ARTICLES

Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination

*James Weinstein**

INTRODUCTION

Abortion is perhaps the most hotly contested issue in America today — a topic engendering intense feelings and unwavering commitments. Most anti-abortion activists exercise their right of free speech in a peaceful, lawful manner. Others, however, come to abortion clinics not to engage in legitimate public discourse but to stop abortions at all cost — through harassment, intimidation, physical obstruction, and violence including bombings, arson, and murder.[1] To protect access to abortion services, abortion rights groups have pursued three types of remedies: 1)

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* Professor of Law, Arizona State University. B.A., 1975; J.D., 1978, University of Pennsylvania. I am grateful to Alan Brownstein, Daniel Farber, Martha Field, David Kaye, Gary Lowenthal, Jeffrie Murphy, Robert Post, Eugene Volokh, and Cynthia Ward for their helpful comments and suggestions.

[1] From 1977 to April, 1993 there were more than 1,000 acts of violence against abortion service providers, including 36 bombings, 84 assaults, 131 death threats, 81 cases of arson, 2 kidnappings, 327 clinic invasions, and 1 murder. S. REP. NO. 117, 103d Cong., 1st Sess. 3 (1993) (citing *Incidents of Violence & Disruption Against Abortion Providers, 1993*, SUMMARY (National Abortion Federation), Apr. 16, 1993). During this same time period there were more than 6,000 clinic blockades or similar activities disrupting the providing of abortion services. *Id. See also* NOW v. Operation Rescue, 726 F. Supp. 1483, 1489-90 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part on other grounds sub. nom.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

state and federal court injunctions;[2] 2) federal legislation criminalizing conduct designed to obstruct access to abortion facilities;[3] and 3) state and local "bubble" ordinances requiring demonstrators protesting near medical facilities to retreat a specified distance from any person making the request.[4]

These remedies present several interesting, although quite technical, First Amendment doctrinal questions. The primary purpose of this paper, however, is not to answer any specific doctrinal question, or even to decide whether these provisions protecting abortion access are constitutional. Instead, the focus will be on the *form* that free speech rules should take to avoid what I call "judicial viewpoint discrimination."

The term "viewpoint discrimination" is familiar. Indeed, the Supreme Court has often remarked that laws that discriminate on the basis of the speaker's viewpoint — for or against the expression of a particular idea — are anathema to the very concept of free speech.[5] In this Article I will discuss a particularly pernicious type of viewpoint discrimination — discrimination by the very persons entrusted to guard against this core violation of the free speech principle. Two conditions increase the risk that in reviewing speech regulations judges will illegitimately inject (in many cases unconsciously) their own attitudes towards the speaker's ideology into the doctrinal analysis.

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[2] *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, (1994); Pro-Choice Network v. Schenck, 67 F.3d 377 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996); Portland Women's Health Ctr. v. Advocates for Life, 859 F. 2d 681 (9th Cir. 1988).

[3] The Freedom of Access to Clinic Entrances Act [hereinafter FACE], 18 U.S.C.A. § 248 (West Supp. 1995).

[4] *See, e.g.*, COLO. REV. STAT. ANN. § 18-9-122 (West 1989); PHOENIX, ARIZ., CITY CODE § 23-10.1 (1993); SANTA BARBARA, CAL., MUNICIPAL CODE ch. 9.99 (1993).

[5] *See, e.g.*, Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2516 (1995) (stating that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (explaining that "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship"); Cohen v. California, 403 U.S. 15, 24 (1971) (stating that "[the First Amendment] put[s] the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

The first condition is the more obvious one. A judge's own ideological viewpoint is most likely to seep into the analysis of regulations passed to regulate the speech of those who aggressively attack some important norm that others are equally as committed to defending. Judges are human and thus are subject to the passions raised by the great issues of their time. This condition is obviously present in cases involving First Amendment challenges to regulations designed to protect abortion access.

The second condition is uncertain doctrinal rules. No matter how strongly a judge may share or despise a speaker's point of view, the more "bright line" the doctrinal rules the judge must apply, the less likely it is that illicit judicial sentiments will affect the outcome. In contrast, indeterminate standards such as multifactor balancing tests or standards that call for ad hoc judgments invite judicial viewpoint discrimination. Unfortunately, an argument frequently found in recent academic commentary encourages just such indeterminate standards in free speech cases.

This argument posits that when a speech regulation seeks to protect the exercise of a constitutional right, as provisions protecting access to abortion services assertedly do, the constitutional status of this right should be factored into the free speech analysis. On the surface, this argument seems eminently reasonable. I will show, however, that with respect to abortion access, this argument is not only fallacious but also subtly pernicious in that it unnecessarily opens up free speech analysis to judicial viewpoint discrimination in cases already prone to such illegitimate considerations.

This Article is in three parts. First, I will explore the concept of judicial viewpoint discrimination and the type of rules that invite it. Next, I will examine the argument that because First Amendment challenges to abortion access regulations involve a clash of constitutional rights, free speech analysis should account for the presence of the competing right. I will show that this argument is based on a false premise by demonstrating that there is, in fact, no competing constitutional right implicated by such regulations. I further demonstrate that any modification of free speech doctrine to account for what is in fact a spurious claim of conflicting constitutional rights would gratuitously invite

judges to inject their own views of the abortion controversy into free speech analysis.

In the last section of this Article, I turn to some difficult doctrinal issues presented by the three types of remedies. With respect to injunctions, I briefly comment on the level of scrutiny that the Supreme Court applied to a state court injunction restricting abortion demonstrations. I also consider the level of scrutiny appropriate for reviewing First Amendment challenges to the recently enacted federal access legislation, and I focus particularly on the argument that the Supreme Court's recent *R.A.V.* decision makes strict scrutiny applicable to the provision outlawing threat of force. I end with a detailed examination of "bubble ordinances," and conclude that they unnecessarily burden core First Amendment expression.

I. GUARDING THE GUARDIANS: THE PROBLEM OF JUDICIAL VIEWPOINT DISCRIMINATION

In 1949, Irving Feiner, a young college student, stood on a street corner in Syracuse, New York, urging listeners to attend a meeting of a leftist political organization.[6] After referring to the American Legion as "a Nazi Gestapo," he urged blacks to rise up and fight for equal rights.[7] As Feiner spoke, "[t]here was some pushing and shoving in the crowd and some angry muttering."[8] An onlooker approached a policeman and said: "If you don't get that son of a bitch off, I will go over there and get him off there myself."[9] Allegedly to prevent a fight from ensuing, the policeman requested that Feiner stop speaking, and when he refused, arrested him for breach of the peace.[10]

The United States Supreme Court upheld the conviction against the claim that the policeman's conduct violated the speaker's right to free speech.[11] Chief Justice Vinson's opinion for the Court began by observing that Feiner was "neither arrest-

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[6] Feiner v. New York, 340 U.S. 315, 329-30 (1951) (Douglas, J., dissenting); People v. Feiner, 91 N.E.2d 316, 316 (N.Y. 1950).

[7] *Feiner*, 340 U.S. at 330 (Douglas, J., dissenting).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 312.

ed nor convicted for . . . the content of his speech,"[12] but rather was arrested "solely by a proper concern for the preservation of order and protection of the general welfare."[13] The Court thus summarily rejected the claim that "the acts of the police were a cover for suppression of petitioner's views and opinions."[14] In light of the widespread antagonism toward leftist expression at the time of Feiner's arrest,[15] the Court's confidence that the policeman was acting in an ideologically neutral way is, at best, naive. Imagine, instead, that it was an American Legionnaire who stood on the street corner using epithets to condemn the American Communist Party. If a leftist member of the audience offended by such talk approached a police officer and threatened forcefully to stop the speaker if the officer did not, it is highly unlikely, to say the least, that the officer would have ordered the Legionnaire to desist.

Far more troubling, however, than the policeman's lack of political neutrality in enforcing breach of the peace rules is the possibility that the Supreme Court's own antipathy toward Feiner's ideology played a part in affirming the conviction. In its opinion, the Court *itself* takes account of the content of Feiner's speech, condemning it as "pass[ing] the bounds of argument or persuasion and undertak[ing] incitement to riot."[16] The Court, moreover, did not announce any definite standards governing when police can silence a speaker because of threats from an audience. Such absence of precise rules not only allows law enforcement officials to give free rein to their own ideological predilections in arresting speakers who anger listeners,[17] but in-

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[12] *Id.* at 319-20.

[13] *Id.* at 319.

[14] *Id.*

[15] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding conviction of high ranking officials of American Communist Party for advocating violent overthrow of United States in violation of Smith Act); *id.* at 581 (Black, J., dissenting) (stating that "[p]ublic opinion being what it now is, few will protest the conviction of these Communist petitioners"); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 159 (1970) (writing that "[t]he use of [anticommunist] legislation coincided with the era of McCarthyism, [a] period of irrational response to imagined fears").

[16] Feiner v. New York, 340 U.S. 315, 321 (1951).

[17] *See id.* (Black, J., dissenting) (arguing that "[t]he record before us convinces me that petitioner . . . has been sentenced to the penitentiary for the unpopular views he expressed").

vites reviewing courts (including the Supreme Court in that case) to do so as well.

It is, of course, impossible to know for sure whether antipathy towards Feiner's radical views played a role in the Court's decision. Vinson's reference to the content of Feiner's speech, while unnecessary to the decision, may reflect no more than judicial dislike of uncivil, intemperate discourse regardless of the ideas expressed. Thus it is possible, I suppose, that the Court would have affirmed the conviction if the defendant had been a mainstream speaker — for instance, a farmer opposed to a reduction in agricultural subsidies who stirred the crowd to anger by urging farmers to rise up and "fight for their rights" — rather than a radical urging an oppressed minority to fight for theirs. But the lack of a precise constitutional rule announced by the Court, together with the gratuitous and conclusory suggestion that Feiner's speech was beyond the pale of legitimate public discourse, at least suggests that the Court's own antipathy to radical ideology in general, and to Feiner's proposed solution to racial segregation in particular, might have had something to do with the decision.[18]

Also telling is that twelve years later, in *Edwards v. South Carolina*,[19] the Court reversed the conviction of civil rights protestors who disobeyed a police order to disperse after an angry crowd of whites gathered nearby.[20] The most obvious difference between these cases was not the factual circumstances; if anything, the threat of crowd violence was greater in *Edwards*.[21] Nor is it a change in legal rules; the Court still declined to announce any definite standards for "hecklers' veto" cases. Rather,

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[18] Compare Justice Douglas's charge that judicial viewpoint discrimination played a role in the affirmance of the Espionage Act convictions of radicals opposed to American involvement in World War I: "[T]he threats were often loud but always puny and made serious by judges so wedded to the status quo that critical analysis made them nervous." Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

[19] 372 U.S. 229 (1963).

[20] *Id.* at 238.

[21] *See id.* at 240 (Clark, J., dissenting) (noting that "[i]t was only after the large crowd [of about 300 onlookers] had gathered, among which the City Manager and Chief of Police recognized potential troublemakers, and which together with the [protestors] had become massed on and around the [circular driveway in front of the State House] so closely that . . . traffic was materially impeded" that protestors were told to disperse within 15 minutes).

the most salient difference is the profound ideological change that had occurred on the Court with respect to civil rights issues, particularly state imposed racial segregation.[22] Manifestly, however, whether a police decision to silence a speaker because an offended listener threatens disorder comports with the First Amendment should not turn on whether a reviewing court happens to be sympathetic to the civil rights movement or hostile to advocacy of radical solutions to racial inequality.

Laws that discriminate on the basis of a speaker's viewpoint have often been condemned as egregious violations of the free speech principle.[23] As one commentator has put it, such laws are free speech doctrine's version of a "cardinal sin."[24] I want to suggest that a worse transgression is for those entrusted with protecting public discourse from viewpoint discrimination to themselves engage in such behavior. Judicial viewpoint discrimination corrodes constraints on government speech regulation far more than legislative or executive viewpoint discrimination. Even frequent legislative or executive attempts at viewpoint discrimination will not necessarily doom free speech as an institution so long as there ultimately is some effective check against ideologically biased speech regulation. Such frequent attempts at viewpoint discrimination can, of course, impair the practice of free speech in a society. The ultimate protection of the right by the judiciary, however, will tend to discourage blatant attempts at viewpoint discrimination. Moreover, so long as there are sufficient costs imposed for such attempts, viewpoint discrimination by the legislature and the executive will become infrequent over time.

In contrast, if judicial viewpoint discrimination were ever to become routine, the results could be disastrous. If the checking mechanism itself became infected with the very disease it was suppose to fight, it is likely that individual instances of viewpoint discrimination would stand. Such commonplace judicial bias will

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[22] In the 12 years between *Feiner* and *Edwards*, the Vinson Court became the Warren Court, the latter of which decided, among other landmark civil rights cases, Brown v. Board of Educ., 347 U.S. 483 (1954) (holding racial segregation in public schools unconstitutional).

[23] *See, e.g.*, Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2516 (1995).

[24] Kathleen M. Sullivan, *Discrimination, Distribution, and Free Speech*, 37 ARIZ. L. REV. 439, 443 (1995).

over time corrode the judiciary's ability to detect and correct instances of legislative or executive viewpoint discrimination, resulting in the collapse of free speech doctrine as a meaningful rule of law.

According to Stanley Fish, this is already the case:

> "Free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors *that* name when we can, when we have the power to do so, because in the rhetoric of American life, the label "free speech" is the one you want your favorites to wear. Free speech, in short, is not an independent value but a political prize . . . .[25]

Implicit in my desire to limit the corrupting influence of judicial viewpoint discrimination is, of course, profound disagreement with Fish and a growing number of other academics who assert that judicial viewpoint discrimination is both omnipresent and unavoidable. Fish makes the obvious point that in some sense free speech doctrine is inherently "political" or "ideological" because the very construction of the rules, for example, that "fighting words" are not protected speech[26] or that only certain public places are considered "public forums,"[27] requires judges to engage in value choice.[28] But the terms "political" or "ideological" refer to a broad range of judicial activity, not all of which is illegitimate. It is one thing for a Supreme Court Justice to say, for example, "In the balance between the right to free expression and the individual's interest in being let alone in public places, I tend to give more weight to the latter than some of my more liberal colleagues. I therefore vote to hold airports not to be public forums." It is quite another matter to say, "Airports are the favorite location of those obnoxious Hare Krishnas, whereas the evangelical Christians, whose views I prefer, tend to proselytize in traditional public forums such as parks

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[25] STANLEY E. FISH, THERE'S NO SUCH THING AS FREE SPEECH 102 (1994).

[26] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942) (holding fighting words unprotected by First Amendment).

[27] *See, e.g.*, Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (holding public property may be reserved by state for its own purposes so long as restriction on speech is reasonable in light of that purpose and not viewpoint based).

[28] FISH, *supra* note 25, at 113.

and sidewalks. Accordingly, I find that airports are not public forums."

Both the preference for privacy over free speech interests and the preference for Christian over Hare Krishna proselytizing are in some sense "political" or "ideological" judgments. But the former, most would agree, is legitimately part of the judicial task of interpreting the First Amendment, while the latter is itself a violation of that provision. Precisely what type of judicial value choice is legitimate, and the extent that such judgments should enter into constitutional interpretation is a perennially debated question. But aside from Fish and a few other radicals, no one seriously maintains that a person's right to engage in public discourse either should or inevitably does depend on whether a judge is sympathetic or hostile to the "substantive agenda" of a particular speaker.

It is possible that I am taking Fish's rhetoric too literally, for I find it hard to believe that he does not appreciate the critical difference between judicial viewpoint discrimination and other, legitimate judicial value choices, or that he really believes judges should let their views towards the speaker's "substantive agenda" decide free speech cases. Perhaps Fish is saying only that such viewpoint discrimination is not just an infection that occurs in the occasional case, but is rather both a chronic and incurable systemic disease. But if this is the burden of Fish's critique, then it is readily disproved by the large number of cases in which judges routinely protect the speech of those with whom we can safely assume they disagree.

I take it, for instance, that no Justice agreed with Noto's Marxist beliefs,[29] or endorsed Brandenburg's seditious sentiments or racist point of view.[30] In both cases, however, the Court unanimously agreed that the speech in question was protected. Similarly, it is a good bet that Chief Justice Rehnquist is much more sympathetic to the Reverend Jerry Falwell's "substantive agenda" than he is to pornographer Larry Flynt's. Yet it was

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[29] *See* Noto v. United States, 367 U.S. 290, 299 (1961) (reversing conviction under Smith Act).

[30] *See* Brandenburg v. Ohio, 395 U.S. at 444, 444-45, 449 (1969) (holding mere advocacy of lawless conduct is protected by First Amendment and reversing conviction of Ku Klux Klan leader under Ohio's Criminal Syndicalism Act).

Rehnquist who wrote an opinion for a unanimous Court affirming Flynt's First Amendment right to publish a vicious parody of Falwell.[31] Indeed, in most free speech cases, especially at the appellate level, it is evident that the decision turns on principles that transcend any concern about the speaker's political point of view.

On the other hand, while judicial viewpoint discrimination is far from routine, the "hecklers' veto" cases are not the only instances where judicial antipathy or sympathy to a speaker's message seem to have played a role. As Justice Douglas observed about the early "clear and present danger" cases: "[T]he threats were often loud but always puny and made serious by judges so wedded to the status quo that critical analysis made them nervous."[32] But in the decades that have passed since this observation, free speech decisions in which one could reasonably suspect that the result was influenced by judges' attitudes towards the speakers' ideology have become much rarer. The reason, I believe, is that free speech doctrine became less subjective and ad hoc as the Court developed more specific rules governing various types of speech. Large, vague categories of unprotected speech, such as libel, obscenity, and fighting words, were substantially contracted or more rigorously defined,[33] while in the all important area of political advocacy, only express calls to illegal action remain punishable under the clear and present danger test.[34] More recently, the Court borrowed the concept of "strict scrutiny" from its equal protection jurisprudence in

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[31] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (holding First and Fourteenth Amendments prohibit public figures from recovering damages for emotional distress caused by publication of caricature unless actual malice is shown).

[32] *Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring).

[33] *See* New York Times v. Sullivan, 376 U.S. 254, 256 (1964) (imposing strict First Amendment limitations on defamation suits by public officials); *see also* Jenkins v. Georgia, 418 U.S. 153, 160 (1974) (holding that "mainstream" movies such as *Carnal Knowledge* cannot be banned as obscene); Miller v. California, 413 U.S. 15, 21 (1973) (narrowly defining obscenity to include only "hard core" pornography). Although "fighting words" technically remain bereft of First Amendment protection, the Court has reversed on "vagueness" and "overbreadth" grounds every fighting words conviction to reach the Court since *Chaplinsky*. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 466-67 (1987); Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974); Gooding v. Wilson, 405 U.S. 518, 527 (1972); *see also* R.A.V. v. City of St. Paul, 505 U.S 377, 381 (1992) (finding fighting words ordinance unconstitutionally content-based).

