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CAN THE UNDUE-BURDEN STANDARD ADD CLARITY AND RIGOR TO INTERMEDIATE SCRUTINY IN FIRST AMENDMENT JURISPRUDENCE? A PROPOSAL CUTTING ACROSS CONSTITUTIONAL DOMAINS FOR TIME, PLACE & MANNER REGULATIONS

CLAY CALVERT* & MINCH MINCHIN**

Abstract

When the government regulates the time, place, or manner of speech, it must satisfy intermediate scrutiny and prove that (1) it has a significant interest, (2) the regulation is narrowly tailored, and (3) ample alternative channels of expression remain open. This article advocates simplifying and improving this test in First Amendment jurisprudence by replacing the often-confused second and third prongs with the far less deferential and much more rigorous undue-burden test embraced by the U.S. Supreme Court in 2016 in the abortion-regulation case of *Whole Woman's Health v. Hellerstedt*. Incorporating the undue-burden standard maintains intermediate scrutiny's balancing framework while simultaneously adding significant muscle, in free-speech-friendly fashion, to the test. First Amendment law long has borrowed from other constitutional domains, the article explains. Under this fact-intensive, benefits-and-burdens tack to intermediate scrutiny, the government must provide extensive factual evidence to support its claims, and courts, in turn, must refrain from deferring to lawmakers' unsubstantiated assertions.

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Introduction

In a 2007 article examining tiers of scrutiny[1] in First Amendment[2] free speech jurisprudence, Professor Ashutosh Bhagwat observes that intermediate scrutiny[3] "has attained central importance in the overall structure of free speech law."[4] Bhagwat points out that intermediate scrutiny "has been the standard of review in literally dozens of significant Supreme Court and courts of appeals cases over the past quarter century."[5]

Today, however, the entire tiers-of-review paradigm in First Amendment law is under fire in some quarters,[6] and the justices, at times, disagree on

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1. The three traditional tiers of judicial scrutiny of government action in U.S. constitutional law are strict scrutiny, intermediate scrutiny, and rational-basis review. *See* Michael Stokes Paulsen, *But Cf.: Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 398 (1998) (proposing, somewhat waggishly, "a new taxonomy to replace the inscrutable categories of 'strict,' 'intermediate,' and 'rational basis' scrutiny"); Christina E. Wells, *Trends in First Amendment Jurisprudence: Beyond Campaign Finance: The First Amendment Implications of* Nixon v. Shrink Missouri Government PAC, 66 MO. L. REV. 141, 158 (2001) (describing the U.S. Supreme "Court's multi-tiered system of judicial review" as consisting "of three levels of scrutiny—strict, intermediate, and rational basis—all of which share the same general structure").

2. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply as against state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

3. Several scholars have examined intermediate scrutiny of content-neutral laws, including Leslie Kendrick. *See* Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley*, 2014 SUP. CT. REV. 215, 238 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (observing that the intermediate-scrutiny standard "has historically required that the law be 'narrowly tailored to serve a significant governmental interest' and that it leave open 'ample alternative channels of communication'").

4. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 785.

5. *Id.*

6. Justice Stephen Breyer, for instance, opined in 2015 that "[t]he First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring). Breyer proposes a more general balancing framework that asks "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Id.* at 2235-36. Framed slightly differently in another case, Breyer wrote that the Court "must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government

which standard of review applies in a given case.[7] Furthermore, strict scrutiny—what Professor David Han calls "the default rule" for "any content-based regulation"[8]—is proving somewhat less than fatal for statutes than once believed,[9] as indicated by the 2015 high court decision in

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action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective." Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring). Ultimately, Breyer contends that the Court's doctrine referring to tiers of scrutiny should be used only "as guidelines informing our approach to the case at hand, not tests to be mechanically applied." Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring).

A complete discussion of Justice Breyer's critique of First Amendment tiers of review is, of course, beyond the scope of this article, but it suffices to say here that Harvard Professor Mark Tushnet refers to Justice Breyer's approach as signaling the "partial de-doctrinalization of the First Amendment." Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 511 (2014); *see also* Vikram David Amar & Alan Brownstein, *The Voracious First Amendment:* Alvarez *and* Knox *in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 497 (2013) (noting that Breyer tends to engage in a "free-form balancing approach").

Others have criticized the tiers of scrutiny as well. *See, e.g.*, R. George Wright, *What if All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 200 (2014) ("Tiered scrutiny inevitably invites overconfident judicial assessments of how important or unimportant some government interests, conceived of in any of several ways, 'really' are.").

7. For example, in the abortion-facility buffer zone case of *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the five-justice majority concluded that the statute in question was "neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny." *Id.* at 2534. In brief, the majority found the statute was "content neutral." *Id.* In contrast, the late Justice Antonin Scalia contended in a concurring opinion that "content neutrality is far from clear (the Court is divided 5-to-4)." *Id.* at 2542 (Scalia, J., concurring). Scalia concluded "that the statute is content based and therefore subject to strict scrutiny." *Id*. at 2545.

8. David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 396 (2015).

9. The late professor Gerald Gunther famously suggested that under the leadership of Chief Justice Earl Warren, some equal protection cases were subjected to a form of review that "was 'strict' in theory and fatal in fact." Gerald Gunther, Forward, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 691-92 (2016) ("Describing the Supreme Court's approach to content-based restrictions on speech is superficially simple. Laws that suppress speech on the basis of content are subject to the strictest constitutional scrutiny, which is *often outcome determinative*." (emphasis added)); David G. Post, *Sex, Lies, and Videogames:* Brown v. Entertainment Merchants Association, 2010-11 CATO SUP. CT. REV. 27, 29–30 (noting that "every first-year law student dutifully learns" that strict scrutiny "is not only substantial, it is *well-nigh insurmountable*" (emphasis added)).

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Williams-Yulee v. Florida Bar.[10] Additionally, strict scrutiny is variously criticized as vague and under-theorized,[11] as well as "internally variegated,"[12] "highly impressionistic and, at times, seemingly indeterminate."[13]

The intermediate-scrutiny standard of review—the focus of this article and the test generally applicable to content-neutral regulations[14] affecting the time, place, and manner ("TPM") of speech[15]—also finds itself caught in the crosshairs of scholarly criticism.[16] For example, Professor Ronald Krotoszynski asserts that

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10. 135 S. Ct. 1656 (upholding, in the face of strict scrutiny and by a five-to-four decision, a Florida Code of Judicial Conduct canon that forbids candidates for judicial office in Florida from personally soliciting campaign funds). Writing for the majority, Chief Justice John Roberts called it "one of the rare cases in which a speech restriction withstands strict scrutiny." *Id.* at 1666.

11. Professor Richard Fallon asserts that:

> The incomplete theorization of the decision to adopt the strict scrutiny formula as the baseline test for protecting fundamental rights lives on in the test's operative terms: They remain crucially vague and thus capable of varying applications from one Justice and one case to another. The Supreme Court has never squarely confronted, much less solved, the conundrum of the level of generality at which to specify compelling governmental interests. Neither has the Court noted the ambiguities built into the narrow tailoring requirement.

Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1336 (2007).

12. Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 16 (2012).

13. Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 350 (2011).

14. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (observing that "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral"); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)) (asserting that content-neutral laws are "those that 'are *justified* without reference to the content of the regulated speech'").

15. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (finding that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech," and setting forth the intermediate-scrutiny test that applies to such restrictions); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (observing "that municipal ordinances receive only intermediate scrutiny if they are content neutral"); *see also* Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 131–32 (2008) (asserting that the Supreme Court "has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient *intermediate scrutiny for those regulations deemed content neutral*)" (emphasis added)).

16. *See, e.g.*, Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998) (asserting that "intermediate

> [o]n its face, the time, place, and manner doctrine appears at least fairly solicitous of free speech: A standard of review that is, in essence, intermediate scrutiny presents a high bar indeed. As the doctrine has evolved over time, however, the criteria set forth by the Supreme Court often present the government with only minor impediments—mere speed bumps along the path to suppression of even core political speech.[17]

The Supreme Court fashioned today's common iteration of intermediate scrutiny more than thirty years ago in *Clark v. Community for Creative Non-Violence*.[18] There, the Court held that content-neutral laws pass constitutional muster only if they are "narrowly tailored to serve a significant governmental interest"[19] and "leave open ample alternative channels for communication of the information."[20] Chief Justice John Roberts reiterated this formulation of intermediate scrutiny in 2014 when writing for the majority in *McCullen v. Coakley*.[21] Federal appellate courts today also use this framing of intermediate scrutiny.[22]

The Court, it should be noted, has articulated slightly different formulations of intermediate scrutiny for symbolic speech regulations[23] and

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scrutiny has been consistently critiqued by judges and scholars who point to its indeterminacy and its invitation to judicial activism").

17. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1260 (2008).

18. 468 U.S. 288 (1984).

19. *Id.* at 293.

20. *Id.*

21. 134 S. Ct. 2518, 2529 (2014).

22. *See, e.g.*, Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1197 (9th Cir. 2016) (quoting *Clark*, 468 U.S. at 293) (asserting that "the government may impose reasonable time, place, and manner restrictions on speech in traditional public fora" if "the restrictions are content neutral, are 'narrowly tailored to serve a significant governmental interest,' and 'leave open ample alternative channels for communication of the information'"); Reynolds v. Middleton, 779 F.3d 222, 225–26 (4th Cir. 2015) (quoting Clatterbuck v. City of Charlottesville, 708 F.3d 549, 555 (4th Cir. 2013)) ("Content-neutral time, place, and manner regulations of speech in traditional public forums are subject to intermediate scrutiny—that is, the restrictions must be 'narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.").

23. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (observing, in the context of a case involving the burning of a draft registration certificate, that a government regulation is permissible "if it is within the constitutional power of the Government," "furthers an important or substantial governmental interest" that "is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no

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restrictions imposed on truthful advertising.[24] Those versions of intermediate scrutiny, however, are beyond the scope of this article, which concentrates, instead, on intermediate scrutiny as applied to content-neutral TPM regulations.[25]

A content-neutral TPM regulation targets "the circumstances of speech rather than the content of the speech."[26] As the Supreme Court wrote in

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greater than is essential to the furtherance of that interest"); *see also* Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the* Central Hudson *and* O'Brien *Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 729 (2001) (observing that "in *United States v. O'Brien*, the Court refused to overturn a conviction for draft-card burning and established the intermediate scrutiny test for content-neutral laws that incidentally infringe symbolic speech").

