow that it impermissibly forbade certain abortions despite

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[100] *Id.* at 844.
[101] *Id.* at 854–69.
[102] *Id.* at 846.
[103] *Id.*
[104] *Id.* at 876 ("The trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life.").
[105] *See id.* ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").
[106] *Id.* at 877.
[107] *Id.* at 880.

serious health risks in contravention of *Roe*.[108] However, the Justices noted, the Court would adhere to the interpretations of lower courts absent clear error.[109] Since the lower court's construction cured the provision's ills, the Supreme Court upheld the definition without needing to implement rational basis with bite or the purpose and effects test.

The Court next tackled the informed consent provision and, in doing so, partially overruled *Akron I* and *Thornburgh*.[110] The Justices incorporated both nexus inquiry and purpose prong inquiry into their analysis. "In attempting to ensure that a woman apprehend the full consequences of her decision," they wrote, "the State *furthers the legitimate purpose* of reducing the risk" that women may come to regret uninformed abortion decisions.[111] The Justices noted both that the state's purpose was legitimate and also that the provision did, in fact, further that purpose, later stating that Section 3205 was a "reasonable means" of ensuring informed consent.[112] As such, the Justices found that requiring women to be informed about fetal development did not constitute a substantial obstacle to obtaining an abortion, and was thus not an undue burden.[113]

The Court then assessed the twenty-four-hour waiting period. Though the Justices noted that the provision was not theoretically an undue burden, whether the provision in practice posed a substantial obstacle was "a closer question."[114] Simply because the delay made abortions riskier and more expensive, they found, it was not necessarily a substantial obstacle.[115] Ultimately, the provision as-applied did not unduly burden the abortion right.[116] Similarly, the parental consent provision was not unduly burdensome. The Court had "been over most of this ground before" in prior cases,[117] all of which had approved a one-parent consent requirement combined with a judicial bypass provision.[118] The reporting requirements, too, were not unduly burdensome,[119] since prior cases had upheld similar provisions[120] and the provisions at hand did not impose substantial obstacles merely because they "might increase the cost of some abortions by a slight amount."[121]

Only the spousal notification provision and its attendant reporting requirement proved unduly burdensome. Invoking the pervasive backdrop of

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[108] *See id.*
[109] *Id.*
[110] *Id.* at 882.
[111] *Id.* (emphasis added).
[112] *Id.* at 885.
[113] *See id.* at 883.
[114] *Id.* at 885.
[115] *Id.* at 886.
[116] *Id.* at 887.
[117] *Id.* at 899.
[118] *See id.*
[119] *Id.* at 900.
[120] *Id.* (mentioning *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976)).
[121] *Id.* at 901.

domestic violence and a long history of common law principles that reinforced misogyny in heterosexual relationships,[122] the Court held that "[t]he husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife."[123] Allowing the state to do so would place a substantial obstacle between a pregnant woman and the abortion she seeks.[124] The Court's analysis of the spousal notification provision thus reveals the potential strength of the undue burden test, which can enable searching assessments into an abortion regulation's genuine consequences.

Although the results of the Court's analysis are clear, it is difficult to condense *Casey*'s convoluted text into a concise holding. The undue burden standard commanded only a plurality, and each concurring Justice viewed the abortion right and the Court's treatment of it differently.[125] As such, I analyze three primary elements of the *Casey* opinion. First, I note the decision's use of language traditionally associated with rational basis review, and demonstrate why lower courts should incorporate rational basis with bite into undue burden analysis. Second, I outline the purpose and effects test, which comprises the second half of my proposed method of implementing *Casey*. The purpose and effects prongs may be utilized independently from one another to invalidate unconstitutional regulations on abortion. Finally, I discuss how *Casey*'s conception of the undue burden standard differed from, and purported to strengthen, Justice O'Connor's initial vision of the test.

1. Rational Basis Language in an Undue Burden Opinion.

Certain language in *Casey* implies that rational basis review affects the implementation of the undue burden test. When defining the undue burden standard, the plurality repeatedly used terms like "legitimate interest" and "reasonable" or "rational relationship" that traditionally appear in rational basis cases. For instance, the plurality 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, 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."[126] The terms "valid state interest" and "legitimate ends" strongly evoke rational basis, yet are unmoored in *Casey* from that standard of review. The language of rational basis appears again when the plurality reaffirms *Roe*'s statement

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[122] *Id.* at 891, 896–97.
[123] *Id.* at 898.
[124] *Id.*
[125] Justices Stevens and Blackmun joined the Court's opinion except Part IV (discussing the undue burden standard, rejecting *Roe*'s trimester framework, and reaffirming the state's interest in potential life throughout the pregnancy); Part V-B (holding that the informed consent provision does not constitute an undue burden); and Part V-D (upholding the informed parental consent requirement).
[126] *Id.* at 877.

"that the State has a legitimate interest in promoting the life or potential life of the unborn."[127]

References to rational basis also pepper *Casey*'s implementation of the undue burden test. In partially overruling *Akron I* and *Thornburgh*, the Court noted that requiring abortion providers to supply women with information about fetal development was a "reasonable measure" to ensure that the woman's choice was informed.[128] Likewise, 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 protecting the life of the unborn by . . . ensuring a decision that is mature and informed."[129] Finally, the Court deemed the twenty-four-hour mandatory waiting period a "reasonable measure to implement the State's interest in protecting the life of the unborn," a measure that was not held to amount to an undue burden.[130]

In a case purporting to establish a new standard of constitutional review, the language of rational basis is striking. The Court intended undue burden as a stringent protection for the abortion right, the exercise of which, the plurality held, "must be shaped to a large extent on [the woman's] own conception of her spiritual imperatives and her place in society."[131] However, the Court repeatedly referenced the lowest standard of constitutional scrutiny review. Consequently, some scholars remain "unclear whether *Casey*'s undue burden standard subjects abortion regulations to intermediate scrutiny, or merely to rational basis review."[132] Justice Scalia's dissent distilled this confusion:

> The joint opinion further asserts 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.[133]

Scalia's critique of the plurality's "confusing equation of the two standards" is not unjustified.[134] The Justices' invocation of the language of rational basis is, perhaps, partially responsible for the dissolution of undue burden's rigor and its persistent misinterpretation. Scholars who contend that "the

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[127] *Id.* at 870.
[128] *Id.* at 883.
[129] *Id.* at 883, 885.
[130] *Id.* at 885.
[131] *Id.* at 852; *see also* Part I.C.
[132] Samantha Harper, *"The Morning After": How Far Can States Go to Restrict Access to Emergency Contraception?*, 28 COLUM. HUM. RTS. L. REV. 221, 253 (2006). *See also* Burdick, *supra* note 12, at 831 (noting that the undue burden standard "reduc[ed] the level of review to something more akin to heightened scrutiny or rational basis review").
[133] *Casey*, 505 U.S. at 986 n.4 (Scalia, J., concurring in part and dissenting in part).
[134] *Id.*

Court in *Casey* made no mention of fundamental rights, strict scrutiny, or rational basis,"[135] however, fail to recognize the import of the Justices' decision to include language associated with rational basis. Though the plurality opinion left much implicit, its repeated references to the language of rational basis revealed the Court's intent that rationality review play some role in undue burden analysis.

Analyzed together, I argue, the Court's references to rationality review indicate that rational basis with bite is the appropriate standard for use in undue burden analysis. It is evident that the plurality believed state regulations on abortion must further a genuinely legitimate state interest. Though they did not incorporate this inquiry explicitly into their articulation of the undue burden test, the plurality opinion repeatedly assessed the state's interest to ensure its validity. The state had no legitimate interest, for example, in "giv[ing] to a man the kind of dominion over his wife that parents exercise over their children."[136] Yet, only rational basis with bite can *truly* assess — rather than simply presume — the legitimacy of a state's interest. Under traditional rational basis, lower courts can rely on superficial conjecture about legislative purpose.[137] However, the *Casey* Court's language indicated that the bite's searching inquiry into state interests is most suitable for effective undue burden analysis.[138]

It is equally apparent that the Court deemed crucial a thorough examination of the nexus between the state's regulatory means and ends. The plurality opinion did not limit its inquiry to whether the state's interest was legitimate or its purpose permissible. Instead, it noted repeatedly that certain provisions were reasonable "means" of furthering an approved interest.[139] Inherent in these statements is a substantial analysis of the relationship between the state's interest and its legislation. Although traditional rational basis review technically contains such analysis, only rational basis with bite actually applies it: courts implementing rationality review purport to assess the connection between the state's means and its ends, but they do not in fact

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[135] Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 527 (2011).

[136] *Casey*, 505 U.S. at 898 (majority opinion).

[137] The Court noted that "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." *Id.* at 877 (emphasis added). The plurality opinion's emphasis on furthering and serving the state's interest made clear that lower courts ought not merely to pay lip service to nexus analysis, but instead should inquire whether challenged legislation was a "permissible means of serving" the state's legitimate purpose. *Id.*

[138] *Id.* at 878 (noting that unless it acts as a substantial obstacle, "a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld *if reasonably related to that goal*" (emphasis added)).