[34] *Brandenburg*, 395 U.S. at 449.

order to underscore the virtually insuperable First Amendment obstacle facing content-based restrictions on public discourse.[35]

The primary benefits of this "brightlining" of free speech doctrine have been clearer notice to the speaker of what expression is punishable and confining law enforcement discretion. Another advantage has been increased safeguards against judicial viewpoint discrimination, even at the Supreme Court level. For example, by agreeing in advance that content restrictions on political speech are virtually always invalid, Justices are less able to justify upholding the suppression of speech that offends their own ideology than they would be under some ad hoc or otherwise indeterminate test. Chief Justice Rehnquist's call in *Texas v. Johnson*[36] for a "flag burning" exception to the usual rules governing content discrimination is a case in point. It is only against the backdrop of clear, somewhat mechanical rules governing both the identification of content-oriented regulations of expressive conduct[37] and the disposition of content-oriented regulations[38] that the dissent's departure from neutral principles is revealed.[39] More importantly, the prior existence of such

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[35] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Boos v. Barry, 485 U.S. 312, 321 (1988). Of particular relevance to the discussion here, Justice Kennedy opposes the adoption of the strict scrutiny test in the First Amendment context because it is, in his view, too indeterminate. Kennedy would instead impose an even brighter-line rule that holds per se unconstitutional all content-oriented restrictions on public discourse that do not fall within one of the already established exceptions. *See Simon & Schuster, Inc.*, 502 U.S. at 124-28 (Kennedy, J., concurring). Kennedy is correct that, as phrased, the strict scrutiny test invites a dangerous amount of subjective and ad hoc judicial judgment. *See infra* text accompanying notes 132-35. But so long as the test is, in practice, virtually always fatal, it operates as a fairly rigid bright-line rule.

[36] 491 U.S. 396, 421-35 (1989) (Rehnquist, C.J., dissenting).

[37] *See id.* at 403 (applying test developed in United States v. O'Brien, 391 U.S. 367 (1968)).

[38] *See id.* at 411-12 (applying "strict scrutiny" adopted in Boos v. Barry, 485 U.S. 312 (1988)).

[39] *Compare also id.* at 421-35 (Rehnquist, C.J., dissenting) (arguing for creation of flag burning exception) *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992) (holding unconstitutional law singling out racial fighting words). Chief Justice Rehnquist was the only dissenter in *Johnson* who joined the *R.A.V.* majority. The position that the state may single out for prohibition from the realm of otherwise protected speech a species of uncivil and offensive expression critical of the U.S. government, but may not single out from the realm of unprotected "fighting words" equally uncivil and inflammatory expression that demeans people on the basis of race would seem to reflect the belief that highly uncivil expression against the government is somehow worse than equally uncivil racist speech.

precise rules to which the Justices had previously agreed, rather than some consider-all-the-circumstances approach, may be the reason that Rehnquist's dissent was just that, and not the law of the land.

The certainty and confinement of discretion accomplished by these rigid, bright line rules comes at a cost, however. Many of these rules depend on formalistic distinctions, such as the distinction between content-neutral and content-based regulations,[40] between speech and conduct,[41] between protected and unprotected speech,[42] between public and nonpublic forums,[43] and between matters of public and private concern.[44] As Professor Brownstein ably demonstrates, adherence to such rigid distinctions sometimes produces undesirable results.[45] The ratio-

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The Chief Justice is, of course, entitled to this opinion, as are those who find the use of racial epithets and burning crosses more offensive than defiling or burning the American flag. What is illegitimate, however, is to let these ideological predictions influence decisions about other citizens' right to express their ideological preferences. That the dissent in *Johnson* may have been engaging in judicial viewpoint discrimination was not lost on the majority:

> To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries . . . . To do so, *we would be forced to consult our own political preferences*, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

Johnson, 491 U.S. at 417 (emphasis added).

[40] *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 98 (1972) (distinguishing between content-oriented regulations, which First Amendment forbids "above all else" and content-neutral time, place, and manner regulations, which are valid if they reasonably further "significant governmental interests").

[41] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 555 (stating that Court "emphatically reject[s] the notion that . . . that [the First Amendment affords] the same kind of freedom to those who would communicate ideas by conduct . . . [as it does] to those who communicate ideas by pure speech").

[42] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (holding that First Amendment does not protect obscene material).

[43] *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (holding that different standards apply to speech on government property dedicated to speech and government property not dedicated to First Amendment activity).

[44] *Compare* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (applying First Amendment limitations to defamation action brought by private plaintiff where allegedly defamatory speech was on matter of public concern) *with* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-60 (1985) (holding no First Amendment limitations applicable to suit by private plaintiff where allegedly defamatory speech was on matter of purely private concern).

[45] *See* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Un-*

nale for the strong presumption against content-oriented laws is that such regulations present the risk of viewpoint discrimination. Yet the Court has applied strict scrutiny and to invalidate speech regulations that, while technically content-oriented, did not seem to pose any realistic danger that the government was engaged in viewpoint discrimination.[46] Does it make sense to employ the heavy artillery of strict scrutiny in such cases? Conversely, some technically content-neutral laws, for instance, "bubble" ordinances protecting abortion access, effectively regulate expression on one side of an issue and thus present a greater possibility of viewpoint discrimination than do some technically content-oriented laws. Is it sensible to apply the rather lax rules applicable to content-neutral time, place, and manner restrictions in such cases? The Freedom of Access to Clinic Entrances Act raises similar challenges to formalistic distinctions between speech and conduct and between protected and unprotected speech.[47]

First Amendment doctrine, like doctrine in most areas of the law, reflects a basic tension between the desirability of clear, rigid rules that give notice and confine discretion, and the need for flexible, fact sensitive standards designed to provide individualized justice and to promote the overall purpose of the rule in each of its applications. Mechanical application of bright line rules can sometimes result in decisions that do not promote the purpose of the rules, or worse yet, frustrate their purpose.[48] A

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protected Speech, and Protected Expression in Anti-Abortion Protests, 29 U.C. DAVIS L. REV. 553, 592-93 (1996) [hereinafter *Rules of Engagement*].

[46] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (invalidating law requiring income from book or other account of crime commited by author to be turned over to account established for benefit of crime victim); *see also* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring) (writing that "it is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable").

[47] 18 U.S.C.A. § 248. In addition, while these abstract and highly conceptual distinctions provide clarity in routine cases, they cannot do so in borderline cases. *See infra* note 86 and accompanying text (discussing failure of doctrine in borderline state action cases).

[48] Moreover, judges who want to reach a certain result can often avoid formalistic contraints through linguistic manipulation. A good example of this phenomenon in the First Amendment area is the holding in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In *Renton*, the Court held a law that applied only to theaters showing erotic material was, despite this facial content discrimination, content-neutral because it was justified by

flexible, nuanced, consider-all-the-circumstances approach may thus be preferable in many areas of the law.[49] However, the desirability of clear rules governing the regulation of speech is manifest. Robust public discourse vital to democratic self-governance requires citizens to have clear notice about what they may say with impunity, and what will land them in jail or subject them to financial penalties. In addition, rigid rules that tightly confine the discretion of law enforcement officials prevent them from permitting the speech that they like while suppressing speech that offends them or challenges their authority.

Moreover, experience has shown that tests that call for ad hoc, subjective judgments have disastrous consequences for free speech. This is the lesson taught by the early years of the "clear and present danger" test. So long as the test turned solely on an ad hoc assessment of danger, it offered little protection against the suppression of unpopular, offensive, but in retrospect not particularly dangerous speech.[50] It was not until an objectively

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the "secondary effects" of such theaters on the surrounding community. Nevertheless, while formalistic constraints cannot confine a result-oriented judge who is determined to avoid such confinement, such restraints are more likely to do so than are loose, multi-factored standards calling for ad hoc judgments. See, for instance, the total absence of constraint imposed by the four-part test applicable to commercial speech in the hands of Justices who had earlier dissented from similar commercial speech cases. *Compare* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 480 (1988), (O'Connor, J., dissenting) (disagreeing with application of four-part test to strike down ban on direct-mail solicitations by lawyers targeting certain recipients known to have particular legal needs) *with* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381) (1995) (applying four-part test to uphold bar regulation prohibiting personal injury lawyers from targeting accident victims with direct-mail advertisements for 30 days after accident); *see also* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 344 (1986) (applying four-part test, Justice Rehnquist, who had dissented in nearly every previous case invalidating regulation of commercial speech, upheld regulation of commercial speech). In addition, as *Renton* demonstrates, when a judge does depart from a bright line rule, the footprints are much more visible than the ones left when a judge departs from a looser, ad hoc standard, such as the four-part test applicable to commercial speech.

[49] *E.g.*, 28 U.S.C. § 1404 (1994) (rules governing change of venue in civil actions).

[50] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 624 (1919) (upholding conviction of anarchists for distribution of literature critical of American military expedition to Soviet Union during World War I and urging workers not to make armaments for that purpose); Debs v. United States, 249 U.S. 211, 216 (1919) (upholding conviction of socialist presidential candidate for speech critical of American involvement in World War I because speech allegedly interfered with military recruiting); Frowerk v. United States, 249 U.S. 204, 206 (1919) (upholding conviction for publishing German language newspaper criticizing American involvement in World War I and expressing admiration for draft resisters); Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding conviction of socialists for denouncing

defined incitement test, suggested decades earlier by Judge Learned Hand,[51] was added to limit the reach of the "clear and present danger" formula that political advocacy in this country received adequate protection.[52] Accordingly, several circumstances — not the least of which is guarding against judicial viewpoint discrimination — argue for free speech rules that are, as Hand put it, "hard, conventional, difficult to evade."[53]

Much less controversial than this doctrinal prescription for preventing judicial viewpoint discrimination is the rather obvious point that cases that involve highly charged issues of national importance are the ones in which judges (often unconsciously) will most likely inject their own positions on the underlying controversy into the free speech analysis. Like the World War I Espionage Act cases and those involving protests against racial segregation, cases involving anti-abortion protests are prime candidates for judicial viewpoint discrimination. Judges, like other citizens, often have passionate views about the hotly contested issues of the day, including abortion. However, whether a law regulating anti-abortion protests is consistent with the First Amendment should in no way depend on whether the judge supports or opposes abortion rights. According to Justice Scalia,

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conscription as unconstitutional and distributing literature critical of American involvement in World War I); *see also* Dennis v. United States, 341 U.S. 494, 516 (1951) (upholding Smith Act conviction of leaders of American Communist Party).

[51] *See* Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). As Professor Gerald Gunther reports: "Hand's major objection to formulations such as 'clear and present danger' . . . was that they were too slippery in 'practical administration.'" GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 696 (5th ed. 1992). Gunther continues: "Learned Hand thought [tests requiring ad hoc assessments of danger were] . . . too much at the mercy of factfinders reflecting majoritarian sentiments hostile to dissent." *Id.* at 696 n.4.

[52] GUNTHER, *supra* note 51, at 696.

[53] *Id.* I, of course, am not suggesting that free speech doctrine either could or should be reduced to a mechanical jurisprudence void of judicial judgment or value choice. Rather, I am suggesting that, on the whole, a free speech jurisprudence that tends towards bright-line rules will be better for it. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring) (stating that "though our rule [that content-oriented regulations are subject to strict scrutiny] has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests"). However, just as some areas of the law require flexible standards rather than rigid rules, the same may be true of certain areas of free speech doctrine, such as the rules for deciding whether a public area is a public forum. But formulas that gratuitously diminish the certainty of free speech doctrine should always be eschewed.

however, abortion politics has already warped free speech doctrine.[54] I am not at all sure that Scalia is correct that this has already occurred at the Supreme Court level[55] — more likely it is his own intense feelings on the subject that are at play.[56] But a controversy at an affiliate of the American Civil Liberties Union concerning a bubble ordinance has alerted me to the enormous pressure that exists to let the merits of the abortion con-

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[54] *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2534-35 (1994). Dissenting from that portion of the Court's decision upholding certain provisions of the state court injunction imposing distance and other time, place, and manner restrictions on anti-abortion demonstrators in front of abortion clinics, Justice Scalia comments:

> The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.
>
> But the context here is abortion . . . . "[N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but — except when it comes to abortion — the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying legal doctrines to cases that come before it."
>
> Today the ad hoc nullification machine claims it latest, greatest, and most surprising victim: the First Amendment.

Id. at 2534-35 (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting)).

Judge Altimari makes a similar charge in Pro-Choice Network v. Schenck, 67 F.3d 377 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996):

> I am saddened by our holding today . . . . Unlike the challenged injunction [restraining antiabortion demonstrators], which I agreed in the original majority opinion was content neutral, I believe that Judge Oakes's decision [upholding that injunction] is content based. Were abortion not the issue, our original disposition would have occasioned little interest and no notoriety.

Id. at 409 (Altimari, J., dissenting).

[55] Undercutting this charge is the fact that Chief Justice Rehnquist, who has consistently opposed the Court's recognition of abortion as a fundamental right, wrote the *Madsen* opinion. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Rehnquist, C.J., dissenting) (arguing that *Roe* should be overturned); Roe v. Wade, 410 U.S 113 (1973) (Rehnquist, J., dissenting) (dissenting from majority opinion that invalidated Texas statute proscribing abortion). In *Madsen*, Chief Justice Rehnquist was joined by Justice O'Connor, who, although recognizing a constitutionally protected right to abortion, *see Casey*, 505 U.S. at 843-911 (joint opinion of Justices O'Connor, Kennedy, and Souter), is certainly no pro-choice ideologue. *See, e.g.*, *Thornburgh*, 476 U.S. at 814, 815 (1986) (O'Connor, J. and Rehnquist, C.J., dissenting) (urging modification of *Roe* to give states greater leeway to regulate abortion); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 462 (1983) (O'Connor, J., dissenting) (same).

[56] *See Casey*, 505 U.S. at 979-1002 (Scalia, J., dissenting).

troversy seep into the First Amendment analysis of regulations protecting access to abortion services.

The Phoenix bubble ordinance was sponsored by Planned Parenthood of Central and Northern Arizona,[57] an organization often allied in the protection of reproductive rights with the Arizona Civil Liberties Union (AzCLU), a state affiliate of the ACLU. During an AzCLU legal panel meeting at which the possibility of filing an amicus brief in support of anti-abortion demonstrators' challenge to the ordinance was under discussion, a member of the panel exclaimed, "We can't challenge that ordinance — we'd be against our friends." Silence fell before several other panel members acknowledged how inappropriate this consideration was. They reaffirmed that it should be entirely irrelevant to the assessment of the constitutionality of a law regulating speech whether one agreed or disagreed with the political ideology of those who sponsored the law, just as it should be entirely irrelevant whether one agreed with the message of those demonstrators who challenge it. But like the naive boy's comment about the Emperor's nakedness, the outburst about "our friends" may have revealed a consideration that was actually in play but which other members of the panel would never acknowledge, not even to themselves.

After a lengthy and heated discussion the AzCLU panel ultimately decided by a divided vote to recommend filing an amicus brief pointing out various First Amendment problems with the ordinance;[58] and by a divided vote, the AzCLU board of directors adopted the panel's recommendation. Being neither a mind reader nor a psychoanalyst, I do not know what role, if any, sympathy for the pro-choice goals of Planned Parenthood or antipathy for the anti-abortion message of the demonstrators

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[57] *See* Motion for Leave to Intervene by Planned Parenthood of Central and Northern Arizona, Sabelko v. City of Phoenix, No. Civ. 93-2229 Phx SMM.

[58] On behalf of the AzCLU, I filed an amicus brief with the United States Court of Appeals arguing that the ordinance was unconstitutional because it unnecessarily restricted the right of antiabortion demonstrators to engage in peaceful, civil discourse with women seeking abortions. Reversing a district court opinion holding that the ordinance violated the First Amendment, a divided panel of the Ninth Circuit Court of Appeals found the ordinance constitutional. *See* Sabelko v. City of Phoenix, 68 F.3d 1169 (1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 4, 1996) (No. 95-1415), *discussed infra* text accompanying notes 212-39.

played in producing the dissenting votes. Unlike the ordinance designed to stop the American Nazi Party from marching in Skokie,[59] a speech regulation entirely at odds with the strong civil libertarian position on free speech for which the ACLU stands, the Phoenix bubble ordinance presents some difficult, rather technical free speech issues. Moreover, while the dangers that those opposed to the Nazi march claimed would result were all quite speculative, the harm produced by overzealous anti-abortion demonstrators is not.[60] Nor is the Phoenix ordinance blatantly viewpoint oriented, as was the Skokie ordinance. Thus there are substantial, although in my view ultimately not persuasive, arguments to support the validity of the bubble ordinance that are not totally inconsistent with those basic free speech principles that the ACLU ordinarily can be counted on to defend. Still, the candid reference to not opposing "our friends" suggests the possibility that other members of the panel also may have allowed such considerations enter into the decision making process.

The continued vitality of free speech in the United States depends upon doctrine that neither favors nor disfavors any particular viewpoint or ideology, either in the formation of the rules or in their application. This is why it was imperative that the flag burning cases were decided the way they were.[61] If instead the Court had upheld these laws to protect the sensibilities of those who "fought for the flag," or otherwise are deeply offended by its desecration, the Court then would have been compelled either to make other exceptions for racial minorities offended by uncivil racist expression, or to explain why protecting their sensibilities does not count. The Court would then face the same dilemma when certain feminist organizations demand an exception permitting the suppression of sexually explicit material demeaning to women, or when religious organizations

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[59] *See* Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir. 1978) (invalidating ordinance that prohibited "dissemination of any materials . . . which [intentionally] promotes and incites hatred against persons by reason of their race, national origin, or religion").

[60] *See supra* note 1.