24. The U.S. Supreme Court adopted a four-part test for commercial speech that requires courts to

> determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n, 447 U.S. 557, 566 (1980); *see* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment) (describing "the intermediate scrutiny of *Central Hudson*"); Goldberg, *supra* note 9, at 705 ("Restrictions on truthful commercial speech are subject to intermediate scrutiny, and can be regulated if the restriction directly advances a substantial governmental interest and is substantially related to achieving the interest."); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) ("[T]he commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment.").

25. Some scholars argue that the Supreme Court has collapsed the different intermediate-scrutiny tests deployed for time, place, and manner regulations and symbolic speech "into a single, combined standard that apparently applies to almost all cases involving content-neutral regulations." Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 636 (1991); *see* Bhagwat, *supra* note 4, at 802 (asserting that there is "no doubt that the courts of appeals increasingly seem to accept the existence of a single, overarching standard of First Amendment scrutiny called 'intermediate scrutiny,' which has emerged as a synthesis of the various distinct bodies of Supreme Court doctrine"); Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule" in the Turner Decisions*, 8 COMM. L. & POL'Y 25, 82–83 (2003) (describing "the Supreme Court's practice of conflating the *O'Brien* rule and the time, place and manner standard").

26. Williams, *supra* note 25, at 637.

Ward v. Rock Against Racism,[27] "[a] regulation that *serves purposes unrelated to the content of expression* is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[28]

The strict- and intermediate-scrutiny standards both focus on government interests and narrow tailoring. In strict scrutiny, the government interest must be compelling,[29] while in intermediate scrutiny it need only be significant.[30] In terms of the tailoring or fit between the government's asserted interest and the statute that serves it, strict scrutiny demands that the statute restricts no more speech than is absolutely necessary to serve the interest,[31] while the fit does not need to be quite so precise under intermediate scrutiny.[32]

The intermediate-scrutiny test, however, adds a third consideration or prong not found in strict scrutiny—namely, that the regulation "leave open ample alternative channels for communication of the information."[33] As Professor R. George Wright observes in a 2015 article, "It seems well settled that content-neutral, but *not* content-based, restrictions on speech must leave ample alternative channels available for conveying the speaker's message."[34] Professor Susan Williams concurs, noting that "the adequate alternatives branch of the test is unique."[35]

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27. 491 U.S. 781 (1989).

28. *Id.* at 791 (emphasis added).

29. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (observing that strict scrutiny demands that a regulation "is justified by a *compelling government interest* and is narrowly drawn to serve that interest" (emphasis added)).

30. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

31. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) ("If a *less restrictive alternative* would serve the Government's purpose, the legislature must use that alternative." (emphasis added)); Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the *least restrictive means* to further the articulated interest." (emphasis added)); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) ("A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.").

32. *See Ward*, 491 U.S. at 798 (explaining that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that *it need not be the least restrictive or least intrusive means of doing so*" (emphasis added)).

33. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

34. R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2088 (2015) (emphasis added). The ample-alternative-avenues-of-communication prong is not, however, part of the intermediate scrutiny test fashioned by the Supreme Court in *United States v. O'Brien*, 391

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Intermediate scrutiny's alternative-channels-of-communication prong comports with Professor Geoffrey Stone's observation three decades ago that "[t]he Court's analysis of content-neutral restrictions is designed primarily to assure that adequate opportunities for free expression remain open and available. This is essential for the preservation of a vital and robust public debate."[36] Finding alternative avenues of communication for speech today, Professor Patrick Garry contends, should be relatively easier than in the past due to "the proliferation of alternative channels for communication"[37] and, in particular, to the "explosive growth of new communications technologies."[38]

Professor Wright, however, asserts that a critical problem wrought by this third prong is "the difficulty of distinguishing the idea of alternative speech channels from the genuinely separate idea of one degree or another of narrow tailoring."[39] The key distinction between the second and third prongs of intermediate scrutiny, Wright points out, is that narrow tailoring forces courts to consider "alternative government regulations of speech,"[40] while the third prong concentrates on the alternative methods of communication that remain available in the face of the government regulation.[41] Put differently, the second prong (narrow tailoring) compels courts to consider alternative ways to *regulate* the speech at issue, while the third prong directs them to contemplate alternative means and modes to *communicate* that speech.

The Supreme Court indicated more than two decades ago in *City of Ladue v. Gilleo*[42] that the ample-alternative-channels prong entails

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U.S. 367 (1968), for cases involving symbolic speech. *See* Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 703 (2016) (citing *Ward*, 491 U.S. at 791) ("Assuming the government's claim of content-neutrality is justified, it may regulate the time, place, and manner of speech whenever this restriction is 'narrowly tailored to a significant government interest' and 'leave[s] open[] ample alternative channels of communication' (an additional factor not in *O'Brien*'s version of intermediate scrutiny)." (alterations in original)).

35. Williams, *supra* note 25, at 644.

36. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 117 (1987).

37. Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 524 (2007).

38. *Id.* at 504.

39. Wright, *supra* note 34, at 2090 (footnote omitted).

40. *Id.* at 2091.

41. *Id.*

42. 512 U.S. 43 (1994).

considering whether "adequate substitutes exist"[43] for conveying a message when compared to the mode of communication the government "has closed off."[44] Whether a substitute mode of communication is adequate, the Court noted, requires evaluation of its cost and convenience,[45] as well as its effectiveness in conveying a message to a speaker's targeted or desired audience.[46]

Perhaps even more troubling regarding the ample-alternative-channels prong than its conflation with the narrow-tailoring facet, Professor Wright contends, is that it carries the bizarre[47] potential to transform intermediate scrutiny into a more rigorous standard of review than strict scrutiny.[48] He reasons here that

> a requirement that a regulation leave open anything such as ample alternative speech channels in the case of content-neutral speech regulations immediately destroys any hierarchy of rigor, exactingness, or stringency between the two tests. Nothing prevents a court, relying on the ample available alternative

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43. *Id.* at 56.

44. *Id.*

45. *See id.* at 57 (noting that the mode of communication closed off in *Gilleo*—namely, residential yard signs—constitutes "an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute").

46. *See id.* ("Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.").

47. The authors use the term "bizarre" because intermediate scrutiny is supposed to be a less demanding standard of review than strict scrutiny. As Professor Jeffrey Shaman explains:

> Whereas strict scrutiny requires the showing of a compelling state interest to sustain a law, intermediate scrutiny prescribes *a less demanding standard* that calls for the showing of an important or substantial state interest to sustain a law. And while strict scrutiny requires that legislative means be absolutely necessary to accomplish their ends, intermediate scrutiny expects that legislative means be carefully tailored, though not absolutely necessary, to accomplish their ends. In practice, *intermediate scrutiny has proven to be less severe than strict scrutiny* and in numerous cases when using intermediate scrutiny the Court has upheld laws challenged on First Amendment grounds.

Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419, 461 (2012) (emphasis added) (footnotes omitted).

48. Wright, *supra* note 34, at 2092 (asserting that "an alternative speech channels requirement can impose different and more stringent free speech requirements than can even the most exacting narrow tailoring requirements," such that "a content-neutral regulation test requiring ample alternative speech channels can be more demanding than a content-based regulation test requiring a compelling interest and narrow tailoring").

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> speech channels requirement, from imposing a more demanding test under content-neutrality than under a content-based test.[49]

This possibility arises, in part, because of the malleable and amorphous meaning of "ample" in assessment of alternative channels of communication. Wright avers here that "there is room for judicial discretion in applying the test in practice, as well as generous room for variations in how, precisely, this requirement is to be formulated in the first place."[50] He notes that in *City of Renton v. Playtime Theatres, Inc.*,[51] the majority and dissent deployed several different and competing interpretations of what is necessary to satisfy the ample-alternative-channels prong.[52] This comports with Boston University Professor Jay Wexler's more general observation that the intermediate-scrutiny test is "particularly vulnerable to manipulation by the Supreme Court."[53]

If Professor Wright is correct that the ample-alternative-channels facet of intermediate scrutiny serves "to undermine the meaningfulness of the judicially created binary distinction between content-neutral and content-based regulations of speech,"[54] then either one of two things must happen to remedy the predicament. One possibility—an extreme one[55]—is for the Supreme Court simply to jettison the distinction between content-neutral and content-based laws altogether and, in its place, perhaps adopt something akin to Justice Stephen Breyer's proportionality approach for considering the constitutionality of all laws targeting speech.[56] An alternative tack—the one proposed here for scholarly consideration—is to reformulate the tests for either or both intermediate and strict scrutiny in such a way that the distinction between content-neutral and content-based laws and, in turn, between intermediate scrutiny and strict scrutiny, becomes meaningful. In addition, such a reformulation must ensure that

49. *Id.* at 2089.

50. *Id.* at 2093 (footnote omitted).

51. 475 U.S. 41 (1986).

52. Wright, *supra* note 34, at 2093.

53. Wexler, *supra* note 16, at 301.

54. Wright, *supra* note 34, at 2101–02.

55. The authors consider this an extreme approach because "[c]onstitutional law students, professors, and judges alike are infatuated with the notion of tiers of scrutiny." Josh Blackman, *The Burden of Judging*, 8 N.Y.U. J.L. & LIBERTY 1105, 1193 (2014).

56. *See supra* note 6 and accompanying text (addressing Justice Breyer's proportionality approach).

intermediate scrutiny is meaningfully different and more rigorous than a mere rational basis standard.[57]

Specifically, this article proposes leaving intact the current strict-scrutiny standard—the government must continue to prove both a compelling interest and that the means serving it restrict no more speech than is necessary—but reworking the intermediate-scrutiny test. In particular, this article recommends retaining the significant-interest component of intermediate scrutiny but discarding *both* the narrow-tailoring and ample-alternative-channels prongs of the test.