[139] *Id.* at 877, 885.

do so.[140] Nexus analysis only truly comes to fruition through rational basis with bite.[141]

Thus, although the Court did not explicitly articulate which version of rational basis review it intended to incorporate, the analysis it favored is not available through traditional rational basis, but, instead, only through rational basis with bite. Exemplary of this distinction is *U.S. Railroad Retirement Board v. Fritz*,[142] which upheld the 1974 Railroad Retirement Act's grandfather clause despite the fact that it awarded only some employees windfall benefits.[143] "Where, as here, there are plausible reasons for Congress' action," the Court wrote, "our inquiry is at an end."[144] In contrast to *Fritz*'s terse analysis stands *Casey*'s searching assessment of congressional means and ends. When analyzing the spousal notification provision, for instance, the Court examined the historical and sociopolitical rationale underlying the legislature's action.[145] Ultimately, it deemed that rationale insufficient to justify the "substantial obstacle" that action placed before pregnant women seeking abortions.[146] In sum, rational basis is "already contained within the undue burden standard,"[147] and rational basis with bite is the iteration of rationality review best equipped to protect the abortion right. In Part II.A, I outline precisely how rational basis with bite relates to undue burden analysis.

2. *The Purpose and Effects Test:* Casey*'s Innovation.*

The second component of the undue burden standard is the purpose and effects test, whose two prongs can operate independently from one another to invalidate unconstitutional abortion regulations. Both prongs are largely empirical. The purpose prong evaluates the state's reason for enacting the challenged statute, determining whether it sought to make abortions more difficult to procure. This prong implicates the legislature's motivation in

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[140] *See, e.g.*, Gunther, *supra* note 8, at 19 (noting that rationality review has "symbolized virtual judicial abdication").

[141] *Id.* at 21 ("Putting consistent new bite into [rational basis review] . . . would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing."). *See also* Mathew Coles, Lawrence v. Texas *& the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 30 (2005) (describing the difference between rational basis and rational basis with bite as whether "the law has some real connection to the state's interest").

[142] 449 U.S. 166 (1980).

[143] *Id.* at 180.

[144] *Id.* at 179.

[145] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992) (majority opinion).

[146] *Id.* at 895.

[147] Metzger, *supra* note 9, at 2089; *see also* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 881 (1994) (noting that undue burden "subsume[d] the application of a rational basis standard of review to regulations that do not impose undue burdens").

regulating abortion. The effects prong, on the other hand, looks not to the state's rationale but to the statute's concrete consequences. How might a twenty-four-hour waiting provision, for instance, practically affect a woman seeking to obtain an abortion? In short, the purpose and effects prongs are the two routes through which a regulation may prove unduly burdensome. If a statute has the purpose of placing a substantial obstacle before a pregnant woman, it is always an undue burden. If it has the effect of placing a substantial obstacle before a pregnant woman, it is similarly invalid.

As I discuss in Part II.C, the purpose prong may play an important role in ensuring that the searching analysis, intended by *Casey*, is faithfully applied. Yet, courts frequently omit purpose prong analysis. It is therefore important to emphasize its indispensability to the undue burden standard. Each prong of *Casey*'s purpose and effects test is self-sufficient and may operate independently from one another. That is, as the Court made clear, *either* an impermissible purpose *or* an unduly burdensome effect is sufficient in itself to invalidate an abortion regulation:

> A finding of an undue burden is 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.[148]

This description reveals that either an impermissible purpose or an impermissible effect is sufficient to invalidate a challenged regulation. 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.[149] Nowhere does the Court imply that a statute must have *both* an impermissible purpose and an impermissible effect to be unconstitutional. Instead, a failure of either prong suffices for invalidity.

3. From Deferential Threshold Inquiry to Stringent Standard of Review.

When defining the undue burden standard, the Justices noted that "the concept of an undue burden has been utilized by the Court as well as individual Members of the Court . . . in ways that could be considered inconsis-

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[148] *Casey*, 505 U.S. at 877 (plurality opinion) (emphasis added).
[149] *Id.*

tent."[150] Scholars agree that "the *Casey* version [of the undue burden standard] is different from any previously articulated,"[151] but few clearly state how and to what extent *Casey* deviates from Justice O'Connor's initial conception in *Akron I* and *Thornburgh*. Two major changes are germane, both of which conceptualize undue burden as a stronger shield for the abortion right. First, whereas O'Connor envisioned undue burden as a threshold analysis, the *Casey* Court elevated undue burden to an independent standard of judicial review.[152] In *Akron I* and *Thornburgh*, O'Connor treated undue burden analysis as the means to determine whether a regulation triggered strict scrutiny or merely rational basis.[153] If a regulation imposed an undue burden on the abortion right, the Court then analyzed the regulation under strict scrutiny.[154] If the regulation imposed no such burden, however, the regulation had only to survive rational basis review.[155]

The *Casey* plurality, however, reimagined undue burden as a discrete and freestanding standard of review. No longer merely the trigger for strict scrutiny or rational basis, undue burden now sufficed to invalidate or uphold abortion regulations on its own. Implicitly, this alteration strengthened the standard. Under O'Connor's concededly nonbinding articulations in dissent, undue burden could only dictate what standard the Court would apply to the regulations before it. Under *Casey*'s binding version of the standard, however, undue burden became an independent tool for evaluating state efforts to police abortion.[156]

The *Casey* Court's second alteration was more overt. O'Connor had defined an undue burden as an "absolute obstacle" or "severe limitation" on the right to an abortion.[157] *Casey*, however, replaced that strong language

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[150] *Id.* at 876.

[151] Burdick, *supra* note 12, at 841.

[152] *See, e.g.*, Brownstein, *supra* note 147, at 879 ("The Court's evaluation of the burden imposed on the right to an abortion is simply elevated to a formal standard without explanation.").

[153] City of Akron v. Akron Ctr. for Reprod. Health Servs. (*Akron I*), 462 U.S. 416, 453, 462 (1982) (O'Connor, J., dissenting) (noting that state legislation must "heavily burden" the abortion right in order to trigger heightened scrutiny and that if no such burden exists, only rational basis applies); *see also* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 134 (1989) (describing O'Connor's vision of undue burden as a "threshold inquiry" that was quantitative, rather than qualitative).

[154] *Akron I*, 462 U.S. at 453, 462 (O'Connor, J., dissenting).

[155] *Id.*

[156] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (noting that "undue burden is the appropriate means" of assessing abortion regulations without mentioning traditional standards of scrutiny).

[157] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) ("An 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.'" (quoting *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting))). *See also* Wharton et al., *supra* note 10, at 331 ("[T]he [*Casey*] plurality rejected the narrow formulation [of undue burden] in Justice O'Connor's prior opinions.").

with the less demanding "substantial obstacle."[158] This change rendered undue burden less deferential to legislative action than O'Connor's original iteration. Whereas few regulations can be said to impose "absolute obstacles" on a woman's ability to procure an abortion, "substantial obstacles" occur more frequently.[159] Consequently, *Casey*'s undue burden standard is — at least facially — more likely to invalidate challenged legislation than O'Connor's early conceptions of the standard. Whereas O'Connor imagined that only the most restrictive regulations would be struck down, *Casey*'s articulation of undue burden revealed its belief that less invasive regulations might still prove unconstitutional.

Casey's articulation of undue burden differed not only from Justice O'Connor's original conception, but also from the Court's three-tiered system of constitutional review. Although the Court did not explicitly situate its new standard of review within that three-tiered regime, the plurality opinion, concurrences, and dissents indicate that the Court understood undue burden as lying somewhere between the deferential rational basis and the punishing strict scrutiny. First, the plurality 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."[160] However, the vigor with which the plurality defended female autonomy and reproductive choice suggested its intent to maintain a rigorous test.[161] "[T]he liberty of the woman," the Court wrote, "is at stake in a sense unique to the human condition and so unique to the law."[162] For this reason, requiring a woman to notify her husband before procuring an abortion would be "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."[163] This language indicates that the Court did not intend to retreat wholly from *Roe*'s protection of a woman's independence and discretion. Instead, it sought to construct a less strict but still vigorous standard capable of defending the abortion right.

In their partial concurrences, Justices Blackmun and Stevens expressed hope 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

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[158] *Casey*, 505 U.S. at 989 (Scalia, J., concurring in part and dissenting in part) ("[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.").

[159] The *Casey* Court, however, noted that a "particular burden is not of necessity a substantial obstacle." *Id.* at 887 (plurality opinion). This strict language, which echoes O'Connor's initially rigid definition of "obstacle," *see id.* at 877, perhaps indicates the Court's intention to apply the undue burden standard narrowly.

[160] *Id.* at 873.

[161] *See, e.g.*, Wharton et al., *supra* note 10, 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").

[162] *Casey*, 505 U.S. at 852 (plurality opinion).

[163] *Id.* at 898.

her own reproductive decisions," Justice Blackmun pointed out, implicitly contending both that the majority had abandoned strict scrutiny and that undue burden would be less capable of protecting reproductive autonomy.[164] However, he applauded the plurality's holding that additional evidence might someday invalidate the challenged regulations under the undue burden standard. "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.'"[165] Justice Stevens was similarly hopeful that undue burden could adequately protect the abortion right. "The future may also demonstrate," he hypothesized, "that [undue burden] . . . will provide a fully adequate framework for the review of abortion legislation."[166] Both Justices imagined that the undue burden standard, correctly applied, could protect the abortion right to the extent that right deserves.

