THREE RING CIRCUS SIX YEARS LATER

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INTRODUCTION

In the 1989 version of *Three Ring Circus*,[1] a brief reference was made to Justice Scalia's opposition to balancing competing interests in dormant Commerce Clause cases.[2] I hope to refute Justice Scalia's argument in this Article. As part of that theme, I will add two additional varieties of criticisms of the balancing of interests approach to constitutional interpretation and, hopefully, refute one and make something of a case for the other.[3] The other goals for this Article are twofold. First, I want to use this opportunity to simplify the overall explanatory scheme of which balancing is the major part.[4] Second, and by far the most important, I want to explore how the balancing of interests process has faired since 1989.

PART 1: IS BALANCING OF INTERESTS VALID?

Two major challenges to balancing governmental interests against their impact on some constitutional guarantees seem to be premised on separate theories: (1) balancing is not appropriate because the constitutional guarantee in question is absolute, permitting no exceptions; or, (2) even where constitutional demands are

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1. Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 STETSON L. REV. 301 (1989) [hereinafter *Three Ring Circus*]. A follow-up piece looked at two very narrow changes in the balancing process. Thomas C. Marks, Jr., *Three Ring Circus Revisited*, 19 STETSON L. REV. 571 (1990).

2. *Three Ring Circus*, *supra* note 1, at 310 n.49.

3. Anything approaching a total exposition and refutation of all the criticisms of the balancing of interest approach to constitutional interpretation cannot be accomplished in the severely limited part of this Article that I have allotted to it. All that I have attempted to do is give the reader a flavor of the nature of the challenges and the reasons why at least two of them do not represent viable alternatives to balancing. While a third may have some validity as a critique, its focus is not on balancing itself but the way balancing is done.

4. *Three Ring Circus*, *supra* note 1, at 305–10.

nonabsolute, the judiciary is not as well equipped as legislative bodies to balance interests. Superimposed upon the latter argument, there is, perhaps, a third challenge in the form of a philosophical question: How wedded should judges be to what might be described as balancing test formulas?

The first challenge to balancing of interests which requires a belief in the absolute nature of a right was probably limited to the handful of Supreme Court justices who saw the First Amendment as an absolute. The second challenge is based on Justice Scalia's apparent belief that, at least in the jurisprudence of the dormant Commerce Clause, the Court simply lacks competence to engage in the balancing process. It is uncertain whether Scalia's distrust of judicial balancing of interests goes beyond this. Finally, the idea espoused by Justice Cardozo, that judges should not be overly wedded to precedent in the growth of judge-made law, may or may not have an application to constitutional interpretation that involves balancing of interests.

I. BALANCING OF INTERESTS AS INCONSISTENT WITH THE SPEECH AND PRESS CLAUSES OF THE FIRST AMENDMENT

The chief proponent of the absolute nature of freedom of speech was, most probably, Justice Hugo Black.[5] Consequently, he criticized

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5. Other justices have occasionally joined him in this view. In Konigsberg v. State Bar of California, 366 U.S. 36 (1961), discussed *infra* at text accompanying notes 6–12, Justice Black was joined in his dissent by Chief Justice Warren and Justice Douglas. The same two justices joined Black's dissent in Barenblatt v. United States, 360 U.S. 109, 134–66 (1959) (Black, J., dissenting). Justice Brennan appeared to join only the part of Black's dissent that found no valid purpose to be served by the government's intrusion on First Amendment interests. He appeared to desire not to reach the question of the validity of the balancing of interest approach. *Id*. at 166 (Brennan, J., dissenting). It is probably fair to say that Justice Brennan, although believing in extensive protection of First Amendment rights, never took the position that those rights were absolutes. *See* his separate opinion in New York Times Co. v. United States, 403 U.S. 713, 724–27 (1971) (Brennan, J., concurring). It seems to me that the modern Justices who most likely would have agreed with Black are Blackmun, Marshall, Murphy and Rutledge. I can, however, find no evidence that they ever did. Indeed, as pointed out by Professor Pritchett, "[i]t is significant that Justice Murphy, as devoted a civil libertarian as ever sat on the Court, admitted in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942): `It is well understood that the right of the free speech is not absolute at all times and under all circumstances.'" C. HERMAN PRITCHETT, THE AMERICAN CONSTITUTION 309 (3d ed. 1977).

the Court for balancing that freedom against the importance and necessity of government attempts to limit it. Illustrative of this judicial philosophy is his dissenting opinion in *Konigsberg v. State Bar of California*.[6] There, the majority of the Court had upheld the Bar's refusal to admit Konigsberg because he had refused to answer questions regarding his suspected association with Communists some years earlier.[7] Specifically, the Court held that cases such as Konigsberg's required it to balance interests.

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First . . . Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. It is in [this] class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. *Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved*.[8]

Justice Black argued that subjection of "speech and association to the deterrence of subsequent disclosure"[9] was a clear violation of the First Amendment.[10] Black further argued that the law in question violated the First Amendment,

> unless one subscribes to the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a state might have interest sufficient to justify abridgement of those freedoms. As I have indicated many times

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6. 366 U.S. 36, 56–80 (1961) (Black, J., dissenting).

7. *Id*. at 38–40.

8. *Id*. at 50–51 (emphasis added) (citations omitted). Although Justice Harlan's description of the nature of the regulation found at the beginning of the quotation in the text appears to bear some resemblance to the situation in United States v. O'Brien, 391 U.S. 367 (1968), the similarity appears to be only superficial. *O'Brien* makes no reference to *Konigsberg* and the former's impact on speech is truly incidental while the impact on speech in the latter is not.

9. *Konigsberg*, 366 U.S. at 60 (Black, J., dissenting).

10. *Id*. at 60–61.

> before,[11] I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.[12]

Although Justice Black's assault on the balancing process appeared broad enough to take in all of the Bill of Rights[13] and perhaps Fourteenth Amendment Equal Protection[14] as well, there does not seem to be any evidence that he ever applied it beyond the Speech and Press Clauses of the First Amendment.[15] Indeed, it can be argued that he waffled on the absolute status of the First Amendment.[16] Rather, his argument seemed to be time and loca

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11. The dissenting opinions he cites are: Braden v. United States, 365 U.S. 431, 441–46 (1961); Wilkinson v. United States, 365 U.S. 399, 422–23 (1961); Uphaus v. Wyman, 364 U.S. 388, 392–93 (1960); Barenblatt v. United States, 360 U.S. 109, 140–44 (1959); and American Communication Ass'n v. Douds, 339 U.S. 382, 445–53 (1950). 366 U.S. at 61.

12. 366 U.S. at 61 (Black, J., dissenting).

13. His reference to "the men who drafted our Bill of Rights [having done] all the `balancing' that was to be done in this field" is equivocal. *Id*. The reference to "this field" seems to limit his unhappiness with balancing to the First Amendment. Later in the same paragraph, however, he refers to the Court's "`balanc[ing]' the Bill of Rights out of existence." *Id*.

14. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

15. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. On Black's absolute view of freedom of the press, see his separate opinion in New York Times v. United States, 403 U.S. 713, 714–20 (1971).

16. For example, in his dissent in Morey v. Doud, 354 U.S. 457, 471–72 (1957), *overruled by* New Orleans v. Duke, 427 U.S. 297 (1967), Justice Black quite clearly accepted the balancing of interest process used by the Court to strike down the Illinois statute. The statute regulated the sale of money orders other than those issued by American Express which were exempted from the regulatory scheme. Justice Black merely disagreed with its application: "Unless state legislatures have power to make *distinctions that are not plainly unreasonable* . . . ." *Id*. at 471 (emphasis added). In the matter of the dormant Commerce Clause, Justice Black not only accepted the balance of interests approach, but defended it.

As early as 1948, Black accused the majority of abandoning the principle set forth in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). In his dissent in H.P. Hood & Sons v. Du Mond, Black stated:

> The vacancy left by the *Cooley* principle will be more than filled, however, by the new formula which *without balancing interests*, automatically will relieve many businesses from state regulation. This Court will thereby be relieved of much trouble in attempting to reconcile state and federal interests. State regulatory agencies too will be relieved of a large share of their traditional duties when they discover that bad local business practices are now judicially immu-

tion based. In *Tinker v. Des Moines Independent School District*,[17] he argued that students had no right to wear black arm bands protesting the United States' involvement in the Vietnam War if school authorities banned such symbolic speech as disruptive of the educational process.

> While I have always believed that under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases or when he pleases.[18]

This argument is bolstered by a reference to *Cox v. Louisiana*.[19] But *Cox* seems to have involved a time, place, and manner regulation in a public forum which the Court has held to require content neutrality.[20] Certainly, the facts of *Tinker* do not suggest content neutrality. The majority noted:

> It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns *and some even wore the Iron Cross, traditionally a symbol of Nazism*. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.[21]

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nized from state regulation. But it is doubtful if the relief accorded will promote the welfare of the state or nation since Congress cannot possibly undertake the monumental task of suppressing all pernicious local business practices.

H.P. Hood & Sons v. Du Mond, 366 U.S. 525, 555 (1949) (Black, J., dissenting) (emphasis added).

17. 393 U.S. 503 (1969).

18. *Id.* at 517 (Black, J., dissenting).

19. 379 U.S. 536 (1965).

20. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (describing what constitutes public/private forum).