In their place, the authors advocate implementing a version of the Supreme Court's undue-burden test. It was most recently applied by the majority in June 2016 in the abortion-restriction case of *Whole Woman's Health v. Hellerstedt*[58] and first adopted twenty-five years ago in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[59]

In brief, the authors' proposed intermediate-scrutiny test has two prongs, rather than the current three. This simplifies matters and avoids conflation of the second and third prongs of the current intermediate-scrutiny test. The proposed standard requires the government to prove both that it has a significant interest in regulating speech and that the regulation it adopts does not impose an undue burden on First Amendment interests. Thus, as suggested here and as compared to the current strict-scrutiny test, the standards would be

Strict Scrutiny
compelling interest served by the *least speech-restrictive means* possible

Intermediate Scrutiny
significant interest served without causing *an undue burden* on speech

57. Although purportedly a more stringent standard than rational basis review, intermediate scrutiny does not always live up to that billing. *See* Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1293 (2005) (asserting that "intermediate scrutiny has become the practical equivalent of lenient, rational basis review").

58. 136 S. Ct. 2292 (2016).

59. 505 U.S. 833 (1992).

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Part I of the article provides a primer on the evolution of the undue-burden standard within the Supreme Court's abortion jurisprudence, concentrating on the Court's significant development of that test's meaning in *Hellerstedt*. Part II then illustrates that First Amendment jurisprudence long has borrowed standards from other constitutional domains, thus providing context for the article's proposal to import into free speech law a component of the Court's abortion-related jurisprudence. Next, Part III explores the potential application of the undue-burden standard in the realm of First Amendment intermediate scrutiny, attempting to identify variables and factors that courts might use in determining if, in fact, a content-neutral regulation imposes an undue burden on speech. Finally, Part IV concludes by encapsulating the potential of the undue-burden standard to improve First Amendment intermediate scrutiny and by calling for other scholars to offer suggestions for how the undue-burden test might be adjusted and fine-tuned to fit within the free-speech framework.

I. Abortion and the Constitutional Right to Choose: Evolution of the Undue-Burden Test

The origins of the undue-burden standard trace back more than half a century to *Griswold v. Connecticut*.[60] In the case, just as in *Hellerstedt*, Planned Parenthood found itself embroiled in a reproductive-rights controversy before the Supreme Court.[61] *Griswold* challenged the prosecution of a physician and the executive director of the Planned Parenthood League of Connecticut, both of whom ran afoul of two Nutmeg State laws[62] criminalizing the use (or abetting the use) of contraceptives.[63] At issue was whether the statutes violated the Fourteenth Amendment and, more specifically as framed for the majority by Justice William O. Douglas,[64] whether prohibiting the dissemination of information regarding

60. 381 U.S. 479 (1965).

61. *Id.* at 480.

62. In particular, the statutes provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned," and "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. §§ 53-32, 54-196 (repealed 1971).

63. *Griswold*, 381 U.S. at 485.

64. Justice Douglas initially framed the issue as a Fourteenth Amendment matter, writing that "we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment." *Id.* at 481. He ultimately decided the case, however, using multiple amendments. *Id.* at 484.

contraceptives violated the "sacred precincts of marital bedrooms"[65] in contravention of the Due Process Clause.[66]

Although Douglas had, in the words of Professor Kenneth Karst, "a number of more traditional doctrinal threads" from which to choose, he instead wove "the opinion from gossamer of his own."[67] In six poignant pages, Douglas knit a unifying thread through precepts of the First, Third,[68] Fourth,[69] Fifth,[70] and Ninth[71] Amendments[72] to declare that "the right of privacy which presses for recognition here is a legitimate one."[73]

In the process of invalidating the Connecticut laws, the Douglas majority did not rely on fundamental liberty interests under the Due Process Clause, but rather on the "penumbras, formed by emanations" from the Bill of Rights that give the right to privacy "life and substance."[74] By taking this indirect and much-maligned[75] approach to recognizing the constitutional

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65. *Id.* at 485.

66. *Id.* at 481.

67. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 653 (1980).

68. The Third Amendment to the U.S. Constitution establishes that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

69. The Fourth Amendment to the U.S. Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Fourth Amendment was incorporated more than half a century ago through the Due Process Clause as a fundamental freedom to apply to all government actors. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

70. The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "[n]o person shall. . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment right not to be a witness against oneself was incorporated about fifty ago through the Due Process Clause as a fundamental liberty to apply as against all state agents and agencies. *See* Griffin v. California, 380 U.S. 609 (1965).

71. The Ninth Amendment to the U.S. Constitution states, in its entirety, that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

72. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

73. *Id.* at 485.

74. *Id.* at 484.

75. *See, e.g.*, Robert G. Dixon, *The "New" Substantive Due Process and the Democratic Ethic: a Prolegomenon*, 1976 BYU L. REV. 43, 84 (wryly referring to how Justice Douglas "skipped through the Bill of Rights like a cheerleader—'Give me a P . . . Give me an R . . . Give me an I . . .' and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right").

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guarantee of privacy, Douglas attempted to distance himself from the stigma of *Lochner*-era[76] substantive due process[77] claims,[78] which similarly fostered the discovery and fundamentalization of unenumerated rights from normative cultural elements.[79]

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76. *Lochner v. New York*, 198 U.S. 45 (1905), invalidated a New York statute limiting the number of hours bakers could work each week. The Court concluded the law interfered with the fundamental-yet-unenumerated liberty of contract between workers and their employers. *Id.* at 64. *Lochner* spurred the Court into a three-decade span of increased judicial intervention into economically related legislative action, commonly known as the *Lochner* era. This jurisprudential zeitgeist, which emphasized substantive due process claims and dominated early twentieth-century jurisprudence, has since received significant criticism from legal scholars. As Stephen Kanter explained:

> *Lochner* and its economic substantive due process doctrine have become constitutional boogeymen. It is difficult to find anyone with a good word to say about the extent of the Court's Lochnerian interventionist period. The critics of *Lochner* do not always agree on the precise defects of economic substantive due process, but the nearly universal rejection of the doctrine . . . serves as an important cautionary flag for any theory of substantive individual liberty rights that looks primarily to the Due Process Clause as the source of those rights.

Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 671 (2006) (footnote omitted).

77. Substantive due process claims, which use the Due Process Clause of the Fourteenth Amendment to address whether the government has a justifiable rationale for depriving a person's life, liberty, or property, are perhaps best explained by the late Chief Justice William Rehnquist. He wrote, "[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted) (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); then quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)). This method of finding fundamental enumerated rights, although controversial, is part of standard constitutional doctrine. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 571–73 (5th ed. 2015).

78. *See Griswold*, 381 U.S. at 481–82 (opining that "[o]vertones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions").

79. *See* Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 305 (1986) (explaining that "Justice Douglas wrote the opinion of the Court, using the penumbra rationale to avoid the stigma of *Lochner*. Three other justices wrote concurring opinions, leaving the *Griswold* rationale in fragmented confusion" (footnotes omitted)); *see also* CHEMERINSKY, *supra* note 77, at 850 ("In an attempt to avoid substantive due process, Douglas, who had lived through the *Lochner* era, found privacy in the 'penumbra' of the Bill of Rights. This approach has been much criticized and has not been followed by subsequent cases.").

Less than a decade later, the Supreme Court used part of *Griswold*'s rationale as a launching pad[80] to address the constitutionality of abortion itself in *Roe v. Wade*.[81] The case challenged a Texas law banning abortions except in instances implicating the mother's life.[82] Writing for the majority, Justice Harry Blackmun first established that the choice to obtain an abortion is an inherently private matter.[83] He then reasoned that because *Griswold* established privacy as a fundamental right, abortion, which is subsumed within privacy, is likewise fundamental.[84] Weighing the interests in strict-scrutiny-like fashion,[85] Blackmun explained that whenever "'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[86]

Once the fundamental nature of abortion rights was established, Blackmun qualified their scope in light of competing interests.[87] He explained that

> a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.[88]

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80. *See* David E. Bernstein, *Lochner Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 55 (2003) ("*Griswold* was a particularly important step toward the Court's announcement and enforcement of a woman's right to terminate a pregnancy in *Roe v. Wade*.").

81. 410 U.S. 113 (1973).

82. TEX. CODE CRIM. PROC. arts. 1191, 1192, 1193, 1194, 1196, *invalidated by* Roe v. Wade, 410 U.S. 113 (1973).

83. *Roe*, 410 U.S. at 151–52.

84. *Id.* at 154–55.

85. CHEMERINSKY, *supra* note 77, at 855 (explaining that the "Court said that strict scrutiny was to be used in striking the balance because the right to abortion was a fundamental right").

86. *Roe*, 410 U.S. at 155 (citations omitted).

87. In this case, Justice Blackmun opined, the Texas statutes furthered legitimate government interests, yet they also went too far and "outstripped these justifications and swept 'far beyond any areas of compelling state interest.'" *Id.* at 156 (quoting Roe v. Wade, 314 F. Supp. 1217, 1222-23 (1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973)).

88. *Id.* at 154.

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The "some point in pregnancy" at which governmental interests of prenatal life and maternal health and safety[89] reach sufficient importance was the second trimester.[90] Attempting to balance all the interests involved, then, *Roe* established a trimester-based approach to ascertaining the constitutionality of abortion regulations.

In the first trimester, governments could only regulate abortions akin to any other medical procedure—i.e., mandating their performance by licensed doctors.[91] The onset of the second trimester, however, triggered a trio of compelling governmental interests in maternal health, safety, and prenatal life, thus allowing governments to regulate—although not entirely restrict—abortions.[92] At the start of the third trimester, Justice Blackmun explained, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion."[93]

The constitutional basis for the trimester framework deviated sharply from the penumbral rationale that gave the right of privacy constitutional footing in *Griswold*. Blackmun relocated the unenumerated right of privacy into the purview of substantive due process,[94] a decision that attracted critics from both the pro-choice and pro-life camps.[95]

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89. The Court attempted to establish that, based upon available data, abortions performed after the second trimester were more likely to result in health-compromising complications. *Id.* at 163.