[61] *See* United States v. Eichman, 497 U.S. 310, 312 (1990) (holding unconstitutional federal flag desecration statute); Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding unconstitutional application of state flag desecration statute to protestor who burned American flag as form of political protest).

demand another exception for blasphemous speech, and so on. And a dilemma it surely would have been, for granting further exceptions would erode the strength of free speech protection, but denying an exception to similarly situated groups would undermine the legitimacy of free speech doctrine. Similarly, the legitimacy of organizations dedicated to defending free speech rights (of which the ACLU is the foremost) depends upon their willingness to do so no matter whose ox is being gored.[62]

Whether one is a judge deciding if a law violates the First Amendment or an ACLU legal panel member voting on whether to challenge a speech regulation, the insidious influence of one's own attitude towards the speaker's viewpoint is always there threatening to corrupt the process. The more important and emotional the topic of the speech, the more likely it is that these illegitimate considerations will emerge.[63]

In the final analysis, then, the major difference between Stanley Fish and me is that I think that the pursuit of viewpoint neutrality in First Amendment doctrine is not only desirable, it is essential. Like any exercise involving interpretation and judgment, this goal can never be perfectly achieved. Two things,

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[62] A recent controversy within the ACLU raises the possibility that in supporting an injunction against antiabortion demonstrators, the national organization has deviated from the strong free speech principles to which the ACLU is dedicated. The injunction in question imposes a 15-foot "floating" bubble buffer zone attaching to "any vehicle or persons seeking access to or leaving" the abortion clinics, with the exception that up to two "sidewalk counselors" may approach those protected by the buffer zone and engage in "non-threatening" conversation. *See* Pro-Choice Network v. Schenck, 67 F.3d 377, 384-85 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996). However, if the person so approached indicates that she is not interested in engaging in conversation, the counselor must "cease and desist" and retreat outside the buffer zone. *Id.* at 385. As it did in the Second Circuit, *see id.* at 381, the national ACLU plans to file an amicus brief in the Supreme Court in support of the injunction. This position has led several state affiliates to take the unusual step of filing a "dissenting" brief arguing that the injunction is unconstitutional. *See* Brief Amici Curiae of the American Civil Liberties Union Foundation of Florida, et. al, in Support of Neither Party and Urging Reversal (on file with author). Whether the national ACLU has, in fact, departed from its usual free speech principles as a result of its sympathy to the "substantive agenda" of those favoring abortion rights, depends on whether the prior conduct of the demonstrators was so egregious as to warrant such speech restrictive relief. This is, of course, an intensely fact based question which I will not attempt to answer here.

[63] It is, of course, possible that persons or organizations could be so committed to not letting antagonism to a speaker's viewpoint affect the free speech analysis that they unwittingly "lean over the other way" and protect speech in part because they find it offensive or disagree with it.

however, will help approximate judicial viewpoint neutrality. Judges must, of course, endeavor to exclude as best they can any sympathy or hostility to the speaker's "substantive agenda."[64] But for such a self-reflective exercise to have any chance of success, First Amendment doctrine should avoid, where possible, ill defined standards or multi-factor balancing tests that invite judges to allow their own attitudes toward the speaker's viewpoint to enter into the analysis. As I now discuss, altering the usual free speech rules to take account of the constitutional status of abortion rights not only invites judicial viewpoint discrimination, but does so for no good purpose.

II. NEUTRAL PRINCIPLES IN THE BALANCE: DISTINGUISHING BETWEEN TRUE AND SPURIOUS CONFLICTS OF CONSTITUTIONAL RIGHTS

Should the fact that abortion is a constitutional right affect the First Amendment analysis of regulations designed to protect access to abortion clinics? Intuitively, it would seem that when there is a constitutional right on both sides of the equation, the analysis should indeed differ from the usual situation in which a constitutional right is opposed only by an ordinary state interest. In discussing the constitutionality of regulations designed to protect abortion access, commentators often make just this assumption.[65] For instance, in his paper for this symposium Professor Brownstein argues:

> The resulting distress and delay that protestors outside of clinics cause is not only problematic in its own right because of its impact on the health of women patients. It is also a matter of concern *because it burdens the exercise of a constitutional right.* When the Court evaluates the constitutionality of restrictions on expression in the areas surrounding medical

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[64] The best way to do this is if the law hampers an ideology that you despise, imagine its application to "your friends," and vice versa. Thus "liberals" sympathetic to FACE should ask themselves how they would feel about specialized legislation imposing heavy penalties for "force" or "physical obstruction" used to "impede military recruiting," or the use of bubble ordinances against labor demonstrators at large medical centers.

[65] *See, e.g.*, Kelly L. Faglioni, Note, *Balancing First Amendment Rights of Abortion Protestors with the Rights of Their 'Victims'*, 48 WASH. & LEE L. REV. 347, 379 (arguing that focusing upon abortion seekers' underlying constitutional right helps to strike balance between individuals exercising their free speech and victims of that speech).

> clinics providing abortion services, *it must take into account the fact that there are two rights at issue in these cases.*[66]

Contrary to Brownstein, I believe that the constitutional status of abortion rights should be entirely irrelevant to the First Amendment analysis of laws protecting access to abortion clinics. That this must be the case can be demonstrated by considering whether one's judgment about the validity of these regulations would change if *Roe v. Wade*[67] was overruled. In such an event, abortion would no longer be a constitutional right, but would doubtless remain legal in many states that might retain laws, such as "bubble ordinances," protecting abortion access. Assuming that such laws were constitutional prior to *Roe's* overruling, is it possible that these laws might now violate the First Amendment? I suspect that most would share my strong sense that this overruling in an entirely different area of the law could not possibly require the overturning of free speech cases in its wake. But how then do we reconcile these two seemingly conflicting intuitions: the feeling, on the one hand, that when two constitutional rights conflict, the constitutional status of each must surely matter, with the equally certain assumption, on the other hand, that regulations protecting abortion access that presently would be held constitutional would not suddenly violate the First Amendment if a case having nothing to do with free speech were overruled? The answer, I submit, is that challenges to laws regulating demonstrations at abortion clinics do not really involve a clash between constitutional rights.

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[66] Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests – Section II*, 29 U.C. DAVIS L. REV. 1163, 1215 (emphasis added); *see also id.* at [36] [hereinafter *Rules of Engagement - Section II*] (writing that "[t]he right to have an abortion is a fundamental right . . . . Protecting the ability of individuals to exercise a fundamental right may be an independently compelling justification for regulating expressive activity outside medical clinics that provide abortion services"); *see also* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1433 (W.D.N.Y. 1992), *aff'd*, 67 F.3d 377 (2d Cir 1995), *and cert. granted*, 116 S. Ct. 1260 (1996) (issuing injunction regulating expressive activities of antiabortion demonstrators to ensure that "the Constitutional rights of one group are not sacrificed in the interests of the Constitutional rights of another").

[67] 410 U.S. 113 (1973).

A. *The Distinction Between True and Spurious Constitutional Conflicts*

To elucidate why there is no clash of constitutional rights in cases dealing with regulation of anti-abortion demonstrations, I will first distinguish between "true" and "spurious" conflicts. Virtually all of the individual rights secured by the Constitution are rights against government, not against other individuals.[68] Thus, with respect to the vast majority of constitutional rights, true conflicts can occur only when by taking a specified action government will impinge one constitutional right, but by failing to take that action it will implicate another constitutional right. Mercifully, such "damned if you do, damned if you don't" dilemmas do not often arise. Another hallmark of American jurisprudence is that the individual rights found in the Constitution are primarily *limitations* on government action rather than provisions requiring the government to act.[69] Precisely because the individual rights provisions of the

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[68] The Bill of Rights, the first eight amendments to the Constitution, limits only the federal government. *See* Barron v. Baltimore, 32 U.S. (1 Pet.) 672, 674-75 (1833) (holding that Fifth Amendment does not apply to state governments); *see also* U.S. CONST. amend. I ("*Congress* shall make no law. . .") (emphasis added). The Fourteenth Amendment's constraints are addressed solely to state government:

> *No State* shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall *any State* deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV (emphasis added).

The Fifteenth Amendment's prohibition against racial discrimination in voting is addressed both to the federal government and to the states. *Id.* amend. XV. In contrast, the Thirteenth Amendment's prohibition against slavery and involuntary servitude contains no reference to government and thus applies to private as well as governmental action. *Id.* amend. XIII. *See also* United States v. Kozminski, 487 U.S. 931, 942 (1988) (stating that Thirteenth Amendment applies to private as well as state action). Aside from the prohibition against slavery and involuntary servitude, the only other individual right protected by the Constitution against private interference is the unenumerated right to interstate travel. *See* United States v. Guest, 383 U.S. 745, 757-60 n.17 (1966) (stating that right to interstate travel is right as against both state and private actors).

[69] *See, e.g.*, DeShaney v. Winnebago County Social Servs., 489 U.S. 189, 195 (1989) (holding that "[t]he [Due Process] Clause [of the Fourteenth Amendment] is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . . Its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means").

Constitution do not usually require government affirmatively to do anything, such dilemmas do not often occur. Occasionally, however, certain government action does require further or ancillary action, and in such situations true clashes between constitutional rights can arise.

1. True Conflicts

If government allows some speakers access to government property for expressive purposes, the Free Speech Clause of the First Amendment may require it to allow other speakers to use the property for that purpose.[70] But if a speaker wants to use government property to express a religious message that may be reasonably understood by an observer as the government's own message, obedience to the core free speech principle of not denying access to a public forum based on the speaker's viewpoint might violate the First Amendment's Establishment Clause.[71] Similarly, if a public university generally funds student publications, the Free Speech Clause forbids denial of funding based on the publication's viewpoint.[72] But if the publication is a sectarian one, such state funding would implicate the Establishment Clause.[73]

Constitutional provisions protecting the rights of criminal defendants can also impose affirmative obligations on govern-

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[70] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269-77 (1981) (holding that university policy denying equal access to university facilities for student religious groups was unconstitutional content-based speech regulation).

[71] *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2451 (1995) (O'Connor, J., concurring); *id.* at 2457-58 (Souter, J., concurring); *id.* at 2465 (Stevens, J., dissenting); *id.* at 2474-75 (Ginsburg, J., dissenting).

[72] *See* Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2516-17 (1995). *Rosenberger* involved a request by a student group for funding of printing costs for an evangelical magazine. *Id.* at 2514-15. The Court held that the requested funding would not, in fact, violate the Establishment Clause, and thus the refusal to fund the publication violated the Free Speech Clause. *Id.* at 2520-25. In contrast, four dissenting Justices thought that the university's refusal to fund the publication was compelled by the Establishment Clause. *Id.* at 2533-51 (Souter, J., dissenting).

[73] *Id.* at 2520-25. Although the majority ultimately rejected the Establishment Clause claim, this does not belie the fact that the Establishment Clause was truly *implicated* on these facts, for under doctrine that existed before the case was decided, the claim was a substantial one. Indeed, Justice O'Connor, whose vote was necessary to the majority, indicated that under slightly different facts, funding might violate the Establishment Clause. *Id.* at 2525-27 (O'Connor, J., concurring).

ment that clash with free speech rights. When the state decides to prosecute a person for a crime, the Due Process Clause of the Fourteenth Amendment requires that it insure that the defendant be tried by an impartial jury, a right that can be violated if prejudicial allegations published by the press come to the jury's attention.[74] However, measures such as "gag orders" adopted by the state in an attempt to satisfy the commands of the Due Process Clause can conflict with the First Amendment.[75] Similarly, because it is the government that is in charge of the electoral process, it has an affirmative duty "to protect the integrity and reliability" of that process to ensure that "an individual's right to vote is not undermined . . . ."[76] On the other hand, laws enacted to protect the right to vote, such as regulations forbidding the solicitation of votes or distribution of campaign literature within a specified distance of polling places, obviously implicate First Amendment free speech rights.[77]

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[74] *See* Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (holding that widespread publicity about accused murderer violated due process right to impartial jury).

[75] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976) (striking down as unwarranted order issued by state judge restraining press from publishing or broadcasting accounts of confessions or admissions made by accused or facts "strongly implicative" of accused in murder case).

[76] Burson v. Freeman, 504 U.S. 191, 199 (1992).

[77] *Id.* at 211 (upholding regulation in part because "the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud").

Of all the examples listed in this section, *Burson*, to my mind, least clearly involves a true conflict. It is not at all certain that the occurrence of the harm the speech regulation at issue in that case seeks to avoid would give anyone a cognizable constitutional claim for impairment of the right to vote. In contrast, a criminal defendant whose conviction was influenced by damaging pretrial publicity would have a valid Fourteenth Amendment claim, or if convicted in a federal court, a valid Sixth Amendment claim. Similarly, at least before the claim was rejected in *Rosenberger*, a student at a state university whose registration fees were used to fund a sectarian publication could have challenged that funding as a violation of the Establishment Clause.

The rejection of the Establishment Clause claim in *Rosenberger* suggests, moreover, that the category of true conflicts perhaps should be subdivided into actual and potential conflicts. Actual true conflicts are cases in which no matter what the state does, it will in fact violate one or the other of the constitutional rights at issue. The result, at least as those rights are defined under normal doctrinal rules, is that the judiciary must "excuse" the violation of one of these rights as being necessary to avoid violation of the other. This would have been the case, for instance, if the Court in *Rosenberger* had found that funding the sectarian publication violated the Establishment Clause. Under such circumstances, what would otherwise have been a free speech violation resulting from the failure to fund

2. Spurious Conflicts

In contrast to true conflicts are controversies that apparently involve a clash between constitutional rights but which, in fact, do not. Prime examples of such spurious conflicts are found in arguments supporting laws that would generally prohibit racist speech and in similar arguments for banning sexually explicit expression demeaning to women. Proponents of these laws often make the following argument: Those who argue against hate speech and anti-pornography laws on constitutional grounds overlook the fact that the First Amendment is but one provision of the Constitution. As least as important as the First Amendment is the Equal Protection Clause of the Fourteenth Amendment, which outlaws invidious racial and gender discrimination. The expression of vicious racist ideas leads to illegal acts of racial discrimination, just as the distribution and consumption of pornography causes subordination of and violence towards women. Both are class-based injuries that implicate the Equal Protection Clause. Accordingly, application of standard First Amendment doctrine, which all but irrebuttably condemns viewpoint-oriented laws as unconstitutional, should not apply to hate speech laws or pornography regulations, because unlike the

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the sectarian publication because of its religious viewpoint would have been "excused" by the necessity of avoiding the Establishment Clause violation. *See Rosenberger*, 115 S. Ct. at 2520. The Court, however, found that the requested funding would not have violated the Establishment Clause and thus, as it turned out, *Rosenberger* involved only a potential true conflict. It was a true conflict because the Establishment Clause was legitimately implicated by the requested funding: Given the state of the law before the Supreme Court's ruling in the case, a cognizable Establishment Clause claim could have been stated by a student whose fees were used to fund the publication. But, as we now know, given the holding in *Rosenberger*, the conflict was only potential in that the university could have avoided violating either right by funding the religious publication.

As *Rosenberger* demonstrates, where one or both of the constitutional claims present a close question, whether the conflict is actual or merely potential can be ascertained only after the case is adjudicated. Similarly, in cases involving conflict between free speech and fair trial rights, whether the pretrial publicity actually violates the defendant's constitutional rights to an unbiased jury will be determinable only if the speech is not restrained and is such that it is likely to have unduly influenced the jurors' deliberations. *See Sheppard*, 384 U.S. at 357 (finding that "deluge of publicity reached at least some of the jury"); *cf.* Murphy v. Florida, 421 U.S. 794, 802-03 (1975) (despite pretrial publicity by which several jurors learned of defendant's prior conviction, under totality of circumstances, defendant failed to show inherent or actual prejudice deprived him of his constitutional right to impartial jury).

ordinary speech regulations these laws protect constitutional rights. Rather, such a ban presents a special case in which the court must balance the speaker's First Amendment rights against equality rights. Since constitutionally guaranteed equality rights are more fundamental to the lives of real people than abstractions supporting free speech, the argument concludes, banning hate speech and pornography is constitutional.[78]

Notice the sleight-of-hand by which the Equal Protection Clause of the Fourteenth Amendment is smuggled into the analysis. Like most provisions of the United States Constitution, the Fourteenth Amendment is a limitation on government, not private conduct.[79] Indeed, unlike several provisions of the Bill of Rights, in which the reference to the federal government is implicit,[80] the Fourteenth Amendment is expressly addressed to the states.[81] Thus a bigot spewing racist venom in the speaker's

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[78] *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 71 (1993) (writing that "the upheaval that produced the Reconstruction Amendments [i.e., the Thirteenth, Fourteenth and Fifteenth Amendments ratified following the Civil War] . . . move[d] the ground under the expressive freedom, setting new limits and mandating new extensions, perhaps even demanding reconstruction of the speech right itself"); *id.* at 106 (arguing that "[w]hen equality is recognized as a constitutional value and mandate, the idea that some people are inferior to others on the basis of group membership is authoritatively rejected as the basis for public policy . . . [Consequently], social inferiority cannot be imposed through any means, including expressive ones"); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 446-47 (1990) (explaining that "[t]he alternative to regulating racist speech is infringement of the claims of blacks to liberty and equal protection. The best way to constitutionally protect these competing interests is to balance them directly") (citation omitted); *id.* at 481 (asserting that "[w]e must weigh carefully and critically the competing constitutional values expressed in the First and Fourteenth Amendments"); Mari J. Matsuda, *Public Response to Hate Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2338, 2355, 2376 (1989) (referring to equality rights protected by proposed ban on hate speech as competing rights of "constitutional dimension"); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills*, 77 CORNELL L. REV. 1258, 1284-85 (1992) (writing that "[s]peech and free expression are not only poorly adapted to remedy racism, they often make matters worse — far from being stalwart friends, they can impede the cause of racial reform . . . . [W]hen insurgent groups attempt to use speech as an instrument of reform, courts almost invariably construe the First Amendment doctrine against them.").

[79] *See supra* note 68 (discussing state action requirement); *see also* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful").

[80] *See, e.g.*, U.S. CONST. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

[81] *See supra* note 68 (discussing text of Fourteenth Amendment).

corner of the park or a bookstore owner selling a pornographic magazine could not possibly violate the Fourteenth Amendment. In contrast, if the proponents of hate speech and anti-pornography regulations have their way, it is the state that will enact the law, as well as arrest, try, and imprison or fine the speaker — conduct that plainly triggers the First Amendment. What is involved, then, in a challenge to a general hate speech or pornography ban is not a conflict between constitutional rights, but rather a clash between a speaker's *constitutional rights* and the *state interest* in protecting individuals from harm caused by the speech.[82]

In response, proponents of hate speech and pornography prohibition correctly point out that this objection rests upon the distinction between state and private action, and then argue that the case law that attempts to articulate this distinction is incoherent.[83] It is true that state action doctrine is extremely muddled, prompting one commentator to refer to it as "a conceptual disaster area."[84] But despite the Court's inability to produce

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[82] In contrast, attempts to regulate hate speech at public institutions, such as state universities, might present a true conflict between free speech and equality rights. The clearest example would be if the speaker is a state employee whose speech materially interferes with a minority student's right to receive educational benefits on equal terms with other students. Thus a professor who continually uses racial epithets to address particular students in class might well violate the Equal Protection Clause.