21. *Tinker*, 393 U.S. at 510–11 (emphasis added). The reader should understand that the portion of the quotation in italics is uninformed and offensive. Many German soldiers, and Prussian soldiers before them, have been honored by the award of the Iron

So the juxtaposition of Justice Black's opinions in *Konigsberg*[22] and *Tinker*[23] find him in the untenable position of arguing that in some circumstances, e.g., *Konigsberg*, balancing of interests is not permissible because the First Amendment represents an absolute rule, while in others, e.g., *Tinker*, the First Amendment is not entitled to any protection, not even that of balancing interests.[24] Thus, the idea that balancing of competing interests is unconstitutional because the First Amendment admitting of no exceptions falls apart when faced with the reality of certain considerations that, under some circumstances, are more important than speech.[25]

II. JUSTICE SCALIA AND THE DORMANT COMMERCE CLAUSE

Justice Scalia's disagreement with balancing of competing interests is his belief that, at least in the case of the dormant Commerce Clause,[26] the judiciary is simply not competent to accomplish a balancing of such interests.

> While it has become standard practice at least since *Pike v. Bruce Church, Inc.*, to consider, in addition to these factors of [the discrimination against interstate commerce by the States,] whether the burden on commerce imposed by a state statute "is clearly ex-

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Cross in one of its degrees before Hitler came to power in Germany in 1933.

> The Iron Cross, one of the most famous decorations in the world, was established by Frederick William III in 1813 as a Prussian order for bravery in battle. It was awarded at Waterloo, in the Franco-Prussian War, and in World War One. During this period it was in two classes with a grand cross. In 1939, Adolf Hitler reinstituted the Iron Cross in eight classes. The decoration was a cross patée in black iron edged with silver and bearing in the center of the original crosses a spray of oak leaves, *and in the Nazi awards a swastika* and the date 1939 on the lower limb.

8 ENCYCLOPEDIA AMERICANA 602 (int'l ed. 1990) (emphasis added).

The reader will thus gather that the swastika (and a peculiar form of it at that), not the Iron Cross, was the symbol of Nazi Germany. Given the odious nature of the Nazi state, anyone to whom the Iron Cross was awarded prior to 1933 would be rightly offended by Justice Fortas' carelessness.

22. *See supra* text accompanying notes 6–12.

23. *See supra* text accompanying notes 17–18.

24. *Tinker*, 393 U.S. at 518–21 (Black, J., dissenting).

25. This is the essence of Justice Black's argument in his *Tinker* dissent. *See id.*

26. It was thus first described by Chief Justice Marshall in Willson v. The Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

> cessive in relation to the putative local benefits," such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all.[27]

It is difficult to determine whether Justice Scalia's alternative to balancing interests would work — leave it for Congress to preempt state law if that body thinks the burden on commerce is too great.[28] While it must, of course, be conceded that the commerce power belongs to Congress, it is difficult to imagine that the cumbersome machinery of federal legislation could be fine tuned enough to sort out, with any degree of accuracy, those state laws that should or should not fall as being inconsistent with the commerce power. Neither Congress nor any other legislative body can enact laws to meet every eventuality.[29] This is why administrative agencies are created and why those agencies promulgate rules.[30] It is possible, although by no means certain, that Congress could have created an agency whose specific duty was to monitor state legislation and meet any undue burden on interstate commerce with a rule against it. Perhaps the reason that Congress has not done so is because the judiciary has, at least since 1829,[31] taken on the job of monitoring, in a proper judicial setting to be sure, the degree of permissible burdens that the States can impose on commerce.[32]

Although John Marshall's opinion in *Willson v. The Black Bird Creek Marsh Co.*[33] does not mention words like "balance" or phrases such as "competing interests," that must have been exactly the process he used in finding that a state law, authorizing the construction of a dam across a navigable stream used in commerce, did not violate what was, for the first time, described as "the power to regulate commerce in its dormant state."[34] After ascertaining that no act of

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27. CTS Corp. v. Dynamics Corp., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment).

28. *Id*. at 96.

29. "[I]t is inconceivable that Congress could pass uniform national legislation capable of adjustment and application to all the local phases of interstate activities that take place in the [then] 48 states." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 545–46 (1949) (Black, J., dissenting).

30. See generally Justice Black's comments in *Du Mond* that "a state commissioner was authorized to hold hearings and make findings of fact . . . ." *Id*. at 547.

31. *Willson*, 27 U.S. (2 Pet.) at 251–52.

32. *See generally* Justice Black's dissent in *Du Mond*, 336 U.S. at 551–55.

33. 27 U.S. (2 Pet.) at 251–52.

34. *Id*. at 252.

Congress preempted the state law, Marshall concluded that "under all the circumstances of the case" the state law was not "repugnant to"[35] what is now called the dormant Commerce Clause.[36] What were these circumstances? Simply stated, the state's reason for authorizing the dam was to drain a swamp to prevent disease.[37] The impact was to close what was at best a marginal avenue of commerce. The health of those people who lived along Black Bird Creek outweighed the relatively minor impact on the free flow of commerce. Ever since *Willson*, it has been the judiciary that has enforced the guarantee of the free flow of commerce that is the pledge of the dormant Commerce Clause. There is no reason known to the author why yet another federal agency should take over the process. Certainly Justice Scalia is wrong if he suggests that the balancing of competing interests in the area began only in 1970 with *Pike v. Bruce Church, Inc.*[38] Perhaps he should take another look at *Willson*.

III. IS BALANCING OF INTERESTS IN A STRAIGHT JACKET?

A third possible criticism of the balancing process does not condemn the process itself, either because an absolute constitutional right will admit to no balancing of interests[39] or because courts are generally less competent than legislative bodies to accomplish it.[40] Rather, this critique examines the arguably rather hidebound form balancing of interests sometimes seems to take. As I have speculated to some extent elsewhere,[41] the egregious misuse of judicial review by the Supreme Court had, and continues to have, a dramatic impact on the Court's balancing of interests strategy — if so fine a word as strategy can be used to describe such a process.

To put it in simplest terms, to further the *laissez faire* belief of a

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35. *Id.*

36. Some justices have also called it the negative Commerce Clause. *See* West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2211 (1994).

37. 27 U.S. (2 Pet.) at 251. This is also amply illustrated by Attorney General Wirt's description of Black Bird Creek: "It is one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inherit its marshes. . . . " *Id.* at 249.

38. 397 U.S. 137 (1970).

39. See *supra* text accompanying notes 5–25 for a discussion of the absolutist view.

40. See *supra* text accompanying notes 26–38 for Justice Scalia's view.

41. *See* Thomas C. Marks, Jr. & Mary Greenwood, *The Burger Court and Substantive Rights: An Analytical Approach*, 57 U. DET. J. URB. L. 751, 761–63 (1980).

majority of the Court, for a period of roughly half a century, that institution used the Due Process Clause,[42] and to a lesser degree the Equal Protection Clause,[43] to strike down governmental regulation thought to be antithetical to their belief that business should generally be insulated from such regulation. The first among equals in this sorry episode in the Court's history[44] is *Lochner v. New York*,[45] probably because of the Holmes dissent.[46] In *Lochner*, the Court found that the Fourteenth Amendment Due Process Clause[47] was implicated because New York's limitation on the number of hours bakers could work interfered with a liberty interest of entering into a contract to work for more hours than the law allowed.[48] The law was declared unconstitutional because, the Court actually stated with a straight face, there was no meaningful relationship between the hourly limitation and the welfare of the bakers it was supposed to serve.[49] With the advent of *Nebbia v. New York*[50] in 1934, the Court virtually abandoned the use of substantive due process[51] and

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42. U.S. CONST. amends. V & XIV.

43. U.S. CONST. amend. XIV.

44. At this point I must indicate that criticism of the *Lochner*-type opinion should not be read or taken to mean unthinking support of government regulation of business. It should simply be taken as a critique of the nature of the judiciary's involvement, much in the manner of the Holmes dissent. See *infra* text accompanying note 53 for Holmes' view of the *Lochner* balancing test.

45. 198 U.S. 45 (1905).

46. *Id.* at 76 (Holmes, J., dissenting).

47. "Nor shall any State deprive any person of life, liberty or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

48. *Lochner*, 198 U.S. at 61.

49. The Court used the term "proper, reasonable and fair provision." *Id*. at 62.

50. 291 U.S. 502 (1934). "If the laws passed are seen to have a reasonable relationship to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*." *Id.* at 537.

51. See also Ferguson v. Skrupa, 372 U.S. 726 (1963), where the Court spoke of "abandon[ing] . . . the use of `vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise . . . ." *Id.* at 731. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court also lashed out at substantive due process:

> Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* 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.

Id. at 481–82 (citations omitted).

with it any sort of due process test that measured the reasonableness of a law, frequently described in terms of a real and substantial relationship between means and purpose.[52]

The Holmes dissent in *Lochner*, to which this Article has previously alluded, has undoubtedly had a momentous impact on the process of balancing interests.

> I think the word liberty [from the Due Process Clause of the Fourteenth Amendment] is perverted when it is held to prevent the natural outcome of a *dominant opinion*, unless it can be said that a *rational* and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[53]

It can certainly be argued, although I have not seen it done until now, that Holmes' dissent led, at least to some extent, not only to the demise for a time of both substantive due process in the realm of economic regulation and the real and substantial relationship test, but also to the rise of what is now called the rational basis test in equal protection jurisprudence. As the law developed after the mid-1930s, the balancing process in equal protection became, as stated earlier, hidebound. If the Court did not apply the strict scrutiny of the compelling governmental interest test,[54] which the government usually lost, then it applied the rational basis test, which the government almost always won.[55] To quote Justice Marshall:

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52. Perhaps the genesis of the actual wording of this test is found in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). There the Court struck down a Virginia law which exempted from taxation the income of domestic corporations which did no business in Virginia, but taxed all the income of domestic corporations which did part of their business in Virginia. The Court's definition of the equal protection test it used is a virtual carbon copy of the *Lochner* substantive due process language: "[T]he classification must be reasonable, not arbitrary, *and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike*." *Id.* at 415 (emphasis added).

53. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) (emphasis added).