90. Foreshadowing what would transpire nearly two decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the *Roe* Court stated that, "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Roe*, 410 U.S. at 163. Yet the established proxy for viability became the rigid, trimester-based framework. *Id.*

91. *Id.* at 150.

92. *Id.* The Court further explained that "[t]hese interests are separate and distinct. . . . [A]t a point during pregnancy, each becomes 'compelling.' With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester." *Id.* at 162-63.

93. *Id.* at 164–65. Justice Blackmun added a caveat here, however, stating that abortions may only be proscribed "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 165.

94. *See id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

95. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985) (suggesting that the *Roe* rationale was "weakened" by a reliance upon the Due Process Clause, rather than the Equal Protection Clause); *see also* David Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the*

The inconsistently applied, sliding-scale, strict scrutiny of the trimester framework was likewise criticized in the years that followed.[96] It would be almost twenty years after *Roe*, however, before the Court fully re-visited the trimester scheme's constitutional implications. The intervening period saw lively debate, both on and off the Supreme Court bench.[97]

Shortly after her confirmation in 1981, for instance, Justice Sandra Day O'Connor predicted both the collapse of the trimester framework and the adoption of the undue-burden standard almost a decade before they occurred.[98] An "'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved," the first female Supreme Court justice wrote in her dissent in *City of Akron v. Akron Center for Reproductive Health*.[99] "If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose,"[100] she elaborated.

O'Connor and others--such as Ruth Bader Ginsburg, who echoed her reasoning[101]--criticized not only the difficulties with the trimester approach,

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Origins of Fundamental Rights Constitutionalism, 92 GEO. L.J. 1, 56 (2003) (contending that "*Griswold* and *Roe*'s protection of the unenumerated right to privacy raises many of the same issues as *Lochner*'s protection of the unenumerated right to liberty of contract").

96. *See, e.g.*, R. Randall Kelso, *The Structure of* Planned Parenthood v. Casey *Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L. REV. 75, 80, 82 (2015) (puzzling over the fact that "[u]nder *Roe v. Wade*, any burden on that woman's fundamental right triggered a strict scrutiny approach," although in the 1970s within other contexts, such as parental-notification statutes, the "Court appeared to apply intermediate scrutiny, rather than strict scrutiny").

97. *See generally* MARY ZIEGLER, AFTER ROE (2015) (discussing the ideological battle over abortion that raged in the 1970s). *See also Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (upholding on procedural grounds a Massachusetts law that required minors to obtain consent from their parents prior to terminating their pregnancies—and foreshadowing the undue-burden test by stating that "a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion"). Three years later, the Court revisited the matter and held that states may require parental notification prior to a minor obtaining an abortion, yet such rules require corresponding allowances for alternative channels to parental approval, such as seeking a judge's approval instead. Bellotti v. Baird, 443 U.S. 622, 643 (1979).

98. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

99. *Id.*

100. *Id.* (citation omitted).

101. Ginsburg, *supra* note 95, at 381 (quoting large passages of Justice O'Connor's opinions).

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but also the irony of the ostensibly rigid trimester standard: "Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health," Justice O'Connor pointed out, "different technological improvements will move *backward* the point of viability . . . . The *Roe* framework, then, is clearly on a collision course with itself."[102]

Indeed, the collision occurred in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[103] The case examined the constitutionality of Pennsylvania laws that mandated, among other items, twenty-four-hour waiting periods and spousal notifications for women seeking abortions.[104] Although the constitutionality of abortion itself was putatively not open for reconsideration in *Casey*, the post-*Roe* addition of several conservative justices suggested to many that *Roe*'s central holding was in jeopardy.[105]

Writing for the *Casey* plurality, however, Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter declared that ignoring nineteen years of stare decisis by overturning *Roe* would harm judicial legitimacy.[106] Therefore, to maintain both jurisprudential integrity and the abortion-liberty interest, the *Casey* Court, in the words of Mary Ziegler, "steered a middle course."[107] It upheld the essence of *Roe*, yet permitted certain abortion restrictions to stand.[108]

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102. *City of Akron*, 462 U.S. at 456-58.

103. 505 U.S. 833 (1992).

104. *Id.* at 844. The five provisions at issue were: (1) mandatory twenty-four-hour informed consent for those seeking abortions; (2) spousal notice requirement for those seeking abortions; (3) parental consent for minors seeking abortions; (4) reporting and record-keeping requirements for abortion providers; and (5) the definition of the phrase "medical emergency" for abortion-related purposes. 18 PA. CONS. STAT. §§ 3203–20 (1990).

105. *See* ZIEGLER, *supra* note 97, at 224 ("Over the course of the 1980s, Republican nominees to the Supreme Court expressed increasing skepticism about the trimester framework set out in the *Roe* decision. By 1992 Court watchers concluded that the justices might be ready to overrule the 1973 opinion.").

106. *Casey*, 505 U.S. at 867 ("The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure.").

107. ZIEGLER, *supra* note 97, at 224.

108. The spousal-awareness provision was struck down, while the other four parts survived. *Casey*, 505 U.S. at 879–911.

At bottom, the fractured[109] *Casey* Court made two key decisions. First, it reaffirmed *Roe*'s rationale that the onset of viability refashions the interests and rights involved, but abandoned the trimester approach as a proxy for viability.[110] Second, the Court jettisoned strict scrutiny from abortion jurisprudence[111] and replaced it with the undue-burden standard.[112] The plurality introduced the new test by explaining that an "undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place *substantial obstacles* in the path of a woman seeking an abortion before the fetus attains viability."[113]

This innovative balancing test, described by the plurality as an "appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty,"[114] would not be triggered by mere attendant effects. Indeed, the Court opined that

> [n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.[115]

Aside, however, from particular statements declaring certain parts of the Pennsylvania law as either unduly burdensome or not, the opinion clarified little about what the new standard practically entailed.[116] An additional

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109. *See* Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003, 1004 (1993) ("No less than three different rationales are used by members of the *Casey* Court in analyzing the Pennsylvania provisions upheld in *Casey*.").

110. *Casey*, 505 U.S at 878.

111. *Id.* Although they concurred in the holding itself, Justices Harry Blackmun and John Paul Stevens would have retained both the trimester approach and the use of strict scrutiny in abortion cases. *See id.* at 930 (Blackmun, J., concurring) ("Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions . . . . [T]he trimester framework ha[s] not been undermined, and the *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard." (citation omitted)).

112. *Id.* at 874 (plurality opinion).

113. *Id.* at 878 (emphasis added).

114. *Id.* at 876.

115. *Id.* at 874.

116. *See* Schneider, *supra* note 109, at 1004 (explaining one year after the *Casey* decision that abortion rights were going to be curtailed because the "discretionary nature of the undue burden test renders it unworkable. It is a standard which cannot be applied by state courts

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troubling aspect of the opinion was that the scant explanation tended to be confusing and self-referential. After explaining, for instance, that the undue-burden concept is a heuristic for illegitimate government intent that abridges a fundamental right, the Court somewhat circularly stated that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[117]

After allowing for three years of ferment, Professor Erin Daly summarized *Casey* in less-than-flattering terms:

> *Casey* is a remarkably splintered and confusing opinion . . . . The lead opinion is so fractured that, as the maze of concurrences and dissents illustrate, there is something in it for everyone to hate. Indeed, *Casey* has received almost nothing but criticism: pro-lifers have derided its continued protection of abortion, while pro-choicers have lamented its support of significant abortion restrictions.[118]

Adoption of the undue-burden standard, in particular, received significant criticism. Aside from the lack of clarity regarding how many women a regulation must affect to constitute an undue burden,[119] another common critique was the lack of clarity regarding the degree of causation necessary between a regulation and the putative burden it created. The Court "seems to be saying," constitutional scholar Erwin Chemerinsky wrote more than a decade after *Casey*,

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consistently, predictably, and without prejudice. The *Casey* Court's test invites judges to roam freely where speculation might take them" (footnote omitted)); *see also* Kelso, *supra* note 96, at 76–79 (describing practical difficulties that lower courts experienced in the ensuing years in applying the vaguely articulated undue-burden standard).

117. *Casey*, 505 U.S at 877. Another tail-chasing trouble, Erwin Chemerinsky points out, is that the Court

> says both that the state cannot act with the purpose of creating obstacles to abortion *and* that it can act with the purpose of discouraging abortion and encouraging childbirth. . . . How is it to be decided which of these laws is invalid as an undue burden and which is permissible? The joint opinion simply says that the regulation "must not be an undue burden on the right." But this, of course, is circular.

CHEMERINSKY, *supra* note 77, at 864 (emphasis added).

118. Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 80 (1995) (footnote omitted).

119. CHEMERINSKY, *supra* note 80, at 864 (commenting on the Court's use of the phrase "significant number of women" in the undue-burden analysis).

> that an undue burden exists only if there is proof that the regulation will keep someone from getting an abortion. However, it must be questioned why burdens, no matter how substantial, are allowed unless they are actually proven to prevent abortions. Also, it is unclear how challengers will be able to prove that particular regulations create insurmountable obstacles to obtaining abortions.[120]

Although the Court had several opportunities[121] to clarify some of these ambiguities in the ensuing years, it remained mum until almost a quarter-century later in 2016 when it decided *Whole Woman's Health v. Hellerstedt*.[122] Billed by Professor Jessie Hill as "the most important abortion case in over two decades,"[123] *Hellerstedt* involved a challenge to two Texas laws adopted in 2013. The first required physicians who perform abortions to have admitting privileges at a hospital within thirty miles,[124] while the second required that abortion clinics comply with state regulations governing ambulatory surgical centers.[125]

Texas contended that the statutes were a legitimate use of its power to further important interests in health and safety.[126] Austin-based Whole Woman's Health, a self-described "privately-owned feminist organization, committed to providing holistic care for women,"[127] countered that the laws were unduly burdensome on fundamental reproductive rights by essentially regulating half of Texas's abortion facilities out of business.[128]

Writing for a five-to-three majority, Stephen Breyer focused much attention on analyzing a lengthy factual record. In so doing, he concluded that enforcement of the admitting-privileges requirement would indeed

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120. *Id.*

121. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007); Ayotte v. Planned Parenthood, 546 U.S. 320 (2006); Stenberg v. Carhart, 530 U.S. 914 (2000).