But even regulation of racist speech of *nonstate actors* at public universities could involve a true conflict of constitutional rights. Just as the government, as administrator of elections, has a constitutional duty to prevent activity at polling places by private individuals that would compromise the integrity of the election, state officials in charge of public universities have, I believe, a constitutional duty to prevent activity by private individuals that will deprive anyone of the right to receive the educational benefits *offered by the state* on an equal basis with other students regardless of race. *See* James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 194-96 (1991); *cf.* United States v. Guest, 383 U.S. 745, 784 (1966) (Brennan, J., concurring) (stating that Congress has power under § 5 of Fourteenth Amendment to outlaw private activity that interferes with "equal utilization of state facilities"); Brewer v. Hoxie Sch. Dist., 238 F.2d 91, 101 (8th Cir. 1956) (holding federal court has power to enjoin private individuals from intimidating state officials from carrying out their Fourteenth Amendment obligation to desegregate schools). But even though the application of "speech codes" at public universities can present a true conflict of constitutional rights, there is a strong argument that the constitutional issues presented by such codes are best resolved by applying ordinary free speech doctrine without reference to countervailing constitutional rights. *See* Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 317-25 (1991).

[83] *E.g.*, Lawrence, *supra* note 78, at 444-49.

[84] Charles L. Black Jr., *The Supreme Court, 1966 Term — Foreword: 'State Action,' Equal*

coherent doctrine, recognizing some basic dichotomy between state and private action remains imperative, for without it the entire concept of constitutional limitations on *governmental* intrusions on *individual* rights becomes meaningless.[85] In most in-

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Protection, and California's Proposition 14, 81 HARV. L. REV. 69 (1967). Similarly, Professor Laurence Tribe comments: "[D]espite the precedents, and despite the vocabulary, the Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 169 (2d ed. 1989). Tribe continues:

> Chaos, however, may itself be a form of order. If the usual premise is reversed — if the state action cases are assumed not to reveal any general rule, and if the inquiry is redirected to consider *why* this anarchy prevails — it is possible to construct an 'anti-doctrine,' an analytical framework which, in explaining why various cases differ from one another, paradoxically provides a structure for the solution of state action problems.

Id. at 1691.

[85] TRIBE, *supra* note 84, at 1691. Tribe states:

> [B]y exempting private action from the reach of the Constitution's prohibitions, [the state action requirement] stops the Constitution short of preempting individual liberty — of denying to individuals the freedom to make certain choices, such as choices of the persons with whom they will associate. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands.

Id.

Some specific examples confirm this point. The Constitution generally forbids sex discrimination, but forbidding individuals to discriminate on this basis in pursuing amorous interests would, aside from being absurd, violate basic autonomy rights. Similarly, the Constitution forbids the government to discriminate on the basis of religion and generally even from taking religion into account. Manifestly, there could be no such prohibition on private decision making in the sphere of religion without contradicting the essential purpose of the religion clauses. With regard to free speech, the First Amendment's purpose of promoting democratic self-governance demands that government "remain neutral in the marketplace of ideas" by refraining from regulating the content of speech on matters of public concern. Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 548 (1980). *See also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content") (citations omitted). But the First Amendment also presupposes that private speakers, such as newspaper publishers, will routinely engage in content discrimination in exercising editorial judgment as to which stories to run or which editorials to publish. Indeed, any attempt by the state to impose a "neutrality" requirement on the press would itself be a violation of the First Amendment. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional Florida law granting political candidates right to equal space to reply to criticism of their record by newspapers; Court finds law to impermissibly intrude "into the function of editors").

What all of these examples show is that the concept of state action cannot be deter-

stances, moreover, the distinction is quite workable. Indeed, it is usually so obvious that state action concerns do not even rise to consciousness in most cases. Rather, determining whether the state is sufficiently involved in conduct so as to implicate a constitutional right is usually determined without discussion. Only in borderline cases is analysis needed.

Borderline cases do occur and here doctrine is often not particularly helpful.[86] But despite this "incoherence," state action doctrine supplies definite answers in many, if not the overwhelming majority, of cases that allege that a constitutional right has been violated. Thus, under current doctrine it is certain that a racist speech in the park or the rental of pornographic movies by the local video store, as well as the host of other expression to which a general ban on hate speech and pornography would apply, is not state action triggering the Equal Protection Clause.[87] Indeed, an attorney who brought a claim alleging that a racist speaker in the park or a owner of a video store that rented a pornographic film violated the Fourteenth Amendment might very well be fined for filing a frivolous lawsuit. Current doctrine aside, I cannot imagine a conception of state action that retains the basic separation between the state and the individual necessary to a liberal democracy under which such speech could be considered the act of the state.[88]

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mined in the abstract, but to a large degree is bounded by the various realms of decision making reserved to the individual in a liberal democracy.

[86] *See, e.g.*, San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987) (5-4 decision) (holding that refusal by private organization to allow organizers of gay athletic event to use word "Olympics" was not governmental action despite congressional grant of exclusive licensing power to organization).

[87] The Court has held that "[t]o find unconstitutional state action in situations where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations.'" Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (holding that racial discrimination by private social club is not state action despite state conferred liquor license).

[88] Which is not to say that outlawing racist speech or pornography is contrary to basic principles of liberal democracy. I address this more difficult question at length in a forthcoming book. My point here is only that holding racist speech in the park or renting pornographic videotapes to be state action would require the total collapse of distinction between private and public realms. Any constitutional argument for banning racist or pornographic speech must therefore rest on some other grounds than the proposition that such speech implicates the Fourteenth Amendment. Moreover, the total collapse of the distinction between private and public realms cannot be avoided by relying on that fact that the park is public property. Such "public" speech is essential to the discourse which is critical

But even if a private person expressing racist ideas or selling pornography cannot *technically* violate the Fourteenth Amendment, racial and gender equality are nonetheless paramount *values* protected by the Fourteenth Amendment. Should not the primacy of these values be factored into the analysis of the constitutionality of laws forbidding speech that undermines this commitment to equality? In one sense, the answer is plainly "yes," for current doctrine already accounts for the importance of the state's interest in eradicating invidious discrimination. For instance, the Supreme Court recently held that preventing illegal racial discrimination is a compelling state interest,[89] and I am sure that it would hold the same with respect to the violence against women and other forms of illegal gender discrimination said to result from pornography.

But if what is meant is that the fundamental equality norm expressed in the Fourteenth Amendment requires that the usual rules for deciding free speech do not apply, then factoring the constitutional status of the norm into the free speech analysis is inappropriate. This position would mean that speech that attacks societal norms that are so basic that they find expression in the Constitution can be prohibited without the state having to make the showing of harm or imminent danger ordinarily required to sustain such content-oriented laws. But as Justice Holmes long ago pointed out,[90] and as modern doctrine presumes,[91] it is

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to democratic self-government. Characterizing such speech as state action because it occurred in a public forum would again obliterate any meaningful distinction between private and state action. A much different situation would arise if a racist tried to prevent African-Americans from speaking in the park. *Cf. supra* note 82 (discussing situations in which government has affirmative constitutional obligation to manage public property to prevent private individuals from depriving others of benefits conferred *by state* or from impeding *state actors* from complying with constitutional duty).

[89] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393-94(1992). The Court, however, invalidated the narrow regulation of hate speech at issue because it failed the additional strict scrutiny requirement that the content discrimination be necessary to serve that interest. *Id.* at 395-96.

[90] United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (stating that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate").

[91] Texas v. Johnson, 491 U.S. 397, 418 (1989) (explaining that "[t]he First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole — such as the principle that discrimination on the basis of race is odious and destructive — will go unquestioned in the marketplace of ideas." *Id.*

precisely speech that challenges basic societal norms that is most in need of First Amendment protection. Like equality, democracy is a basic constitutional norm. If we learned anything from the free speech cases of the McCarthy era, however, it is that the suspension of the normal free speech rules to uphold the suppression of anti-democratic Communist propaganda was itself a blow to democracy from which we have only recently recovered.[92]

Finally, and particularly pertinent to avoiding judicial viewpoint discrimination, discovering what fundamental *rights* the Constitution actually confers can often be an extremely subjective exercise;[93] discerning what basic *values* underlie that document is even more unbounded. If a majority of Justices happens to believe that the government's ability to raise an army to fight for this nation's interests abroad is a fundamental constitutional value, it is hard to argue otherwise. If they derive from this the view that protecting against interference with military recruiting is a "compelling state interest," that is also fair enough. But suspending the normal free speech rules in cases involving anti-war speech because such speech attacks a core constitutional norm is obviously not consistent with a commitment to robust public discourse.[94]

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[92] *See, e.g.*, EMERSON, *supra* note 15, at 159-60 (writing that "[e]xperience with sedition laws [such as the Smith Act] has demonstrated that they are not needed to protect internal security and are incompatible with the democratic process"). In an illuminating article tracing the history of balancing free speech rights against other constitutional norms, Professor Eugene Volokh cites Justice Frankfurter's concurring opinion in Dennis v. United States, 341 U.S. 494 (1951), as a prime example. *See* Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223 (1996). *Dennis* affirmed the conviction of high ranking officers of the American Communist Party under the Smith Act for conspiracy to advocate overthrow of the United States government.

[93] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 132-63 (1989) (revealing widespread disagreement among Justices about proper method for determining which liberty interests are fundamental).

[94] According to Professor Volokh, several early cases rely on the constitutional status of the government's war powers in affirming the convictions of anti-war protestors for interfering with the government's war efforts during World War I. *See* Volokh, *supra* note 92, at 234-35.

B. Free Speech vs. Abortion Access: True or Spurious Conflicts of Constitutional Rights?

Does the clash between free speech and abortion rights arising from regulation designed to protect abortion access present a true or a spurious constitutional conflict? Like constitutional equality rights, which are found in the Equal Protection Clause of the Fourteenth Amendment, the constitutional right to abortion, which derives from the Due Process Clause of Fourteenth Amendment,[95] is a right against the state, not private individuals.[96] Therefore private interference with abortion rights cannot violate the *constitutional* right to abortion.[97] As discussed above, the line between private and state action is not always an easy one to draw. But any distinction that would preserve the separation between the state and the individual necessary to a liberal democracy would have to place protest activity by anti-abortion organizations and their members clearly on the private side of the line.[98]

It is true, of course, that the causal link between the distribution of racist and pornographic material and actual incidents of racial or gender discrimination is debatable, while there can be no doubt that some anti-abortion activists have directly, sometimes even violently, interfered with abortion rights.[99] This difference in impact is pertinent to the First Amendment analysis of the state interest in regulating demonstrations at abortion clinics; it does not, however, make the actions of private anti-abortion demonstrators state action.[100] Still, when a woman ter-

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[95] *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

[96] *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993) (holding that right to abortion is not among few constitutional rights protected against both private and official encroachment).

[97] *Id.* at 264.

[98] *See supra* note 85 (discussing state action requirement as essential to protection of realm of individual liberty).

[99] *See supra* note 1.

[100] If private conduct was specifically intended to interfere with *state protection* of a right that individuals hold against the government, and if in fact this conduct so overwhelmed law enforcement that state protection of the right became impossible, there would be an interesting, although still problematic, argument for a finding of "state action" in these circumstances. *Cf. Bray*, 506 U.S. at 303-04 (Souter, J., dissenting in part) (arguing that acts of anti-abortion groups overwhelming law enforcement authorities supports Congressional power to prevent such conduct under § 5 of Fourteenth Amendment in order to assure equal protection of laws); *see also* Brewer v. Hoxie Sch. Dist., 238 F. 2d. 91, 101 (8th Cir.

minates a pregnancy is she not *exercising* a constitutional right? Should it not be relevant to the First Amendment analysis that the law in question protects against *interference* with a right of constitutional magnitude. This is but a variation of the argument that the usual doctrinal rules should not apply to regulation of speech that is inimical not just to what are truly constitutional rights, but to basic constitutional values or norms as well.

It is true that we speak about a woman choosing an abortion as exercising a constitutional right,[101] just as we refer to someone standing on a soap box in the park as exercising First Amendment rights. But this is just shorthand for the more complete statement that the person is engaging in activity that she has a right *as against government* to engage in. There is, however, a host of activity that is expressly protected against government intrusion with which private persons can, and often do, interfere. Yet, in the absence of state action, burglary does not implicate the Fourth Amendment's protection of the home,[102] just as murder, kidnapping, or theft do not implicate the Fourteenth Amendment's prohibitions against the arbitrary deprivation of life, liberty, and property.[103] Consequently, laws that regulate speech that the state claims might lead people to intrude in the homes of others, or to commit murder, kidnapping or theft should not be exempt from ordinary First Amendment analysis just because these laws protect interests that are constitutionally protected against government interference.

1956) (upholding federal power to restrain private individuals from intimidating state officials from complying with their Fourteenth Amendment obligation to desegregate public schools). Fortunately, we have not reached the point where this interesting concept of state action can be tested. For while there have been several incidents in which state law enforcement officials have been *temporarily* overwhelmed by anti-abortion demonstrators, these incidents have been neither so widespread nor prolonged that abortion rights can be fairly characterized as no longer protected by law. *See, e.g.*, *Bray*, 506 U.S. at 290 (Souter, J., dissenting in part) (noting that local police were outnumbered by anti-abortion demonstrators and unable to prevent clinic from closing for over six hours).

[101] *See* Faglioni, *supra* note 65, at 362 (writing that "the conduct of some anti-abortion protestors at times . . . infringe[es] upon a woman's constitutional right to have abortion) (citations omitted).

[102] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

[103] U.S. CONST. amend. XIV ("Nor shall any State deprive any person of life, liberty, or property, without due process of law").

That certain activities or interests are protected from government interference is, of course, strong evidence that society considers the activity important enough to protect against even private interference (hence the ubiquity of and heavy penalties attaching to laws against burglary, murder, kidnapping, and theft). But like most constitutional rights, procreative choice is not important because it is a constitutional right; rather it is a right of constitutional magnitude because it is important to individual autonomy.[104] Moreover, as explained above, First Amendment doctrine already accounts for the importance of the state interest justifying speech regulations. So long as abortion is a legal medical procedure, the state has a strong, even a compelling, interest in assuring access to abortion services. But so far as free speech analysis is concerned, the strength of that interest should in no way turn on the happenstance of whether the legality of the procedure stems from the federal Constitution or state law.

For laws protecting access to abortion to present an actual conflict, states would have to have a constitutional obligation to protect abortion rights against private interference. Does such an obligation exist? As noted above, in the case of criminal trials the state has an obligation to insure that private conduct — media publication of allegations adverse to defendants — does not result in deprivation of defendants' due process rights,[105] just as the state has a constitutional obligation to regulate the areas around polling places to insure that the right to vote is not undermined by coercive or fraudulent acts by private individuals.[106] Some might argue that the state has a similar constitutional duty to prevent private individuals, in this case anti-abortion demonstrators, from depriving women of their Fourteenth Amendment abortion rights. Again, however, absence of state

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[104] *See* Planned Parenthood v. Casey, 505 U.S. 833, 853 (1992) (stating that "[contraception and abortion] involve not only the meaning of procreation but also human responsibility and respect for it"); *id.* at 928 (Blackmun, J., concurring in part and dissenting in part) (arguing that "[b]ecause motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life").

[105] *See supra* text accompanying notes 74-75 (discussing state's obligation in criminal trial to protect defendant's right to fair trial).

[106] *See supra* text accompanying notes 76-77 (discussing state's obligation to protect voting rights).

action belies the analogy, for it is the state's control of criminal trials that triggers its obligation to protect defendants' right to a fair trial. Similarly, it is the state's control over the election process that gives rise to its affirmative duty to protect the individual right to cast a vote free from fraud or duress.[107] In contrast, the provision of abortion services in this country is not exclusively, or even primarily, controlled by the state.[108]

Any argument that government has a *constitutional* obligation to protect abortion rights — above and beyond its duty not to discriminate against these rights[109] — leads to two problems. First, what principle justifies privileging abortion rights with respect to protection against private interference over other rights that assume constitutional magnitude when impinged upon by government? What about private interference with property rights arising from demonstrations during labor disputes? Or expression that interferes with the constitutionally protected family relationships, such as marriage[110] and child rearing,[111] as many books and movies are alleged to do? Second, if legislation designed to prevent private interference with abortion rights is justified because of a constitutionally mandated governmental duty to protect these rights, then those jurisdictions that have not enacted such ordinances must be acting unconstitutionally.

Like the conflict of the constitutional rights said to be presented by hate speech and anti-pornography legislation, the constitutional conflict allegedly arising from regulations designed

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[107] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); *see also* Burson v. Freeman, 504 U.S. 191, 211 (1992).

[108] If, however, the state were to affirmatively discriminate against abortion rights by refusing women seeking abortions, or those providing abortion services, the same protection that it would provide to similarly situated people beset by demonstrators, state action would exist. Such discrimination would not only violate the right to abortion but the Equal Protection Clause as well, for the purpose behind such discrimination would surely be illegitimate. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 292-93 (1993) (Souter, J., dissenting in part). As discussed above, it could be argued by extension that private conduct specifically designed to disable law enforcement from protecting a particular right that the government itself may not infringe is state action if such conduct effectively nullifies protection of this right. *See supra* note 100 (discussing state action implications of private conduct overwhelming state protection forces).

[109] *See supra* note 108.

[110] *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

[111] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

to prevent anti-abortion demonstrators from impeding access to abortion facilities is spurious. Because laws regulating anti-abortion protests do not really protect the *constitutional* right to abortion,[112] they are analytically no different from any other speech regulation that seeks to vindicate an important interest.[113] Any effort to elevate the interest so as to suspend the usual free speech rules is thus unjustified. Additionally, such attempts are mischievous, for they would create an opening for judges reviewing the constitutionality of abortion access regulation to insert their viewpoint on the abortion controversy into the free speech analysis.[114]

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[112] Professor Brownstein acknowledges that "the burden imposed by private speech on the exercise of other constitutional rights does not technically create a true clash of rights." *Rules of Engagement - Section II*, *supra* note 66, at 1200. He then proceeds to argue that laws may nevertheless protect against private interference with constitutional rights, even if doing so requires the state to restrict free speech rights. *Id.* at 1201-08. Brownstein is surely correct that the state interest in protecting individual rights can justify speech restrictions, even when the right sought to be protected is not technically a constitutional one. Thus it is the state interest in protecting state created reputational rights that supports the restrictions on libel, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-45 (1974), and the state interest in protecting residential privacy that permits states to outlaw focused residential picketing. Frisby v. Schultz, 487 U.S. 474, 487 (1988). My disagreement with Brownstein rests with his assumption that the First Amendment analysis should consider the fact that the individual right in question happens to be constitutionally protected against state interference. Brownstein relies on free speech cases that refer to countervailing constitutional rights, such as the Sixth Amendment right to a fair trial, *e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986), and the right to an untainted electoral process, *e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992). *Rules of Engagement - Section II*, *supra* note 66, at 1211 nn.121-22. All of these cases, however, involve true conflicts between free speech and other constitutional rights. *See supra* notes 70-77 and accompanying text (discussing true conflicts).