54. The government's purpose had to be compelling and the means used to achieve it had to be necessary in the sense that no less drastic means existed to achieve the desired purpose. *See, e.g.,* Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

55. The government's purpose had to be constitutional and the means selected to achieve it merely rational. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

> If a statute is subject to strict scrutiny, the statute always or nearly always, is struck down. . . . . But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld.[56]

Justice Marshall considered this to be an "abdication" of judicial responsibility.[57]

Perhaps to some extent spurred on by his criticism, the Court has, in equal protection, carved out three categories of classifications that fall between the two extremes mentioned by Justice Marshall.[58] Those that are based on legitimacy of birth or gender require an important government purpose for the classification and that the classification have a real and substantial relationship to that purpose.[59] Classifications that grant to some and deny to others a free public education must have an important purpose and the classification must be rationally related to that purpose.[60]

Since the revival of substantive due process in *Roe v. Wade,*[61] the Court, acting outside the area of privacy protected by strict

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56. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

57. *Id*. at 320. Justice Marshall was able to assemble a series of cases which he believed showed that "the Court's deeds have not matched its words." *Id*. The "deeds" illustrate the move by the Court toward, in some cases, applying a degree of something somewhere in between the extremes Marshall had alluded to.

58. *See supra* text accompanying note 56.

59. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988).

60. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982).

61. 410 U.S. 113 (1973). The operative words are: "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, . . . " *Id.* at 153. I believe that this selection of a constitutional basis for privacy can be traced directly to Justice Harlan's defense of the substantive aspect of the concept of due process in Griswold v. Connecticut, 381 U.S. 479 (1965):

> In my view, the proper constitutional inquiry in this case is whether the Connecticut [birth control] statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates the basic values "implicit in the concept of ordered liberty" . . . . While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations [referring to the Douglas opinion]. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Id. at 500 (Harlan, J., concurring in the judgment) (citations omitted).

scrutiny,[62] will apparently use the rational basis test, except when one's liberty interest in refusing medical treatment is implicated.[63] In freedom of expression, perhaps because of its supposed preferred position in the pecking order of constitutional rights,[64] the balancing tests are somewhat more varied with little emphasis placed on the rational basis test.

Thus, in equal protection, substantive due process, and to a somewhat lesser extent, freedom of expression, the Court appears to have gotten itself into somewhat the same predicament as those judges described by Justice Cardozo in *The Nature of the Judicial Process*:[65]

> [T]he work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of cases would also be the wisest judge.[66]

Now, admittedly, Justice Cardozo was talking about the growth of judge-made common law, not about judicial review. There is certainly great reason to lean toward the rational basis test when judicial review cannot be avoided altogether because, it has been pointed

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62. See *supra* note 54 for a definition of the strict scrutiny test. The effect of Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), and its "undue burden" test for measuring the constitutionality of at least some state regulation of abortions has created some uncertainty regarding strict scrutiny at least in the abortion aspect of privacy. *See* discussion *infra* Part 3.III.B.

63. *Compare* General Motors Corp. v. Romein, 503 U.S. 181 (1992) *with* Cruzan v. Director of Missouri Dep't of Health, 497 U.S. 261 (1990).

64. See, e.g., the well-known footnote 4 in United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

65. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale Paperbound ed. 1960).

66. *Id.* at 20–21.

out in so many ways by so many writers as to be axiomatic, when judicial review strikes down a law it thwarts the will of the majority.[67] But the difference between the growth of judge-made law and the admittedly different process of constitutional interpretation may not provide an answer to the problem which I am about to address. That problem can be simply illustrated using Justice Cardozo's color card metaphor.[68] The Court, and let us for the sake of relative brevity limit ourselves to equal protection as it will provide a most suitable example, now has only ten cards with which to play, although several of them have writing on both sides. If a card has the shading of a racial classification, alienage classification[69] or national origin classification, it attracts the Court's strictest scrutiny. If a card has the color of a classification that affects voting, interstate travel or privacy, it gets the same strict scrutiny.[70]

If a card is colored gender classification or has the color of a classification based on legitimacy of birth, it receives slightly less scrutiny than the first six cards.[71] The gender card, however, has writing on the other side that suggests that if the two genders are similarly situated in regard to the purpose for which they are classified, the government will lose. But, if they do not share similarity of situation, the government will win.[72] The ninth card has the color of a classification that gives to some a free public education while

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67. *See, e.g., supra* text accompanying note 56.

68. See *supra* text accompanying note 66 for an explanation of Cardozo's metaphor.

69. This card has writing on both sides. On one side one finds the words "alienage classification," on the other, the words: "But there are two exceptions, that involving state governance and that involving federal power to which the rational basis test or something similar applies." *See Three Ring Circus*, *supra* note 1, at 315–17.

70. The interstate travel and privacy cards also have writing on both sides. "Interstate travel is a fundamental right," proclaims one side of that card. But, counters the other side, "[o]nly if there is a substantial impediment placed in its path." *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) *with* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). One side of the privacy card is emblazoned "strict scrutiny" but the other warns to "beware of the undue burden in abortion cases." *See infra* text accompanying notes 152–55.

71. As explained by Justice O'Connor:

> Between [the] two extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications [sic] based on sex and illegitimacy. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important government objective.

Clark v. Jeter 486 U.S. 456, 461 (1988) (citations omitted).

72. *Compare* Reed v. Reed, 404 U.S. 71 (1971) *with* Schlesinger v. Ballard, 419 U.S. 498 (1975).

denying it to others. It gets the scrutiny of important purpose and rationality of means.[73] If a card is colored *anything else* the rational basis test applies.[74] I could be wrong, but I believe that Justice Cardozo would have been, if not appalled, at least bewildered.

This is not to say that the Court is totally on the wrong tack. However, in coming to focus on ten cards, even with the slight modifications mentioned,[75] it has lost sight[76] of the argument that one card colored gender classification might not really mean the same thing as another card also colored gender classification. There are arguably various shades of gender coloration, not just the one which the Court has discovered or at least recognized.[77]

In *Schlesinger v. Ballard*,[78] the Court found that since male and female line naval officers were not equal in terms of sea duty, a prime criterion for promotion, equal protection concepts were not violated by giving the female naval officers what apparently amounted to one extra opportunity to be on a promotion list before being honorably separated from the service for non-promotion.[79] No other factors were considered, or to describe in the color card language, no other shadings of color were even considered. The Court only addressed broad classes of people: Male and female line naval lieutenants who *had* twice not made the lieutenant commander promotion list. To be sure, this is relatively easy, neat and clean. But does it really go to the essence of equal protection concerns? Suppose there were, within the broad classes described above, female lieutenants who had accumulated the requisite sea duty and male lieutenants who *had not*? Nothing would change even though under that hypothetical circumstance the promotion system is at once under-inclusive and over-inclusive. I am fairly certain that I know the Court's answer to this argument, and I am not absolutely prepared to say that it is wrong. The Court considered the public policy behind a legislative amendment reducing AFDC funding and

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73. *See* Plyler v. Doe, 457 U.S. 202 (1982).

74. As will be seen, the Court has, on at least three occasions, misused or distorted the rational basis test to achieve a result other than the one a normal application of that test would have achieved. See *infra* text accompanying notes 100–02 for a discussion of aberrational cases.

75. *See supra* notes 69–70 and text accompanying note 71.

76. *But see supra* text accompanying note 72.

77. *See supra* note 72 and accompanying text.

78. 419 U.S. 498 (1975).

79. *Id*.

explained:

> General rules are essential if a fund of this magnitude [substitute for "fund," "promotion system"] is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.[80]

What has just been described goes to one of the ten cards — gender. A broader but similar concern is at the heart of a whole system of jurisprudence that consists of only ten cards. In *Reed v. Reed*,[81] apparently the first gender based classification case to reach the Supreme Court, the Court held that equal protection was violated by preferring males over females as administrators of decedent's estates, all other things being equal.[82] Since the two genders were similarly situated, there was no substantial reason for treating them differently, never mind that the state's purpose was what amounted to administrative convenience and surely that classification had a substantial relationship to it. To cover this avenue of attack, Chief Justice Burger explained in effect that even if there was a substantial relationship between means and purpose, the administrative convenience purpose was not important enough to support a gender-based classification.[83] *Putting aside the generally distasteful nature of gender-based classifications*, the women suffered an injury considerably less serious than occurred as a result of government classification schemes to which the tenth card, the rational basis test, was routinely played.

In *New Orleans v. Dukes*,[84] *Massachusetts Board of Retirement v. Murgia*,[85] and *Vance v. Bradley*,[86] the apparent ability to earn a particular livelihood was at issue. But ability to earn a livelihood is not one of the nine "exceptional" cards.[87] In *Dukes*, the city excluded push-cart food vendors from the French Quarter with the exception of two who were apparently old-timers and were grandfathered-in.[88]

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80. Bowen v. Gilliard, 483 U.S. 587, 599 n.13 (1987).
81. 404 U.S. 71 (1971).
82. *Id*.
83. *Id*. at 76–77.
84. 427 U.S. 297 (1976).
85. 427 U.S. 307 (1976).
86. 440 U.S. 93 (1979).
87. *See supra* text accompanying notes 69–74.
88. This, of course, created the classification. But, even without that factor, if all

The Court treated the matter as one of economics to which the rational basis card was to be applied virtually without thought. The vendors lost — perhaps they could earn a livelihood another way, perhaps not. It really did not seem to matter.[89] In *Murgia* and *Vance*, respectively, police and foreign service officers were forced to retire at age fifty and sixty respectively because it was irrebutably presumed that they were not sufficiently able to carry out their duties at that age. Undoubtedly, some were not while others were still quite capable. But equal protection was not allowed to be a precise enough tool to say which was which. Again, the Court had, of its own doing, only the rational basis card to play.[90]

Now it seems to me that we are looking at constitutional law examples of what Justice Cardozo criticized in the common or judge-made law. If one of the nine color cards does not come up, very little thinking is necessary. If the card is, say, the gender one, then it is a simple question of similarity of situation and the judicial labor is over. Justice Cardozo commented that it is "when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."[91] The difficulty with applying this comment to the Supreme Court's equal protection balancing of interests jurisprudence is that the Court has ensured that the colors, all ten of them, match every other similar

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food push-cart vendors had been excluded from the French Quarter, presumably the action taken by New Orleans would have still created a classification: the push-cart vendors and those who merchandise their food products other ways. *Dukes*, 427 U.S. at 298.