122. 136 S. Ct. 2292 (2016).

123. Jessie Hill, *Some Thoughts About Whole Woman's Health v. Hellerstedt*, PRAWFSBLAWG (July 5, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/07/some-thoughts-about-whole-womans-health-v-hellerstedt.html.

124. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A)) (2009); 25 TEX. ADMIN. CODE §§ 139.53(c)(1), 139.56(a)(1) (2013).

125. TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West Cum. Supp. 2015); 25 TEX. ADMIN. CODE § 139.40 (2013).

126. *Hellerstedt*, 136 S. Ct. at 2300–01.

127. *About Us*, WHOLE WOMAN'S HEALTH, http://wholewomanshealth.com/about-us.html (last visited May 12, 2017).

128. *Hellerstedt*, 136 S. Ct. at 2313.

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cause the closure of roughly half of Texas's abortion clinics.[129] The surgical-center requirement, likewise, was determined to inhibit access to reproductive care while simultaneously offering women little benefit, by way of health or safety, in return.[130] The laws were thus deemed unconstitutional,[131] with Justice Breyer writing that each statute both "places a substantial obstacle in the path of women seeking a previability abortion"[132] and "constitutes an undue burden on abortion access."[133]

The day after the decision, Supreme Court reporter Adam Liptak mused that "[i]f Casey limited the right established in Roe, allowing states to regulate abortion in ways Roe had barred, [*Hellerstedt*] effectively expanded that right."[134] Indeed, Professor Hill explained that "[b]y focusing on the health benefits of the law in relation to the burdens, the Court made sense of, and breathed new life into, the undue burden standard."[135] It did this in three important and practical ways that give teeth to the undue-burden test.[136]

First, the Court added *Roe*-like rigor to the standard by reshaping it—at least the means-end fit of it[137]—in a strict-scrutiny-like construction.[138] In particular, Justice Breyer declared that even if a statute does not impose a "substantial obstacle" to abortion access, it must nonetheless be more than "reasonably related to (or designed to further) a legitimate state interest."[139] This means that even if a regulation furthers a "legitimate" interest, the

129. *Id.*

130. *Id.* at 2315.

131. *Id.* at 2320.

132. *Id.* at 2300.

133. *Id.*

134. Adam Liptak, *Justices Overturn Texas Abortion Limits*, N.Y. TIMES, June 28, 2016, at A1.

135. Hill, *supra* note 123.

136. As Georgetown Professor David Cole writes, the *Hellerstedt* "decision gives teeth to the 'undue burden' standard that the court announced in 1992 in *Planned Parenthood v. Casey*." David Cole, *Justice Kennedy's Surprisingly Open Mind*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/opinions/justice-kennedys-surpisingly-open-mind/2016/06/27/6e217886-3c98-11e6-84e8-1580c7db5275_story.html.

137. *See infra* notes 148–153 and accompanying text (explaining how the undue-burden test, although similar to strict scrutiny, deviates from the Court's most exacting standard in that the undue-burden test is more holistic).

138. *Hellerstedt*, 136 S. Ct. at 2324 (Thomas, J., dissenting) (explaining how the decision "transform[ed] the undue-burden test to something much more akin to strict scrutiny").

139. *Id.* at 2309 (majority opinion).

nexus between the regulation and the interest must be exceptionally strong in order to withstand constitutional scrutiny.[140]

The second clarification regards deference. Specifically, it instructs lower courts that, when an abortion regulation's justifications are not medically certain, they should not defer to lawmakers' judgments.[141] Instead, reviewing courts should engage in careful assessment to determine the compellingness and interest-regulation linkage by scrutinizing the record itself.[142] As Justice Breyer wrote, the undue-burden test entails placing "considerable weight upon evidence and argument presented in judicial proceedings."[143]

Professor Hill thus asserts Breyer's "opinion made it clear that courts are not to defer to legislatures on the medical or scientific issues that underlie abortion restrictions; instead, they should examine the evidence independently and critically."[144] The result, contends Professor Mary Ziegler, is a "more rigorous undue burden test. . . . That means that legislatures claiming to protect women's health will need proof that a law actually does so."[145] Similarly, former Supreme Court reporter and current Yale Law School lecturer Linda Greenhouse writes that *Hellerstedt* mandates that "evidence-based medicine meets evidence-based law."[146]

The third change to the undue-burden standard is more general, but still very important. It restructures the test to be more holistic and comprehensive in nature, which should not be surprising in an opinion authored by Justice Breyer.[147] This doctrinal amendment requires courts not only to examine the burdens imposed on abortion but also to "consider the *burdens* a law imposes on abortion access together with the *benefits* those

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140. *Id.*

141. *Id.* at 2310.

142. *Id.*

143. *Id.* For instance, in evaluating the admitting-privileges requirement, Breyer cited evidence in the judicial record including peer-reviewed studies, expert testimony, and data from friend-of-the-court briefs. *Id.* at 2311–14.

144. Hill, *supra* note 123.

145. Mary Ziegler, *The Supreme Court's Texas Abortion Ruling Reignites a Battle over Facts*, WASH. POST (June 28, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/28/the-supreme-courts-texas-abortion-ruling-reignites-a-battle-over-facts/?utm_ te rm=.714b92e221f2.

146. Linda Greenhouse, *The Facts Win Out on Abortion*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/opinion/the-facts-win-out-on-abortion.html.

147. *See supra* note 6 for a discussion of Justice Breyer's propensity toward "free-form balancing."

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laws confer."[148] Whereas the Court in *Casey* only evaluated the burdens imposed on obtaining an abortion, the *Hellerstedt* majority requires these burdens to be weighed against the alleged benefits of the regulation.[149] In brief, the burdens and benefits must be balanced.[150] Justice Breyer thus lauded the district court in *Hellerstedt* for applying "the correct legal standard"[151] when it gave "significant weight to evidence in the judicial record,"[152] including expert testimony, and "then weighed the asserted benefits against the burdens."[153]

Collectively, these changes make the undue-burden test a far more rigorous test for evaluating government restrictions and provide courts—even appellate courts—with a large degree of discretion to engage in detailed factual analyses.[154] The practical upshot is, in the words of Professor Ziegler, that any future challenges to abortion rights are going to become "a battle over facts,"[155] forcing supporters of abortion regulations to have more (and more persuasive) evidence of the regulations' benefits in order to demonstrate their constitutionality.[156]

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148. *Hellerstedt*, 136 S. Ct. at 2309 (emphasis added). Practically, Justice Breyer explained, this simply means engaging in a balancing test. Justice Breyer's full quotation states that the undue-burden standard requires that lower courts

> consider the burdens a law imposes on abortion access together with the benefits those laws confer. See [*Planned Parenthood of Southeastern Pennsylvania v. Casey*] 505 U.S., at 887 (opinion of the Court) (performing this *balancing* with respect to a spousal notification provision); *id.*, at 899-901 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (same *balancing* with respect to a parental notification provision).

Id. (emphasis added) (parallel citations omitted).

149. *See* Elizabeth Price Foley, Whole Woman's Health *and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2015-16 CATO SUP. CT. REV. 153, 172 ("The *Casey* plurality assessed only the *burdens* of the medical emergency, informed consent, parental consent, spousal notification, and recordkeeping provisions of Pennsylvania's abortion law.").

150. *Hellerstedt*, 136 S. Ct. at 2309.

151. *Id.* at 2310.

152. *Id.*

153. *Id.*

154. *See* Michael Dorf, *Symposium: The Wages of Guerilla Warfare Against Abortion*, SCOTUSBLOG (June 27, 2016, 5:12 PM), http://www.scotusblog.com/2016/06/symposium-the-wages-of-guerrilla-warfare-against-abortion/ (writing that some courts may not even need to look at subjective legislative intent if they don't want to and may instead look at the factual, practical effects of the law(s) in question).

155. Ziegler, *supra* note 145.

156. *See id.* ("Those on both sides will have to pull together extensive, persuasive and often expensive trial evidence about the effect and purpose of an abortion regulation.").

"The Court was clear," Erwin Chemerinsky wrote soon after the decision, "that the judiciary must carefully scrutinize laws restricting abortion that are adopted with the purported justification of protecting women's health. The majority rejected judicial deference to legislatures."[157] He added that the Court "stressed that in deciding whether a law imposes an undue burden on abortion it is for the judiciary to balance the justifications for the restrictions against their effect on the ability of women to have access to abortions."[158]

Thus, if the undue-burden test were applied to evaluate the constitutionality of a government-imposed TPM restriction on speech, it would

1. *Require the government to proffer a detailed factual record demonstrating that the speech-restricting law actually serves and benefits a significant interest;*

2. *Allow those challenging the government regulation to provide their own factual evidence, including expert testimony, of the ways in which the law unduly burdens the First Amendment freedom of speech to the point of creating a substantial obstacle in conveying messages effectively; and*

3. *Require courts to (a) not defer to legislative judgment; (b) carefully scrutinize the factual evidentiary record illustrating both the purported benefits of the regulation in serving a significant governmental interest and the alleged burdens on speakers, their messages, and audiences; and (c) determine whether those burdens, viewed in the aggregate, impose a substantial obstacle on the First Amendment freedom of speech.*

In summary, *Hellerstedt* added muscle to the undue-burden standard by requiring courts to factually assess and balance all interests involved—and all benefits and burdens of the regulation—and by making it clear that courts should not defer to legislative fact-findings or judgments.[159] Especially in light of the standard's newfound clarity, then, Part II explains why importing the doctrine into a different constitutional context seems neither unusual nor surprising.

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157. Erwin Chemerinsky, *Everything Changed: October Term 2015*, 19 GREEN BAG 2d 343, 355 (2016).

158. *Id.*

159. *See* Foley, *supra* note 149, at 175 (observing that in *Hellerstedt* the majority "provided no deference at all to the Texas legislature's factual findings regarding the benefits to be derived from the admitting-privileges or surgical-center provisions," while simultaneously "deferring to the district court's findings of fact").

