

Supplementing the Assumed Definitions: A Commentary on Professor Brownstein's Analysis of Abortion Protest Restrictions

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INTRODUCTION

Professor Brownstein's analysis of the proper scope of abortion protest speech restrictions¹ is thoughtful and well-reasoned. I share with him the intuition that the Freedom of Access to Clinic Entrances Act (FACE Act)² does not violate the Constitution, but that the Supreme Court's free speech jurisprudence, and particularly its recent decision in *R.A.V. v. City of St. Paul*,³ cast a shadow upon that conclusion. In fact, I would argue that, in addition to *R.A.V.*'s prospective spectre, the Court's free speech jurisprudence has already adversely affected the FACE Act because the Act's prohibitions were crafted to conform to an inappropriately limited concept of the extent the Constitution permits the government to regulate abortion protest activities.⁴ After discussing the constitutionality of the FACE Act, Professor Brownstein argues that prohibition of harassment, beyond intimidation, and of some speech, other than unprotected threats, may be constitutionally appropriate. Again, I agree. But

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¹ Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553 (1996).

² Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C.A. § 248 (West Supp. 1995).

³ 505 U.S. 377 (1992).

⁴ See, e.g., Michael S. Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y & L. 261 (1994) (providing testimony to Senate Committee about constitutionality of proposed FACE Act, which resulted in several changes restricting its scope).

crucial to applying the general analyses are the definitions contained within them. In my view, several of the definitions assumed within Professor Brownstein's analysis and the analysis of courts that have reviewed the FACE Act are too narrowly understood. Accordingly, I argue that there is a supplementary concept appropriate to each. I advocate adding "impact" to the definition of viewpoint discrimination, adding "equality" to the definition of the abortion right, and adding "women's perspective" to the definition of a threat within the FACE Act.

I. SUPPLEMENTING THE ASSUMED DEFINITIONS

A. Adding "Impact" to the Definition of Viewpoint Discrimination

Professor Brownstein begins his discussion of the constitutionality of the FACE Act by pointing out that although all of the lower federal courts that have reviewed the FACE Act have found it constitutional, their analyses have been less rigorous than the Supreme Court's recent decision in *R.A.V.* would indicate they should be. In particular, *R.A.V.* holds that content discrimination with respect to unprotected speech must undergo strict scrutiny. Although much of the FACE Act prohibitions can be classified as conduct-based and thus subject to a lower level of scrutiny pursuant to the Court's decision in *Wisconsin v. Mitchell*,⁵ at least the prohibition of threats covers pure speech and therefore would seem to fall within the *R.A.V.* rule. The lower courts, Professor Brownstein argues, have not applied strict scrutiny to this aspect of the FACE Act either because they have failed to understand *R.A.V.*, or more likely, because of an unstated judgment that the *R.A.V.* rule makes no sense. Professor Brownstein agrees with the lower courts' decisions not to subject the FACE Act's threat prohibition to strict scrutiny, and also agrees that the Court in *R.A.V.* could not have meant what it said. Strict scrutiny of government regulations of unprotected speech, he argues, is properly limited to viewpoint discrimination. Content discrimination with respect to unprotected speech should be subject to a multi-factor balancing test.

⁵ 508 U.S. 833 (1993). The court held that penalty enhancement for hate crimes is constitutional. *Id.* at 835.

Professor Brownstein's detailed analysis provides the Court with an excellent basis for retreating from a decision that undoubtedly swept too broadly. It may be very useful in cases where neither the purpose nor the impact of a government regulation on unprotected speech is viewpoint-based. My concern is with the application of this analysis to the FACE Act. Professor Brownstein concludes that the FACE Act threat prohibition is viewpoint-neutral and therefore easily passes the multi-factor balancing test that he proposes. All the lower courts that have looked at the issue have implicitly agreed, concluding that the FACE Act is viewpoint-neutral without isolating the threat prohibition for special consideration.⁶ These courts have also noted that this feature distinguishes the FACE Act from the viewpoint-discriminatory ordinance at issue in *R.A.V.*⁷