89. This is not to say that the ultimate outcome was wrong. What it is to say is that perhaps New Orleans should have been required to demonstrate something more to the Court than mere rational relationship of its action to the merely legitimate purpose required to be served.

90. The Court made just such an admission in Dandridge v. Williams, 397 U.S. 471 (1970). Comparing prior equal protection cases involving the "state regulation of business and industry" with the instant case involving "the administration of public welfare assistance, [which] by contrast, involves the most basic needs of impoverished human beings," the Court stated: "We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard [the rational basis test]." *Id*. at 485. As has been alluded to already, *Lochner* was the culprit:

> For this Court to approve the invalidation of state economic and social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history.

Dandridge, 397 U.S. at 484–85 (citation omitted).

91. CARDOZO, *supra* note 65, at 21.

classification but not each other. Furthermore, the index is constructed so that it cannot fail and there are always decisive precedents.

Admittedly, I have stated only one side of the case. The specter of *Lochner* still hangs over the whole balancing of interests process. And there is the very real concern that government should not be hamstrung by the judiciary's overzealous use of the limitations found in the Constitution. But, recognizing the very real validity of these concerns, is the ten card game the Court is playing the best that can be done in equal protection? Perhaps the answer the Court would give is that "the problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be and unscientific."[92]

In summary of Part I then, Justice Black and Justice Scalia are well off the mark in their critiques of balancing of interests. However, the concern that I have linked to Cardozo's comments on judging, as tentative and perhaps poorly illustrated as it is, needs to be addressed, but this is neither the time nor the place.

PART 2: TO SIMPLIFY AN EXPLANATORY SCHEME

In *Three Ring Circus*[93] and its forerunner article,[94] the balancing of interests discussion that was begun in the latter and extended in the former was only part of an overall analytical scheme. The involvement of a means-ends (purpose) analysis was the basic assumption of that scheme. In Part I, the question was asked: Was the government's purpose constitutional? In most cases the answer would be yes and the analysis would proceed to the next part of the scheme. In the rare case where the answer was no, the inquiry ended at that point because if a law's purpose was unconstitutional, so was the law. The next part of the analytical scheme was limited to equal protection and involved the disproportionate impact of an apparently harmless classification on certain groups. Since this might ultimately result in the re-examination of the purpose, I described this as Part IA of the scheme. I do not propose to go into it any further at this point since it is described adequately in *Three*

92. Bowen v. Gilliard, 438 U.S. 586, 601 (1987) (citing Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69–70 (1913)).

93. *See generally Three Ring Circus*, *supra* note 1.

94. *See generally* Marks & Greenwood, *supra* note 41.

Ring Circus and what small question I have about it goes not to the analysis but to the narrowness of its use.

Part II involved that rare situation where the government selected a truly illogical means to achieve what had been found to be a constitutional purpose — the means simply did not advance the purpose at all. As an intellectual exercise, Part II might have been warranted, but as a teaching tool it was a non-starter. The cases supporting the concept of illogical means boiled down to little more than *Baxtom v. Herold*,[95] *Walters v. City of St. Louis*,[96] and *Bell v. Hongisto.*[97] The concept itself was equally impossible to distinguish from the rational basis test in the balancing of interests part of the analytical scheme which was Part III. It was also impossible, *Bell v. Hongisto*[98] notwithstanding, to explain why certain means could be logical but irrational. It is better to give up the whole business and consign *Baxtom*, *Walters* and *Bell* to a constitutional law never-never-land where better cases than they have found a home for much poorer reasons.

PART 3: CRITIQUE

How well has *Three Ring Circus* stood the test of six years of Supreme Court decisions? The answer is, with the exception of the dormant Commerce Clause, fairly well. As with *Three Ring Circus*,[99] we will begin with the balancing test that puts the least burden on the government.

I. BALANCING THAT PUTS THE MINIMUM BURDEN ON THE GOVERNMENT

A. Equal Protection

In equal protection, I have not discovered any balancing that puts the minimum burden on the government in what I would call aberrational cases along the lines of *City of Cleburn*e,[100] *Metropoli*

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95. 383 U.S. 107 (1966); *see* Marks & Greenwood, *supra* note 41, at 760.

96. 347 U.S. 231 (1954); *see* Marks & Greenwood, *supra* note 41, at 760 n.48.

97. 501 F.2d 346 (9th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *see* Marks & Greenwood, *supra* note 41, at 761 n.58.

98. 501 F.2d 346 (9th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

99. *See generally Three Ring Circus*, *supra* note 1.

100. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); *see Three Ring*

tan Life,[101] or *Zobel*.[102] Indeed, in 1993, the Court issued a ringing defense of the rational basis approach to balancing interests and another *sub silentio* repudiation of *Lochner*.[103]

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, Equal Protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against Equal Protection challenge if there is any conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action "our inquiry is at an end." This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[104]

In *Gregory v. Ashcroft*,[105] the Court again refused to go beyond the rational basis test except in the nine exceptional categories alluded to above.[106] *Ashcroft* involved a provision mandating retirement for judges of age seventy which was in Missouri's Constitution.

Circus, *supra* note 1, at 318–21. In *Cleburne*, the ordinance in question should have been held to satisfy the rational basis test although it was weak. The Court, however, held otherwise. *See also Three Ring Circus*, *supra* note 1, at 318–19. The most recent Supreme Court case involving a classification, based on mental retardation, was Heller v. Doe by Doe, 113 S. Ct. 2637 (1993), and cites *Cleburne*. But it does so merely for the proposition that the rational basis test has been applied to such cases. *Id*. at 2643. The Court conceded, as it had to, that "even the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation." *Id*. But this can amount to very little indeed, for the Court had just finished saying that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id*. (citations omitted). It is doubtful that the outcome in *Cleburne* would have been the same if this type of reasoning had been applied.

101. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); *see Three Ring Circus*, *supra* note 1, at 320–21.

102. Zobel v. Williams, 457 U.S. 55 (1982).

103. FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993).

104. *Id*. (citations omitted).

105. 111 S. Ct. 2395 (1991).

106. See *supra* text accompanying notes 69–74 for a discussion of equal protection categories.

Relying in large measure on *Murgia*[107] and *Bradley*,[108] the Court found no constitutional infirmity in Missouri's constitutional provision.

As a final comment on the rational basis analysis in equal protection, a comparison of the outcomes in *Allegheny Pittsburgh Coal Co. v. Webster County*[109] and *Nordlinger v. Hahn*[110] provides a beautiful illustration of the correct operation of the rational basis test and an inferential repudiation of *City of Cleburne*,[111] *Metropolitan Life*[112] and *Zobel*.[113] For the sake of clarity, the discussion of *Allegheny* will be the one found in *Nordlinger*:[114]

> At issue in *Allegheny Pittsburgh* was the practice of a West Virginia county tax assessor assessing recently purchased property on the basis of its purchase price, while making only minor modifications in the assessments of property that had not recently been sold. . . . This Court determined that the unequal assessment practice violated the Equal Protection Clause.[115]

To the Court "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme."[116] This was so because the purpose of assessing real property values for tax purposes in West Virginia was, as stated in its Constitution and laws, "that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value."[117] The icing on the cake was West Virginia's argument that "its assessment scheme is rationally related to its purpose of assessing properties *at true current value*."[118] Very simply put, if the government's purpose is to insure statewide uniformity of assessment of real property values

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107. 427 U.S. 307 (1976).
108. 440 U.S. 93 (1979).
109. 488 U.S. 336 (1989).
110. 112 S. Ct. 2326 (1992).
111. 473 U.S. 432 (1985).
112. 470 U.S. 869 (1985).
113. 457 U.S. 55 (1982).
114. 112 S. Ct. 2326 (1992).
115. *Id*. at 2331.
116. *Id*. at 2335.
117. *Id.* at 2334.
118. *Id.*

for tax purposes, it does not encourage or allow its tax assessors to reassess at the time a piece of real property is sold and almost never at any other times. Thus, what was going on in West Virginia truly lacked rationality.

The California scheme in *Nordlinger* was quite different. As understood by the Court,[119] it was California's purpose not to have statewide uniformity of assessment of the value of real property for tax purposes, but rather to base value solely on the cost of acquisition. The Court surmised that such a system could have been selected for at least two reasons. First,

> [t]he State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established "mom-and-pop" businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the [California] assessment scheme rationally furthers this interest.[120]

Also,

> the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to "lock in" to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protections than the anticipatory expectations of a new owner at the point of purchase.[121]

To repeat, then, the rational basis test in equal protection jurisprudence appears to remain the norm, while the nine exceptional classifications have generally remained the same.

