

Abortion and the First Amendment

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I am delighted with the invitation to comment upon Professor Weinstein's paper¹ and to attend this stimulating conference. I enjoyed the paper partly as a "mini-hornbook" on First Amendment law, clearly explicating several central precepts and critical First Amendment dilemmas. But the particular problems Weinstein is addressing are bubble ordinances, injunctions, the Freedom of Access to Clinic Entrances Act,² and other intersections between abortion rights and the First Amendment. I will briefly comment on each of these subjects in turn.

I. BUBBLE ORDINANCES

"Bubble ordinances" differ, but the Phoenix ordinance that Weinstein litigated against involved an eight-foot bubble. The ordinance provided that when someone approached a woman who was trying to enter a medical facility such as an abortion clinic, if requested to do so, the person had to back off to eight feet. Professor Weinstein has three main objections: (1) a clinic worker, not just the patient-to-be, can ask for a back off; (2) the size of the bubble — eight feet — makes the quiet persuasion that some people would want to engage in quite difficult; and (3) the size of the bubble precludes a demonstrator from handing a leaflet to a woman who is entering the clinic.

This is more than the lament of a litigator who has lost his case. These provisions of the Phoenix ordinance may indeed be more restrictive than necessary. The interests of the anti-abortion demonstrators are significant, because the space outside an abortion clinic is a very important site for them. This is where

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¹ James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471 (1996).

² 18 U.S.C.A. § 248 (West Supp. 1995).

the people *are* whom they have to persuade. And this site represents the demonstrators' last chance to save what they see as innocent life.

I do not believe that the vulnerability of the abortion clinic patient validates measures that would otherwise be overbroad. The purpose of speech is to invite dispute, as the Court stressed in *Terminiello v. Chicago*,³ and even to invite distress, I suggest, of people who the speaker thinks are acting immorally.⁴ Accordingly, it seems that a four-foot bubble would be a significant improvement. At a distance of four feet, the protester could still pass leaflets, and also would not have to scream. Even better, perhaps, would be a six- or eight-foot "wedding march" aisle, cordoned off so that the worker and the patient could walk down the center of the aisle to the clinic entrance, while the demonstrators stand along both sides and speak and pass leaflets to the patient without obstructing access.

These are only a couple of many variations and possible improvements on the Phoenix ordinance's eight-foot bubble. And therein lies the problem with the "least restrictive alternative" approach that the Court has sometimes enunciated and that Weinstein faults the Ninth Circuit for not pursuing in *Sabelko v. City of Phoenix*.⁵ For applying a "least restrictive alternative" approach in such a situation means that a judge can strike down any legislation because he or she thinks of something that seems to be a little better — a little less restrictive of constitutional interests. The irony is that allowing the judiciary to think creatively of less restrictive alternatives, as Weinstein suggests, dramatically increases the opportunity for judicial viewpoint discrimination, which Weinstein abhors and which is, in his view, even worse than legislative discrimination. If he wants to avoid judicial

³ 337 U.S. 1 (1949).

⁴ *See id.* at 4 (noting that "[free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"); *see also* *Cohen v. California*, 403 U.S. 15, 25 (1971) (finding that "the immediate consequence of [free speech] may often appear to be only verbal tumult, discord, and even offensive utterance That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength").

⁵ 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415).

viewpoint discrimination, he should call for less judicial scrutiny, not more.

II. INJUNCTIONS

The law that emerges from *Madsen v. Women's Health Center, Inc.*,⁶ is murky, but the important point that the Supreme Court should have emphasized, in my view, is that the demonstrators had already violated a narrowly-tailored injunction. The case therefore involved a remedy against injunction-violators — a context in which courts clearly need more leeway to be restrictive than with issuance of original injunctions.