[113] This is why overruling *Roe's* holding that abortion is a constitutional right would not mean that laws protecting access to abortion, previously held consistent with the First Amendment, might suddenly become unconstitutional. In contrast, if *Rosenberger* had decided that the University's refusal to fund the evangelical magazine did not violate the Free Speech Clause of the First Amendment because such funding would violate the Establishment Clause, a subsequent change in law finding no Establishment Clause violation might well have made the refusal to fund the publication a free speech violation.

[114] For additional commentary critical of invoking other constitutional norms in free speech cases, see Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349 (1995); Volokh, *supra* note 92; Weinstein, *supra* note 82, at 166-72.

Even in cases of true conflict, there is a substantial question as to whether the normal free speech rules should be suspended, and if so, to what degree. In *Rosenberger*, for instance, the normal free speech rules were apparently affected little, if at all by the presence of a true conflict between constitutional rights. Both the majority and the dissent seemed to subsume the Establishment Clause problem into the usual paradigm for dealing

III. DOCTRINAL ANALYSIS OF ABORTION ACCESS REGULATION

In the first section of this Article I discussed the concept of judicial viewpoint discrimination; in the second section I argued that characterizing abortion access cases as presenting a conflict between constitutional rights is analytically fallacious and an invitation to judicial viewpoint discrimination. Although the pur-

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with content-oriented restrictions. The dissent expressly stated that avoiding an Establishment Clause violation was a "compelling state" interest that can justify a speech restriction, Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2547 (1995), and the majority implied as much. *Id.* at 2521. *See also* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446 (1995) (explaining that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."). Moreover, after finding that an Establishment Clause violation would not ensue from funding the sectarian publication, the majority's free speech analysis did not mention the possible governmental interest in avoiding situations that come close to actual Establishment Clause violations. Similarly, the dissent did not suggest that the interest in avoiding serious Establishment Clause problems, rather than preventing actual Establishment Clause violations, should enter into the free speech analysis. Only Justice O'Connor suggested that the usual free speech rules, as well as the usual Establishment Clause doctrine, might not apply. She stated that "this case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activit[y] . . . . When two bedrock principles so conflict, understandably neither can provide the definitive answer." *Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring).

The plurality in *Burson*, in contrast, apparently applied a somewhat softened version of strict scrutiny in response to the presence of a countervailing constitutional right. *See* Burson v. Freeman, 504 U.S. 191, 225 (1992) (Stevens, J., dissenting) (documenting "marked departures" from strict scrutiny); *see also id.* at 213 (Kennedy, J., concurring) (arguing that "[t]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right."). An interesting question raised by Justice Kennedy's comment, as well as a similar assumption shared by both the majority and the dissent in *Rosenberger*, is why freedom of expression rather than the other constitutional right should "yield."

Professor Volokh apparently opposes varying free speech doctrine to account for countervailing constitutional rights, even in the case of true conflicts. Although his primary target is the balancing proposed by proponents of hate speech legislation, which as we have seen involves a spurious conflict, he also includes in his criticism the Court's reference to competing constitutional rights in *Nebraska Press Ass'n v. Stuart*, which involves a true conflict, and Freeman v. Burson, which arguably does. *See* Volokh, *supra* note 92, at 236 n.80.

No matter what the cause or justification, departure from the normal free speech rules increases the possibility of judicial viewpoint discrimination. Thus, even in the case of true conflicts, departure from normal doctrine entails risks. It may be, however, that in cases of true conflicts, particularly actual true conflicts as opposed to potential ones, some modification is inevitable. What the doctrinal rules should be in cases when free speech rights truly conflict with some other constitutional right is a difficult question more appropriately addressed in an article that focuses on that question.

pose of this paper is not to analyze in depth the constitutionality of particular access provisions, to conclude this Article without some doctrinal assessment of these provisions would be to play Hamlet without the Prince. In this concluding section I therefore briefly discuss a Supreme Court's recent decision dealing with a state court injunction protecting abortion access; suggest a doctrinal framework for analyzing the First Amendment issues raised by the federal Freedom of Access to Clinic Entrances Act; and explore in some detail the constitutionality of "bubble ordinances" requiring demonstrators in front of abortion clinics to withdraw a specified distance from the presence of anyone requesting them to do so. While I do come to some conclusions about the constitutionality of these provisions, my primary concern remains with developing and applying doctrine that avoids judicial viewpoint discrimination.

A. *Injunctions*

As part of a campaign to close down abortion clinics in Central Florida, leaders of Operation Rescue America proclaimed that they planned to violate trespass laws and block entrances to abortion clinics.[115] At the request of the operators of one of the threatened clinics, a Florida state court issued an injunction narrowly prohibiting the threatened illegal conduct.[116] Six months later, after a three day evidentiary hearing, the court found that despite the injunction Operation Rescue had "interfer[ed] with ingress" to the clinic and that this injunction was thus "insufficient to protect the health, safety and rights of women" seeking abortions.[117] The court therefore issued a broader injunction that included a thirty-six foot buffer zone in which the defendants were prohibited from demonstrating, various noise regulations, a ban on the use of "images observable" by patients inside the clinic, and a prohibition against approaching anyone seeking abortion services within 300 feet of the clinic unless the person indicates a desire to communicate.[118]

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[115] *See* Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 666 n.2 (Fla. 1993).

[116] *Id.* at 666.

[117] *Id.* at 667.

[118] *Id.* at 669.

In reviewing the constitutionality of this injunction the key question facing the United States Supreme Court in *Madsen v. Women's Health Center, Inc.*,[119] was the appropriate level of scrutiny to apply. Operation Rescue argued that because the injunction restricted only anti-abortion protestors, it was a content- and viewpoint-oriented speech regulation and thus subject to strict scrutiny.[120] Writing for a six-member majority, Chief Justice Rehnquist rejected this argument. "An injunction," the Chief Justice explained, "by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group."[121] Thus to accept Operation Rescue's argument "would be to classify virtually every injunction [imposing speech restrictions] as content or viewpoint based."[122] Finding that the purpose of the regulation — vindication of an earlier order imposed to prevent physical obstruction of clinic access — was "incidental to [the demonstrators'] antiabortion message," the Court deemed the injunction content-neutral.[123]

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[119] 114 S. Ct. 2516 (1994).

[120] *Id.* at 2523. The Supreme Court of Florida had readily found the injunction to be content-neutral:

> The restrictions regulate when, where, and how Operation Rescue may speak, not what it may say. The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location and violent or harassing nature of Operation Rescue's expressive activity.

Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 671 (Fla. 1993). In contrast, the Court of Appeals for the Eleventh Circuit, in considering the same injunction, was sure that it was content-oriented:

> That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted. . . . [Because the order names certain antiabortion organizations and members, it] is no more viewpoint- neutral than one restricting the speech of "the Republican Party, the state Republican Party, George Bush, Bob Dole [and] Jack Kemp . . . ." The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not.

Cheefer v. McGregor, 6 F.3d 705, 710-11 (11th Cir. 1993).

[121] *Madsen*, 114 S. Ct. at 2523.

[122] *Id.*

[123] *Id.* at 2523-24. The Court's holding that an injunction is not content-based because applicable to certain individuals sharing the same viewpoint does not mean, of course, that such an injunction might nonetheless be content-based on other grounds. For example, an

The Court went on to hold, however, that content-neutral injunctions are not to be measured by the usual standard for assessing content-neutral speech regulations. "If this were a content-neutral, generally applicable statute," Chief Justice Rehnquist explained, "we would determine whether [it was] 'narrowly tailored to serve a significant governmental interest.'"[124] Believ-

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injunction that restrained certain named parties from referring to people entering abortion clinics as "baby killers" would be content-based. Similarly, the "images observable" and the "no approach" provisions of the injunction against Operation Rescue in *Madsen* might also be content-based. The Court, however, did not reach this question since it found these provisions invalid under the test it announced for content-neutral injunctive provisions. *Id.* at 2529 n.6.

Justice Scalia thought that the entire injunction was content-based, but on quite different grounds than the Eleventh Circuit. According to Scalia, the judge who issued the injunction interpreted the order's residual coverage of "all persons acting in concert" with the named defendants as applying to "*all* those who wish to express the same views as the named defendants." *Id.* at 2539-40 (emphasis added) (Scalia, J., concurring in the judgment in part and dissenting in part). This construction shows, Scalia concluded, that the injunction "is tailored to restrain persons, distinguished not by prescribable conduct, but by prescribable *views*." *Id.* at 2540. Scalia overstates matters. The transcript Scalia relies on records an objection by those arrested for violating the injunction that pro-choice demonstrators within the buffer zone were not similarly arrested. *Id.* at 2550. In response, the trial judge confirmed that such "selection" was consistent with his order and agreed that "in effect" that the order would apply "*only* to people that were demonstrating that were pro-life." *Id.* at 2551 (emphasis added). Automatically excluding people demonstrating in support of abortion rights from the universe of those possibly acting in concert with the named defendants makes perfect sense, in the same way as would excluding the owner of a company from consideration as acting in concert with a labor organization restrained from picketing the company. While the trial judge does indicate that, as a practical matter, an antiabortion viewpoint is a necessary condition to bring a protester within the "acting in concert" provision, a fair reading of the trial judge's remarks cannot support the view that he meant that such a viewpoint would be sufficient to make that determination.

Justice Scalia's dissent does, however, underscore the risk that, by virtue of an "acting in concert" provision, even injunctions justified by interests unrelated to expression can easily operate as viewpoint discriminatory devices. The greater the reliance on the fact that a protestor shares the same viewpoint as the named party, and the less the direct evidence of cooperation between them, the more attenuated becomes the nonspeech related justification that the injunction is a response to some prior law violation (or threat of one) by the named parties. Similarly, unconstitutional viewpoint discrimination can result if law enforcement officials routinely arrest protestors based solely on assumption that because they share the named parties' viewpoint they are acting in concert with them. Even if the charges are ultimately dismissed for lack of proof of actual cooperation, the arrest itself, not to mention the burden of having to go to trial and prove lack of actual cooperation, is a very real penalty on free expression. The *Madsen* majority, however, declined to address the problems raised by the "acting in concert" provision on the grounds that all of those who were involved in that case were named parties and thus did not have standing to challenge the "acting in concert" provision. *Id.* at 2530.

[124] *Id.* at 2524 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

ing, however, that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," the Court held that "a somewhat more stringent application of general First Amendment principles" is warranted when speech restrictive injunctions are at issue.[125] Accordingly, the Court held that the proper standard is whether "the challenged provisions of the injunction burden no more speech than necessary to serve a substantial government interest."[126] Applying this standard, the Court upheld the thirty-six foot buffer zone[127] (except to the extent that it applied to private property abutting the clinic),[128] upheld the noise restrictions,[129] but invalidated the "images observable"[130] and the consent provisions.[131]

The Court was wise to reject the argument that just because an injunction regulates the speech of a group of people sharing a particular viewpoint, it should be classified as content-oriented or should otherwise trigger strict scrutiny. As phrased, "strict scrutiny"[132] would seem to require a great deal of ad hoc judgment, such as an assessment of the strength of the state's interest and the fit between that interest and the speech repressive means it has chosen to accomplish it. This formula thus has the potential for causing much uncertainty in the law.[133] Consequently, it has the potential for inviting unprincipled decision making by judges unable or unwilling to separate their own antipathy for a speaker's agenda from an objective assessment of the strength of the state interest in suppressing the message or the necessity for doing so. So far this mischievous potential has not been realized, for the Court has made clear that the strict scrutiny test is long hand for an all but irrebuttable presumption

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[125] *Id.*

[126] *Id.* at 2525.

[127] *Id.* at 2527.

[128] *Id.* at 2528.

[129] *Id.*

[130] *Id.* at 2528-29.

[131] *Id.* The Court also invalidated a provision broadly restricting residential picketing. *Id.* at 2530. Justice Scalia argued that even if the injunction was technically content-neutral, it should nevertheless be subject to strict scrutiny and invalidated in its entirety. *Id.* at 2538-39, 2550 (Scalia, J., concurring in the judgment in part and dissenting in part).

[132] Strict scrutiny requires the state to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Boos v. Barry, 485 U.S. 312, 321 (1988).

[133] *See supra* note 35.

against the constitutionality of the statute.[134] Thus, even more so than in Equal Protection decisions, strict scrutiny in free speech cases has been "strict in theory, but fatal in fact."[135]

Categorizing an injunction as content-oriented and subjecting it to strict scrutiny on the ground that it restricts a particular group of speakers would result either in making such injunctions virtually impossible to obtain or in weakening the strict scrutiny test in a way that would unlock its potential for judicial viewpoint discrimination. Unlike legislation, which typically forbids all people from engaging in specified conduct, injunctions must be addressed to particular individuals or groups. Subjecting an injunction regulating speech to strict scrutiny just because it applies to certain individuals or groups is synonymous with saying that strict scrutiny applies to all injunctions regulating speech. But such injunctions are not uncommon and are, moreover, a useful tool for protecting individual property, privacy, and safety interests. If the Court in *Madsen* had deemed that all speech regulating injunctions warrant strict scrutiny, it is unlikely that courts would have stopped issuing orders preventing members of labor unions engaged in a strike from continuing to

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[134] The Court imported the concept of strict scrutiny from Equal Protection jurisprudence in the early part of the last decade, *see* Carey v. Brown, 447 U.S. 455, 461 (1980); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 125 (1991) (Kennedy, J., concurring). Since then there has to my knowledge been only one Supreme Court case upholding a regulation of speech subject to strict scrutiny. That case, Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), sustained a Michigan law prohibiting corporations, excluding media corporations, from using general treasury funds in connection with state candidate elections. Although not using the term "strict scrutiny" or relying on a finding that the regulation was "content oriented," the Court held that the law served the compelling state interest of preventing political corruption or appearance of such corruption and was narrowly tailored to achieve that goal.

In Burson v. Freeman, 504 U.S. 191 (1992), a plurality of the Supreme Court held that a Tennessee law prohibiting solicitation of votes and display of campaign materials within 100 feet of a polling place passed strict scrutiny. *Id.* at 211 (opinion of Blackmun, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.). Justice Scalia thought the application of strict scrutiny was inappropriate because the regulated area was not a public forum, *id.* at 214, and thus voted to sustain the regulation under a standard far less searching than strict scrutiny. *Id.* at 216. Three other Justices found the Tennessee law failed strict scrutiny. *Id.* at 228 (Stevens, J., dissenting, joined by O'Connor and Souter, JJ.). Justice Thomas did not participate in the consideration or decision of the case. *Id.* at 211.

[135] *See* Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

threaten replacement workers, regulating how close a photographer can get to a celebrity he has previously stalked, or prohibiting an ex-husband from persisting in making harassing telephone calls to his former wife. Rather, courts faced with such problems, and countless others like them, would have found that the requested order was the narrowest means available for vindicating a compelling state interest and thus passed strict scrutiny.

Such a proliferation of judicially recognized compelling state interests, as well as approval of various means for vindicating them, would inevitably put pressure on courts to uphold statutory schemes seeking to protect such interests. Whether this pressure would actually weaken First Amendment strict scrutiny in statutory cases is difficult to say. Perhaps courts and lawyers would come to look upon strict scrutiny in injunction cases as a special type of not-quite-full-strength strict scrutiny, much like the type the Court has used in recent years in affirmative action cases[136] and previously employed in Free Exercise cases.[137] Such quasi-strict scrutiny, if recognized as such, would not be readily transferable to other cases. But if the level of scrutiny to be applied to all injunctions regulating speech was not, in fact, to be the engine of destruction that First Amendment strict

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[136] *See, e.g.*, Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2117 (1995) (opinion of O'Connor, J.). Although holding that strict scrutiny applies to race-based minority preference programs, Justice O'Connor, joined by Justice Kennedy, whose votes were necessary to the holding that strict scrutiny applies to race-based affirmative action plans, emphasizes that the strict scrutiny she has in mind is not the "fatal in fact" variety: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id. Accord* City of Richmond v. J.A. Crosson Co., 488 U.S. 469, 509 (opinion of O'Connor J., joined by Rehnquist, C.J., White and Kennedy, JJ.) (applying strict scrutiny to racially based set aside plan but noting that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate [racial] exclusion" by private business interests).

[137] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604-05 (1983) (applying strict scrutiny but upholding denial of tax-exempt status to educational institutions who practiced racial segregation in accordance with religious beliefs upon which institutions were founded). In Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990), however, the Court held that generally applicable laws not aimed at religious practices do not implicate the Free Exercise Clause despite the burden it may impose on religiously motivated conduct. Interestingly, in doing so the Court expressly noted that "watering down" strict scrutiny in free exercise cases would tend to "subvert its rigor in other fields where it is applied." *Id.* at 888.

scrutiny currently signifies, then the Court was wise not to risk diluting (or even causing confusion about) this test.