In contrast, undue burden's potential strength prompted Chief Justice Rehnquist to condemn it. Chief Justice Rehnquist stated decisively in dissent that "the Constitution does not subject state abortion regulations to heightened scrutiny."[167] Undue burden, he remarked, "leaves the Court in a position to closely scrutinize all types of abortion regulations"[168] — a comment he would not have made about a standard no stricter than rational basis review, which, as noted in Part I.A, is widely considered a free pass for legislation. Since the rigor of close scrutiny is divorced from the deference of rationality review,[169] Chief Justice Rehnquist's denunciation of undue burden as an agent of such close scrutiny marked it as more searching than rational basis.

In sum, the doctrinal rifts that render *Casey* so conflicted paint undue burden as a "constitutional compromise"[170] between the polar standards of constitutional scrutiny.[171] It is precisely *because* undue burden is a form of

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[164] *Id.* at 930 (Blackmun, J., concurring in part and dissenting in part).
[165] *Id.* at 926.
[166] *Id.* at 920 n.6 (Stevens, J., concurring in part and dissenting in part).
[167] *Id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part).
[168] *Id.* at 945.
[169] *See supra* Part I.A.
[170] *Casey*, 505 U.S. at 945 (Rehnquist, C.J., concurring in part and dissenting in part).
[171] Scholarship also indicates that undue burden is a stricter test than mere rational basis review — one that strongly resembles intermediate scrutiny. *E.g.*, Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 496 (2002) (The *Casey* Court proceeded "under the auspices of a new intermediate standard of review."); 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." (citation omitted)); David D. Meyer, Gonzales v. Carhart *and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57, 65, 68 (2008) (noting that undue burden "was not as weak as some had supposed" — although less rigorous than strict scrutiny, "it wasn't a pushover either"); Mark Moody, *Constitutional Questions Regarding Grandparent Visitation and Due Process Standards*, 60 MO. L. REV. 195, 200 (1995); Melodie Pillitire, *Grandparent Visitation Rights: The Pitfalls and the Promise*, 2 LOY. J. PUB. INT. L. 177, 194–95 (2001) (noting that the plurality intended its new test to "allow a state action to infringe more on a fundamental right than strict scrutiny,

intermediate review that Justice Blackmun expressed his preference for *Roe*'s strict scrutiny and Chief Justice Rehnquist for *Webster*'s rational basis.[172] Had the Court fashioned undue burden as a version of rational basis, on the one hand, Chief Justice Rehnquist would neither have denounced undue burden as "created largely out of whole cloth" nor worried that the test would invalidate abortion regulations with impunity.[173] Had the Court intended undue burden to approximate strict scrutiny, on the other hand, Justice Blackmun would not have argued that "[t]oday, no less than yesterday," the Constitution requires abortion restrictions to withstand "the strictest of judicial scrutiny."[174] The method of implementation I propose is faithful to *Casey*'s compromise yet protective of reproductive autonomy.

II. *Casey*, Confused: Relating Rational Basis with Bite and Undue Burden

Although *Casey* made clear that undue burden analysis is more searching than rational basis, the relationship between those two standards remains poorly understood. By utilizing language common to rational basis cases ("valid interest"; "legitimate ends") in addition to new phrases, such as "substantial obstacle," *Casey* suggested that rational basis review somehow informs undue burden analysis. It did not articulate, however, precisely how rational basis ought to do so. In this Part, I propose a strategic method of implementing the undue burden standard: rational basis with "bite," I contend, should preface the purpose and effects test. I then demonstrate why rational basis with bite, in particular, is appropriate in the reproductive context: the abortion right satisfies the factors that trigger the Court's use of heightened rationality review. Finally, I discuss the relationship between rational basis with bite and the purpose prong. Even if courts choose to omit or alter my proposed method of implementing undue burden, the purpose prong can act as a reasonable substitute for rational basis with bite.

A. *Toward the Best* Casey*: The "Bite" of Undue Burden*

More than a few scholars have viewed the Court's incorporation of rational basis analysis in *Casey* as an illicit method of downgrading the abortion right.[175] Indeed, some view *Casey*'s rationality language as evidence

but less than rational basis review"); Wharton et al., *supra* note 10, at 331, 387 (noting that the Court intended to replace *Roe* with a "rigorous standard" that would provide "meaningful protection for women").

[172] *Casey*, 505 U.S. at 926–27 (Blackmun, J., concurring in part and dissenting in part); *id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part) ("[We] think that the correct analysis is that set forth by the plurality opinion in *Webster* [*v. Reproductive Health Services*, 492 U.S. 490, 520 (1989) (Rehnquist, C.J.) (plurality opinion)].").

[173] *Id.* at 964 (Rehnquist, C.J., concurring in part and dissenting in part).

[174] *Id.* at 926 (Blackmun, J., concurring in part and dissenting in part).

[175] *See, e.g.*, Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 Temp. L. Rev. 1003, 1030 (1993) ("It is neither traditional nor reasonable for a court to approach review

that the Court had abandoned even intermediate scrutiny for abortion regulations.[176] Little, if any, scholarship, however, has considered how rational basis might strengthen undue burden analysis, rendering the test appropriately stringent.

Given the Court's intent to protect rigorously the abortion right and my desire to lend undue burden all the strength it can tolerate, I propose a method of implementing undue burden that incorporates not merely rational basis review, which is of limited utility because it encourages judicial deference, but instead its heightened corollary: rational basis with bite. Heightened rationality review is a valuable component of the undue burden standard that remains grounded in the text and principles of the plurality opinion. Further, rational basis with bite contains nexus inquiry, which is well equipped to target abortion regulations that fail to further the state's interest. Though the *Casey* Court did not explicitly contemplate rational basis with bite, I discuss in Part II.B why the "bite" is especially suitable in the context of reproductive rights jurisprudence. A method of applying the undue burden standard that marshals the vigor of rational basis with bite lends *Casey* all the strength it was meant to have.

I propose to implement undue burden as follows. First, courts should assess the challenged regulation under the heightened form of rational basis review known as "rational basis with bite." If the statute fails to further a permissible state interest under that test, the court need go no further — the legislation is an impermissible invasion of the abortion right. If the statute survives heightened rationality review, however, the court must then analyze it under both the "purpose" and "effects" prongs of the undue burden standard. The court's purpose prong inquiry must be a searching assessment of the legislature's real intent, and its effects prong inquiry must determine whether the regulation places a substantial — not absolute or severe — obstacle before a woman seeking abortion services. If the statute fails either the purpose prong *or* the effects prong, it is an unconstitutional undue burden on the abortion right. By allowing heightened rationality review to provide the nexus analysis absent from the purpose and effect prongs of undue burden, this method is most capable of giving *Casey* its necessary bite.

This formulation requires that courts, potentially, subject legislation to *both* rational basis with bite *and* purpose and effects analysis. It is important to recognize that the purpose and effects prongs do not somehow include rational basis with bite. Instead, they are preceded by it. The undue burden standard will not retain its intended rigor unless rational basis analysis is properly situated *before*, rather than *within*, the two prongs of that test. Al-

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of a fundamental right by first looking at the state's interest, and then selecting the standard of review which matches that interest.").

[176] *See, e.g.*, Metzger, *supra* note 9, at 2032–33 (noting that although some have viewed *Casey* as a form of intermediate scrutiny, "this conclusion seems unlikely given the [Court's] use of rationality review to examine regulations imposing burdens not considered to be substantial obstacles").

though either an impermissible purpose or an unduly burdensome effect is sufficient to invalidate a regulation, a regulation may never survive the undue burden test simply by surviving rational basis with bite. Instead, courts should implement both standards but maintain the distinctions between them. Whereas the purpose and effects test examines the state's means and its ends separately, asking whether each is sufficient in itself, the nexus inquiry of rational basis with bite examines the connection between those means and those ends, assessing the adequacy of the relationship between them.

B. The Abortion Right as a Trigger for Heightened Rational Basis

The Court has yet to define which factors trigger its implementation of rational basis with bite.[177] *Cleburne* and *Plyler* indicate, however, that the Court uses rational basis with bite when it is reluctant to elevate formally the status of a right or a classification, but still perceives "the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment."[178] This analysis comports with scholarship documenting two primary triggers for heightened rational basis: first, classifications that are targeted, if not "quasi-suspect," and second, rights that are significant, if not "quasi-fundamental."[179] Under this theory, the bite "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."[180] Rational basis with bite thus appears to apply to discriminatory legislation the Court is reluctant to examine under formal intermediate or strict scrutiny.

As discussed in Part II.A, to preserve *Casey*'s stringency, rational basis with bite should precede the purpose and effects test of the undue burden standard. Given the complexity of heightened rationality review, however, courts may be reluctant to preface undue burden analysis with the bite.

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[177] *See* Hanafin, *supra* note 20, at 468 ("[T]he triggering mechanism for rational basis with bite is elusive . . . ."). *See also* Smith, *supra* note 29, at 2770 (criticizing "the Supreme Court's failure to articulate its more searching form of rational basis review").

[178] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 (1985) (Marshall, J., concurring in part and dissenting in part); Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class . . . . Nor is education a fundamental right . . . . But more is involved in these cases than the abstract question whether [the challenged statute] discriminates against a suspect class, or whether education is a fundamental right.").

[179] Lawrence v. Texas, 539 U.S. 558, 580 (2004) (O'Connor, J., concurring) (noting 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").

[180] 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* Hanafin, *supra* note 20, at 468 ("The Court has applied a more 'searching scrutiny' to groups of people who do not qualify as a quasi-suspect class but have been subject to unfair treatment."); Pettinga, *supra* note 23, at 801 (arguing that rational basis with bite is only justified "if it is used to review legislation that burdens an important right of a group at least approaching quasi-suspect status").