B. Substantive Due Process

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119. *Id.* at 2333.
120. *Id.*
121. *Id.*

The rational basis approach has now appeared in substantive due process jurisprudence to anchor the law's minimal scrutiny end of a continuum that, much like equal protection, finds strict scrutiny at the other end.[122] In *General Motors v. Romein*,[123] the Court describes "the test of due process" as "a legitimate legislative purpose furthered by rational means."[124]

C. The Contract Clause

In *Three Ring Circus*,[125] I attempted to establish that in the case of private contracts the Court had traditionally utilized the rational basis test and this usage was linked by judicial history to equal protection and substantive due process.[126] While I am not willing to concede that this cannot be done, I do readily admit that much space was devoted to a woefully inadequate effort. Furthermore, it is an effort that neither time nor inclination allows for its renewal here. Therefore, for the present I will allow that the Contract Clause protection of private contracts falls somewhere other than the rational basis test.[127]

II. BALANCING THAT PUTS THE MAXIMUM BURDEN ON THE GOVERNMENT

A. Equal Protection

This, of course, is strict scrutiny and applies in equal protection jurisprudence to the three suspect classifications[128] and those three fundamental rights linked to equal protection.[129] This area of constitutional law has tended to remain relatively static with the exception of the application of an "undue burden" test to certain govern-

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122. See *supra* text accompanying notes 69–70 for examples of when strict scrutiny applies.

123. 112 S. Ct. 1105 (1992).

124. *Id*. at 1112.

125. *Three Ring Circus*, *supra* note 1, at 321–27.

126. *Id*. at 321–25.

127. See *infra* text accompanying notes 242–58 for a discussion of the Contract Clause.

128. See *supra* text accompanying notes 69–74 for the balancing tests applied to classifications.

129. See *supra* text accompanying note 70 for the balancing tests applied to fundamental rights.

ment regulations affecting abortion. Since this new test does not appear to be strict scrutiny, it will be addressed elsewhere.[130]

B. Substantive Due Process

Substantive due process was not broken out as a separate heading in *Three Ring Circus*. However, since it has already been mentioned in regard to the rational basis test and will be mentioned again in regard to the intermediate levels of scrutiny, it is best to merely point out that privacy, which attracts strict scrutiny,[131] has been affected in two different ways. First, *Cruzan v. Director, Missouri Department of Health*[132] has added emphasis to the impression given by the Court in *Bowers v. Hardwick*[133] that the fundamental right of privacy will not be expanded beyond what is presently encompassed by it.[134] Second, as already alluded to above, abortion, which is an aspect of privacy, may no longer enjoy strict scrutiny of every government attempt to regulate it.[135]

C. Dormant Commerce Clause

As a matter of principle, I stand by my position taken in *Three Ring Circus* that, given any significant impact by state regulation on the free flow of commerce between the states, the dormant Commerce Clause will apply the strict scrutiny of the compelling governmental interest test to such regulation. I knew at the time[136] that I was taking somewhat of an extreme stance but thought then and think now that it is a defensible one. Given the nature of this Article as an examination of how *Three Ring Circus* had faired over the six

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130. *See* discussion *infra* Part 3.III.B.

131. *See supra* text accompanying notes 68–70.

132. 497 U.S. 261 (1990).

133. 478 U.S. 186 (1986).

134. These would apparently include marriage, Zablocki v. Redhail, 434 U.S. 374 (1978), and Loving v. Virginia, 388 U.S. 1 (1967); the right of blood relatives to live together, Moore v. City of East Cleveland, 431 U.S. 494 (1977); procreation, Skinner v. Oklahoma, 316 U.S. 535 (1935); a limited right to choose abortion, Roe v. Wade, 410 U.S. 113 (1973); contraception, Griswold v. Connecticut, 381 U.S. 479 (1965); and possibly divorce, Boddie v. Connecticut, 401 U.S. 371 (1971). Perhaps also included is bringing up and educating one's children, Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923).

135. *See* discussion *infra* Part 3.III.B.

136. *See Three Ring Circus*, *supra* note 1, at 335.

years since its publication, the view that there are three tests, not one, should be mentioned. In 1987, the Court of Appeals for the Third Circuit discussed judicial review under the dormant Commerce Clause:

> Three standards of review are applied in performing dormant Commerce Clause analysis: 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.[137]

More recently, the Supreme Court has laid out a similar, but by no means identical, approach:

> If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive to the putative local benefits."[138]

III. BALANCING THAT PLACES INTERMEDIATE BURDENS ON GOVERNMENT

A. Equal Protection

The intermediate tests in equal protection that apply to classifications based on gender, legitimacy of birth, and deprivation of a free public education to some but not to others[139] appear to remain relatively static and will not be discussed further.

B. Substantive Due Process

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137. Norfolk S. Corp. v. Oberly, 822 F.2d 388, 398–99 (3d. Cir. 1987).

138. Oregon Waste Sys., Inc. v. Department of Env. Qual., 114 S. Ct. 1345 (1994).

139. See *supra* text accompanying notes 59–60, 71–73 for discussion of intermediate tests used in equal protection.

In many ways, it is regrettable that the Supreme Court was unable to agree to adopt, as its own, the opinion of the Third Circuit Court of Appeals in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[140] because it is a model of organization and clarity. In fact, I will go so far as to suggest that without understanding the Panel opinion, it is difficult if not virtually impossible to decipher the welter of opinions that, combined, are the Supreme Court's offering in this crucial case. Therefore, I will begin with what the Panel had to say.

The Panel began by recognizing that it had to decide the standard of review to be applied to the various aspects of the Pennsylvania laws before it.[141] After analyzing *Roe*[142] and the major Supreme Court abortion cases subsequent to it,[143] the Panel recognized that a change in the standard of review had apparently occurred and set for itself the necessary task of figuring out the correct standard to apply.[144] The panel began by recognizing how important it is to apply the correct standard of review.

> As Justice O'Connor cogently observed in an equal protection case alleging racial discrimination, a "dispute regarding the appropriate standard of review may strike some as a lawyers quibble over words, but it is not. The standard of review establishes when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the government may resort to racial distinctions more readily." Similarly, the standard

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140. 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 112 S. Ct. 2791 (1992).

141. The district court which first heard challenges to various aspects of the Pennsylvania Abortion Control Act of 1982, upheld some aspects and struck down others. *Casey*, 947 F.2d at 687. The ones it struck down were those that found their way to the Third Circuit and ultimately to the Supreme Court because Casey and the other defendants sought review. *Id*. The plaintiff did not cross-appeal regarding the portions of the Act upheld by the district court. *Id*. Thus, the appeal involved 1) the medical emergency exception to various requirements of the Act, *id*. at 694; 2) the informed consent requirement, *id*. at 702, including who was required to do the informing, *id*. at 704; 3) the 24-hour waiting period, *id*. at 706; 4) the parental consent with judicial bypass, *id*. at 707; 5) spousal notification, *id*. at 709; and 6) the reporting and disclosure requirements. *Id*. at 715–19.

142. Roe v. Wade, 410 U.S. 113 (1973).

143. These include: Hodgson v. Minnesota, 497 U.S. 417 (1990); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); and Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983). *Casey*, 947 F.2d at 687–88.

144. *Casey*, 947 F.2d at 687–88.

> of review used for abortion legislation establishes the degree to which the government may regulate abortion.[145]

The Panel then pointed out that the standards of review generally argued for in abortion cases were the strict scrutiny of the compelling governmental interest test[146] and the minimal scrutiny of the rational basis test.[147] The former view prevailed in *Roe*[148] and for a time thereafter.[149] The Panel apparently considered it to be highly relevant that Justice O'Connor had staked out a "middle ground"[150] between these two views. She believed that abortion was a "limited" fundamental right,[151] applying "the strict scrutiny standard if the regulation at issue causes an `undue burden' on a woman's abortion decision and the rational basis standard if it does not."[152] Thus the key to Justice O'Connor's approach is the "undue burden."[153] In her dissent in *Akron v. Akron Center for Reproductive Health, Inc.*,[154] she explained "that an undue burden occurs when a regulation imposes an `absolute obstacle [ ] or severe limitation[ ] on the abortion decision,'" in contrast to those regulations which "may `inhibit' abortions to some degree."[155] She gave similar definitions in other opinions.[156]

The Panel then decided that although strict scrutiny review was

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145. *Id.* at 688 (citations omitted).

146. *Id*. at 688–89. This view was held by those justices who considered abortion to be a fundamental right. *Id*.

147. *Id*. This view treated an abortion regulation as "no different from reviews of any social or economic legislation implicating a liberty interest" under due process. *Id.*

148. *Id.*

149. *See supra* text accompanying note 143.

150. *Casey*, 947 F.2d at 688.

151. *Id.*

152. *Id*. at 688-89 (citing *Akron*, 462 U.S. at 453, 465 n.10 (O'Connor, J., dissenting)).

153. The Panel pointed out that "[i]n the abortion context, the pedigree of the undue burden standard can be traced to Justice Powell's opinion for the majority in *Maher v. Roe*, a government funding case." *Casey*, 947 F.2d at 690 n.3.

> Roe did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion.

Id. (quoting *Maher*, 432 U.S. U.S. at 473–74).

154. 462 U.S. 416 (1983).

155. *Casey*, 947 F.2d at 690 (citing *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting)).

156. *Id*. at 690–91.

the order of the day up through *Thornburgh v. American College of Obstetricians and Gynecologists*,[157] things might have changed in the two cases immediately preceding *Casey*, *Webster v. Reproductive Health Services*[158] and *Hodgson v. Minnesota*.[159] Thus the Panel set itself the task of "review[ing] *Webster* and *Hodgson* to determine if the standard of review used in those cases displaced strict scrutiny as the standard binding on lower courts."[160] This was not to be an easy task.