At the same time, however, by subjecting the injunction to serious judicial inquiry the Court was able to raise the level of scrutiny to account for the discriminatory impact on a particular political viewpoint resulting from the injunction.[138] Crucially, in my view, the Court was able to do so in a principled, general way rather than in an ad hoc manner. The question of how to account for disparate impact vexes the entire domain of constitutional law.[139] Disparate impact can often indicate a discriminatory governmental purpose, and irrespective of bad purpose, it disadvantages an identifiable group of people. But deciding how much disparate impact is needed and under what circumstances it must occur before the usual constitutional rules are modified (e.g., the level of scrutiny is raised) calls for subjective, ad hoc judgments. As I emphasize throughout this Article, whatever the proper balance between bright line, rigid rules and context sensitive, flexible ones in other areas of constitutional law, the more free speech doctrine requires ad hoc judgments, the greater the risk of judicial viewpoint discrimination. In *Madsen*, the Court was able to avoid ad hoc assessment, yet account for the discriminatory impact often associated with speech regulating

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[138] Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524 (1994). The Court did not expressly give disparate impact as a reason for the increased scrutiny, but rather relied on "the greater risks of censorship and discriminatory application" arising from injunctions as compared to generally applicable statutes. *Id.*

[139] *See, e.g.*, Mueller v. Allen, 436 U.S. 388 (1983) (rejecting Establishment Clause challenge to tax deductions that primarily benefitted parents with children in private schools, 96% of whom attend church related institutions); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (rejecting Equal Protection Clause challenge to Massachusetts civil service preference for veterans, over 98% of whom were male); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977) (invalidating, primarily because of law's discriminatory impact on interstate commerce, North Carolina law banning display of state grades on closed containers of apples); Washington v. Davis, 426 U.S. 229 (1976) (rejecting challenge under the equal protection component of the Fifth Amendment to job test which had adverse disproportionate impact on black applicants for positions as police officers in District of Columbia Metropolitan Police Department); Braunfeld v. Brown, 366 U.S. 599 (1961) (rejecting Free Exercise Clause challenge by Orthodox Jews to Pennsylvania closing law who, because they had to close their stores on Saturdays in accordance with their religious beliefs, were put at severe competitive disadvantage by law); *see also* David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (discussing constitutional issues raised by racially discriminatory effects of harsh mandatory federal sentences for trafficking in crack cocaine).

injunctions by creating a general rule that *all* such injunctions will be subject to heightened scrutiny.[140]

B. Freedom of Access to Clinic Entrances Act

The Freedom of Access to Clinic Entrances Act (FACE) prohibits the use of "force or threat of force" or "physical obstruction" which "intentionally injures, intimidates, or interferes . . . with any person because that person has been . . . obtaining or providing reporductive health services."[141] By focusing on "force," "threat of force," and "physical obstruction," the statute seems carefully designed to exclude protected speech from its scope. Thus the usual senses of the terms "force" and "physical obstruction"[142] would seem to exclude any activity that is likely to qualify either as "speech" or "expressive conduct."[143] Similarly, the term "threats of physical force," outlaws only unprotected speech.[144] This design of the statute to apply only to activity not protected by the First Amendment is made explicit by a "rule of construction."[145] Lawyers for anti-abortion protes-

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[140] The Supreme Court appears poised to revisit the question of injunctions issued to protect abortion access. *See* Pro-Choice Network v. Schenck, 67 F.3d 377 (2d Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 1260 (1996).

[141] 18 U.S.C.A. § 248(a)(1). The Act also protects access to places of religious worship. *Id.* § 248(a)(2).

[142] *Id.* § 248(e)(4). "Physical obstruction" is defined as "rendering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." *Id.*

[143] *See infra* text accompanying notes 149-53 (discussing why sit-ins and blockades do not qualify as "expressive conduct"). The only activity that could realistically come within these provisions that might be entitled to First Amendment protection are large scale demonstrations, not intended to blockade entrances to clinics, but which because of their size nonetheless incidentally cause momentary delay to those entering the facility. I would hope that courts would construe FACE as not applying to such minor, incidental interference with access, for such application would raise serious constitutional questions. However, the possibility of this arguably unconstitutional application would not support a facial overbreadth challenge. *See* Broaderick v. Oklahoma, 413 U.S. 601, 615 (1973) (noting that "particularly where conduct and not merely speech is involved, . . . the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

[144] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) (referring to threats as unprotected speech); *see also* Watts v. United States, 394 U.S. 705, 707 (1969) (explaining that "[w]hat is a threat must be distinguished from what is constitutionally protected speech" such as "political hyperbole" not amounting to a "true threat"); *Rules of Engagement*, *supra* note 45, at 574 n.45 (listing cases holding that threats are not protected speech).

[145] 18 U.S.C.A. § 248(d). Section 248(d) reads as follows: "RULES OF CONSTRUCTION.

tors,[146] as well as legal commentators,[147] argue, however, that nonviolent "blockading" of abortion clinics, such as sit-ins in the entryways, is "expressive conduct" protected by the First Amendment.[148] But all relevant case law unmistakably indicates that conduct intended to, and which in fact does interfere with access to a building can find no First Amendment shelter as "expressive conduct."[149] Indeed, mere threats of blockading led to the initial injunction in *Madsen*,[150] and in upholding the provision of the subsequent order that imposed a thirty-six foot bubble zone, the Court emphasized that its purpose was to protect "free access of patients and staff."[151] Because blockading of health care facilities "produce[s] special harms distinct from their communicative impact,"[152] the Court would most likely

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Nothing in this section shall be construed . . . (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." *Id.*

[146] *See* Petition for Writ of Certiorari p. 5, Woodall v. Reno, 47 F.3d 656 (4th Cir.) (on file with author), (arguing that "[s]it-ins and picketing on First Amendment issues have long been recognized as forms of speech protected by the First Amendment"), *cert. denied*, 115 S. Ct. 2577 (1995).

[147] *See, e.g.*, Comment, *Face-ial Neutrality: A Free Speech Challenge to The Freedom of Access to Clinic Entrances Act*, 81 U. VA. L. REV. 1505, 1521-26 (1995) (arguing that conduct proscribed by FACE is expressive conduct afforded some First Amendment protection).

[148] "Expressive conduct" is a First Amendment term of art meaning that although the activity in question does not conform to a conventional mode of communication, it is nonetheless entitled to some degree of constitutional protection against government regulation. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (although ultimately rejecting merits of First Amendment claim, Court assumed that draft card burning as form of political expression is expressive conduct entitled to some degree of First Amendment protection).

[149] *See, e.g.*, Cameron v. Johnson, 390 U.S. 611, 621-32 (1968) (upholding ordinance making it unlawful to engage in picketing or mass demonstrations "in such a manner as to obstruct or unreasonably interfere with free ingress or egress" to public buildings); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (holding that right of free speech and assembly does not include right to block access to buildings).

[150] *See supra* note 115 and accompanying text.

[151] *Madsen*, 114 S. Ct. at 2526.

[152] Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). In *Roberts*, the Court explained that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Id.* In Spence v. Washington, 418 U.S. 405, 410-11 (1974), the Court stated that in determining whether conduct has sufficient communicative elements to bring the First Amendment into play, the inquiry should focus on whether "[a]n intent to convey a particularized message was present, and [whether] . . . the likelihood was great that the message would be understood." In light of the exclusionary statement in *Roberts*, however, the communicative elements mentioned in *Spence* must be understood as stating a

summarily declare such activity categorically ineligible for First Amendment protection.[153]

The conclusion that FACE does not regulate activity protected by the First Amendment, does not, however, end the First Amendment inquiry. In *Wisconsin v. Mitchell*,[154] the Court indicated that a law regulating violent conduct that cannot "by any stretch of the imagination" be considered "expressive conduct" protected by the First Amendment could nonetheless violate the First Amendment if the law's *purpose* was unconstitutional.[155] Similarly, in *R.A.V. v. City of St. Paul*,[156] the Court held that, subject to several exceptions, content-based restrictions on even unprotected speech, such as "fighting words" or threats are subject to strict scrutiny.[157] In *Mitchell*, however, the Court went on to indicate that any plausible legitimate justification for a law

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necessary condition for First Amendment protection, not a *sufficient* one. *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (no matter how specific the communicative intent, "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment").

[153] Even if blockading an abortion clinic were considered expressive conduct and thus a candidate for First Amendment protection, none would ultimately be forthcoming, for the statute would easily meet the First Amendment scrutiny imposed by United States v. O'Brien, 391 U.S. 367, 377 (1968). This test inquires whether there is 1) "an important or substantial governmental interest" for the regulation that is 2) "unrelated to the suppression of free expression" and 3) imposes no greater burden on expression "than is essential to the furtherance of that interest." *Id.* The first two parts of the test are easily met; preventing medical complications that might ensue if the abortion procedure is delayed is a substantial speech neutral interest for outlawing physical obstruction such as sit-ins, as is the need to assure immediate access for patients who might need follow-up procedures on an emergency basis. As to the third part of the test, despite the language implying that the regulation must be the least speech-restrictive means available, this condition is satisfied so long as "the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994). The restriction on physical obstruction such as blockages and sit-ins directly and narrowly accomplishes the legitimate goals of the statute to protect access without any gratuitous burden on antiabortion protestors' ability to convey their message.

[154] 508 U.S. 476 (1993).

[155] *Id.* at 484. *Mitchell* involved a First Amendment challenge to a Wisconsin law that enhanced the punishment for a crime whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . " *Id.* at 480 n.1. The defendant in that case, who committed a racially motivated battery, argued that the enhancement provision unconstitutionally punished him because of his beliefs. *Id.* at 481.

[156] 505 U.S. 377 (1992).

[157] *Id.* at 387-90, 395.

regulating nonexpressive conduct is sufficient to dispel the suspicion of a constitutionally illegitimate purpose.[158] In light of the strong, legitimate reasons for outlawing "force" and "physical obstruction" used to impede abortion access, these provisions would easily withstand First Amendment challenge. The provision outlawing "threat of force," on the other hand, is much more vulnerable to constitutional attack.

Professor Brownstein concludes that the threats provision is a content-oriented regulation of unprotected speech, and thus, under *R.A.V.*, is subject to strict scrutiny requiring its invalidation.[159] Brownstein views the relevant statutory language, outlawing "threat of force" against "any person *because* that person is or has been . . . obtaining or providing reproductive health services," as regulating speech in terms of the *speaker's motive* for issuing the threat.[160] Viewed this way, there are strong reasons for concluding that the statute is content-oriented. A speaker's reason for communicating is usually so intimately connected with her idea that regulating speech in terms of the speaker's motive will often be synonymous with regulating the content of the message. Indeed, regulating the speaker's motive for speaking will often be tantamount to viewpoint discrimination. Thus if the Court were to share Brownstein's view that FACE's threats provision regulates speech in terms of the speaker's motive, it would probably find FACE to be content-oriented and, hence, presumptively unconstitutional.[161]

On the other hand, it is possible to view this provision as focusing not on the speaker's motive but rather on the *status of the victim* of the threats.[162] Thus it strikes me that FACE's

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[158] *See Mitchell*, 508 U.S. at 488; *see also* James Weinstein, *Hate Crime and Punishment: A Comment on* Wisconsin v. Mitchell, 73 OR. L. REV. 345, 353 (1994) (discussing lack of any serious scrutiny applied to Wisconsin's justifications for enhancement).

[159] *Rules of Engagement*, *supra* note 45, at 570.

[160] *Id.* at 563, 578-80.

[161] It is possible that even if the Court were to find the threats provision to be content-oriented, it would nonetheless decline to apply strict scrutiny. In *R.A.V.*, the Court stated that an exception to such scrutiny is warranted where "a particular content-based subcategory of a prescribable class of speech [is] swept up incidentally within the reach of a statute directed at conduct rather than speech." R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992). Arguably, FACE is aimed primarily at conduct, such as "physical obstruction" and "force," with "threats of force" being "swept up incidently within [its] reach."

[162] The *R.A.V.* Court noted that a "prohibition of fighting words that are directed at

threats provision (like the entire statute) is defined primarily in terms of the status of the victims of the proscribed behavior — people seeking or providing reproductive health services (or who have obtained or provided such services). Viewed this way, the reference to the speaker's reasons for issuing the threats is incidental, serving primarily to limit the class of people protected by the statute. (A statute that blanketedly prohibited threats against anyone who has obtained or provided reproductive health services without any limitation that the threats be related to the exercise of the right to reproductive health services would obviously be much too broad). Linguistic analysis aside, I think the Court will be quite reluctant to subject FACE's threat provision to strict scrutiny, for to do so would put in doubt the constitutionality of other laws designed to protect the exercise of rights that are under siege.[163]

Perhaps, though, in the final analysis, the crucial First Amendment question is not whether FACE's threats provision is infirm because it is in some sense content-oriented, but rather whether

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certain persons or groups" would not be considered content oriented. *Id.* at 392.

[163] *See, e.g.*, 18 U.S.C. § 241 (1994). This statute makes it a crime to "conspire to injure, oppress, *threaten*, or intimidate [anyone] . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same . . . ." *Id.* (emphasis added). Another law prohibits use of "force or *threat of force*" which intentionally interferes with a person's right to obtain housing because of a persons's race, color, religion, sex, handicap, familial status or national origins. 42 U.S.C § 3631(a) (1994) (emphasis added). Yet another statute makes illegal the "denial or deprivation, or the *threat* of the denial or deprivation" of any employment in order to cause an individual to "contribute of a thing of value (including services) for the benefit of any candidate or any political party." 18 U.S.C. § 601 (1994) (emphasis added).

All of the reported decisions to date have rejected First Amendment challenges to FACE. *See* Cheffer v. Reno, 55 F.3d 1517, 1521 (11th Cir. 1995); Woodall v. Reno, 47 F.3d 656 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F. 3d 642, 645 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423, 1435 (C.D. Cal. 1995); United States v. Dinwiddie, 885 F. Supp. 1286, 1290 (D. Mo. 1995); United States v. Brock, 863 F. Supp. 851, 866 (E.D. Wis. 1994); Riply v. Reno, 860 F. Supp. 693, 701 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426 (S.D. Cal. 1994). As Professor Brownstein reports, however, none of these decisions "engaged in the analysis required by *R.A.V.*" *Rules of Engagement*, *supra* note 45, at 571. [As this Article was about to go to press, a federal district court decision finding FACE to be unconstitutional as exceeding Congress's power to regulate interstate commerce also held that FACE violated the First Amendment because it turned on listeners' reactions and was overbroad. *See* Hoffman v. Hunt, No. 3:93-CV-393-P, 1996 WL 192934 (W.D.N.C. Apr. 1, 1996).]

R.A.V. is unsound because it generally subjects content-oriented restrictions of unprotected speech to exacting scrutiny.[164] Specifically, what the First Amendment challenge to FACE's threat provision shows is that the majority in *R.A.V.* may have painted with too broad a brush in announcing a rule applicable to all categories of unprotected speech. Unlike "fighting words" or obscenity, threats are not well suited to regulation by a general law outlawing all varieties of its genus. Rather, regulation of a threat will often be part of legislation protecting the exercise of a specific activity and thus will naturally be defined in terms of the reason for the threat. Subjecting such regulatory schemes to strict scrutiny would unduly interfere with the government's ability to respond to assaults on the exercise of lawful activity.

Finally, there remains the problem of discriminatory effects. Although anti-abortion animus is not strictly necessary to violate FACE,[165] there can be no doubt that in practice the brunt of the law will be felt by the anti-abortion movement. Appropriately, FACE reserves its most severe penalties for those who engage in violent conduct.[166] But FACE also applies hefty penalties to nonviolent obstruction such as "blockades" and "sit-ins,"[167] and thus applies only to the civil disobedience engaged in by one side of an ideological struggle. There is very little that free speech doctrine does do, or should do, to respond to this disparate impact. As discussed above, even when protected speech is at issue, invalidating a statute or even significantly increasing the level of scrutiny because of discriminatory effects requires judges to make highly subjective judgments and thus invites judicial

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[164] This is the burden of Professor Brownstein's thoughtful article. *See Rules of Engagement*, *supra* note 45.

[165] FACE refers to "reproductive health" not just "abortion" services, and thus would apply to contraceptive and pregnancy services as well. 18 U.S.C.A. § 248(a)(1). Moreover, FACE applies to one who for purely personal rather than ideological reasons intentionally interferes with abortion access (e.g., a husband who did not want his pregnant wife to have an abortion).

[166] *See id.* § 248(b). Section 248(b) provides for up to one year imprisonment for a first violent offense, and up to three years imprisonment for subsequent violations. In cases involving bodily injury, a prison sentence of up to 10 years is provided; in cases in which death results, a term of years up to a life sentence is authorized. *Id.*

[167] For a first offense involving "exclusively a nonviolent physical obstruction," FACE authorizes up to 6 months imprisonment, and for subsequent offenses a prison sentence of up to 18 months. *Id.*

viewpoint discrimination. Where regulation of conduct and unprotected speech is at issue, there is even less warrant for invalidating a statute because of discriminatory effects or increasing the level of scrutiny.

As a policy matter, however, those dedicated to a free speech principle based on ideological neutrality should be slow to embrace laws that will have a severe disparate impact on the nonviolent civil disobedience of one side of any ideological struggle, not to mention a possible chilling effect on legitimate discourse that comes close to the line between protected and unprotected speech. In light of the widespread instances of interference with abortion access, together with the paucity of instances in which those dedicated to protecting abortion rights have interfered with the rights of their opponents, perhaps support for FACE by such dedicated civil libertarians as the ACLU[168] was justified despite the marked discriminatory impact on one side of the abortion controversy. The point is certainly debatable, however.

C. Bubble Ordinances

So-called "bubble ordinances" require demonstrators to withdraw a specified distance from any person asking them to do so. A typical example of such legislation is the Phoenix ordinance,[169] which makes it unlawful:

> [F]or any person, in the course of demonstration activity within the access area of a health care facility, to fail to with-

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[168] The ACLU actively supported enactment of FACE, *see* Sam Skolnik, *Hard Days for ACLU Office*, LEGAL TIMES, May 1, 1995, at 5 (reporting that ACLU played a key role in passage of FACE), and has defended it in the courts. *See, e.g.*, United States v. Wilson, 73 F.3d 675, 676 (7th Cir. 1995) (listing ACLU as amicus curiae).

[169] I filed an amicus brief on behalf the Arizona Civil Liberties Union (AzCLU) arguing that the ordinance unduly burdened antiabortion speech and participated in oral argument before the court in Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir. 1995). In writing this Article, I have tried my best to appraise the constitutionality of this provision with the balance appropriate to scholarly writing. In the interest of scholarship, the AzCLU has graciously allowed me to express my opinions about the constitutionality of the ordinance without the usual constraints of client loyalty imposed upon an advocate who later publicly writes about a case. The opinions expressed in this Article are of course mine alone.

> draw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.[170]

1. The Appropriate Level of Judicial Scrutiny

In *Madsen*, the Supreme Court indicated that if the regulation at issue had been a generally applicable, content-neutral *ordinance* rather than an injunction, it would be subject to the test developed to review the constitutionality of time, place and manner regulations.[171] While this level of scrutiny is not toothless (the Court has referred to the test as "intermediate" level of scrutiny[172]), it certainly is not nearly as searching as the strict scrutiny applicable to content-oriented regulations of speech in a public forum, nor even as rigorous as the scrutiny that *Madsen* determined is applicable to content-neutral injunctions.[173]

On its face, the Phoenix ordinance would seem easily to fit the definition of content-neutral. It regulates the manner of demonstrations around health care facilities without reference to any particular viewpoint or subject matter, and unlike the injunction in *Madsen*, applies to "any person," not to any particular group or individual.[174] Despite such facial content-neutrali-

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[170] PHOENIX, ARIZ., CITY CODE § 23-10.1. "Access area" is defined as any "public street or other public place" within 100 feet of a health care facility; the definition of "health care facility," in turn, expressly includes "family planning counseling and pregnancy-related services"; "demonstration activity" is defined as including, but is not limited to, "protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities."