Scholars arguing for the bite's inclusion in undue burden analysis have neither confronted the Court's unpredictable application of rational basis with bite nor justified the use of such enhanced scrutiny in the context of abortion.[181] It is important, then, to explain why the Court ought to apply rational basis with bite to abortion regulations. Two factors support this application. First, the Court could recognize abortion providers or women seeking abortions as comprising a vulnerable or targeted class under the Equal Protection Clause, and second, the Court could deem the abortion right important under the Due Process Clause.

The first approach is likely unavailing. Although many contend that courts should assess abortion regulations under the Equal Protection Clause rather than the Due Process Clause,[182] equal protection claims have proven unsuccessful.[183] The Fourth Circuit, for instance, has emphasized that "abortion services are rationally distinct from other routine medical services" and that abortion regulations do not impinge upon a fundamental right or a suspect classification.[184] Consequently, states may promulgate regulations that

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[181] *See* Metzger, *supra* note 9, at 2084 (noting that the proposed methodology includes "the rationality-with-bite approach" yet failing to flesh out the Court's use of that standard). In proposing a new formulation of the undue burden standard, Metzger gives short shrift to 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 further analysis into the Court's past use of rational basis with bite and the likelihood of its application to abortion regulations.

[182] *See, e.g.*, David H. Gans, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1900 (1995) (arguing that equal protection analysis should apply in the abortion context); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 125, 127–28 (2007) ("An individual woman's taking control over her sexuality and maternity is part of a large-scale process centered on the status of women as a group."); Eileen McDonough, *The Next Step After* Roe*: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173, 1174–75 (2007) ("[T]he answer to the question of how to strengthen reproductive rights is to add constitutional guarantees under the Equal Protection Clause to the current foundation of abortion rights based upon the Due Process Clause."); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833 (2007) (noting that since *Casey*, "the literature urging the Court to adopt an equality-based framework for analyzing laws regulating reproduction has continued to grow").

[183] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 509–10 (1989) (rejecting the argument that states have an affirmative duty to fund abortions under the Equal Protection Clause and holding that states may use public facilities to promote childbirth over abortion); Harris v. McRae, 448 U.S. 297, 308 (1980) (upholding the Hyde Amendment, which prohibited the use of Medicaid funding for most abortions, under the Equal Protection Clause because indigent women seeking abortions did not constitute a suspect class); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 159 (4th Cir. 2000) (upholding a South Carolina statute mandating licensure and operational requirements for abortion clinics because it neither impinged on a fundamental right nor discriminated against a suspect class); Mary Catherine Wilcox, *Why the Equal Protection Clause Cannot "Fix" Abortion Law*, 7 AVE MARIA L. REV. 307, 316–17 (arguing "that the Supreme Court has conclusively established — and lower courts understand — that policies disfavoring abortion are not ipso facto sex discrimination, and do not discriminate against a suspect class").

[184] *Greenville*, 222 F.3d at 173–74. *Greenville* also cites several Supreme Court cases standing for the same proposition, namely *Harris*, 448 U.S. at 325, and Planned Parenthood v. Danforth, 428 U.S. 52, 80–81 (1976). *See also* Planned Parenthood of Mid-Mo. and E. Kan. v.

single out abortion for unique treatment without running afoul of the Equal Protection Clause. Furthermore, the Court has been reluctant to regard a class as vulnerable, much less suspect; scholars indicate that only a true state animus will justify heightened rationality review.[185] However, litigators have yet to *prove* animus that rises to the requisite level of irrational discrimination or improper prejudice.[186] Finally, scholars have urged the Court to apply the bite to certain disadvantaged groups such as the homeless; these requests have proved unavailing. Advocates have emphasized those groups' "stature in society," "political powerlessness," and "harmful criminalization."[187] Yet none of these factors obviously applies to abortion providers or women seeking abortions, who endure much slyer forms of legislative discrimination that are difficult to demonstrate in court.

More convincing is the argument that the importance of the abortion right itself justifies the application of rational basis with bite. To be sure, *Roe* and its progeny rendered the status of the abortion right contested.[188] Although *Roe* deemed the right fundamental, Justices have since either explicitly declared the right less than fundamental[189] or implicitly downgraded its status by implementing less than the strictest scrutiny.[190] However, the principles and 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.[191]

Dempsey, 167 F.3d 458, 464 (8th Cir. 1999) (noting that discrimination against abortion service providers is "plainly allowed under cases such as *Maher, Harris,* and *Rust*").

[185] *See* Hanafin, *supra* note 20, at 468 ("[T]here is concern that a liberal application of rational basis scrutiny gives courts too much leeway, creating a judicial branch that acts as a super-legislature.").

[186] *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 546 (9th Cir. 2004) (holding that a regulation distinguishing between abortion providers and other medical practitioners did not violate the Equal Protection Clause because it had no "stigmatizing or animus based purpose").

[187] Hanafin, *supra* note 20, at 436–37; *see also id.* (arguing generally that "equal protection claims advanced by homeless individuals" should merit "an enhanced version of rational basis scrutiny").

[188] *Compare* Burdick, *supra* note 12, at 831 (arguing that *Casey* "effectively abolishes the fundamental status of a woman's right to choose"), *with* Brownstein, *supra* note 147, at 872 (contending that "the 'undue burden' standard of the *Casey* plurality is reflected in one form or another throughout the fundamental rights case law of the past forty years," and implying that the *Casey* Court accepted abortion as a fundamental right).

[189] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("We think, therefore . . . that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a 'fundamental right' that could be abridged only in a manner which withstood 'strict scrutiny.'").

[190] Borgmann, *supra* note 97, at 681 (noting that the *Casey* Court "altered the very nature of the abortion right, demoting it from a fundamental right to something more enigmatic and certainly more fragile").

[191] *See, e.g.*, *Casey*, 505 U.S. at 869 (plurality opinion) (discussing the "urgent claims of the woman to retain the ultimate control over her destiny and her body"); Priscilla J. Smith, *Giving Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 389 (2011) (describing the abortion right as "weakened but amazingly resilient").

First, the abortion right may remain fundamental even though it no longer triggers strict scrutiny. *Casey* did not directly address whether the abortion right is fundamental, and it remains unclear whether that silence implicitly rejected *Roe*'s categorization of abortion as a fundamental right, implicitly accepted that holding, or implicitly downgraded the status of the abortion right while leaving it formally undefined.[192] If the right remains fundamental, then, *a fortiori*, heightened scrutiny likely applies and rational basis with bite is certainly appropriate. Numerous scholars have denounced the Court's abandonment of strict or even intermediate scrutiny in the abortion context, condemning undue burden as an impermissibly deferential standard for a right of the highest order.[193] If the abortion right is indeed fundamental, therefore, it is hardly unreasonable for courts to apply mere rational basis with bite. Though still a departure from the formal heightened scrutiny afforded to other important rights, the Court's use of the bite in the context of undue burden is preferable to its application of the purpose and effects test alone.

Even if the abortion right is less than fundamental after *Casey*, it is still substantial enough to merit rational basis with bite. The plurality opinion describes the right to reproductive autonomy in impassioned language. A woman's pregnancy "is too intimate and personal for the State to insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[194] The State could not fully regulate a woman's right to terminate her pregnancy, the Court went on, because "the mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."[195] This language reveals the Court's intent to give the abortion right "some real substance."[196]

Indeed, the Court refers to the state's interest in language traditionally associated with intermediate or even strict scrutiny: the plurality opinion thrice deems the state's interest "substantial" rather than merely "legitimate,"[197] twice cites *Roe*'s description of that interest as "important,"[198] and once calls the interest "profound."[199] The Court's elevation of the state's interest above mere "legitimacy" perhaps acknowledges that only heightened interests may infringe upon substantial rights. If this is so, the Court

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[192] Wharton et al., *supra* note 10, at 321–22 (discussing the uncertain status of the abortion right after *Casey*).

[193] *See, e.g.*, Schneider, *supra* note 175, 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.").

[194] *Casey*, 505 U.S. at 852.

[195] *Id.*

[196] *Id.* at 869.

[197] *Id.* at 876.

[198] *Id.* at 871, 875.

[199] *Id.* at 878.

would be more than justified in deeming the right to abortion analogous to the right to homosexuality in *Romer* and *Lawrence* and the right to education in *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.

C. The Purpose Prong as a Substitute for Rational Basis with Bite

Given *Casey*'s contention that "abortion is a unique act" that is "unique to the law," courts may decline to adopt my methodology and omit rational basis with bite from undue burden analysis. Because abortion is sui generis, they might reason, the bite's ordinary triggers are less persuasive. Scholars often characterize rational basis with bite as a response to judicial perceptions of injustice, but current courts are unlikely to deem abortion legislation as contraventions of the principles of the Fourteenth Amendment.[200] However, even if a court should preface its purpose and effects analysis with traditional rationality review or incorporate no rational basis whatsoever, the purpose prong may suffice to invalidate problematic legislation. Understanding this point requires outlining the relationship between the bite and the purpose prong.