A. *The Freedom of Access to Clinic Entrances Act*

I agree with Weinstein that the Freedom of Access to Clinic Entrances Act (FACE) regulates conduct, not speech, and thus does not violate First Amendment protections. The legitimacy of limitations on expressive activity has been recognized also in contexts other than abortion. For example, a federal statute has long prohibited picketing or parading in or near a federal courthouse with the intent of interfering with, obstructing, or impeding the administration of justice.⁷ And *Cox v. Louisiana*,⁸ an important Supreme Court case known for delineating broad protection for demonstrators, said that regardless of the reason for a demonstration, “[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.”⁹ FACE’s restrictions are thus firmly supported by First Amendment doctrine.

B. *The Problems of Discrimination or Disparate Impact and “Content Neutrality”*

Perhaps the hardest problem is determining whether enactments, such as FACE or the bubble ordinances, are “content-neutral” or “content-oriented” (assuming it is appropriate at all

⁶ 114 S. Ct. 2516 (1994).

⁷ 18 U.S.C. § 1507 (1994).

⁸ 379 U.S. 536 (1965).

⁹ *Id.* at 555.

to make this distinction and even to make it determinative of First Amendment issues, as the Supreme Court has done¹⁰). Current doctrine instructs us to look to the language of a statute, and then to the legislature's stated purpose, to determine whether the statute is neutral.

It is troublesome if bubble ordinances would be unconstitutional if they regulated speech outside of "abortion clinics," but magically become acceptable with substitution of the words "health facilities." Even if the effect (and even the actual, though not provable, intent) is exactly the same because abortion clinics are the only health facilities where demonstrations are occurring, such a transformation can save an enactment by making it be classified as "content-neutral."

Another way to think about this problem is to note that these ordinances disparately impact the anti-abortion protestors because they are the only group which is demonstrating in the prohibited manner. The bubble ordinances, even though they don't refer to any ideological position or particular group of people, in fact almost exclusively regulate the speech of those who oppose abortion. It would be unconstitutional for government directly to regulate the activity of "pro-life" forces in the abortion debate, and it would also be unconstitutional for the government to regulate certain religious groups by name. These results would follow from the Equal Protection Clause of the Fourteenth Amendment, and both religion clauses and the speech clause of the First Amendment. Can government avoid this consequence by artful statutory language?

The current law is that if discriminatory intent can be shown, a law is unconstitutional; but without discriminatory intent, disparate impact lacks significance. Moreover, clearly knowing that one group will be disproportionately affected is not enough to constitute discriminatory intent. Instead there must be an *invidious* intent — an intent to discriminate, possibly even a desire to hold the group back — for the statute to be unconstitutional. This currently-followed approach to disparate impact leads to

¹⁰ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* Court sustained the defendant's conviction, finding the draft card-burning statute was content-neutral despite evidence that the legislation was aimed at anti-war protesters.

schizophrenic results in court,¹¹ as well as putting a premium on artful legislative drafting. Nonetheless, there are things to be said in its favor. The problem with allowing disparate impact by itself to trigger a finding of unconstitutionality is that legislatures must be free to ban a particular harmful activity even when only one group is doing it. For example, if one religious group is engaging in animal sacrifice and the legislature wants to ban animal sacrifice,¹² the activity cannot be protected because only one religious denomination is engaging in it. Similarly, residential picketing can be banned, even if the only group doing it is anti-abortion demonstrators,¹³ because the prohibition against residential picketing can be applied more broadly to other groups as well.

The key issue is the harm caused by the banned activity and not the character or the diversity of those engaging in it. Current disparate impact doctrine would support this result, for leading cases presume that statutes are designed to serve neutral rather than discriminatory ends. They follow this approach even when faced with statutes burdening a disfavored racial or gender group on the basis of even immutable or hard-to-change characteristics.¹⁴

¹¹ Compare *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that purposeful discrimination for demonstrating violation of Equal Protection Clause requires that decisionmaker select course of action at least in part "because of," not merely "in spite of," its disparate impact) and *Washington v. Davis*, 426 U.S. 229, 239-48 (1976) (holding disparate impact of employment test does not violate Equal Protection Clause without showing of purposeful discrimination) with *Hunter v. Underwood*, 471 U.S. 222, 225 (1985) (invalidating provision of Alabama's constitution which disenfranchised people convicted of moral turpitude crimes because Court found both disparate impact and evidence of legislators' discriminatory intent to establish white supremacy).