I disagree both with the conclusion that the FACE Act threat provision is properly analyzed as viewpoint-neutral and the conclusion that the FACE Act's viewpoint neutrality distinguishes it from the ordinance at issue in *R.A.V.* Despite the justified criticism heaped upon the *R.A.V.* decision by Professor Brownstein and others,⁸ in determining whether a government action is viewpoint-discriminatory, this decision, by looking beyond the face of the government regulation to its practical effect, in fact provides a deeper, more speech-protective analysis than that traditionally employed. For those who believe that the government should protect access to abortion, overlooking the *R.A.V.* decision's analysis of viewpoint discrimination might have the salutary short term effect of promoting an analysis that renders

⁶ See, e.g., *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1427 (S.D. Cal. 1994) (noting that statute is not discriminatory on basis of content); see also *American Life League, Inc. v. Reno*, 47 F.3d 642, 648-50 (4th Cir.) (finding FACE Act to be both content and viewpoint neutral), *cert. denied*, 116 S. Ct. 55 (1995).

⁷ See, e.g., *American Life League*, 47 F.3d at 648 (noting that if Act was content or viewpoint discriminatory, then strict scrutiny mandated by *R.A.V.* would apply).

⁸ See, e.g., *United States v. Hayward*, 6 F.3d 1241, 1258 (7th Cir. 1993) (Flaum, J., concurring) (noting inapplicability of *R.A.V.* analysis to prevention of intimidation provision in Fair Housing Act), *cert. denied*, 114 S. Ct. 1369 (1994); Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992) (proposing that racial hate speech should be treated differently than other forms of hate-filled expression); Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 788-91 (1992) (criticizing Court's emphasis on constitutional rights of attackers as opposed to rights of victims of hate speech).

all aspects of the FACE Act constitutional. Nevertheless, I think the better long term strategy for those in favor of women's rights, and minority rights in general, is to embrace the *R.A.V.* analysis of viewpoint discrimination, acknowledge that the FACE Act properly fits within it, and develop an analysis that responds to this conclusion.

The portion of the FACE Act at issue punishes anyone who "by . . . threat of force . . . intentionally . . . interferes with . . . any person because that person is or has been . . . obtaining or providing reproductive health services."⁹ The argument that it is viewpoint-neutral is that reproductive health services can be provided on both sides of the abortion debate.¹⁰ Consequently, a prohibition against threats that interfere with providing such services on its face limits a certain form of unprotected speech about the entire subject matter of reproductive options, rather than targetting and limiting solely anti-abortion expression.

This demonstration that the FACE Act threat prohibition is facially viewpoint-neutral is plausible and consistent with a number of the Court's decisions.¹¹ But that its superficial facial neutrality is enough to avoid the classification of viewpoint-discriminatory in light of *R.A.V.* is less clear. The ordinance invalidated in *R.A.V.* punished "[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, . . . which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."¹² On its face, the St. Paul ordinance prohibited speech about particular subject matters that resulted in certain reactions. This can be seen as viewpoint-neutral because a range of different ideas about the listed subject matters could cause the listed reactions. Justice Scalia, for the Court in *R.A.V.*, acknowledged as much when he carefully distinguished the language of the ordinance, which prohibited "abusive invective . . . addressed to one of the specified

⁹ 18 U.S.C.A. § 248.

¹⁰ See, e.g., *American Life League*, 47 F.3d at 649 (noting that "[t]he Act . . . protects access to all reproductive health services, including both abortion and services connected with carrying a fetus to term.").

¹¹ See Brownstein, *supra* note 1, at 636 n.161 (citing cases and arguing to support this claim).