As discussed above, traditional rationality review encourages courts to construct legitimate legislative rationales to replace a state's potentially improper interest. Under both rational basis with bite and purpose prong analyses, however, a court may only examine the legislature's *actual* interest or purpose.[201] Whereas ordinary rational basis has been branded "perfunctory judicial hypothesizing,"[202] purpose prong and rational basis with bite analyses are strictly fact-specific.[203] Because the bite's strictness arises from its searching assessment of the state's actual interest,[204] a similar strictness may inhere in the same element of the purpose prong. Even should courts apply a toothless version of rational basis in their undue burden analysis, therefore, the purpose prong's similarity to rational basis with bite may permit courts to examine the state's interest with at least some rigor.

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[200] *See supra* note 183 and accompanying text.

[201] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 626, 632 (1996) (deeming Colorado's prohibition against legislation protecting homosexuals from discrimination "inexplicable by anything but animus," although the state had argued it only intended to place homosexuals and heterosexuals on a level playing field); Okpalobi v. Foster, 190 F.3d 337, 356 (5th Cir. 1999) (noting that "established methods for assaying a legislature's purpose are valid in the abortion context" and noting that courts may deem a purpose improper even if the legislature does not admit to such a purpose).

[202] Gunther, *supra* note 8, at 21.

[203] *See* Brownstein, *supra* note 147, at 885 ("The mere recitation of a presumptively valid purpose should not be allowed to mask an impermissible state goal [under *Casey*].").

[204] *See, e.g.*, Pettinga, *supra* note 23, 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").

Importantly, however, the purpose prong and rational basis are distinct: the legitimacy of the state's interest and the permissibility of its purpose are closely related but not identical. The distinction is borne out by *Casey*'s use of the word "purpose" rather than "interest" when referring to the state's regulatory goals. Notably, the notion of the state's "purpose" is different in the reproductive context from ordinary references to the state's "interest." Whereas under rational basis a state's interest is assessed in light of the state's traditional police powers, *Casey* requires that a regulation be motivated by a permissible purpose *in the context of abortion*. The appropriate analysis, Justices O'Connor, Souter, and Kennedy made clear, is whether the state's *purpose* was to hinder autonomous reproductive choice, and not whether the legislation was reasonably related to any conceivably legitimate state interest.[205] A generally unobjectionable *interest* in protecting maternal health, for instance, might be improper under *Casey* if the legislature's *purpose* was to hamper a woman's ability to procure an abortion. In sum, the purpose prong properly applied may be a reasonably effective substitute for rational basis with bite. Both the purpose prong and rational basis with bite require the court to engage in a searching analysis unclouded by legislative deference or judicial speculation.

III. The "Bite" in Action: *Casey*'s Potential

Having outlined what I believe to be the most effective method for implementing undue burden, I will demonstrate its benefits by means of several case studies. First, I use Texas's recent legislation mandating ultrasounds to illustrate how current abortion regulations are often poorly tailored to meet the state's interest, rendering nexus inquiry especially valuable for reviewing courts. Next, I analyze the Ninth Circuit's decision in *Tucson Women's Clinic v. Eden*,[206] the Eighth Circuit's decision in *Planned Parenthood of Greater Iowa, Inc. v. Atchison*,[207] and the Seventh Circuit's decision in *Wisconsin v. Doyle*[208] — all of which apply undue burden according to my method.

A. Texas's House Bill No. 15: The Poor Tailoring of Current Abortion Statutes

During its 2011 Session, the Texas Legislature enacted House Bill No. 15 (the Act),[209] which requires, among other things, that physicians perform

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[205] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).
[206] 379 F.3d 531 (9th Cir. 2004).
[207] 126 F.3d 1042 (8th Cir. 1997).
[208] 162 F.3d 463 (7th Cir. 1998).
[209] 2011 Tex. Gen. Laws 342 (codified as Tex. Health & Safety Code § 171.001 *et. seq.* (West 2011)).

sonograms prior to an abortion.[210] First, the Act provides that at least twenty-four hours prior to an abortion, the physician who is to perform the procedure must provide the pregnant woman with certain written and oral informational materials,[211] including a comprehensive list of healthcare providers that offer sonogram services but do not themselves perform abortions.[212] During the same time frame, the physician must also perform a sonogram and display the visual results to the woman, simultaneously describing to her "the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs."[213] Finally, the physician must "make[ ] audible the heart auscultation [heartbeat]."[214]

The statute is limited in only two ways. First, the physician may perform an abortion without providing a sonogram in cases of medical emergency, which the Act defines as a "life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that . . . places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[215] Although this exception formally encompasses both a woman's life and her health, the health exception as written is particularly stringent. A woman's health may be endangered in significant ways that do not seriously risk the substantial impairment of her major bodily functions. Only the most severe medical conditions, therefore, rise to the level required by the Act before a physician may bypass the sonogram requirement.

Second, the statute provides the pregnant woman an unusual "opt-out" from several statutory requirements.[216] First, she may "choose not to view" the printed materials.[217] Second, she may "choose not to view" the sonogram images.[218] Finally, and most notably, she may "choose not to hear" the heart auscultation provided with the sonogram.[219] Read in conjunction with the statutory provisions discussed above, however, the woman's right "not to view" or "not to hear" does not allow her to request that the doctor *not* distribute the printed materials or *not* complete the sonogram.[220] Instead,

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[210] Tex. Health & Safety Code Ann. § 171.012.
[211] *Id.* at § 171.012(b).
[212] *Id.* at § 171.012(a)(3)(B)(iv).
[213] *Id.* at § 171.012(a)(4)(A)–(C).
[214] *Id.* at § 171.012(a)(4)(D).
[215] *Id.* at § 171.003(3).
[216] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573, 583 (5th Cir. 2012).
[217] Tex. Health & Safety Code Ann. § 171.0122(a) (West 2011).
[218] *Id.* at § 171.0122(b).
[219] *Id.* at § 171.0122(c).
[220] Chief Judge Jones noted the distinction between requiring physicians to ensure that women *view* the images and to ensure that they display the images so they *may be viewed*. Physicians are always under the obligation to do the latter. If women wish not to see the images presented, it is incumbent upon them to avert or cover their eyes in order to fulfill the statutory language. *Tex. Med. Providers*, 667 F.3d at 583.

in order "not to view," she must avert her eyes, and in order "not to hear," she must cover her ears. Even if she does so, the doctor must still place pamphlets in front of her, display sonogram images to her, and play the sound of the fetal heartbeat for her.

Judge Sam Sparks of the Western District of Texas found that the Act's compelled speech requirements were not justified by sufficiently important state interests and thus were unconstitutional.[221] He began by noting that *Casey* "did not . . . give governments *carte blanche* to force physicians to deliver, and force women to consider, whatever information the government deems appropriate."[222] The Texas Act imposed requirements "both more onerous, and less medically relevant"[223] than those at issue in *Casey*, and the requirements were not "particularly relevant to any compelling government interest."[224] Furthermore, Judge Sparks held that the Act's compelled disclosure provision and its selective opt-out provision, read in conjunction, were unconstitutionally vague.[225] Due to the "troubling uncertainty" these sections create, Judge Sparks found the Act made it difficult for a physician to determine his affirmative duty under the Act.[226] The severity of the criminal penalties attached to violations of these provisions rendered this uncertainty constitutionally impermissible.[227]

The Fifth Circuit vacated and remanded. "[I]nformed consent laws that do not impose an undue burden," the court noted, "are permissible if they require truthful, nonmisleading, and relevant disclosures."[228] The court found it "obvious" that sonograms, fetal heartbeats, and medical descriptions constituted "the epitome" of truthful, relevant information.[229] Furthermore, Chief Judge Edith Jones disagreed with the court below that the tension between the disclosure and opt-out provisions rendered the statute impermissibly vague.[230] Instead, she held that the sections constituted "a harmonious pair of regulation and exception."[231] The district court failed to recognize that:

> the physician's unconditional obligations are merely to display images so they *may* be viewed, to provide an *understandable* explanation, and to *make audible* the auscultation. Section

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[221] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011), *vacated*, 667 F.3d 570 (5th Cir. 2012), *amended by* No. A-11-CA-486-55, 2012 WL 373132 (W.D. Tex. Feb. 6, 2012).

[222] *Id.* at 972.

[223] *Id.*

[224] *Id.* at 974.

[225] *Id.* at 967.

[226] *Id.*

[227] *Id.*

[228] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012).

[229] *Id.* at 577–78.

[230] *Id.* at 583.

[231] *Id.*

> 171.012(a)(4) specifically does *not* require the physician to ensure the woman *views* the images, that she *understands* the explanation, or that she *listens* to the auscultation.[232]

Jones emphasized that physicians need not ensure that women absorb or comprehend the information before them. For this reason, she held, there was no problematic tension between the opt-out provision and the physician's requirements.

Importantly, the plaintiffs chose not to allege an undue burden violation under *Casey*.[233] This decision likely reflects their recognition that, under *Casey*, compelled disclosure and informed consent provisions tend not to place substantial obstacles between a woman and the abortion she seeks.[234] Thus, under undue burden analysis as typically conducted, the Act is likely constitutional. Women are ultimately no less capable of obtaining abortions because they must receive certain information or view certain images beforehand, however emotionally trying the process.