[171] *Madsen*, 114 S. Ct. at 2516, 2524.

[172] *See* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994) (explaining that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny"); *see also Madsen*, 114 S. Ct. at 2537 (Scalia, J., concurring in judgment in part and dissenting in part) (stating that standard applicable to content-neutral time, place, and manner regulations imposes "intermediate scrutiny . . . midway between the 'strict scrutiny' demanded for content-based regulation of speech, and the 'rational basis' standard").

[173] *See supra* notes 124-26 and accompanying text (discussing scrutiny applied to content-neutral injunctions).

[174] An arguably content discriminatory feature of this ordinance is that it applies exclusively to "demonstration" activity and not, for instance, to communication of commercial information. Thus, a representative of a pharmaceutical company hawking birth control pills in front of an abortion clinic does not seem to be subject to the restrictions imposed by the bubble ordinance. But even if the ordinance were construed as not covering commercial solicitations, it should not be considered content-oriented. Formally, this distinction might not trigger strict scrutiny because it arguably singles out "demonstration activity"

ty, however, in *Sabelko v. City of Phoenix*,[175] a federal district court found the ordinance to be content-oriented and invalidated it under strict scrutiny. In the court's view the ordinance was content-oriented because the legislative history revealed that "the ordinance was enacted in direct response to 'anti-abortion' speech outside medical clinics."[176]

This finding of content orientation is erroneous. As an initial matter, the legislative history does not reveal an *illicit* motive, for example, a desire to suppress the expression of anti-abortion viewpoints because of its power to persuade women seeking abortions to change their minds. Rather, it shows only that despite the ordinance's general application to demonstrations at "health care facilities," the impetus for the ordinance is to control intimidating demonstrations at abortion clinics. More importantly, even if this legislative history did show an illicit motive,

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from other expressive activity due to the *manner* of the expression (e.g., picketing, distributing literature) rather than *what* is said. A more functional explanation is that even if in some sense the regulation draws lines on the basis of content (after all, the only way to tell the difference between a covered "oral protest" and a commercial solicitation is by *what* is said), "demonstration activities" involve distinct regulatory challenges. As long as the category of "demonstration activity" is inclusive enough to dispel any fear of viewpoint discrimination, the state should not be forced to go through the gratuitous exercise of including other types of speech not presenting the same problems. As we shall see, the viewpoint discriminatory impact of the Phoenix ordinance arises not from the failure to include other forms of expression, but from its site-specific application.

[175] 846 F. Supp. 810 (D. Ariz. 1994).

[176] *Id.* at 818. The district court rested its finding of content discrimination on two additional grounds. First, it found that the ordinance regulates "protest" but not supportive speech. *Id.* at 818-19. But as the court of appeals noted in disagreeing with this finding, "[t]he plain terms of the ordinance" contradict this assertion, for the ordinance "does not limit its reach to 'oral protest, education [and] counseling.'" Rather, the ordinance "merely lists them among the activities it regulates under the rubric of 'demonstration activity,' and it states explicitly that '[f]or purposes of this section . . . demonstration activity . . . *is not limited to*' these activities." Sabelko v. City of Phoenix, 68 F.3d 1169, 1171-72 n.2 (9th Cir. 1995). Second, the district court found content orientation because "the invocation of the 'bubble zone' will likely depend upon whether the listener agrees with or disagrees with the content of the speaker's communication." *Sabelko*, 846 F. Supp. at 819. Precedent makes clear, however, that if the *statute* does not discriminate on the basis of content, or vest *law enforcement* with the discretion to do so, but merely gives *private citizens* unfettered discretion to object to speech, the regulatory scheme will be deemed content-neutral. *See, e.g.*, Rowan v. Post Office, 397 U.S. 728, 737 (1970) (upholding federal statute that gives addressee of "pandering advertisement" right to request post office order requiring mailer to remove his name from mailing list, Court emphasized "unlimited" power of addressee to object, e.g., "he may prohibit the mailing of a dry goods catalog because he objects to the contents").

the Supreme Court has held that such evidence is not admissible to prove content discrimination.[177] Thus, in reversing the district court's invalidation of the Phoenix ordinance, the Court of Appeals for the Ninth Circuit summarily rejected the claim that the ordinance was content-oriented.[178]

Whether the Supreme Court has been wise to eschew inquiries into legislators' actual reasons for enacting a speech regulation, and to focus instead on the stated purpose, is a difficult question. As is the case with disparate impact determinations, deciding when the comments of those voting in favor of a law is sufficient to show illicit motive warranting a law's invalidation is not susceptible to a bright line test.[179] Precisely because any such determination would necessarily be ad hoc and highly contextualized, there would be a substantial risk that the judge's own attitude toward the speaker's message would seep into the analysis. Perhaps it is this need for greater prophylaxis against illegitimate judicial considerations in free speech cases that explains the Court's wooden rejection of inquiry into legislative motive in free speech cases, while allowing some room for such inquiries in other areas of constitutional law.[180]

Whatever the merits of the rules for determining content orientation, under current doctrine there is little doubt that the Phoenix ordinance is content-neutral. A more difficult question is whether the level of scrutiny should nonetheless be height-

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[177] *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) (explaining that Court "will not strike down an otherwise constitutional statute on the basis of alleged illicit legislative motive."); *see also* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (same).

[178] *Sabelko*, 68 F.3d at 1171. In doing so the court did not even discuss the "illicit motive" grounds discussed in the text, but rather addressed only the two alternative grounds described *supra* in note 176. *See Sabelko*, 68 F.3d at 1171-73 nn. 2-3.

[179] *O'Brien*, 391 U.S. 367, 383-84 (1962) (stating that "[i]nquiries into [legislative] motives or purposes are a hazardous matter . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."). Instead, the Court relies exclusively on the *stated purpose* or *justification* for the regulation. *Id.* at 377-80.

[180] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 587 (1987) (invalidating under Establishment Clause Louisiana law forbidding teaching of evolution in public schools because legislative history showed religious purpose motivated law's enactment); Hunter v. Underwood, 471 U.S. 222, 228-31 (1985) (striking down as violation of Equal Protection Clause of Fourteenth Amendment section of Alabama Constitution disenfranchising people convicted of crimes of "moral turpitude" because legislative history showed that provision was motivated by racially discriminatory purpose).

ened to reflect the *selectivity* of location to which the ordinance applies and hence its discriminatory effect on one side of an ideological debate. In *Madsen*, the Court stated that if the restrictions applicable to the demonstrators had been imposed by a "content-neutral, *generally applicable* statute"[181] rather than an injunction, the regulations would have been subject to the relatively lax standard usually applicable to time, place, and manner regulations. The Phoenix ordinance, however, applies only at medical facilities and thus, arguably, is not a "generally applicable" law. Rather, it applies specifically to a place that is associated with demonstrators on one side of an ideological debate — a place, moreover, that is uniquely situated for the effective dissemination of this group's message.

Such selective, site-specific regulations are troubling. If Planned Parenthood can obtain a bubble ordinance to protect access to abortion clinics, one can easily imagine that others will want similar measures when facilities they own or support are besieged by demonstrators. For example, operators of nuclear power plants and logging operations will want such protection from environmental activists; owners of supermarkets will want their bubble ordinance the next time their is a concerted effort by the Farmworkers Union to persuade customers not to buy certain agricultural products; owners of fur stores will be interested in some sort of "back off" provisions to keep animal rights protestors from engaging their customers in unwanted face-to-face confrontations; and the federal government will want to impose bubble ordinances around military recruiting centers if the United States were again to engage in an unpopular war. And unlike injunctions, which can be obtained by anyone who can make the requisite showing, bubble ordinances can be obtained only by those interests with sufficient political clout to obtain such legislation.

Doctrine, however, does not support raising the level of scrutiny due to the site-specific nature of a regulation. The Court has upheld site-specific ordinances, such as provisions regulating speech in front of courthouses[182] or schools[183] with no indica-

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[181] *Madsen*, 114 S. Ct. at 2524 (emphasis added).

[182] *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965).

[183] *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972).

tion that these regulations should be subject to any higher level of scrutiny than any other content-neutral time, place, and manner restriction. Of course, unlike the Phoenix bubble ordinances, the typical site-specific ordinance is not enacted in response to demonstrations by one side of a political movement; nor do they result in discriminatory impact on any one viewpoint. Rather, such regulations are usually enacted as a means of protecting activity particularly vulnerable to noise or other disruption. But even when the impetus for a regulation is protests associated with a particular political viewpoint, as was the case with a Mississippi anti-picketing ordinance passed in response to civil rights demonstrations in front of government buildings,[184] and thus would, in the short run at least, have a discriminatory impact on that viewpoint, the Court did not alter the usual free speech rules.

Whether doctrine *should* be more responsive to discriminatory effects caused by site-specific regulations is a more difficult question. I have already discussed the disparate impact that FACE imposes on anti-abortion ideology and argued that such impact should *not* increase the otherwise applicable level of scrutiny. FACE, however, prohibits physical interference with or threats of force against someone seeking abortion access — activity that by "no stretch of the imagination" could be considered legitimate public discourse protected by the First Amendment protection.[185] The Phoenix bubble ordinance, in contrast, focuses on "demonstration activity" and thus directly regulates speech at the core of the First Amendment.

Later in this section, I argue that despite the legitimate goal of protecting people seeking medical attention from emotional upset, the Phoenix ordinance places an unconstitutional burden on protected speech.[186] But even if I am wrong in this conclu-

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[184] *See* Cameron v. Johnson, 390 U.S. 611 (1968). In response to civil rights protests at public buildings, in 1964 Mississippi enacted an antipicketing law that made it illegal to engage in demonstration activity "in such a manner as to obstruct or unreasonably interfere with free ingress [to] or egress" from courthouses, jails or other government buildings. *Id.* at 612 n.1. In an opinion written by Justice Brennan, the Court upheld the ordinance against a facial challenge. The facts as related by the Court make it clear that the statute was adopted in response to civil rights demonstrations at government buildings. *See id.* at 614-15.

[185] Wisconsin v. Mitchell, 508 U.S. 476, 484-85 (1993).

[186] *See infra* text accompanying notes 192-211.

sion and demonstrators in public forums surrounding medical facilities can be constitutionally required to retreat from unwilling listeners, the activity prohibited by the Phoenix ordinance is still much closer to legitimate public discourse than anything prevented by FACE. As I explain in detail, the ordinance has a devastating impact on the ability of those opposed to abortion to try to engage women seeking abortion in quiet, civil discourse about their decision.[187] Thus the discriminatory impact of the Phoenix ordinance is a much more serious matter than the disparate impact resulting from FACE.[188]

But the fact that the discriminatory effects of site-specific ordinances regulating demonstrations might be particularly troubling does not answer the question about what, if anything, free speech doctrine should do about it. In *Madsen*, the Court was able to adjust the level of scrutiny without engaging in an ad hoc determination about disparate impact, and thus avoided the risk of judicial viewpoint discrimination attendant to such judgments.[189] Is any such bright line rationale available for elevating the level of scrutiny for site-specific ordinances? Unlike assessment of disparate impact, or even discovery of the impetus for a site-specific law,[190] determining whether a regulation is site-specific as opposed to generally applicable should, in most cases, be obvious and not require subjective, unbounded judgments. The harder question is how much the level of scrutiny should be adjusted. There are strong reasons for being cautious about applying too rigorous a standard, for if protests at particular places are indeed causing such severe problems as to prompt

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[187] *See infra* pp. 533-34.

[188] The ordinance, it is true, is technically applicable to any demonstrator at a medical facility, not just antiabortion demonstrators at abortion clinics. Similarly, its coverage of all medical facilities rather than just abortion clinics obviates an explanation of why people seeking other medical procedures (e.g., chemotherapy) are not equally emotionally vulnerable and thus as deserving of special protection from demonstrators. The fact that the ordinance potentially could, and no doubt someday will, be applied to someone other than an antiabortion demonstrator (e.g., an employee engaged in a labor dispute at a medical center) is also an important consideration in evaluating both the bona fides of the city's asserted interest in regulating the speech and the strength of that interest. Nonetheless, at present the ordinance in practice operates exclusively against antiabortion protestors.

[189] *See supra* text accompanying notes 138-40.

[190] Whether a regulation is aimed at regulating problems associated with a particular social or political issue presents much the same difficulties as inquiry into the legislative history to find an illicit motive belying the government's stated purpose.

special legislation, it would be perverse to presume that this focused response is unconstitutional.

With respect to site-specific regulations, I suggest the following modest adjustment to the usual standard for assessing the validity of content-neutral time, place, and manner regulations: The government must make some plausible showing that a more general regulation could not adequately deal with the problem. Under this approach, many of the hypothetical bubble ordinances mentioned above would be hard to justify. What, for instance, is the need for special regulations of unruly demonstrations at grocery stores as compared to any other commercial establishment? Similarly, a bubble ordinance that applied specifically to abortion clinics, rather than to medical facilities generally, would be difficult to explain. In contrast, the Mississippi law, which basically applied to all government buildings would be deemed sufficiently general. By the same token, the Phoenix ordinance, which regulates demonstrations at all medical facilities, not just at abortion clinics, would be considered sufficiently general in light of special vulnerability of people about to undergo medical procedures.

This analysis is not much of a departure from the present test applicable to content-neutral regulations. Indeed, this test already demands some reasonable fit between the ends to be accomplished by the regulation and the means it employs. As phrased, though, the usual test prevents the state from burdening "substantially more speech than necessary."[191] The threshold inquiry I propose for site-specific ordinances is that the state also have to demonstrate that it has not burdened "substantially *less* speech than appropriate."

Other than this small proposed modification, site-specific regulations such as the Phoenix bubble ordinances should be subject to the same level of scrutiny as ordinary content-neutral time, place, and manner restrictions. Although the impetus for such laws might be to regulate speech associated with a particular political movement, and despite the discriminatory effects often resulting from such regulation, any more significant change to the usual rules runs too great a risk of judicial viewpoint discrimination. Because the Phoenix ordinance would

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[191] Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

easily pass this threshold inquiry, its validity should be measured by the usual rules for evaluating content-neutral time, place, and manner regulations of speech in a public forum. Whether the Phoenix ordinance can survive even this relatively lax test is the question to which I now turn.

2. Does the Phoenix Ordinance "Burden Substantially More Speech than Necessary?"

a. Doctrinal Analysis

The standard for evaluating the constitutionality of content-neutral regulations of the time, place, or manner of speech in a public forum can be easily stated: Such regulations will be upheld if "narrowly tailored to serve a significant governmental interest, and [if they] leave open ample alternative channels for communication of the information."[192] Applying this standard, however, can be considerably more difficult. Protecting people who are about to undergo medical procedures from emotional trauma that might create additional health risks is plainly a substantial state interest.[193] The hard question is whether requiring a protestor within the public areas abutting a medical facility to retreat eight feet from anyone making such request is a "narrowly tailored" means of achieving that legitimate purpose.

At one time there was considerable uncertainty as to just how rigorous this "narrow tailoring" requirement was supposed to be. In *Ward v. Rock Against Racism*,[194] however, the Court made clear that this requirement does not mean that the regulation must be "the least-restrictive" or "least-intrusive" means available to achieve the government's objective.[195] Rather, the narrow tailoring requirement is satisfied so long as the regulation does not "burden *substantially* more speech than is necessary."[196] This clarification was helpful, but the term "substantial" is still far from self-defining.

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[192] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[193] *See Rules of Engagement - Section II*, *supra* note 66, at 1194 n.87.

[194] 491 U.S. 781 (1989).

[195] *Id.* at 798.

[196] *Id.* at 799 (emphasis added).

Looking just at the *results* of Supreme Court cases, one might conclude that the test for evaluating content-neutral time, place, and manner regulations has no bite, for such regulations are almost always upheld.[197] On the other hand, the Court continues to insist that the scrutiny to be applied in evaluating content-neutral speech regulations should be significantly more searching than a "mere rationality" standard,[198] and occasionally does invalidate content-neutral regulations.[199] Furthermore, it is a well established principle that the First Amendment greatly restricts the government's ability to protect people standing in public places from offensive messages.[200] Thus the Court has often emphasized that a consequence of the robust public discourse essential to democratic self-governance is that a person who finds a message offensive or upsetting generally has the burden to avoid further exposure.[201]

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[197] *See, e.g., id.* at 803 (upholding New York City noise regulation requiring those giving concerts in Bandshell in Central Park to use City's sound equipment and technicians); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) (upholding National Park Service regulation prohibiting camping in certain parks, as applied to prohibit demonstrators from sleeping in park across from White House to call attention to plight of homeless); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-55 (1981) (upholding Minnesota State Fair rule that prohibits sale or distribution of any merchandise, including printed or written material, except from booths); Grayned v. City of Rockford, 408 U.S. 104, 119-21 (1972) (sustaining anti-noise ordinance as applied to political demonstrator that prohibited any person on grounds adjacent to any school building from willfully "making of any noise or diversion which disturbs . . . the peace or good order" of the school) (citation omitted).

[198] *See supra* note 172 and accompanying text.

[199] *See* United States v. Grace, 461 U.S. 171 (1983) (striking down federal law prohibiting demonstrations in United States Supreme Court building or grounds to extent that prohibition applied to public sidewalks constituting outer boundaries of grounds); *see also* City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (assuming that city ordinance regulating display of signs within city limits is content-neutral, court nevertheless holds ordinance unconstitutional to the extent that it bars a homeowner from displaying a small sign bearing a political message in her window or front yard).

[200] For instance, in *Madsen*, the Court explained: "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994).

[201] *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 484 (1988) (stating that outside the home "we [generally] expect individuals simply to avoid speech they do not want to hear"); Erznoznik v. Jacksonville, 422 U.S. 205, 210-11 (1975) (noting that when confronted with offensive speech "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities . . . "); Cohen v. California, 403 U.S. 15, 21 (1971) (finding that those offended by scurrilous epithet on jacket could "effectively avoid further bombardment of

Bubble ordinances reverse this burden by requiring a demonstrator protesting in a public forum to retreat from the unwilling listener. On the other hand, as the Court has also noted, hospitals are not just any building, but places where people undergo treatment for conditions that can be easily aggravated by noise and stress.[202] The question then becomes whether the emotional and physical vulnerability of patients warrants the reversal of this burden. In light of the key doctrinal inquiry of whether a regulation "burdens substantially more speech than necessary," the answer depends on the extent to which the Phoenix ordinance burdens protected speech, and the necessity for the regulation.