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II. Borrowing the Undue-Burden Standard from Abortion Cases: A Tradition of Cutting Across Constitutional Domains

The possibility of borrowing the undue-burden standard from the realm of substantive due process in abortion-restriction cases and applying it to First Amendment speech disputes should not be startling.[160] That is because, as Professor Randall Kelso writes, "[t]he structure of modern First Amendment free speech doctrine . . . has evolved consistent with the more formalized structure of doctrine under modern Equal Protection and Due Process review."[161]

Writing more than forty years ago in the *University of Chicago Law Review*, Professor Kenneth Karst observed that "[i]n a number of recent cases involving first amendment interests, the Supreme Court has used the framework of equal protection analysis to limit government's power to restrict free expression."[162] Karst pointed to the Court's opinion in *Police Department of Chicago v. Mosley*[163] as "fully"[164] enunciating the principle that "equal liberty of expression is inherent in the first amendment."[165] In *Mosley*, the Court considered the constitutionality of a municipal picketing ordinance.[166] The ordinance distinguished protected from unprotected speech based on subject matter, as it allowed "[p]eaceful picketing on the subject of a school's labor-management dispute"[167] but banned "all other peaceful picketing."[168] In holding the regulation unconstitutional and delivering the Court's opinion, Justice Thurgood Marshall explained that

> under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum

160. *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (providing a thorough overview of "constitutional borrowing").

161. R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 291 (2016); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 304 (1997) ("Although the three-tiered approach is rooted in the Equal Protection Clause, it has spread to other areas of constitutional law. In recent years, the Court's First Amendment free speech jurisprudence, originally distinct from its equal protection jurisprudence, has entirely succumbed to the tiered-review model.").

162. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 *U. CHI.* L. REV. 20, 20–21 (1975).

163. 408 U.S. 92 (1972).

164. Karst, *supra* note 162, at 26.

165. *Id.*

166. *Mosley*, 408 U.S. at 92–93.

167. *Id.* at 95.

168. *Id.*

> to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.[169]

More recently, Justice Anthony Kennedy wrote in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*[170] that the requirements under strict scrutiny in First Amendment jurisprudence that a law must serve a compelling state interest and be narrowly drawn "derive[] from our equal protection jurisprudence."[171] Tracing back through a line of free speech cases,[172] Kennedy contends that "a principle of equal protection [was] transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech."[173] Thus, the strict-scrutiny doctrine today "spans equal protection, substantive due process, and the First Amendment."[174]

Similarly, as Professor Jeffery Shaman writes, the intermediate-scrutiny standard "was first developed in equal protection cases"[175] and then was "imported for use in First Amendment cases concerning commercial speech . . . and in those freedom of speech cases in which restrictions of expression are unrelated to its ideological content."[176] Professor Bhagwat notes that the evolution of a unified intermediate-scrutiny standard in First Amendment jurisprudence "paralleled, and drew upon, the emergence of an

169. *Id.* at 96 (footnote omitted) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948).

170. 502 U.S. 105 (1991).

171. *Id.* at 124 (Kennedy, J., concurring in judgment).

172. Among the key cases cited by Justice Kennedy is *Carey v. Brown*, 447 U.S. 455 (1980), in which the Court wrote that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Id.* at 461–62.

173. *Simon & Schuster*, 502 U.S. at 125 (Kennedy, J., concurring in judgment).

174. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 317 (2015).

175. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163 (1984).

176. *Id.*

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intermediate scrutiny tier of review as the test for sex discrimination in the equal protection arena[].”[177]

The bottom line is that First Amendment jurisprudence long has borrowed doctrinal principles from other realms of constitutional law. Thus, to dip into the sphere of Fourteenth Amendment substantive due process and, in particular, the undue-burden standard fits within the historical trajectory of First Amendment doctrinal development. The next part explains and defends the relevance of the undue-burden standard as a potential facet of intermediate scrutiny under the First Amendment.

III. Exploring the Application of the Undue-Burden Standard in Free-Speech Cases Involving Intermediate Scrutiny

This part includes two sections. Initially, Section A identifies five reasons why the undue-burden standard fits well within intermediate scrutiny as applied to TPM restrictions on expression. Section B then operationalizes the meaning of undue burden within a free-speech context and identifies variables that courts should consider in evaluating whether a TPM regulation imposes an undue burden on freedom of speech.

A. The Nexus Between Undue Burden and Intermediate Scrutiny

There are at least five reasons why merging the undue-burden standard with intermediate scrutiny is prudent and appealing. First, both the undue-burden and intermediate-scrutiny standards apply where the government does not completely prohibit conduct or speech, but instead imposes regulatory hurdles or impediments that make engaging in such activity or expression more difficult and challenging. For example, Texas did not ban abortions in *Hellerstedt*. Instead, it instituted admitting-privileges and surgical-center requirements that made obtaining an abortion more difficult, and the Court applied the undue-burden standard to measure their constitutionality.[178]

Similarly, Massachusetts in *McCullen v. Coakley*[179] did not ban people from communicating with women approaching facilities that perform abortions. Instead, it imposed buffer zones around such clinics that made it more difficult to speak with individuals entering them, and the majority applied the intermediate-scrutiny standard to measure their

177. Bhagwat, *supra* note 4, at 784.
178. Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).
179. 134 S. Ct. 2518 (2014).

constitutionality.[180] In brief, both the undue-burden and intermediate-scrutiny tests are designed for evaluating *burdens, not bans*.

Second, application of the undue-burden standard in the context of intermediate scrutiny comports with the current "balancing-oriented"[181] nature of intermediate scrutiny. Indeed, Justice Elena Kagan has described content-neutral regulations of speech as being "usually . . . subject to a fairly loose balancing test."[182] And Professor Alan Brownstein writes that the judicial standard for evaluating content-neutral TPM regulations is "a multifactor balancing test."[183] He adds that "[t]he burden imposed by a content-neutral law . . . no matter how egregious it may be, is always balanced against the state interest being furthered by the restriction on speech."[184]

The undue-burden test, as articulated in *Hellerstedt*, also amounts to a "benefits-and-burdens balancing test."[185] Indeed, Professor Brownstein noted the similarities between the undue-burden test and intermediate scrutiny more than two decades ago, writing that "under both the *Casey* standard and the balancing test applied to content-neutral regulations, laws that serve permissible goals are evaluated as to their impact on the exercise of fundamental rights to determine if they are excessively burdensome."[186] Similarly, Professors Jud Mathews and Alec Stone Sweet observed in 2011 that the undue-burden standard, "like the move to intermediate scrutiny, is a means to allow courts to consider the interests on both sides of a constitutional controversy."[187]

Justice Breyer, who authored the *Hellerstedt* majority opinion, used the language of burdens in describing the intermediate-scrutiny test he applied when concurring in *United States v. Alvarez*.[188] As Breyer wrote there, the

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180. *Id.* at 2534–35.

181. Han, *supra* note 8, at 396.

182. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996).

183. Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 920 (1994).

184. *Id.* at 923.

185. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting); *see* Thomas J. Molony, *Fulfilling the Promise of Roe: A Pathway for Meaningful Pre-Abortion Consultation*, 65 CATH. U. L. REV. 713, 734 (2016) (referring to "the balancing test described in *Hellerstedt*").

186. Brownstein, *supra* note 183, at 925.

187. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 854 (2011).

188. 132 S. Ct. 2537 (2012).

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Court had to "ask whether it is possible substantially to achieve the Government's objective in *less burdensome* ways."[189]

Third, the undue-burden standard subsumes the current concern under intermediate scrutiny with the availability of ample alternative channels of communication.[190] In particular, if use of alternative channels of communication left open by a TPM regulation would impose a greater fiscal cost to a speaker and/or require substantially more time and energy in order to convey, as effectively, the same message, then such heightened costs are evidence under the undue-burden analysis weighing against constitutional validity.[191] In other words, forcing speakers to embrace avenues of communication that carry greater monetary or human-capital outlays may constitute undue burdens. Alternative avenues of communication may not be ample—as in sufficient or adequate[192]—when they create undue burdens for speakers.

Fourth, both the undue-burden standard and the intermediate-scrutiny test are intended to be somewhat easier to surmount than strict scrutiny but more demanding than rational basis review.[193] In other words, the undue-burden and intermediate-scrutiny tests ostensibly aim for the same level of judicial review. In fact, several scholars consider the undue-burden standard

189. *Id.* at 2555 (Breyer, J., concurring) (emphasis added). Breyer wrote that the circumstances in *Alvarez* "lead me to apply what the Court has termed 'intermediate scrutiny' here." *Id.* at 2552.

190. *See supra* notes 33-35 and accompanying text (describing this prong of the current intermediate-scrutiny test).

191. *See infra* notes 221-224 and accompanying text (describing this in greater detail in the context of the Supreme Court's ruling in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)).

192. *Ample*, DICTIONARY.COM, http://www.dictionary.com/browse/ample (last visited May 12, 2017).