The Panel began by recognizing that "our system of precedent or *stare decisis* is thus based on adherence to both the reasoning and result in a case, not merely the result alone."[161] The Panel then recognized the truism that, while lower courts are bound by *stare decisis*, the Supreme Court can change its collective mind as to reasoning or result "when it finds it is unsound in principle [or] unworkable in practice."[162] This change obviously binds lower courts, but a problem arises when a Supreme Court decision "reveals that a standard established in an earlier case no longer commands the allegiance of a majority of the Justices, but also reveals that no single substitute is endorsed by that majority of the Justices."[163] Then lower courts have to decide "whether to apply the old standard or, if not, what standard to apply."[164] However, "the Supreme Court has instructed the lower courts on how to resolve these issues."[165] This involves a two step process synthesized from the Supreme Court's decision in *Marks v. United States*.[166]

The first step is to recognize that "a legal standard endorsed by the Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it, even if that majority is composed of Justices who disagree on what the proper standard should be."[167] The second step is the recognition that "[w]hen a frag-

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157. 476 U.S. 747 (1986).
158. 492 U.S. 490 (1989).
159. 497 U.S. 417 (1990).
160. *Casey*, 947 F.2d at 690–91.
161. *Id.* at 692.
162. *Id.* (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).
163. *Id.*
164. *Id.*
165. *Id.*
166. 430 U.S. 188 (1977).
167. *Casey*, 947 F.2d at 693.

mented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, `the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[168] The examples given by the Panel are somewhat difficult to follow but, in any event, the application of the two steps should become clear when the Panel applies them to the question of what standard should be used in abortion cases.

Beginning with *Webster*, the Panel found that four Justices would apply strict scrutiny, and four would apply, at a minimum, the rational basis test.[169] On the other hand, Justice O'Connor first found that the challenged law did not impose an undue burden and, since it did not, voted to uphold it under the rational basis test.[170] Thus, under the first step alluded to above,[171] strict scrutiny can no longer be the standard because it was rejected by five of the nine Justices. Applying the second step,[172] Justice O'Connor was found to have authored the narrowest opinion.[173] The reason is apparently to be found in the following language of the Panel:

> Where a Justice or Justices concurring in the judgment in [a case where no single rationale is accepted by at least five Justices] articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land. In a constitutional case where (1) there is a 5–4 decision or where there are only two opinions in the majority and (2) the majority votes to uphold law as constitutional, the "narrowest grounds" principle will identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional.[174]

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168. *Id.* (quoting *Marks*, 430 U.S. at 193, which in turn quoted Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

169. *Casey*, 947 F.2d at 695.

170. *Id.*

171. *See supra* text accompanying note 167.

172. *See supra* text accompanying note 168.

173. *Casey*, 947 F.2d at 695 n.9.

174. *Id.* at 693–94. The converse was also explained by the Panel although it would not apply to *Webster* conversely: "In a constitutional case where (1) there is a 5–4 split or there are only two opinions in the majority and (2) the majority strikes down a law as unconstitutional, the authoritative standard will be that which would invalidate the fewest laws as unconstitutional." *Id.* at 694.

Thus, four of the five Justices "in the majority" in *Webster* would simply apply the rational basis test without qualification. The fifth Justice, O'Connor, would qualify the application of the rational basis test by first requiring a finding of no undue burden[175] and her view would have "upheld the fewest laws as constitutional." Thus, her view was the most narrow and is the authoritative standard or the law of the land.[176]

An application of both aspects of the second part of the two part test,[177] formulated in *Marks*[178] to *Hodgson v. Minnesota*,[179] again resulted in the Panel finding Justice O'Connor's undue burden test as the authoritative standard.[180]

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175. *See supra* text accompanying note 152.

176. *See supra* notes 173–74 and accompanying text.

177. *See supra* notes 168–70 and accompanying text.

178. *See supra* text accompanying notes 166-68.

179. 497 U.S. 417 (1990).

180. *Casey*, 947 F.2d at 696–97. In *Hodgson*, the Court considered the Minnesota two-parent notification standard without the judicial bypass safeguard and five Justices voted to hold it unconstitutional. *Id*. at 696. Applying the first part of the *Marks* test, the strict scrutiny of the compelling governmental interest test could be considered abandoned since it was adhered to by three Justices in the majority. *Id*.; *see supra* text accompanying notes 166–68. The fourth Justice, Stevens, would have applied a standard that was apparently higher than Justice O'Connor's and would result in more laws being held unconstitutional. *Casey*, 947 F.2d at 696. Justice O'Connor found that the law imposed an undue burden before applying strict scrutiny. *Id.* From this the Panel concluded that Justice O'Connor's undue burden approach would result in the fewest laws being held unconstitutional.

> Justice O'Connor concurred in the Court's judgment . . . [that without the judicial bypass provision the parental notice requirement was unconstitutional] on the ground that an abortion regulation that imposes an undue burden on the decision to abort violates the Due Process Clause if [it] does not meet the strict scrutiny standard . . . . [T]he other Justices concurring in the judgment on this issue did not join her opinion, but they would strike down as unconstitutional any regulations struck down under the undue burden standard.

Id. at 697.

The four dissenters would have upheld the law applying the rational basis test. *Id.* at 696. Thus, the unalloyed compelling governmental interest test did not garner five votes and was to be considered abandoned in this context while Justice O'Connor's undue burden test was, as in *Webster*, the law. *Id*. at 695–97; *see supra* text accompanying notes 175–76.

The Court in *Hodgson* also considered a parental notice requirement with a judicial bypass safeguard. *Casey*, 947 F.2d at 696. Here, as in *Webster*, fewer than five Justices followed strict scrutiny and the law was held to be constitutional by five Justices, four of whom applied the unalloyed rational basis test. Justice O'Connor looked unsuccessfully for the existence of an undue burden before applying the rational basis test. Her view could have resulted in more laws being held unconstitutional and was thus the narrowest view in the majority. *Id*. at 696–97. Consequently, it is the law of the land.

Therefore, strict scrutiny was out and Justice O'Connor's undue burden test as understood by the Panel was in.

> In these circumstances, we conclude that it would be inconsistent with the teachings of *Marks* for lower courts to apply the strict scrutiny test of *Roe*, *Akron* and *Thornburgh* to all abortion regulations. We also conclude that only by applying the undue burden standard of review, that is, only by applying strict scrutiny review to regulations that impose an undue burden and rational basis review to those which do not, can we remain faithful to *Marks*. Only by following the rationales of Justice O'Connor's concurring opinions will the lower courts decide abortion regulation cases in a way consistent with the way the Court decided them in *Webster* and *Hodgson*.[181]

Since a number of the Pennsylvania regulations were waived in the event of a "medical emergency," the Panel first considered the definition of "medical emergency" and found it to be constitutional.[182] The Panel next considered the informed consent requirement which involved "two information disclosure requirements and a requirement that the woman wait 24 hours between the time she receives this information and the time the abortion is performed."[183] As to the information that had to be disclosed by a physician and by a counselor before the woman's consent could, under the law, be considered informed, the Panel found that no undue burden was imposed.[184] As to each branch of the disclosure requirement, the Panel found that the rational basis test was met.[185] The Panel also found that the twenty-four hour waiting period did not impose an undue burden on the abortion right and it passed the rational basis test.[186] The Panel then found that as long as a parental consent requirement was alleviated by an adequate judicial bypass procedure

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181. *Casey*, 947 F.2d at 697. In a subsidiary issue, the Panel decided that it was not obliged to follow Supreme Court precedent on specific issues that pre-dated *Webster* and *Hodgson* because the standard was considered changed from strict scrutiny to undue burden. *Id*. at 697–98.

182. *Id*. at 699–702.

183. *Id*. at 702.

184. *Id*. at 703–05.

185. *Id.* The reader will recall that under the Panel's understanding of the undue burden test, if no undue burden is found, the regulation in question need only survive a rational basis review. *See supra* text accompanying note 181.

186. *Casey*, 947 F.2d at 706–07.

no undue burden was imposed and that "[i]t is not irrational for the state to require adult guidance for a minor woman, eleven or twelve years old in some cases . . . in deciding whether to obtain an abortion."[187] Regarding the confidential medical reports and publicly available reports requirements of the Pennsylvania law, neither was found to impose an undue burden and each passed the rational basis test.[188]

The Panel had the most difficulty with the spousal notification requirement. A majority found it to impose an undue burden and to fail the compelling governmental interest element of strict scrutiny.[189] Judge Alito dissented on this point finding that, since no undue burden, as he understood what Justice O'Connor meant by that term, was imposed by spousal notification, this part of the Pennsylvania law should have been upheld under the rational basis test.[190]

Having explained in some depth the Panel's understanding of the undue burden test[191] and how it decided that it was the appropriate test to use in *Casey*,[192] I can now turn to the Supreme Court version of *Casey*.

The so-called joint opinion[193] of Justices O'Connor, Stevens and Souter utilizes the undue burden test as did the Panel but it is not the same test, although either test would appear to give the same result; indeed, that is precisely what happened in *Casey* with one exception.[194] However, as the reader will have noted, the Panel's

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187. *Id*. at 707–09 (citations omitted).

188. *Id*. at 715–19.

189. *Id*. at 710–15.

190. *Id*. at 719–22 (Alito, J., concurring in part and dissenting in part).

191. *See supra* text accompanying notes 140–90.

192. *See supra* notes 152–81 and accompanying text.

193. It is, for example, thus described by both Justice Blackmun and Justice Stevens and will be so described in this Article. 112 S. Ct. at 2843, 2839. The discussion will focus solely on the joint opinion. Where its reasoning is not supported by at least five Justices, the result of its holdings is the law. This is because part of Pennsylvania's law was upheld by the votes of the Chief Justice and Justices White, Scalia and Thomas who would essentially scuttle judicial review of government regulation of abortion, which must be added to the three Justices who authored the joint opinion. When the two parts of the Pennsylvania law were declared invalid, the fourth and fifth votes were those of Justices Blackmun and Stevens. The former applied strict scrutiny and it is difficult to determine on what basis Justice Stevens reached his conclusions.

194. The panel upheld all of the reporting requirements of the Pennsylvania statute while the joint opinion found that the reporting requirement of a married woman's reason for failing to give notice to her husband also posed an undue burden for essentially the same reason as the spousal notification requirement itself. *Casey*, 112 S. Ct. at 2833.

undue burden test was a two step process.[195] The joint opinion's undue burden test has only one step; the absence of an undue burden leads directly to a finding that an abortion regulation is constitutional while the presence of an undue burden leads directly to a finding that an abortion regulation is unconstitutional.[196]

The joint opinion defined undue burden in a way that makes one wonder if it involves a balancing of competing interests in the same way as rational basis review[197] or strict scrutiny review,[198] if indeed it represents a balancing of interests at all rather than a simple definition.