¹² *R.A.V.*, 505 U.S. at 380.

disfavored topics” from “its practical operation,” which went “even beyond mere content discrimination, to actual viewpoint discrimination.”¹³ He found it “obvious” that the symbols targeted by the ordinance were those “that communicate a message of hostility based on one of the[] characteristics.”¹⁴ This message he distinguished from messages of racial tolerance, which he determined not to be covered by the ordinance.¹⁵ Therefore, the St. Paul ordinance singled out those who espouse intolerant views for punishment.

This same reasoning should result in the same conclusion with respect to the threat prohibition of the FACE Act. Although the subject matter of “obtaining reproductive services” theoretically covers both sides of the abortion debate, it is “obvious” to most of us that the FACE Act targets speakers who “communicate a message of hostility based on” someone’s desire to obtain or provide reproductive services. Analogous to the hostile messages prohibited by the ordinance in *R.A.V.*, this message can be distinguished from messages of tolerance of reproductive choices, which are not prohibited by the FACE Act. Viewed this way, the FACE Act threat prohibition singles out those who are intolerant of certain reproductive choices for special, disadvantageous treatment.

Reading the FACE Act threat prohibition as viewpoint-neutral requires a suspension of disbelief equal in magnitude to the one Justice Scalia refused to adopt in *R.A.V.* It is possible that a symbol of racial tolerance could provoke anger, resentment, or alarm and thereby fall within the terms of the St. Paul ordinance. To find such expressions not covered, the Court relied upon a common sense understanding of the actual intended operation of the ordinance, supporting its conclusion with legislative intent as articulated in the ordinance’s title and as construed by the the city’s counsel and the state supreme court.¹⁶ Similarly, it is possible that a pro-choice believer could threaten someone because they are obtaining or providing a reproductive service other than abortion. But most of us know that, like the

¹³ *Id.* at 391.

¹⁴ *Id.* at 392.

¹⁵ *Id.* at 393-94.

¹⁶ *Id.* at 391-92.

placement of the hypothetical symbols of racial tolerance, this simply is not happening.¹⁷ In fact, in the context of the abortion issue, this possibility may be even less likely than that symbols of racial tolerance will provoke the requisite reactions. Unlike the dichotomy between beliefs in racial tolerance and racial supremacy, support of the abortion right does not necessarily or even usually imply hostility toward those who seek or provide alternate services. As with the St. Paul ordinance, the FACE Act's title makes clear its purpose — to provide free access to reproductive clinics. Its legislative history confirms that the FACE Act's purpose was to protect access to abortion services.¹⁸ Where one side of the issue believes in choice about reproductive services and the other side seeks to restrict the available options, a very fine distinction is required to demonstrate that a government regulation designed to preserve the availability of all reproductive options by restricting speech that opposes any particular option is more viewpoint-neutral than the ordinance in *R.A.V.*

I think that the above discussion shows that the prohibition of threats under the FACE Act is properly analyzed as viewpoint-discriminatory. At least it shows that the FACE Act prohibition of threats and the St. Paul ordinance's prohibitions are appropriately analyzed as the same type of discrimination. In either case, it is not possible to preserve the *R.A.V.* decision and still apply anything less than strict scrutiny to the FACE Act threat prohibition.

Of course, the malleable nature of the distinction between content and viewpoint discrimination and the Court's fact-specific articulations about it¹⁹ mean that it is possible to distinguish the FACE Act threat prohibition from the *R.A.V.* ordinance.

¹⁷ The most possible scenario is that pro-choice supporters outside an abortion clinic would threaten so-called "sidewalk counselors" or those abortion seekers who listened to them. Section 3(e) of the FACE Act covers "counseling . . . relating to the human reproductive system," and therefore, such behavior by pro-choice supporters might be covered by the FACE Act. This is perhaps the strongest ground for arguing that the threat prohibition of the FACE Act is viewpoint neutral.

¹⁸ See SEN. REP. NO. 117, 103d Cong., 1st Sess. 2 (1993) (stating that Act prevents use of forceful and threatening tactics against abortion-related services).

¹⁹ See Brownstein, *supra* note 1, at 554 n.3 (noting that Court's determinations of whether law is content discriminatory or viewpoint discriminatory "seems far more result oriented than principled").