¹² See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993) (striking down ordinances barring ritual animal sacrifice). The Court found that the ordinances were neither neutral nor generally applicable because they excluded most secular killings and suppressed more religious conduct than was necessary to achieve the professed governmental interest.

¹³ See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding ordinance prohibiting residential picketing as content-neutral and narrowly tailored to significant government interest of protecting well-being, tranquility, and privacy of home, and because ample alternatives for expression existed).

¹⁴ See *supra* note 11 (discussing *Washington*, *Feeney*, and *Hunter*).

*C. Other Intersections Between Abortion Rights
and the First Amendment*

That concludes my comment on Weinstein's fine paper, but I want to say another word about the topic of abortion and the First Amendment. Rather than let the anti-abortion activists steal the entire show, we should pay some attention to other interconnections.

One possibility is the First Amendment as the basis for a right to choose abortion. One avenue of argument is that the First Amendment protects individual choice of a wide range of lifestyles; it favors individual decisionmaking, particularly "expressive" decisionmaking, over government orthodoxy. Along with rights to make reproductive choices, such a First Amendment right encompasses choices about how to live, how to look, what to wear, whom to live with, how to develop one's personality. At the heart of such a First Amendment "right to choose" is rejection of government orthodoxy concerning questions on which people deeply and sincerely differ from each other — a concern also central to other, more mainstream, First Amendment issues. Today such constitutional rights, when found protected, rely most frequently on the Fourteenth Amendment Due Process Clause. The right to choose found there is often described either as the "right of privacy" or the "right to liberty." But a First Amendment foundation could be recognized as well. That foundation would rest upon the speech clauses of the First Amendment and would protect reproductive choice as part of the right to choose how to be or the right to develop one's own personality. This does not seem like a difficult stretch when one remembers that other expression has been included within First Amendment protections, even expression that is not literally "speech." Demonstrations, for example, are clearly covered,¹⁵ as are boycotts.¹⁶ Similarly, there is a recognized First Amendment right to liberty of learning and research¹⁷ as well as "speech."

¹⁵ See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969) (holding that picketing and parading may constitute methods of expression protected by First Amendment).

¹⁶ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¹⁷ See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion) (holding that "local school boards may not remove books from school library

Additionally of course the religion clauses of the First Amendment can provide a foundation for access to abortion. Legislation prohibiting abortion can be attacked as establishment of religion. One case that would support that approach is *Epperson v. Arkansas*,¹⁸ which suggests that legislation is suspect if it was enacted because of lobbying by religious groups. The *Epperson* approach has not, however, been followed consistently. That anti-abortion legislation does represent establishment of religion has often been argued to the Supreme Court, especially by amici curiae in leading abortion cases. So far, however, Supreme Court decisions have not rested on this ground. Free exercise of religion is another possible avenue. Crucial to any such argument would be a broad definition of "religion" — a definition like the Supreme Court has adopted in statutory contexts but has not decided as a matter of constitutional law. In *United States v. Seeger*,¹⁹ for example, the Supreme Court included as "religious beliefs" those beliefs which play an essential role in a person's existence but which do not necessarily involve belief in a Supreme Being.²⁰

One day the Court will have to decide what "religion" means for purposes of the Free Exercise clause. The speech clauses of the First Amendment and the Establishment clause may also be found relevant to key questions about the existence, scope, and meaning of a right to choose abortion. I would expect these issues to become even more crucial and interesting connections between the First Amendment and abortion than regulating anti-abortion demonstrations is.

shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" (citation omitted).

¹⁸ 393 U.S. 97, 107 (1968) (holding that law prohibiting teaching of evolution has no justification in public policy other than religious views of its citizens).

¹⁹ 380 U.S. 163 (1965).

²⁰ *Id.* at 166 (defining "religious belief" as "a belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God").