> A finding of an undue burden is a shorthand for a conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.[199] A statute with this purpose is invalid because the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[200]

Thus, in studying how this standard of review is applied to the various aspects of the Pennsylvania law that were before the Court, it is difficult not to come to the conclusion that what is, in reality, going on is far more an exercise in defining than in balancing.

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195. *See supra* text accompanying notes 167–68.

196. *Casey*, 112 S. Ct. at 2820.

197. For an act of government to survive rational basis analysis, the purpose must be constitutional and the means must be rationally related to the purpose. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1948).

198. For an act of government to survive strict scrutiny analysis, the purpose must, in addition to being constitutional, be compelling while the means must be necessary to the achievement of the purpose, that is to say that the purpose cannot be achieved by means that have a less drastic impact on the constitutional guarantee at issue. *See, e.g.*, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

199. Of course, if the fetus is viable the state may prohibit all abortions except those that are necessary to protect the life and health of the mother. The joint opinion reaffirmed Roe's holding: "[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 112 U.S. at 2821 (citation omitted) (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

200. *Casey*, 112 S. Ct. at 2820.

Various limits Pennsylvania placed on obtaining an abortion were excused if there was a medical emergency which would have affected the life or health of the mother.[201] At all three levels of courts, district, circuit and Supreme, the constitutionality of the medical emergency hinged on its *definition*. There was not, as there really could not be, any pretense at balancing of interests. In any event, the Supreme Court found the definition, taken in context, to be sufficiently broad so as to meet constitutional muster.[202]

The informed consent provisions of the Pennsylvania law were upheld even though prior Supreme Court decisions had to be in part overruled.[203] The consent provisions can be bifurcated for purposes of discussion. Part one is the requirement that "a physician inform the woman of the nature of the [abortion] procedure, the health risks of the abortion and of childbirth, and the `probable gestational age of the unborn child.'"[204] Part two requires that:

> The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.[205]

Part one's constitutionality is predirected on both the State's interest in potential life[206] and the substantial government interest justifying a requirement that a woman be apprised of the health risks and childbirth.[207] Part one also apparently includes information "relating to the consequences to the fetus. . . ."[208] Part two ap-

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201. *Id*. at 2821–22.

202. *Id*. at 2822.

203. These cases are: Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), and Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983). *Casey*, 112 S. Ct. at 2823–24.

204. *Casey*, 112 S. Ct. at 2822.

205. *Id.* at 2822–23.

206. *Id.* at 2823.

207. *Id.*

208. *Id.*

parently hinges on the State's interest in unborn life before viability.[209] As the Court stated:

> [R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion.[210]

Applying the joint opinion's own definition of undue burden,[211] since there is no suggestion that there is an invalid State purpose predicated upon means that are calculated to hinder rather than inform "the woman's free choice," both parts one[212] and two[213] are valid. This is simply because the authors of the joint opinion do not believe that either part can "be considered a substantial obstacle to obtaining an abortion, and it [thus] follows that there is no undue burden."[214]

One struggles without notable success to see how this is a balancing of interest process rather than simply a fact driven definition of what is or is not an undue burden. What is even more puzzling is what factor or factors change a due burden or a non-undue burden to an undue burden except the collective opinion of the three authors of the joint opinion. At one point the joint opinion uses the phrase "legitimate purpose,"[215] but that is directly linked to the definition of an undue burden. A purpose becomes unconstitutional if the means chosen to achieve it are calculated to hinder rather than inform.[216] Other purposes linked either to the State interest in health or potential life are presumably legitimate. At another point the Court refers to "a substantial government interest."[217] Would part one[218] change into an undue burden if the state interest were merely legitimate? No suggestion that this would be the case appears either in

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209. *Id.* at 2824.
210. *Id.*
211. *See supra* text accompanying notes 199–200.
212. *See supra* text accompanying notes 206–08.
213. *See supra* text accompanying note 209.
214. *Casey*, 112 S. Ct. at 2824.
215. *Id.* at 2823.
216. *See supra* text accompanying notes 199–200.
217. *Casey*, 112 S. Ct. at 2823.
218. *See supra* text accompanying notes 206–08.

the definition of undue burden or its application. At another point, the authors of the joint opinion make the comment that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[219] This is nothing more than shorthand for the means part of strict scrutiny,[220] but surely does not suggest that only *necessary* regulations escape being described as undue burdens. One would be hard pressed to describe as necessary any of the State regulations at issue. Certainly the authors of the joint opinion do not do so. Perhaps convenient or useful, but not necessary.

These comments can apply to the rest of the Pennsylvania regulations to which the joint opinion applied the undue burden test. The twenty-four hour waiting period after the administration of informed consent is certainly a burden but not an undue one.[221] It is also convenient and useful in the furtherance of the State interest in maternal health and the unborn who are not yet viable, but it is hardly necessary, a claim which the authors of the joint opinion do not claim for it. The closest the joint opinion appeared to come to balancing interests was to describe the twenty-four hour waiting period as part of the system of informed consent as facilitating the "wise exercise" of the right protected by *Roe*.[222]

The Pennsylvania requirement of spousal notification was found to be an undue burden basically because in some cases husbands would act in a number of ways to prevent the abortion.[223] This is obviously an undue burden as that phrase is used by the authors of the joint opinion,[224] but this conclusion reflects the merest scintilla of balancing of interests. The lip service paid to the husband's interest in the unborn child his wife is carrying is simply overwhelmed by the various far greater interests enjoyed by her. Maybe this is a sort of balancing of interests, but it is clearly viewed by the joint

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219. *Casey*, 112 S. Ct. at 2821.

220. *See supra* note 198.

221. *Casey*, 112 S. Ct. at 2826.

222. *Id.*

223. *Id.* at 2826–31.

224. *Id*. at 2820. "[A] statute which, while furthering the interest in potential life *or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* (emphasis added).

opinion as added ammunition to the decision already reached that an undue burden exists.

The joint opinion then proceeds to find that the parental consent provision with the safety value of judicial bypass is consistent with prior decisions and is constitutional. The phrase "undue burden" is never used.[225] The plurality also upheld all of the record keeping and reporting requirements of the Pennsylvania law except the one regarding the woman's reason for not notifying the spouse.[226]

Apart from making it easier to uphold the regulation of abortions, *Casey* is perhaps even more important for its departure from directly balancing the competing interests of government and individuals. Instead, *Casey* adopts a process of identifying whether the State interest in the life and health of the mother, in potential life, or other concerns such as the interest of the husband, is accomplished in a way that "place[s] a substantial obstacle in the path of a . . . woman's free choice,"[227] thus creating an undue burden.[228] Of course if the State's *purpose* is to throw up this kind of road block, the law is also unconstitutional.[229]

Applying the rationale for determining upon what basis the Supreme Court has acted which the Panel of the Third Circuit used in *Casey*,[230] it is clear that all but at the most two Justices have abandoned the application of strict scrutiny[231] to laws that regulate but do not ban abortions before viability. Justice Blackmun would continue to use strict scrutiny[232] as would Justice Stevens.[233] It is a bit more difficult to ascertain the actual standard the Court is using. According to the Third Circuit Panel's understanding, "in a constitutional case where (1) there is a 5–4 split . . . and (2) the majority strikes down a law as unconstitutional, the authoritative standard will be that which would invalidate the fewest laws as uncon-

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225. *Id.* at 2832.

226. *See supra* note 194.

227. *Casey*, 112 S. Ct. at 2820.

228. *Id.*

229. *Id.*

230. *See supra* text accompanying notes 161–81.

231. *See supra* and compare text accompanying note 169.

232. *Casey*, 112 S. Ct. 2844. "I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*." *Id.*

233. See generally his discussion of the continued vitality of the abortion cases beginning with *Roe*. *Id.* at 2841.

stitutional."[234] If I am counting correctly, in Part V of the joint opinion, where the undue burden test was applied,[235] the only five-to-four splits were as to Part VA and VC. Since VA does not involve the use of the undue burden analysis,[236] it will not be considered. Part VC seems to fit the rationale described above.[237] Applying that rationale, the undue burden analysis of the joint opinion is the law because the spousal notification provision was found to be unconstitutional and the undue burden standard would invalidate fewer laws than the higher degree of scrutiny used by Justices Blackmun and Stevens.[238] With regard to Parts VB (informed consent and the twenty-four hour waiting period) and VD (parental notification with judicial bypass), a five-to-four split did *not* occur since not only the joint opinion but the Chief Justice and Justices White, Scalia and Thomas voted in favor of their constitutionality, albeit for differing reasons. In that case, "the idea is to locate the opinion of the Justice or Justices who concurred on the narrowest grounds *necessary to secure a majority*."[239] Clearly, the undue burden analysis is narrower than any of the views expressed by the Chief Justice, Justices White, Scalia or Thomas.[240]

With regard to Part VE, an even more complex problem is created. It will be recalled that, there, the record keeping and reporting requirements of the Pennsylvania law were upheld except for the reports on why a woman refused to provide notice to her husband.[241] Beginning with that part, it should be clear that Justices Blackmun and Stevens would be in support even though not with the rest of VE. Likewise, the Chief Justice and Justices White, Scalia and Thomas would support the rest of VE. And, since the undue burden analysis is the narrowest approach as discussed above, it is the law.