This distinction, coupled with Professor Brownstein's analysis, could assist the Court were it inclined to find the FACE Act constitutional without completely abandoning its decision in *R.A.V.* Despite this possible result, I still find it unwise to advocate the method of classification necessary to get there.

As demonstrated above, distinguishing the FACE Act from the ordinance in *R.A.V.* depends upon an extremely formal, facial interpretation of the statute that is at odds with reality. The government's intent in enacting the FACE Act was to eliminate certain speech that is hostile to the free exercise of reproductive choices. The FACE Act's practical effect will be to disproportionately silence one side of the abortion debate. These factors should lead to close scrutiny of the government's justification for limiting speech. Although in this situation the formal view could lead to a result that serves women's interests by preserving access to abortion, in many instances a formal view of government neutrality has ignored women's interests and those of other historically disadvantaged groups.²⁰ A constitutional analysis that includes the practical impact of government actions is particularly important to groups, like women, who may be underrepresented in the initial decisionmaking process.²¹

Professor Weinstein is concerned about judicial viewpoint discrimination.²² But judges at least must listen to both sides and write opinions that remain available for criticism and review.²³ I am more concerned about entities not subject these procedural checks and rigid judicial categories that preclude examination of what these entities were doing. By contrast to

²⁰ See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 280 (1979) (finding state's preference for hiring veterans facially neutral despite its disproportionate impact on women); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (stating that racial impact of government action "[s]tanding alone, . . . does not trigger [strict scrutiny analysis under the Equal Protection Clause]"); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (finding that pregnancy discrimination is not sex discrimination).

²¹ See, e.g., Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 38-45 (1987) (pointing out that unstated male norm in equal treatment jurisprudence harms members of politically less powerful groups who have different needs than men and that analysis of impact of ostensibly neutral rules can reveal when this is case).

²² James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471 (1996).

²³ See Leslie Gielow Jacobs, *Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV. 363 (advocating articulate decisionmaking to enhance the legitimacy of constitutional decisionmaking).

facial categorizations, impact analysis casts a wider net subjecting to close constitutional scrutiny government actions that unconsciously disregard minority group interests as well as those consciously designed to discriminate against them.²⁴ As discrimination moves from overt to more subtle actions, this more probing analysis becomes increasingly important to protect minority interests.²⁵ Therefore, taking the longer view, further enshrining a formal distinction to achieve an immediate result is not in women's interests.²⁶ These interests, and constitutional jurisprudence in general, are better served by seizing upon, and emphasizing, the Court's willingness to look to the "practical operation" of a government regulation to determine the level of scrutiny to be applied.

B. Adding "Equality" to the Definition of the Abortion Right

If the FACE Act threat prohibition is classified as viewpoint-discriminatory, then under either the *R.A.V.* decision or Professor Brownstein's revised analysis it must be justified under strict scrutiny review. Currently, this classification is nearly always fatal. But I think it is time for a change. Strict scrutiny should mean that the government interests must be fully articulated and examined, not that they are never sufficient. Under this standard, the FACE Act threat prohibition, as well as other government regulations of abortion protest speech, should pass.

Although Professor Brownstein does not undertake a strict scrutiny analysis with respect to the FACE Act, his discussion of constitutional compromises in Part V is closely related. In that part, he asks whether any compelling state interests justify restricting protest activities outside abortion clinics even though

²⁴ See Leslie Gielow Jacobs, *Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses*, 7 YALE J.L. & FEMINISM 137, 157 (1995) (arguing that "[t]he focus on neutrality as lack of conscious intent to discriminate . . . rewards willful ignorance of minority religious beliefs on the part of government decisionmakers with less constitutional scrutiny").

²⁵ See, e.g., Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing for impact analysis).