Had the court analyzed the statute under rational basis with bite, it may have reached a different result. Chief Judge Jones emphasized information's profound importance in the abortion context, noting that informed consent laws are significant because they allow women to make decisions based on complete knowledge.[235] Indeed, "[d]enying [pregnant women] up to date medical information is more of an abuse to her ability to decide than providing the information."[236] Although both Judge Sparks and Chief Judge Jones recognized the apparent contradiction between the Act's compelled disclosure and selective opt-out provisions,[237] neither applied the nexus requirement of rational basis with bite. Doing so would have revealed the Act's strained logic: the selective opt-out provisions render the compelled disclosure provision moot, thwarting the legislature's purported intent to help pregnant women understand available choices. Permitting a woman to cover her ears while a doctor recites information or plays a fetal heartbeat or cover her eyes while a doctor shows her written material contradicts the statute's purported purpose. A woman with closed eyes or covered ears is unable to receive the information the legislature deemed crucial. Thus, the opt-out provisions render the statute ill-tailored to meet the Texas Legislature's asserted commitment to ensuring that pregnant women are well-informed.

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[232] *Id.*

[233] *See* Plaintiff's Motion for Preliminary Injunction, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942 (W.D. Tex. 2011) (No. 1:11-cv-00486-SS).

[234] *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (striking down under *Casey* a preliminary injunction against a South Dakota statute's compelled disclosure provisions); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992) (plurality opinion) (upholding Pennsylvania's informed consent provision and noting prior decisions' tendency to do the same).

[235] *Tex. Med. Providers*, 667 F.3d at 579.

[236] *Id.*

[237] *See id.* at 583; Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 967 (W.D. Tex. 2011).

Indeed, the Act is not only poorly tailored to the legislature's articulated ends, but is also well-tailored to an improper state interest. Given the conflicted relationship between the compelled disclosure and opt-out provisions, the Act's purpose appears to be to shame women for exercising the abortion right or make abortions more difficult to procure, both impermissible state interests under *Casey*.[238] Thus, the Texas statute is unconstitutional not only because it fails to further Texas' legitimate interest in providing women with true, accurate information about abortion services. The statute fails again because it *actually* furthers an unconstitutional interest in inflicting coercive emotional distress upon pregnant women. A doctor may fulfill her statutory obligations even if a pregnant woman has received no information from her whatsoever. Yet a pregnant woman must endure the recitation or viewing of information, even with eyes averted or ears plugged.[239] The state's interest in the infliction of such an experience on pregnant women hardly constitutes a legitimate governmental purpose contemplated by *Casey*.

By encouraging the court to ask whether abortion regulations *actually* further the government's stated interest, therefore, nexus analysis may expose the state's real interest, which may be more insidious than either its articulated interest or the interest the court articulates for it.[240] If, as is true of H.B. 15, nexus analysis reveals that the legislature's chosen means poorly further its articulated ends, courts are more likely to seek out the legislature's actual goals. This searching inquiry into legislative ends better effectuates *Casey*'s mandate that a statute have neither the effect *nor* the purpose of placing a substantial obstacle between a woman and an abortion.[241] Rational basis with bite thus buttresses purpose prong analysis and aids the court in uncovering true legislative purpose.

B. Successful Appellate Implementations of Casey

Three appellate decisions apply the undue burden test according to this Note's suggestions. First, the Eighth Circuit correctly recognized the distinction between rational basis review and the purpose prong. In *Planned Parenthood of Greater Iowa, Inc. v. Atchison*,[242] the Eighth Circuit invalidated a state statute requiring family planning clinics to obtain certificates of

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[238] *See Casey*, 550 U.S. at 871 (plurality opinion) (noting the state's permissible interests in protecting the health of the woman and preserving the potentiality of fetal life).

[239] *See* Borgmann, *supra* note 97, at 324 ("Women must now go through a kind of public shaming in order to 'earn' their abortions. They are forced to endure state-scripted speeches from their physicians conveying the state's claim that an abortion kills a child.").

[240] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); N.Y. Transit Auth. v. Beazer, 440 U.S. 568, 610–11 (1979) (White, J., dissenting).

[241] *See Casey*, 505 U.S. at 877 (plurality opinion) (noting that 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*" (emphasis added)); *see also id.* at 917 (Stevens, J., concurring in part and dissenting in part) (noting that the Court has "consistently rejected state efforts to prejudice a woman's choice").

[242] 126 F.3d 1042 (8th Cir. 1997).

need (CON) — legal documents authorizing a medical facility for a proposed project — for new clinic construction. The court began with a rational basis inquiry, declaring that "CON laws in general have been recognized as a valid means of furthering a legitimate state interest."[243] Only after establishing that the challenged regulation survived rational basis review did it proceed to the separate question of whether that regulation served a permissible legislative purpose. Because the statute, as interpreted, had the "intended effect of impeding or preventing access to abortions,"[244] the court found, it contravened *Casey*'s mandate that abortion regulations not seek merely to make it more difficult for women to obtain abortions. Although *Atchison*'s preliminary rational basis inquiry was deferential rather than searching, it demonstrated how a rigorous purpose prong analysis can compensate for inadequate rationality review, as discussed in Part II.C.

One year later, the Seventh Circuit, with Judge Richard Posner writing for the panel, struck down a statute under heightened rationality review without ever having to reach the purpose and effects test. In *Planned Parenthood of Wisconsin v. Doyle*, the court granted a preliminary injunction against 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."[245] The opinion begins with *Casey* and observes that the challenged regulation "impermissibly burdens the constitutionally recognized right to an abortion."[246] However, Judge Posner then invalidated the statute using rational basis with bite.[247] "Even if the standard for judicial review of state abortion laws . . . were merely that of rational relation to a legitimate state interest," Posner pointed out, "Wisconsin's partial birth statute would be in trouble."[248] Because the statute was neither "rationally designed to protect fetal life" nor "rationally related" to any other stated interest, the court held, a preliminary injunction was appropriate where legislation was "arbitrary to the point of irrationality."[249] Not merely deferring to legislative wisdom, Posner instead analyzed the actual relationship between the state's regulatory ends and its chosen means. In addition, he assessed the legislature's motives skeptically, questioning "how a rational legislature" could morally distinguish between the

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[243] *Id.* at 1048.
[244] *Id.* at 1049.
[245] 162 F.3d 463, 471 (7th Cir. 1998).
[246] *Id.* at 466.
[247] *See, e.g.*, Eric A. Johnson, *Habit and Discernment in Abortion Practice: The Partial-Birth Abortion Ban Act of 2003 as Morals Legislation*, 36 RUTGERS L.J. 549, 557 (2005) (emphasizing Judge Posner's "skeptical view" of the statute's "underlying rationale" and his searching inquiry into whether the state's interest was legitimate).
[248] *Doyle*, 162 F.3d at 470.
[249] *Id.* at 471.

abortion method forbidden by the statute and other methods left unregulated.[250]

Doyle exemplified how a statute's failure to pass heightened rationality review can negate the need for purpose and effects analysis. Because Wisconsin's statute failed nexus inquiry in that it did not 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. *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.[251] That these courts both invalidated the challenged legislation further demonstrates that the bite and the purpose prong, applied correctly, can render undue burden a rigorous tool of judicial scrutiny.

Finally, the Ninth Circuit's opinion in *Tucson Woman's Clinic v. Eden*[252] demonstrated a sophisticated understanding of the undue burden test. *Eden* confronted the claims of Arizona physicians, who alleged that the state's regulatory abortion scheme violated their Fourth and Fourteenth Amendment rights.[253] The court began with a section titled "When the Undue Burden Standard is Triggered,"[254] demonstrating a rare willingness to engage in important preliminary analysis. The court noted the limitations inherent in mimicking *Casey*'s application of the undue burden standard when faced with other regulations. "[B]ecause *Casey* largely dealt with a law aimed at promoting fetal life," the court pointed out, "its application of the 'undue burden' standard is often not extendable in obvious ways to the context of a law purporting to promote maternal health."[255] Already, the court had avoided a common pitfall: by realizing that *Casey*'s analysis is not automatically appropriate, the circuit judges declined to apply the plurality's results mechanically to the regulations at hand as discussed *infra* in Part IV.

Furthermore, in distinguishing between fetal life and maternal health, the *Eden* court engaged in a sophisticated analysis of rational basis's role in the undue burden standard. On the one hand, the court reasoned, any obstacle an abortion regulation places in a woman's path will serve the interest in fetal life by preventing some women from obtaining abortions.[256] On the other hand, however, a law seeking to promote maternal health "that is

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[250] *Id.* at 470. Posner mentions, inter alia, the following legal methods of performing abortions: the first trimester "D&C," or dilation and curettage, which involves scraping or suctioning the fetus from the uterus; the second trimester "D&E," or dilation and extraction, which involves crushing the fetal skull; and the third trimester procedure that involves either injecting chemicals into the fetus' heart or draining the fetus' spinal fluid through a hole drilled in its cranium. *Id.*

[251] *See id.* at 470; Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1048–49 (8th Cir. 1997).

[252] 379 F.3d 531 (9th Cir. 2004).

[253] *Id.* at 536.

[254] *Id.* at 539.

[255] *Id.*

[256] *Id.* at 540.

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*."[257] Inherent in this statement is the recognition that nexus inquiry plays a significant role in undue burden analysis. Whereas ordinary purpose prong analysis does not assess the regulation's relationship to the state's purpose, the *Eden* court instead correctly asked the question posed by rational basis with bite: are the state's ends reasonably furthered by its means?