193. *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 417 (2008) (noting that "the strongest presumption of unconstitutionality [is] reflected in the strict-scrutiny test," while "[m]any, if not most, constitutional rights are protected by the *lesser presumptions of the undue burden and intermediate scrutiny tests*, or by what is effectively the nonpresumption reflected in the two types of rational basis tests" (emphasis added)); Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 860 (2010) (describing intermediate scrutiny as "a standard between the rigorous strict scrutiny that applies to other speech regulations and the rational basis standard that the Court uses to review regulations that do not implicate the free speech right"); Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992) ("The label 'intermediate scrutiny' situates these standards between the bipolar rule-like tiers of strict review and rationality review.").

a form of intermediate scrutiny.[194] Professor Adam Winkler adds that "the undue burden test is clearly more tolerant of regulation than traditional strict scrutiny."[195]

Fifth—and perhaps most importantly, at least from the perspective of First Amendment advocates—the undue-burden test, as articulated in *Hellerstedt*, would add significant teeth to an intermediate-scrutiny standard often criticized as too weak.[196] In fact, in arguing against the majority's decision in *Hellerstedt*, Justice Clarence Thomas opined that the undue-burden standard now looks "far more like the strict-scrutiny standard"[197] than it did in *Casey*. Similarly, in applying the undue-burden standard in July 2016, an Ohio appellate court observed that the Court in *Hellerstedt* "set forth *a more exacting* undue burden standard."[198]

On top of this, the undue-burden standard fleshed out in *Hellerstedt* is favorable to free speech in the face of government regulation because, as Dean Chemerinsky notes, "[t]he majority rejected judicial deference to legislatures."[199] This is critical for improving protection of free expression because, in contrast, the intermediate-scrutiny standard for TPM regulations has been described by former Stanford Law School Dean Kathleen Sullivan as "relatively deferential."[200] Stripping away deference from intermediate

194. *See* Edith L. Pacillo, *Expanding the Feminist Imagination: An Analysis of Reproductive Rights*, 6 AM. U. J. GENDER & L. 113, 117 n.20 (1997) ("The Court's singular 'undue burden' standard is reminiscent of the Court's 'intermediate scrutiny' standard created to differentiate between racial classifications and gender classifications."); Paulsen, *supra* note 1, at 398 (asserting that the undue-burden standard "seems to be some form of intermediate scrutiny"); Roy G. Spece, Jr., *The Purpose Prong of* Casey's *Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its Progeny*, 33 WHITTIER L. REV. 77, 79 (2011) (asserting that after *Casey*, the right to an abortion "is protected by *the intermediate scrutiny of the undue burden test* rather than by strict scrutiny" (emphasis added)). *But see* Erin Daly, *supra* note 118, at 144 n.345 (asserting that the undue-burden standard is distinguished "from intermediate scrutiny in that it does not permit the government to justify the regulation: even the most compelling purpose will not save a law if it is found to impose an undue burden").

195. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 235 (2006).

196. *See supra* note 17 and accompanying text.

197. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting).

198. Capital Care Network of Toledo v. State Dep't of Health, 58 N.E.3d 1207, 1215 (Ohio Ct. App. 2016) (emphasis added), *appeal allowed sub nom.* Capital Care Network of Toledo v. Ohio Dep't of Health, 71 N.E.3d 297 (Ohio Mar. 15, 2017) (table decision).

199. Chemerinsky, *supra* note 157, at 355.

200. Kathleen M. Sullivan, *Discrimination, Distribution, and City Regulation of Speech*, 25 HASTINGS CONST. L.Q. 209, 217 (1998).

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scrutiny in First Amendment jurisprudence is crucial, given "that deference's elasticity makes it ripe for misuse and abuse that often leave First Amendment rights hanging out to dry."[201] Jettisoning deference from the intermediate-scrutiny equation would help to ensure that intermediate scrutiny truly is a standard that, as Professor David Han contends, "does not preordain victory for one side or the other."[202]

In brief, the undue-burden standard comports with intermediate scrutiny's present framework as a balancing test that falls somewhere below the rigor of strict scrutiny while simultaneously adding strength to intermediate-scrutiny review by (a) mandating vigilant judicial review of the factual record, (b) requiring thorough analysis of both benefits and burdens imposed by regulations, (c) denying deference to legislative judgments, and (d) limiting judicial discretion. Judicial discretion is limited by requiring more in-depth factual analysis instead of speculation regarding benefits and burdens. In addition, replacing both the narrow-tailoring and ample-alternative-channels prongs of intermediate scrutiny with the undue-burden approach streamlines intermediate scrutiny to a two-part test—one requiring a significant government interest served by a regulation that does not unduly burden speech. This change thereby eliminates the danger of conflating the current second and third prongs described by Professor Wright.[203]

B. Operationalizing Undue Burden Within Intermediate Scrutiny

How might the undue-burden standard operate as the second prong of an intermediate-scrutiny test for reviewing content-neutral TPM regulations? First, identification of a government interest as "significant" under intermediate scrutiny would be determined independently from the question of whether a regulation actually serves that interest without imposing an undue burden on speech. In other words, the undue-burden facet of a reformulated intermediate-scrutiny standard would apply only to the "means" side of the equation, not to the "ends." This comports with the two-pronged nature of strict scrutiny, in which recognition of a compelling government interest is independent from the question of whether the

201. Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 17 (2012).

202. Han, *supra* note 8, at 399–400.

203. *See supra* note 34 and accompanying text.

regulation in question restricts no more speech than is necessary to serve that interest.[204]

Second, the undue-burden prong of a refashioned intermediate-scrutiny test would require courts to consider, per the majority's balancing analysis in *Hellerstedt*, the *benefits* of a government regulation of expression, as well as the *burdens* it imposes on the First Amendment right of free speech. Because the *Hellerstedt* explication of the undue-burden test eliminates legislative deference, the government must put into the judicial record factual proof of the actual benefits that any given TPM restriction serves. The government would need to substantiate, in other words, that *prior to* imposing the regulation, its allegedly significant interest sustained actual harm that was mitigated or reduced *after* the regulation was imposed. Put differently, the government would need *pre-regulation* and *post-regulation* comparison points to demonstrate actual alleviation or mitigation of a problem to show a benefit toward the significant government interest.

Such a requirement comports squarely with the intermediate-scrutiny standard already deployed by the Supreme Court in the commercial speech arena.[205] As the Court wrote more than thirty-five years ago in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[206] the government must prove that "the regulation *directly advances the governmental interest* asserted."[207] In other words, the government must demonstrate that there is a direct benefit from the regulation of speech. The Court later elaborated in *Edenfield v. Fane*[208] that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and *that its restriction will in fact alleviate them to a material degree*."[209] The *Edenfield* Court added that "[t]his burden is not satisfied by mere speculation or conjecture."[210]

In context of TPM regulations, adding *Hellerstedt's* undue-burden approach to intermediate scrutiny brings the test much more in line with the variation of intermediate scrutiny already applied in commercial-speech cases by forcing the government to prove direct, material benefits from a

204. *See supra* notes 26-32 and accompanying text (comparing strict scrutiny with intermediate scrutiny on the ends/means prongs of both current tests).

205. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (noting that the Court has "developed a framework for analyzing regulations of commercial speech that is 'substantially similar' to the test for time, place, and manner restrictions").

206. 447 U.S. 557 (1980).

207. *Id.* at 566 (emphasis added).

208. 507 U.S. 761 (1993).

209. *Id.* at 770–71 (emphasis added).

210. *Id.* at 770.

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regulation. Speculation and conjecture simply won't suffice;[211] as in *Hellerstedt*, a factual record of benefits is one key necessary for a regulation to withstand an undue-burden analysis as imported into intermediate scrutiny.

Furthermore, the degree or size of the purported benefit of a content-neutral restriction on expression must be considered, relative to all other variables that also may negatively impact the government's asserted significant interest. For instance, if the government alleges that a significant interest in aesthetics is served by banning residential, yard-posted signs over a certain size, regardless of the subject matter of those signs, then the benefits to the aesthetics of the community wrought by this regulation would need to be placed within a macro-context of other factors detrimentally affecting community aesthetics. Although there might be a benefit to aesthetics from such a size-of-sign regulation, the level of improvement to the overall aesthetics of the community—the magnitude of the benefit—might be insignificant or *de minimis* because so many other unregulated variables may continue to plague community aesthetics.[212] Per *Edenfield*, this would not provide a benefit "*to a material degree*."[213] Trying to fathom the actual size or scale of the regulatory benefit is vital because it must be weighed against the burdens imposed on speech. The smaller the size or degree of the benefit, in turn, the more likely it is to be outweighed by burdens imposed on First Amendment rights in the undue-burden formulation.

Importantly, evaluating the magnitude of the actual benefit to the government's interest under the undue-burden approach blends seamlessly with the Supreme Court's underinclusivity doctrine. As Chief Justice John Roberts recently explained in *Williams-Yulee v. Florida Bar*,[214] "[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*."[215] Put differently, if the government regulates too little speech to prevent or mitigate a particular type of harm—the harm constituting "the

211. *Id.*

212. Although a quality such as aesthetics may seem subjective, *Hellerstedt* would suggest that expert testimony is relevant here. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016). Testimony from community planning and development experts would seem very pertinent to such an inquiry.

213. *Edenfield*, 507 U.S. at 771 (emphasis added).

214. 135 S. Ct. 1656 (2015).

215. *Id.* at 1670.

problem,"[216] as Roberts called it—that "vast swaths"[217] of unregulated speech continue to produce, then a law may be fatally underinclusive. As attorney James Ianelli explains, a statute is underinclusive if it "fails to reach much of the speech that implicates the government's interest."[218]

In brief, *Hellerstedt's* emphasis on the degree of a demonstrable benefit from a government regulation[219] under the undue-burden standard comports with the Supreme Court's concern regarding the constitutionality of laws that confer *de minimis* benefits. Adding the undue-burden analysis to intermediate scrutiny, in other words, provides a built-in mechanism for ferreting out underinclusive TPM restrictions.

In addition to the government's obligation to proffer evidence of the benefits of a TPM regulation, the undue-burden standard would afford those attacking the regulation the opportunity to demonstrate how the regulation imposes an undue burden on First Amendment speech rights. To better understand the burdens that might be imposed on expression by a content-neutral TPM, it is useful to divide potential burdens into three categories. Specifically, burdens from a TPM regulation might befall:

- *speakers*;
- *audiences*; and
- *messages*.

The question becomes whether, when viewed collectively across these three domains (speaker, audience, and message), the burdens rise in the aggregate to the level of—per the nomenclature of the undue-burden test—a substantial obstacle or obstacles on freedom of expression.[220]

How might a TPM regulation burden speakers? By restricting a particular mode, venue, or timeframe for expression (or some combination thereof), a TPM regulation can force speakers both to spend more money and to devote greater time and effort to convey their message in a way that may or may not be as effective as the method prohibited by the regulation. In other words, the burdens on speakers who attempt to convey a message in a manner as efficacious as that thwarted by a TPM regulation may be both *fiscal* and *exertive*. The Supreme Court made it clear in *City of Ladue v. Gilleo*[221] that eliminating "an unusually cheap and convenient"[222] method

216. *Id.*
217. *Id.* at 1668.
218. James Ianelli, *Noncitizens and* Citizens United, 56 LOY. L. REV. 869, 901 (2010).
219. *See supra* notes 149-153 and accompanying text.
220. *See supra* note 113 and accompanying text.
221. 512 U.S. 43 (1994).