²⁶ See, e.g., Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 862 & n.134 (1990) (stating that "[f]eminists have found that neutral rules and procedures tend to drive underground the ideologies of the decision maker, and that these ideologies do not serve women's interests well.").

they constitute protected speech under the First Amendment. Professor Brownstein presents several arguments in support of the government's ability to regulate some otherwise protected abortion protest activities. He asserts that the government has a compelling interest in protecting women's health and in protecting the constitutional right to choose abortion. He also argues that because the free speech right of abortion protestors may disproportionately interfere with women's right to choose abortion, the state may constitutionally intervene to protect the latter.

I agree with this analysis as far as it goes. My concern is that the grounding for the particular judgments may not be obvious to someone less sympathetic to a woman's right to choose abortion. The fact that a medical procedure is involved may not be precise enough as it leaves open the possibility of prohibiting speech any time that adverse health effects result from it. The fact that the right to choose abortion is a constitutionally fundamental right does not explain its scope. Some would argue that the constitutional right to choose abortion allows the government only to ensure physical access to abortion services. Most basically, the issue with respect to abortion speech limitations is how to accommodate two rights that clash at the boundaries. What is required is an explanation beyond intuition of why abortion seekers and providers may be protected from speech when in other contexts the Constitution would protect the expression.

In my view, a crucial supplement to the government's justification for limiting abortion protest activities is the equality basis of the abortion right. Privacy, or autonomy, rights are not natural rights. Their definitions depend upon social understandings about the intersection between the individual and the community.²⁷ Under this view, abortion is a constitutional right because in our society people are not required to make similar bodily, economic, or social sacrifices to support the lives of other com-

²⁷ See Leslie Gielow Jacobs, *Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions About the Proper Scope of Government Regulations*, 70 TUL. L. REV. 1359, 1374 (1996) [hereinafter *Nonviolent Abortion Protests*] (noting that our current understanding of individual liberty "is a social choice"); see generally LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985) (illustrating in number of different contexts how Court's constitutional decisions represent choices among variety of competing visions of constitutional meaning).

munity members.²⁸ Outlawing abortion would force women into a role not imposed upon men. Until such bodily sacrifice becomes an obligation of all community members, male or female, the right to choose abortion must be part of the constitutional guarantee of personal autonomy and privacy.²⁹

The equality basis of the abortion right grounds the line between the constitutional rights of abortion protestors to speak and the right of abortion seekers to avoid their expression. It is not only that a medical facility is involved that renders abortion seekers captive. It is also the fact that only women must take to the public streets to effectuate their right not to bodily aid another individual. Because of their biology, abortion seekers can be identified and targeted by protestors who disagree with their decision. By contrast, men can make the same type of moral decision not to aid another human being in their homes, where the Court has held that a privacy right protects them from unwanted expression.³⁰ This inequality supports classifying abor-

²⁸ Specifically, the argument runs as follows:

Maybe it would be acceptable for a majority of the population to decide to force women to carry conceived embryos to term if it were willing to impose a similar obligation on men to donate their body to the care of others in need. . . . [P]erhaps it would be acceptable for a majority of the population to restrict access to abortion if it were willing to neutralize the social, economic, and political consequences of pregnancy and childbirth so that the 'cost' in these areas to women forced to carry fetuses to term were the same as to all other citizens.

See Nonviolent Abortion Protests, supra note 27, at 1375-76.

²⁹ Others have noted that the abortion right is best understood as based on sex equality. *See, e.g.*, LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1354 (1988) (arguing that "[a] right to terminate one's pregnancy might . . . be seen more plausibly as a matter of resisting sexual and economic domination than as a matter of shielding 'private' transactions between patients and physicians from public control"); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (concluding that "[o]verall, the Court's *Roe* position is weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective"); Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977) (arguing that issue in Court's pregnancy, abortion, and birth control cases was "not so much in recognizing a woman's interest in controlling the use of her body" as "an issue going to women's position in society in relation to men"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1319 n.163 (1991) (stating that "the real constitutional issue raised by criminal abortion statutes like that in *Roe* is sex equality").