The court went one step further, clarifying how heightened rationality review related to the application of *Casey*. "The undue burden standard is not triggered at all," the court remarked, "if a purported health regulation fails to rationally promote an interest in maternal health on its face."[258] This understanding of *Casey* — that a challenged regulation must withstand the bite before being scrutinized under the purpose and effects prongs — accurately distills the undue burden standard. By interpreting rational basis with bite as a threshold analysis whose failure negates the need for further review, the Ninth Circuit recognized that any statute that fails rational basis review *must necessarily* also fail undue burden. If a statute fails to promote rationally a legitimate state interest, it is already invalid. No additional analysis is necessary.

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.[259] Scholars, too, emphasize that rifts between *Casey*'s articulation of undue burden and its own application of that test have

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[257] *Id.* (emphasis added).

[258] *Id.*

[259] *E.g.*, A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 714 (7th Cir. 2002) (Wood, J., dissenting) ("The difficulty here is that there is no single independent variable that will show 'undue burden.'"); Planned Parenthood of the Rocky Mountains Servs. Corp. v. Owens, 287 F.3d 910, 931 (10th Cir. 2002) (Baldock, J., dissenting) ("[T]he Justices have struggled to articulate meaningful [abortion] standards for lower courts to apply."); Planned Parenthood of S. Ariz. v. Lawall, 180 F.3d 1022, 1025 (9th Cir. 1999) ("There is much debate over the meaning of *Casey*."); Karlin v. Foust, 188 F.3d 446, 480 (7th Cir. 1999) ("The difficulty lies, however, in determining what exactly is meant by an 'undue' burden."); Manning v. Hunt, 119 F.3d 254, 260 (4th Cir. 1997) ("Subsequent to *Roe* . . . no one standard of review [for abortion regulations] has secured a solid majority of the Court . . . . The 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."); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 212 (6th Cir. 1997) (Boggs, J., dissenting) ("Some [reproductive] choices, however, remain within the state's legislative power. [But] [t]hese choices have not always been well delineated by the Court . . . ."); 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."); 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

rendered lower courts unable to interpret the plurality consistently.[260] Even some Justices, divided as to the correct standard of review, acknowledged that the plurality opinion lacked clarity as to how precisely undue burden ought to be applied.[261]

This well-documented confusion renders my proposed method of implementation both timely and necessary. *Casey*'s mixed messages have led courts to misapply *Casey* in a plethora of ways: some fail to engage in independent factfinding or reflexively apply *Casey*'s holdings after cursory analysis, while others rely on biased moral premises or apply undue burden as a threshold analysis rather than as an independent standard of review.[262] Others mimic *Casey*'s use of rational basis language but misconstrue the role of rationality review within undue burden, while still others construe the purpose prong as rational basis in disguise. Most egregiously, courts sometimes omit nexus analysis, rational basis, or purpose prong analysis entirely.

This Part reviews certain Supreme Court and appellate decisions that apply the undue burden test to state regulations on abortion, and analyzes those cases through the lens of rational basis with bite and its 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 flawed restrictions on abortion, courts that neglect or misapply rational basis or purpose prong analysis improperly uphold unconstitutional legislation. Nexus analysis is crucial to effective undue burden analysis because it

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abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution.").

[260] *See, e.g.*, 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."); Borgmann, *supra* note 97, at 681 ("*Casey*'s standard lacks content, which makes it both difficult to apply and susceptible to manipulation."); Brownstein, *supra* note 147, at 878 ("The description of the 'undue burden' test in the joint opinion is, unfortunately, not free from ambiguity."); Burdick, *supra* note 12, 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."); Schneider, *supra* note 175, at 1004 ("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.") Wharton et al., *supra* note 10, at 323 (noting that the Court "stumbled in its efforts to adequately clarify the contours of the undue burden standard").

[261] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion) (noting that the Court and individual Justices had previously used the undue burden standard "in ways that could be considered inconsistent"); *see also id.* at 945 (Rehnquist, C.J., concurring in part and dissenting in part) ("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."); *id.* at 985–87 (Scalia, J., concurring in part and dissenting in part) (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").

[262] Wharton et al., *supra* note 10, at 385 (listing lower courts' errors in implementing *Casey*).

targets the most frequently problematic element of abortion regulation, as discussed in Part II.A. Omitting nexus analysis denies *Casey* its rightful bite because regulations without unduly burdensome purposes or effects may still fail to further reasonably 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 vindication of *Casey*'s central principles.

A. Gonzales v. Carhart*: Diminishing* Casey

Any effort to understand the undue burden standard must confront the Supreme Court's most recent application of that test in *Gonzales v. Carhart*.[263] *Gonzales* addressed the federal Partial-Birth Abortion Ban Act of 2003, which, under the Interstate Commerce Clause, criminalized the knowing performance of a particular method of late-term abortion.[264] The Court upheld the Act against facial challenges of vagueness and overbreadth. Because the Act "defines the line between potentially criminal conduct on the one hand and lawful abortion on the other," Justice Kennedy wrote, the Act "is not vague."[265] Furthermore, the Court found that the Act was not unduly burdensome despite its broad prohibitions on late-term abortions.[266]

Gonzales began with an accurate recitation of *Casey*'s two-pronged purpose and effects test:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.[267]

The Court then discussed the Act's purposes, citing the government's legitimate interests in maintaining the integrity of the medical profession, protecting the potential life of the fetus, demonstrating respect for human life, and preserving the emotional well-being of the pregnant woman.[268] Justice Kennedy noted that "[i]t was reasonable" for Congress to decide that partial-birth abortion "perverts a process during which life is brought into the world."[269] Ultimately, the Court concluded that the congressional purpose of the Act was *not*, as *Casey* proscribed, to place a substantial obstacle

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[263] 550 U.S. 124 (2007).
[264] 18 U.S.C. § 1531 (2003).
[265] *Gonzales*, 550 U.S. at 149–50.
[266] *Id.* at 156.
[267] *Id.* at 158.
[268] *Id.* at 128–29.
[269] *Id.* at 160.

before a woman seeking abortion services.[270] Next, the Court considered the Act's effects, accurately stating that "[t]he Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right."[271] Because whether the Act created significant health risks for women was "a contested factual question," the Court held, deference to the legislature was appropriate; the Act's effects were not unduly burdensome.[272]

Gonzales gained notoriety as the first case to uphold an abortion regulation entirely lacking an exception for women's health. "[F]or the first time since *Roe*," wrote Justice Ginsburg in a scathing dissent she read from the bench, "the Court blesses a prohibition with no exception safeguarding a woman's health."[273] Justice Kennedy emphasized, however, that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women," which would necessitate a health exception.[274] For this reason, he noted, a "zero tolerance policy" would endanger legitimate abortion regulations if outliers in the medical profession were "disinclined" to agree.[275]

Because *Gonzales*' rejection of a health exception requirement so startled the legal community,[276] few have examined the impact *Gonzales* had on the undue burden standard itself. Though *Gonzales* correctly separated purpose and effects analysis, it sorely misconstrues the purpose prong as merely an assessment of the legitimacy of the state's interest.[277] By declining to inquire whether the state's *actual* purpose was permissible and neglecting to engage in substantial nexus analysis, the *Gonzales* Court omitted those analyses that would have proved most dangerous to the statute. Indeed, in her dissent, Justice Ginsburg pointedly noted the absence of nexus analysis in the majority opinion. Although the Court purported to assess whether the Act furthered the state's legitimate interest in protecting fetal life, she wrote,

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[270] *Id.* ("In sum, we reject the contention that the congressional purpose of the Act was to place a substantial obstacle in the path of a woman seeking an abortion." (internal quotations omitted)).

[271] *Id.* at 161.

[272] *Id.*

[273] *Id.* at 171 (Ginsburg, J., dissenting).

[274] *Id.* at 162 (majority opinion).

[275] *Id.* at 166. Scholars, however, have repeatedly noted that the vast body of medical evidence indicates that, in certain circumstances, partial-birth abortions are indeed necessary to protect the health of pregnant women. Emphasizing the district court's thorough findings in *Carhart v. Stenberg*, 11 F. Supp. 2d 1099 (D. Neb. 1998), Justice Ginsburg lamented the numerous factual errors in the Act, and called Justice Kennedy's opinion a "bewildering" departure from "longstanding precedent" that gave "short shrift to the records before us." *Id.* at 179 (Ginsburg, J., dissenting).

[276] *See, e.g.*, Smith, *supra* note 191, at 396 (noting that *Gonzales* presented an "unexpected twist" when it "open[ed] a crack in the door to expanding the ability to limit abortions based on a state interest in women's health").

[277] *See* Meyer, *supra* note 171, at 83 ("[T]he [*Gonzales*] Court underscored the deferential nature of its review by infusing its opinion with the language of rational-basis review.").

in fact "the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[278] Justice Ginsburg identifies the opinion's central flaw. By claiming fidelity to *Casey* yet omitting nexus analysis, the Court ignored the test necessary to determine whether the statute actually furthered the state's interest.

Indeed, nexus inquiry would perhaps have invalidated the Partial-Birth Abortion Ban Act. *Gonzales*'s purpose prong analysis emphasizes the state's interest in ensuring that women seeking abortions are well-informed about partial-birth procedures. Justice Kennedy notes that "[i]t is . . . precisely [the] lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the state."[279] Tellingly, Justice Kennedy reserves his strongest prose for what he saw as the dire consequences of uninformed abortions:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed the doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming human form.[280]

This language implies that the state's most legitimate interest with regard to abortions is in ensuring that women are well-informed before they seek late-term abortions. Justice Kennedy emphasizes the importance of "dialogue that better informs . . . expectant mothers" about the nature of partial-birth abortions,[281] and praises the regulation for the "knowledge it conveys."[282] The purpose prong inquiry, as a whole, clearly indicated that the Court was most concerned that women would undergo medical procedures they did not fully understand.