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of communication may be grounds for striking down a TPM regulation.[223] A particular mode of communication—in *Gilleo*, it was yard signs—may be "both unique and important."[224]

Consider, for instance, a TPM regulation that prohibits leafletting directly to people within fifteen yards of City Hall between the business hours of 8:00 a.m. and 5:00 p.m. in order to serve significant interests in (1) the ingress and egress of government employees, lobbyists, and other visitors to and from the building; and (2) safe facilitation of all foot traffic on the narrow and normally crowded sidewalks that surround the building.[225] With this low-cost and direct approach to communicating a message to those who may hold positions of (or be influencers of) government power blocked, a speaker would need to adopt more expensive and time-intensive measures—and, importantly, less direct ways—of trying to reach his or her desired audience. Those might include, for example, having to (1) purchase newspaper, television, and/or Internet advertisements; (2) send mass mailings; and (3) rent billboard space.

A TPM regulation can also burden audiences—something a comprehensive and detailed undue-burden approach to intermediate scrutiny would address. In particular, the U.S. Supreme Court has recognized an unenumerated First Amendment right to receive speech.[226] As Professor Catherine Ross explains, "[t]he right to receive information is a corollary of the right to speak."[227] Indeed, "courts have recognized in a

222. *Id.* at 57.

223. The Court in *Gilleo* assumed, for the sake of argument, "the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination." *Id.* at 53.

224. *Id.* at 54.

225. The sidewalks in this scenario are adjacent to busy streets on all four sides of City Hall, and pedestrians would need to step into the streets and into oncoming vehicular traffic were the sidewalks to become blocked.

226. *See generally* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (observing that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, [and] the right to read" (emphasis added)); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (asserting that the First Amendment "freedom embraces the right to distribute literature and necessarily protects *the right to receive it*" (emphasis added) (citation omitted)).

227. Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 477 (2000). Professor Marc Blitz adds that a listener's right to receive information "is simply the mirror image of the speaker's right to express it. And the First Amendment cannot protect one without meaningfully protecting the other." Marc J. Blitz, *Constitutional Safeguards for Silent*

variety of contexts that a right to free speech is not held just by speakers. Listeners, too, have a First Amendment right to receive speech."[228]

Thus, in considering the constitutionality of a TPM regulation, a court would need to consider how the regulation burdens the ability of potential audience members to receive speech. For example, an ordinance banning or limiting the number of all newsracks, regardless of the content of the publications they hold, in a particular space or location detrimentally affects not merely the right of publishers to convey speech, but also the right of individuals who may want to receive speech. Similarly, an ordinance limiting the number and size of yard signs that may be posted on a plot of residential property affects not only a homeowner's right to speak—perhaps regarding political candidates or ballot initiatives—but also her neighbors' ability to know how others, whom they may respect or loathe, might be voting.

Finally, it is important for courts to consider how a message itself may be burdened by needing to take on a different form or be conveyed via another medium because of a TPM restriction. In other words, some modes and manners of message conveyance may be more efficacious than others, not only in terms of reaching a certain quantity of people, but also in terms of attracting attention, gaining understanding, facilitating persuasion and being remembered. Here, communication science[229] might prove useful in helping courts to understand why a TPM regulation that thwarts a particular mode or manner of communication unduly burdens the underlying message.[230] The use of expert testimony and data-driven findings in such areas comports with the *Hellerstedt* majority's deployment of the undue-burden standard in analyzing the benefits and burdens in that case.[231]

Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information, 74 UMKC L. REV. 799, 809 (2006).

228. Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1100 (2007).

229. *See* Charles R. Berger & Steven H. Chaffee, *The Study of Communication as a Science*, *in* HANDBOOK OF COMMUNICATION SCIENCE 15, 17 (Charles R. Berger & Steven H. Chaffee eds., 1987) ("Communication science seeks to understand the production, processing, and effects of symbol and signal systems by developing testable theories, containing lawful generalizations, that explain phenomena associated with production, processing, and effects.").

230. *See generally* JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW (1990) (providing an overview of the ways in which research from the field of communication may help inform the law regarding message effects).

231. *See supra* notes 151–154 and accompanying text.

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In considering the burdens imposed on a message, a comprehensive undue-burden analysis must also address what the Supreme Court in *Cohen v. California*[232] called the "dual communicative function"[233] of speech. As Justice John Marshall Harlan wrote in *Cohen*, speech "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[234]

In turn, some modes of message conveyance may be more effective than others in demonstrating the depth of a speaker's passion and fervor for her message. For example, a TPM regulation limiting the decibel level of speech and/or banning speech-amplifying devices, such as microphones and bullhorns, arguably reduces the emotional impact of spoken words. If the alternative left open by such a regulation is the distribution of printed words on leaflets, then the emotive force of seeing and hearing a person express her views in a loud, passionate manner is burdened.

Similarly, a content-neutral TPM regulation that limits billboards or yard signs to only words restricts the emotive force of a message conveyed by images. A text-only billboard stating, "Abortion Kills the Innocent," for instance, may not pack the same degree of emotive and persuasive force as an image of a mangled fetus.[235] As UCLA Professor Eugene Volokh asserts, "photographs can expose that which is otherwise hidden, with a vividness that words often cannot capture; images of aborted fetuses are an especially apt example."[236]

In summary, analysis of the burdens spread across the domains of speakers, audience members, and messages would collectively help the judiciary determine if the burden imposed on First Amendment rights is undue when balanced against the government-proven benefits of a TPM regulation. A demonstrably slight government-proven benefit might well be outweighed by aggregate burdens that are tantamount to a substantial obstacle in the way of First Amendment free expression.

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232. 403 U.S. 15 (1971).

233. *Id.* at 26.

234. *Id.*

235. *See* Clay Calvert et al., *Gruesome Images, Shocking Speech & Harm to Minors: Judicial Pushback Against the First Amendment After* Brown v. Entertainment Merchants Association*?*, 13 VA. SPORTS & ENT. L.J. 127, 155–58 (2014) (providing an overview of the power of images relative to those of words).

236. Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 904 (2015).

IV. Conclusion

Intermediate scrutiny today, Professor Lillian R. BeVier asserts, "has become the practical equivalent of lenient, rational basis review."[237] Professor Susan Williams concurs that intermediate scrutiny, as it applies to TPM regulations, is a "fairly lenient standard."[238] That is bad news, of course, for advocates of free expression.

This article thus proposed importing the Supreme Court's undue-burden test from the realm of abortion-restriction cases like *Hellerstedt* into the intermediate-scrutiny standard of review for content-neutral TPM restrictions of expression. The proposal, in turn, called for eliminating both the narrow-tailoring and ample-alternative-channels prongs of the current intermediate-scrutiny test, while retaining the significant-interest facet.

As argued above, the undue-burden standard articulated and applied by the *Hellerstedt* majority provides a more free-speech-friendly approach for evaluating TPM regulations by eliminating deference to lawmakers and requiring a fact-intensive, judicial inquiry into both the benefits of regulations and their burdens on First Amendment rights. Justice Elena Kagan once characterized the current version of intermediate scrutiny as providing "a fairly loose balancing test."[239] Blending in the undue-burden standard as clarified in *Hellerstedt* provides a key mechanism for reducing such looseness and elasticity, while preserving a balancing approach that adds muscle in deference-free fashion. Stripping away deference is important if intermediate scrutiny is to live up to its potential as a test that "allows the Court to take a neutral stance that favors neither the government nor the party challenging it."[240]

Although the undue-burden standard may be criticized as nothing more than a balancing test that provides the judiciary with leeway for its own discretion, it is important to remember that intermediate scrutiny *already* involves balancing.[241] Furthermore, as the Introduction made clear, intermediate scrutiny has gained importance in First Amendment jurisprudence.[242] Given this heightened value of intermediate scrutiny to free-speech jurisprudence, it is critical to review and reconsider the current

237. BeVier, *supra* note 57, at 1293.
238. Williams, *supra* note 25, at 644.
239. Kagan, *supra* note 182, at 443.
240. Shaman, *supra* note 175, at 163.
241. *See supra* notes 181-189 and accompanying text.
242. *See supra* notes 4-5 and accompanying text.

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standard as to how it might be improved. Doctrines, after all, are not set in stone, but are judicial creations that can evolve.[243]

The proposal here is presented for scholarly and judicial consideration and critique as a possible means of shoring up intermediate scrutiny in a way that makes it more difficult for the government to sustain regulations on expression. No series of brief hypothetical ordinances like those suggested in Section B of Part III, of course, can ever possibly capture all of the nuances of how a court might apply an intermediate-scrutiny standard that requires the government to demonstrate a significant interest and to show that a regulation does not unduly burden First Amendment rights. Indeed, *Hellerstedt* deployed the undue-burden standard in a highly fact-intensive, evidentiary manner.[244] Requiring courts to non-deferentially examine what Justice Breyer called "record evidence"[245] provided by the government of an actual benefit served by a TPM regulation and, in turn, to weigh the size and scope of that benefit against demonstrable burdens imposed on First Amendment rights across the domains of speakers, audiences, and messages would mark a significant step toward eliminating substantial obstacles in the marketplace of ideas.[246]

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243. *See* Delphine Nougayrède, *Yukos, Investment Round-Tripping, and the Evolving Public/Private Paradigms*, 26 AM. REV. INT'L ARB. 337, 349 (2015) (noting that "judicial doctrines are not set in stone and can change over time to adapt to new circumstances").

244. *See supra* notes 143-146 and accompanying text. The types of evidence in the judicial record that Breyer lauded the district court for considering included, among other things, "expert evidence, presented in stipulations, depositions, and testimony." Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

245. *Id.* at 2316.

246. The marketplace of ideas theory is "one of the most powerful images of free speech, both for legal thinkers and for laypersons." MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2 (2001). It pivots on the assumption that free speech "contributes to the promotion of truth." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 998 (2003). Justice Anthony Kennedy reaffirmed this maxim and the power of the marketplace metaphor in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), writing for the plurality that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Id.* at 2550 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).