³⁰ *See* *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (stating that "important aspect of residential privacy is the protection of the unwilling listener").

tion seekers directly outside abortion clinics as captive, thereby heightening their ability to avoid unwanted expression, and simultaneously lessening the protestors' right to deliver it.³¹ Adding this understanding of the equality basis of the right to choose abortion to the constitutional analysis should ensure that the threat prohibition of the FACE Act, as well as the additional abortion protest speech prohibitions discussed by Professor Brownstein, pass strict scrutiny review.

C. Adding "Women's Perspective" to the Definition of
Threat in the FACE Act

In addition to defining the scope of regulation of protected speech, the equality basis of the abortion right should also ground the definition of unprotected speech, specifically threats within the meaning of the FACE Act. The impact of speech may differ according to the respective social and political powers of the speaker and recipient.³² Specifically, vehement exhortation targeted at individuals seeking abortions may have a particularly painful or destructive impact because these historically subordinated role of women in American society.³³ Abortion protesters are able to exploit the fears of stigma and discovery because these fears have particular significance in the context of abortion. Women who seek abortions are stigmatized in ways that people who refuse to give aid in other ways are not because of

³¹ See *Nonviolent Abortion Protests*, *supra* note 25, at 1434 (stating that "a speech analysis that protects individuals from painful, disturbing, or psychologically damaging expression only in the home treats women who choose abortion differently from other individuals who choose not to aid others and thus violates the equality ideal that should underlie the right to choose abortion").

³² Professor Charles Lawrence provides the following explanation:

There is a great difference between the offensiveness of words that you would rather not hear — because they are labeled dirty, impolite, or personally demeaning — and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.

Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 456, 472-73.

³³ See *id.* at 453 (arguing that "[t]he subordinated victim of fighting words also is silenced by her relatively powerless position in society.").

the social expectations about women's appropriate role.³⁴ Moreover, the fear of discovery is not just of stigma, but of physical violence or financial abandonment by male partners. Both dangers are experienced particularly acutely by women.³⁵ Also, women may generally perceive the mode of delivering messages differently than men; women's more vulnerable position to male violence may cause them to perceive threats more readily.³⁶ All of these different effects of anti-abortion speech on women seeking abortions mean that the Court's current First Amendment assumptions require abortion seekers to bear a larger burden of the commitment to free speech than individuals who otherwise choose not to use their bodies to enable others to survive.³⁷ Consequently, the Court should ask whether particular speech constitutes a threat from the perspective of abortion

³⁴ See, e.g., Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 36 (1992) ("[T]he history of abortion restrictions unambiguously supports the claim that in fact, such restrictions are closely tied up with, indeed in practice driven by, traditional ideas about women's proper role."). See generally Janet Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175, 193-219 (1992) (chronicling history of abortion restrictions focusing particularly on move towards government intervention in abortion seekers' deliberative autonomy).

³⁵ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 888-95 (1992) (finding that spousal notification requirement for women seeking abortions constitutes undue burden on right to choose abortion because many women "may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion," including "fears of physical abuse," fears of "provok[ing] further instances of child abuse," fears of "devastating forms of psychological abuse . . . , including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends.").

³⁶ Cf. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 540 (1993) ("[Any incident of street harassment] remind[s] women that they are vulnerable to attack and demonstrate[s] that any man may choose to invade a woman's personal space, physically or psychologically, if he feels like it.").

³⁷ Professor Lawrence's article beautifully illustrates this point:

Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society — to pay the price for the societal benefit of creating more room for speech. . . . We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the fact that the cost will be borne by others.

Lawrence, *supra* note 32, at 472.

seekers, rather than from the perspective of members of the general public who are expected to ignore harsh messages and turn away.

CONCLUSION

Professor Brownstein presents strong analyses that could help a court that is inclined to find a variety of abortion protest speech restrictions constitutional. In my view, reconceiving several of the definitions assumed within his analysis would create a constitutional jurisprudence even more protective of women's, and minorities', rights.