C. The Contract Clause

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234. *Casey*, 947 F.2d at 694.
235. *Casey*, 112 S. Ct. at 2821–33.
236. *See supra* text accompanying note 201.
237. *See supra* text accompanying note 234.
238. *See supra* text accompanying notes 232–33.
239. *Casey*, 947 F.2d at 694 n.7.
240. *Casey*, 112 S. Ct. at 2855–85. These four would essentially remove the abortion question from judicial review altogether. *Id.*
241. *See supra* text accompanying note 226.

With the concession regarding the Contract Clause[242] made earlier herein,[243] I am prepared to suggest that it is at least possible to argue that in the case of both private[244] and public[245] contracts, intermediate scrutiny is used, but at apparent different levels of intensity. The key to modern analysis of the Contract Clause appears to be the Supreme Court opinion in *United States Trust Co. of New York v. New Jersey*[246] as modified by *Allied Structural Steel v. Spannaus*[247] and perhaps in one instance clarified by *Home Building & Loan Association v. Blaisdell*.[248] The test for public contracts from *United States Trust*[249] was briefly discussed in *Three Ring Circus*[250] and will be repeated here only to the extent necessary to illuminate a comparison between it and the test for private contracts drawn from *United States Trust* and *Spannaus*.[251]

Although, as was suggested in *Three Ring Circus*,[252] much of the language in the Supreme Court's opinion in *United States Trust* regarding private contracts seems to amount to a rational basis test approach, the Court, when comparing the test for public and private contracts, appeared to enhance the gravity of purpose requirement for the private contracts test. The crucial language from the opinion is quite clear. *"As with laws impairing the obligations of private contracts*, an impairment may be constitutional if it is reasonable and necessary to serve an *important* public purpose."[253]

Deferring for the moment a discussion of the means part of the test, the Court clearly said two different things in regard to the requisite gravity of purpose of a law that impairs a private contract. Earlier in the *United States Trust* opinion, the Court had clearly

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242. "No State shall . . . pass any . . . law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

243. *See supra* text accompanying notes 125–27.

244. A private contract is one between parties in the private sector. *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

245. A public contract is one where at least one of the contracting parties is a government entity. *See id*.

246. 431 U.S. 1 (1977).

247. 438 U.S. 734 (1978).

248. 290 U.S. 734 (1934).

249. *See supra* note 246.

250. *See Three Ring Circus*, *supra* note 1, at 346–47.

251. *See supra* notes 246 & 247.

252. *See Three Ring Circus*, *supra* note 1, at 321–27.

253. *United States Trust Co.*, 431 U.S. at 25 (emphasis added).

stated that only a legitimate purpose was required.[254] If the English language is to be believed, a purpose can be legitimate, not unconstitutional, and still not rise to the level of important.[255] As much as I would like to believe that *Allied Structural Steel v. Spannaus*[256] is an aberration, an example of the idea that sometimes horrid legislation makes equally horrid constitutional law, it is nevertheless there for now. And it unmistakably not only recognizes the important purpose *United States Trust* apparently required before a court could simply defer to a legislative decision to impair a private contract, but actually required that a purpose supporting such deference had to be of a high order of importance — the solution or at least attempted solution of "an important general social problem."[257] Thus, strangely enough, it can be seriously argued that the gravity of purpose is actually higher in cases involving private contracts than in cases involving public contracts. However, that high gravity of purpose, if met in a private contract, should insure that a court will defer to a legislative impairment of a contract.

This is, of course, not the case with public contracts. Whether the requisite purpose remains merely important or is elevated to the *Spannaus* standard, a court and not a legislature must determine whether the impairment is a reasonable and necessary means of achieving that purpose.[258]

D. Freedom of Expression

The only change in intermediate scrutiny in cases involving freedom of expression that seems to warrant mention would appear to be *International Society for Krishna Consciousness, Inc. v. Lee*,[259] and its companion case *Lee v. International Society for Krishna*

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254. *Id.* at 22.

255. This difference between legitimate purpose and important purpose is reflected in equal protection analysis in the difference between gravity of purpose in the rational basis test and the intermediate level of scrutiny applied to classifications based on gender or legitimacy of birth.

256. 438 U.S. 234 (1978).

257. *Id.* at 147. The Court in *Allied* made copious reference to Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), where the social problem was the Great Depression, but cautioned that these references to *Blaisdell* were "not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts." *Spannaus*, 438 U.S. at 249 n.24.

258. *See Three Ring Circus, supra* note 1, at 346–47.

259. 112 S. Ct. 2701 (1992).

Consciousness.[260] Because of the similarity of names, they will be referred to by case number, the former being 91-155 and the latter, 91-339. The cases are bizarre whether considered together or separate.

In case number 91-155, the majority of the Supreme Court upheld a ban on the solicitation of money imposed by the Port Authority of New York and New Jersey at three airports, Kennedy, La Guardia and Newark. After holding that an airport terminal is not a public forum,[261] the Court did not apply the rational basis test as presumably suggested by *Perry Education Ass'n v. Perry Local Educators Ass'n*[262] but rather a reasonableness test, which is also traceable to *Perry*.[263] Considerable reflection suggests that perhaps the use of both a "reasonable" and a "rational basis" approach in *Perry* is a result of an attack on the mailbox regulations under the Equal Protection Clause as well as directly under the First Amendment.[264] As the Court pointed out, the change of focus made no difference, but it is at this point in the opinion that is found the reference to the rational basis test.[265]

Does the word "reasonable" in the context of the First Amendment and non-public forums carry a different meaning than the rational basis test "in equal protection garb?"[266] My guess is that they mean substantially the same thing and the Court used the language of the rational basis test in the equal protection scenario because it was familiar in that context, especially when contrasted with "strict scrutiny" as the Court did.[267] The use of the word "reasonable" in the context of content neutral regulations on a non-public forum goes back at least to *Perry* itself[268] and has been used several times since in that context.[269] In *Cornelius* we find the following

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260. 112 S. Ct. 2709 (1992).

261. Case number 91-155, 112 S. Ct. at 2706.

262. 460 U.S. 37 (1983). As the *Perry* Court stated: "The School District's policy need only rationally further a legitimate state purpose." *Id.* at 54.

263. *See*, *e.g.*, *id.* at 46, 53.

264. *Id*. at 54. "The Court of Appeals also held that the differential access provided the rival unions constituted impermissible content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id*. at 46, 53.

269. Both Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985), and United States v. Kokinda, 497 U.S. 720 (1990), are mentioned in case num-

comment: "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the restrictions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[270] The Court also defined what it meant by "reasonable" by stating: "The government's decision to restrict access to a non-public forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[271] If "reasonable" in this context is different from "rational," the difference would appear to be minimal. This view is reinforced by another observation from the Court's opinion in *Perry*. "[W]hen government property is not dedicated to open communication the government may — without further justification — restrict use to those who participate in the forum's official business."[272] Finally, there must be factored in the Supreme Court's imprecise use of English.[273]

In case number 91-339[274] the Court, for differing reasons, *struck down* the Port Authority's ban on distribution of literature. The five votes, a bare majority, against the ban generated three different opinions. With the exception of Justice O'Connor, the other four Justices in the majority held the areas involved at Kennedy, La Guardia and Newark to be public fora. Thus, while important, they still represent a minority view about airports and, even then, there was a disagreement with the result to be reached in applying the balancing test for public fora.[275] The Chief Justice and Justices White, Scalia and Thomas dissented and, applying the test from 91-155,[276] would have upheld the Port Authority's ban on distribution of literature.[277] Justice O'Connor, applying the test utilized in 91-155,[278] voted to strike down the ban on literature distribution as

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ber 91-155.

270. *Cornelius*, 473 U.S. at 806.

271. *Id.* at 808.

272. *Perry*, 460 U.S. at 53.

273. *See Three Ring Circus*, *supra* note 1, at 352 n.350.

274. *See supra* note 261 and accompanying text.

275. Case number 91-339, 112 S. Ct. at 2715–27. Kennedy, joined by Blackmun, Stevens and Souter, concurred in the judgment as to Part 1. Souter, Blackmun and Stevens, JJ., concurred in the judgment in case number 91-339 and dissented in case number 91-155.

276. *See supra* notes 263–64 and accompanying text.

277. Case number 91-339, 112 S. Ct. at 2710 (Rehnquist, C.J., and White, Scalia and Thomas, JJ., dissenting).

278. *See supra* note 276.

being unreasonable on the record before the Court.[279] Thus the pertinent portions of the airports involved are not public fora by a five-to-four vote. Justice O'Connor's reason for concurring in the judgment in case number 91-339 appeared to be summarized in these words from her opinion:

> Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction "preserv[es] the property" for the several uses to which it has been put.[280]

It should be pointed out, in conclusion, that even though Justice O'Connor concurred fully in the opinion in case number 91-155, her need for an "explanation" in 91-339[281] probably nudges "reasonable" a little apart from "rational."[282] The rational basis test in equal protection analysis "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . . *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*"[283]

CONCLUSION

Thus rests the state of *Three Ring Circus* after the passage of six years. On the whole, with the exception of the rather large change in the scrutiny accorded to state abortion regulations, vast changes have not taken place in how the Court balances interests. This may be the most true in the continued lack of precision in the use of English, to the extent such precision is possible.[284] As for the rest, the readers can judge for themselves how well taken is my critique on the *process* of balancing interests.[285] No doubt all will cheer the simplification of the framework within which balancing of inter-

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279. Case number 91-339, 112 S. Ct. at 2711–15 (O'Connor, J., concurring in number 91-155 and concurring in the judgment in number 91-339).

280. *Id*. at 2714 (citing *Perry*, 460 U.S. at 50–51).

281. *See supra* text accompanying note 280.

282. A true rational basis test approach would probably not require such an explanation.

283. McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) (emphasis added).

284. *See supra* note 273 and accompanying text.

285. *See* discussion *supra* Part 1.III.

ests appears. It will be interesting to continue to follow the Court's balancing acts into the future.