The state's chosen regulatory *means*, however, poorly match the Court's articulated regulatory ends. If the government primarily sought to provide adequate pre-procedure information, an informed consent statute may have been more appropriate. However, the Court considered and upheld a ban on an entire procedure. A regulation criminalizing all partial-birth abortions insufficiently addresses the "lack of information" which troubled Justice Kennedy.[283] Instead, such a regulation implies a bare desire to "reduc[e] the absolute number of late-term abortions."[284] Had the Court in good faith ana-

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[278] *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting). Justice Ginsburg further criticized the majority for allowing moral bias to taint its impartiality, noting pointedly, "the concerns expressed [by the majority] are untethered to any ground genuinely serving the Government's interest in preserving life." *Id.* at 182.

[279] *Id.* at 159 (majority opinion).

[280] *Id.* at 159–60.

[281] *Id.* at 160.

[282] *Id.*

[283] *Id.* at 159.

[284] *Id.* at 160.

lyzed the Act under rational basis with bite, therefore, it might have held that the Act was ill-tailored to suit the government's interest. If that had been the case, the Court need not have reached purpose and effects analysis to recognize the Act's flaws.

Until the Supreme Court again has occasion to implement the undue burden standard, it is difficult to predict whether *Gonzales* permanently emasculated that standard or whether it simply represents a momentary departure from *Casey*'s optimal application. As per Part I.A, to the extent that *Gonzales* diminished the potential vigor of the undue burden standard, it should not have done so. Had the Court prefaced its undue burden analysis with the bite, it would likely have recognized the Act's unconstitutionality under *Casey*. *Gonzales* thus demonstrates the tremendous value of including rational basis with bite in undue burden analysis.

B. Incorrect Implementation of Rational Basis and Purpose Prong Analyses

Gonzales omitted nexus inquiry entirely. More common, however, are cases that confuse the distinction between rational basis review and purpose prong analysis. The Seventh Circuit's *Karlin v. Foust*[285] exemplifies how courts have misconstrued the relationship between these two discrete inquiries. *Karlin* is frustrating because the court correctly articulates rational basis's relationship to undue burden analysis: an abortion regulation can only survive a purpose prong analysis "if it is a reasonable measure designed to further the state's legitimate interest . . . provided that it cannot be shown that the legislature deliberately intended the regulation to operate as a substantial obstacle to women seeking abortions."[286] Although the language of rational basis is somewhat intertwined with the language of purpose, the court appears to recognize that the reasonableness of a regulation's relationship to the state's interest is separate from the legislature's specific intent to make abortions more difficult to procure.

However, the *Karlin* court did not make good on its largely accurate restatement of *Casey*. The court held that, "[a]bsent some evidence demonstrating that the stated purpose is pretextual, our inquiry into the legislative purpose is necessarily deferential and limited."[287] Although the *Karlin* court misconstrues *Casey* as dictating a high level of legislative deference in the purpose prong analysis, this error is not the opinion's most severe. More problematic is the court's omission of nexus analysis despite acknowledging the significance of rational basis. Although the court suggests that regulations must be reasonably designed to further the state's interest, nowhere does it assess whether Wisconsin's informed consent statute actually fulfilled

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[285] 188 F.3d 446 (7th Cir. 1999).
[286] *Id.* at 494.
[287] *Id.* at 496.

that criterion. Whether the *Karlin* court assumed that the statute reasonably furthered the state's purpose or simply neglected to apply the bite, nexus analysis might have revealed the statute's true flaws and rendered it invalid under *Casey*.

C. Incorrect Omission of Rational Basis or Purpose Prong Analyses[288]

Among the errors courts commit when implementing *Casey*, the omission of nexus or purpose prong analysis is most common. In *Richmond Medical Center for Women v. Herring*,[289] the Fourth Circuit upheld a Virginia statute criminalizing conduct it labeled "partial birth infanticide."[290] Tellingly, the court cited language from *Carhart* implicating the purpose prong: "The government may use its voice and its regulatory authority," the court quoted, "to show its profound respect for the life within the woman."[291] Despite this implicit acknowledgement that undue burden involves an assessment of the state's regulatory purpose, the court went on to note only that the statute "creates no barrier to, or chilling effect on, a woman's right to have a standard D&E [Dilation & Extraction]."[292] Simply because the statute created no unduly burdensome *effects*, the court held, it was not facially unconstitutional under *Casey*.

Conspicuously missing from its analysis, however, was any inquiry into the state's purpose in criminalizing certain abortion procedures. After deeming the statute's effects permissible under *Casey*, the court should have examined legislative history and other indicia of the state's purpose in order to ensure that the statute was not invalid under the purpose prong or rational basis review. Had it done so, the court 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 unreasonable means of achieving even a legitimate interest.

Similarly deficient was the Sixth Circuit's decision in *Women's Medical Professional Corporation v. Taft*,[293] which upheld a similar Ohio statute ban-

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[288] Though integral components of the undue burden standard, rational basis and purpose prong analysis need not appear in every decision correctly applying *Casey*. The Tenth Circuit exemplified 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*, 102 F.3d 1112 (10th Cir. 1996), 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." *Id.* at 1116 n.5. Because the court went on to invalidate the statute as having both an impermissible purpose and impermissible effects, it did not need to engage in any rational basis analysis.

[289] 570 F.3d 165 (4th Cir. 2009).

[290] *Id.* at 171.

[291] *Id.* at 179 (quoting Gonzales v. Carhart, 550 U.S. 124, 157 (2007)).

[292] *Id.*

[293] 353 F.3d 436 (6th Cir. 2003).

ning "partial birth" abortion procedures.[294] *Taft* noted 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."[295] The court went on to state correctly that undue burden was intended not merely to weigh the severity of a regulatory burden on women, but also to examine that burden in conjunction with the state's various interests in curtailing abortion.[296] Despite this recognition of the purpose prong's significance, however, the court engaged in no analysis of the state's purpose, focusing solely on the effects of the statute's health exception and the scope of its definitions. The court's holding is as conclusory as *Herring*'s: "[B]ecause 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."[297] Like in *Herring*, the challenged statute is analyzed only in terms of its effects on a woman's right to an abortion. The purpose prong and nexus inquiry go entirely unexamined. This truncated analysis reduces the undue burden standard to a single-pronged test that merely gauges the intensity or degree of an abortion regulation's effects — a distortion of the *Casey* plurality's language and intent.

V. Conclusion: Saving *Casey*

Perhaps *Casey*'s largest failure is that it is emphatically not a balancing test, despite its purported intention to weigh the woman's liberty against the state's interest.[298] The *Casey* 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.[299] The Court's duty, it noted, was "resolving this tension."[300] 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, "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[301]

Despite the fact that *Casey* so prized an adequate weighing of the state's interest, the Court constructed a standard not fully capable of a searching inquiry into that interest. A more genuine translation of the plurality opinion's language would not have been merely the undue burden standard, but instead a rigorous balancing test more reflective of the Court's carefully es-

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[294] *Id.* at 453.
[295] *Id.* at 445 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).
[296] *Id.* at 447.
[297] *Id.* at 453.
[298] *See* Metzger, *supra* note 9, at 2033–34 (noting the "absence of any balancing in the abortion undue burden test . . . [d]espite . . . jurisprudential precedent and linguistic implication").
[299] *Casey*, 505 U.S. at 871 (plurality opinion).
[300] *Id.*
[301] *Id.* at 876.

tablished "tension" between the state's stake in fetal life and the mother's reproductive liberty.[302] Though it is difficult to speculate about the Court's reluctance to adopt a proportionality-based test, that hesitation may be symptomatic of the judiciary's conception of its own perceived boundaries.[303] Whatever the reason, the absence of a balancing standard raises the stakes for lower courts applying undue burden. A correct understanding of rational basis' role in the context of the undue burden test and a rigorous implementation of undue burden become particularly essential to giving *Casey* its necessary bite.

In his partial concurrence in *Casey*, Justice Stevens acknowledged the plurality's lack of clarity. However, he also hoped that courts would recognize and vindicate 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."[304] Justice Stevens's comment distills undue burden to its essence: at bottom, *Casey* asks lower courts to engage in a rigorous three-part 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 the weight of the burden, the legitimacy of the state's regulatory purpose, and the sufficiency of the relationship between them. A regulation that fails any of the above components is an unconstitutionally undue burden on the right to abortion.

Lower courts have failed, however, to give equal weight to both prongs of the purpose and effects 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 promise unfulfilled and Justice Stevens's optimism unjustified. The lack of "authoritative articulation" in any single court opinion has proven insurmountable for lower courts attempting to apply *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

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[302] *See* Borgmann, *supra* note 97, 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.").

[303] *See, e.g.*, Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1587 (2012) ("Proportionality analysis is simply not within the competence of the American judiciary. Worse yet it is not even within their legitimate role; it is somehow too policy-centered, too 'activist.'").

[304] *Casey*, 505 U.S. at 920 n.6 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

word on the contours of the 'undue burden' standard."[305] 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 identify 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 quite obviously violates *Casey*'s facial requirements and deprives undue burden of its appropriate strength. Only by recognizing undue burden's proper relationship to 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.

[305] Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1156 (1993).