The burden that the Phoenix ordinance places on speech can be measured both quantitatively and qualitatively. If the ability to invoke the mandatory back-off provision ordinance was limited solely to patients not wanting to engage in face-to-face discussions or to be handed a leaflet, the burden on speech would be fairly limited. By its express terms, however, the Phoenix ordinance allows not just patients but "any person" to invoke the back-off provision.[203] Many abortion clinics now have staff or volunteers who meet patients in the access area and escort them into the clinic. The Phoenix ordinance thus empowers these escorts unilaterally to order demonstrators not to approach.[204]

On the other hand, limiting the invocation of the back-off provision to patients would be impractical. Such a limitation

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their sensibilities by simply averting their eyes").

[202] *Madsen*, 114 S. Ct. at 2528 (stating that "[h]ospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry . . . .") (citations omitted).

[203] *See supra* text accompanying note 170.

[204] As one antiabortion activist testified at the city council meeting at which the ordinance was under consideration:

> I am a sidewalk counselor; I go to abortion clinics; I talk to women about abortion . . . . My understanding is that [under this ordinance] . . . another party could ask me to stop that and [to] step away from [a woman seeking an abortion]. Yes, that obviously would be another party making a decision and we see that all the time. I am constantly pushed away from women by escorts. They get in between us, *so even if she is reaching for the materials, she is stopped from doing so.*

Statement of Sheila Reilly, Verbatim of Item 4, City Council Policy Meeting, City of Phoenix, at 12-13 (Nov. 16, 1993) (on file with author) (emphasis added).

would require women seeking abortions to compromise their privacy by identifying themselves as such or forego the protection of the ordinance. But this objection does not diminish the fact that the ordinance significantly burdens what is potentially the most effective form of anti-abortion speech by giving a third party the power to veto the possibility of a dialogue with a woman seeking an abortion. Moreover, by strategic placement of clinic staff and volunteers around the perimeter of the public access area, management of abortion clinics could create a 100-foot "no speech" zone. Alternatively, employees of an abortion clinic (or any health care facility for that matter) could approach a demonstrator doing no more than kneeling in prayer within the 100-foot zone, and by simply issuing a series of commands to withdraw, force the demonstrator outside of the 100-foot perimeter.

More troubling than the amount of speech burdened by the Phoenix ordinance is the type of speech it inhibits. To be effective, certain communicative activity requires the speaker be able to draw close to the intended audience. For instance, anti-abortion demonstrators have a strong interest in offering women seeking abortion pamphlets showing pictures of fetuses at various stages of development or literature describing some of the negative physical and psychological side effects of abortion. Such information can be upsetting to women seeking abortions (and will often be biased and sometimes utterly false). Nonetheless, it is information that anti-abortion protestors have a right to offer, and occassionally might even be of interest to the intended recipient. In practice, however, because the Phoenix ordinance requires anti-abortion demonstrators to stand at least eight feet away from people entering the clinic, leafletting — long protected as a vital means of political expression[205] — will be made impractical.

In addition, the distance requirement will interfere with the rights of anti-abortion activists who sincerely want to persuade women intending to undergo an abortion to change their mind. At the heart of the First Amendment is the right to try to persuade others to change their minds about matters of political, social, and moral concern. Each individual abortion decision is

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[205] *See* Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating ban on handbilling).

an extremely intimate, private matter to the woman faced with the decision; collectively, however, these decisions are also a matter of public concern. At the entrance to abortion clinics, the private and public aspects of abortion decision collide. Thus it is the strong interest in protecting individual patients from increased physical and emotional trauma that makes special restrictions on speech in front of medical facilities even arguably constitutional. But the entrances to abortion clinics are also the best place (as well as the last opportunity) for those who sincerely believe that abortion is a grave moral wrong to try to persuade women who have decided to undergo an abortion to reconsider their decision.

Because several large anti-abortion organizations are committed to stopping abortions at all costs,[206] and because the media tend to cover anti-abortion protests only when they involve violence, it is easy to overlook the many anti-abortion demonstrators who engage only in civil discourse, including prayer and "sidewalk counseling." The Phoenix ordinance will effectively curb those anti-abortion protestors who want to get close to women entering abortion clinics to shout epithets at them. The problem is that it will also impede anti-abortion activists who want to engage in quiet, civil conversation.

Precisely because the decision to abort a pregnancy is such a personal, intimate choice, it is important for those "sidewalk counselors" sincerely interested in persuading a woman to change her mind about this decision to establish a rapport with her. A law that effectively prevents sidewalk counselors from getting closer than eight feet from anyone entering an abortion clinic will severely impede the counselors' ability to create this intimacy. Assume, for instance, that a counselor wants to convey the following message to a young, pregnant woman entering the clinic: "When I was nineteen and unmarried, I had an abortion. It was the biggest mistake of my life. Can we talk about some of your other options?" Making the anti-abortion activist shout this message from eight feet away, rather than speaking it normal conversational tones from a conversational distance, will greatly

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[206] *See, e.g., supra* text accompanying notes 115-17 (discussing activities of Operation Rescue); *see also supra* note 1.

reduce the counselor's ability to engage the young woman in dialogue.

In sum, the Phoenix ordinance imposes a substantial burden on speech. The much harder question is whether this burden is "substantially more than necessary" to achieve the legitimate objective of preventing emotional upset to people about to undergo medical procedures. In most settings designated as public forums, the First Amendment protects even aggressively obnoxious speech. For instance, at the public areas surrounding a business subject to a labor dispute, striking workers may well have a First Amendment right to approach "replacement workers" entering a building, shout unpleasant epithets at them, and perhaps to some limited extent, follow and continue the abuse as the replacement workers walk towards the building. But in assessing the reasonableness of time, place, and manner regulations of speech in a pubic forum, "the nature of a place" and the "pattern of [the] activities" in the building abutting the forum must be taken into account.[207] Thus there may be some public forums in which such aggressively confrontational speech may be prohibited.

The interest in protecting patients about to undergo surgery and other risky medical procedures against increased emotional distress is sufficient to prohibit anyone from shouting at people entering medical facilities[208] or from following them, even for a few feet,[209] once they have indicated an unwillingness to engage in further conversation and have walked away. Thus an ordinance that contained prohibitions against shouting or following others in the public access areas around medical facilities would, I believe, be a "narrowly tailored" constitutional means of accomplishing the legitimate interest of protecting patients against emotional upset. By directly attacking the specific problems associated with protests at medical facilities, such a provision would not unduly burden the right of protestors to offer

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[207] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[208] *Cf. id.* at 121 (sustaining noise regulations in front of schools).

[209] *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2533 (1994) (Stevens, J., concurring in part and dissenting in part) (stating that First Amendment does not confer "an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services").

leaflets to people entering the building or try to engage them in civil dialogue.

The Phoenix ordinance, on the other hand, takes a much broader approach by effectively creating a moving, eight-foot, no approach zone around people in these access areas. As we have seen, not only does it allow a patient to require a demonstrator to withdraw, the ordinance empowers an escort to invoke the bubble, thereby frustrating the protestor's ability to hand even a willing recipient a pamphlet or to engage her in dialogue.[210] In light of much more direct means available to prevent patients from being subjected to loud or unwanted face-to-face confrontations — means that would not unduly interfere with peaceful leafleting or with the ability to try to initiate civil, face-to-face dialogue — the Phoenix ordinance burdens "substantially more speech than necessary."[211]

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[210] If this ordinance had specified that when two or more people are walking together, each would have to invoke the bubble to warn off a protestor, it would burden less speech, but still might not be constitutional in light of the basic public forum rule that the burden rests on the unwilling listener to avoid unwanted communication.

[211] Alternatives to the broad based regulation of bubble ordinances include the type of injunctive relief affirmed by *Madsen*, as well as the remedies against threats and physical obstruction provided by FACE.

Professor Field agrees that there are alternative means of protecting abortion access that would not so severely burden the ability of anti-abortion demonstrators to convey their message. *See* Martha A. Field, *Abortion and the First Amendment*, 29 U.C. DAVIS L. REV. 545 (1996). Field, however, argues that judicial invalidation of the ordinance for these reasons involves a "least restrictive alternative" analysis associated with strict scrutiny. *Id.* at 546. In addition, she argues that this "least restrictive alternative" analysis "dramatically increases the opportunity for [the type of] judicial viewpoint discrimination" that I decry throughout this paper. *Id.* I agree with Field's second point, but not her first. Under the truly "strict" means-ends scrutiny rejected in Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989), a speech regulation is invalid if there is any imaginable alternative means available for accomplishing the state's objective that is even marginally less restrictive of expression. In contrast, under the more moderate scrutiny approved in *Ward*, the existence of alternative means will invalidate a regulation only if it will accomplish the same ends with *substantially* less burden on speech. *See supra* text accompanying notes 194-96. I have argued, and Field seems to agree, that there are alternative means that would accomplish the legitimate goals of the Phoenix ordinance with a far less restrictive impact on expression. But as Field suggests, even this intermediate level of means-ends scrutiny invites judicial viewpoint discrimination. Indeed, I believe that intermediate levels of scrutiny are particularly prone to this problem.

Under a truly strict scrutiny, judicial discretion is confined by the all but irrebuttable presumption that the regulation is unconstitutional. Conversely, under a rationality standard the equally strong presumption that the regulation is valid effectively limits "judicial creativity." But as then Justice Rehnquist argued in opposition to adopting intermediate

b. The Sabelko *Case*

As mentioned above, in *Sabelko v. City of Phoenix*,[212] the United States District Court for the District of Arizona invalidated the Phoenix ordinance on the grounds that it was content-oriented. In addition, the court found that even if the ordinance were to be considered content-neutral, it failed the "narrow tailoring" requirement.[213] A divided panel of the United States Court of Appeals for the Ninth Circuit, however, disagreed and upheld the ordinance.[214]

Although unanimously agreeing that the Phoenix ordinance was content-neutral,[215] the panel divided on the issue of whether it was sufficiently "narrowly tailored." Writing for the majority, Judge Schroeder read the Supreme Court's *Madsen* decision as "expressly recogniz[ing] that persons approaching a health care facility represent a 'captive audience,' thus rejecting the position of the district court in this case that a public area adjacent to a health care facility must be considered, for all purposes, an open forum."[216] In disagreeing with the contention that the ordinance was not sufficiently "narrowly tailored" because its back-off provision could be invoked by anyone, the majority emphasized the privacy problems that would arise if the ordinance required patients personally to invoke the back-off provi-

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scrutiny in another context: "[T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough." Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting from application of intermediate scrutiny to invalidate gender discriminatory law regulating 3.2% beer to young adults under Equal Protection Clause). Nevertheless, since neither strict scrutiny nor mere rationality would be an appropriate standard for evaluating the validity of content-neutral regulations of the time, place, or manner of speech, the potential for judicial viewpoint discrimination inherent in an intermediate standard of review is a necessary cost. This cost can be reduced, however, by the development and close adherence to specific rules within the framework of intermediate scrutiny, for example, that in a public forum the burden should be on the unwilling listener to avoid further exposure to expression she finds upsetting or offensive.

[212] 846 F. Supp. 810, 818-19 (D. Ariz. 1994), *rev'd*, 68 F.3d 1169 (9th Cir. 1995).

[213] *Id.* at 819-22.

[214] Sabelko v. City of Phoenix, 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).

[215] *Id.* at 1171-72.

[216] *Id.* at 1172.

sion.[217] In addition, the majority found too speculative the concern that clinic personnel would use the ordinance to sweep anti-abortion demonstrators from the entire 100-foot area covered by the ordinance.[218] Finally, the majority emphasized that since the ordinance did not regulate signs, placards, or pictures, or affect handbilling or personal approaches to anyone outside of the 100-foot area or within the 100-foot area "until the individual affirmatively requests a disengagement," the ordinance left open "ample alternative means of communication."[219]

In a vigorous dissent, Judge Beezer found that "the Phoenix ordinance broadly sweeps at peaceful communication that lies at the core of the First Amendment" and thus "burden[s] substantially more speech than necessary."[220] He found "[e]specially disturbing" the effect the ordinance would have on peaceful handbilling and leafletting, and "[e]ven more disturbing," the "strategic use" to which clinic personnel might put the ordinance, including escorts "preventing access to patients who may otherwise have at least glanced" at written materials offered by protestors.[221] Beezer concluded that although the ordinance accomplished the legitimate aim of eliminating harassment and intimidation, it also unnecessarily interfered with the "peaceful [communication of] a protected viewpoint."[222]

Although, as I have explained, I think that the better view is that the Phoenix bubble is unconstitutional, I readily acknowledge that it is a close question. Unlike, for instance, the question whether the "force" and "physical obstruction provisions" of FACE are consistent with the First Amendment, to which case law supplies a definite answer, doctrine is much less determinant with respect to the constitutionality of the Phoenix ordinance. Thus in no strong, descriptive sense can the *result* reached by the Ninth Circuit be condemned as wrong. Rather, this is the type of case in which the answer can legitimately turn on various empirical assessments (such as the burden on speech or the degree of risk to patient's health presented by unwanted face-to-

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[217] *Id.* at 1173.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 1175-76 (Beezer, J., dissenting).
[221] *Id.*
[222] *Id.*

face confrontations prior to surgery) or even on principled value choices (for example, the weight one gives the interest in social order as compared to vigorous expression). But just because doctrine does not, in some ironclad way, demand a certain result in a particular case does not mean that doctrine has nothing to say on the matter. What is troubling about the way the majority decided the Phoenix bubble ordinance case is not the result it reached, but its distortion, and in some instances, its total failure to acknowledge relevant doctrine. Such disregard for doctrine, in turn, allowed the court to avoid grappling with the hard questions presented in this case.

By far the most significant constraint that the court ignored is the public forum doctrine. A previous Ninth Circuit case, *Portland Feminist Women's Health Center v. Advocates for Life*,[223] also involved the difficult issue of regulating harassing and intimidating speech in front of abortion clinics. Although the court in that case ultimately upheld the injunction, it candidly acknowledged and addressed the doctrinal constraints to doing so:

> We begin our constitutional analysis by noting that the injunction undeniably regulates political speech in a public forum . . . . [T]he injunction regulates speech on "public streets and sidewalks, traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" The authority to restrict expression in public fora is "very limited."[224]

In contrast, the *Sabelko* opinion begins by slipping out from these constraints, claiming that *Madsen* has changed the law and that the public places in front of abortion clinics are not "for all purposes, an open forum."[225] This failure to afford these areas full public forum status is premised on the claim that "the Supreme Court in *Madsen* expressly recognized that persons approaching a health care facility represent a 'captive audience.'"[226] Far from expressly recognizing that people approaching abortion clinics are a "captive audience," the Court did not even implicitly do so. To begin with, the Court did not, in its

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[223] 859 F.2d 681 (9th Cir. 1988).

[224] *Id.* at 685 (quoting Boos v. Barry, 485 U.S. 312, 318 (1988)).

[225] *Sabelko*, 68 F.3d at 1172.

[226] *Id.*

own voice, make any statement about captive audiences. Rather, in summarizing the numerous significant government interests identified by the Florida Supreme Court, it reported that "[t]he [Florida] court observed that . . . targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstances."[227] This is the sole reference to "captive audiences" in the majority opinion. Even more significantly, the Court then directly contradicts the *Sabelko* court's assertion about the status of public places in front of abortion clinics by expressly stating that "the forum around the clinic is a traditional public forum."[228]

Moreover, the *Madsen* Court's analysis of the section of the injunction most similar to the Phoenix ordinance shows that as far as people entering medical facilities are concerned, the usual public forum rules are still firmly in place. In striking down a provision prohibiting uninvited approaches within 300 feet of the clinic, the Court explained:

> Absent evidence that the protesters' speech is independently prescribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[229]

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[227] Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2526 (1994).

[228] *Id.* at 2524. As Judge Meskill recently emphasized, the Supreme Court has been quite reluctant to invoke the "captive audience" doctrine to create exceptions from the usual rules governing speech in the public forum, reserving it for speech that intrudes into the home and other rare instances in which "'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" Pro-Choice Network v. Schenck, 67 F.3d 377, 405 (2d Cir. 1995) (Meskill, J., dissenting) (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)), *cert. granted*, 116 S. Ct. 1260 (1996).

[229] *Madsen*, 114 S. Ct. at 2529 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). It could be argued that this holding is dispositive of the bubble ordinance's unconstitutionality. Two differences between the injunctive provision and the bubble ordinance, however, prevent this from being the case. First, the no approach provision was part of an injunctive order, and thus was subject to a higher level of scrutiny than is applicable to the Phoenix ordinance. *See id.* at 2524. In addition, the "no approach" provision was more restrictive than the Phoenix ordinance. The injunctive provision applied to a much larger area (300 feet) than does the ordinance (100 feet). More significantly, the injunction permitted an approach only if the intended audience affirmatively requests, whereas the bubble ordi-

This is classic public forum language, unmodified by any "captive audience" concerns. Thus to the extent that "captive audience" considerations are relevant at all to the Supreme Court's analysis in *Madsen*, they would seem to be limited to provisions such as the noise restrictions designed to protect patients *already confined in the hospital* and undergoing or recuperating from medical procedures. Unlike patients already in the clinic, those walking towards the facility are in no real sense "captive;" they can avoid further unwanted communications by simply walking into the facility. But even with respect to the provisions of the *Madsen* injunction protecting patients inside the clinic, the Court does not suggest that the usual public forum analysis is not applicable. Rather, the Court relies on the common sense proposition that in regulating speech in a public forum "the nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.'"[230] Similarly, in reviewing the injunction regulating anti-abortion protests, the court in *Portland Feminist* recognized that the reasonableness of the regulation depends in part on the "nature of the place."[231] Both *Madsen* and *Portland Feminist* recognized that any special dispensations required by the "nature of the place" are to be made within the confines of general rules governing regulation of speech in a public forum.

In contrast, the *Sabelko* majority frontloads these special considerations to create a new jurisprudential entity — the "not quite-a-public forum." The consequences of this move are subtle, but profound, for it changes the whole way the court approaches the problem. Whereas *Portland Feminist* acknowledged that the power of government to regulate speech in the public forum is "very limited,"[232] no such restraining language is to be found in *Sabelko*. More specifically, characterizing access areas in front of abortion clinics as something less than a full status public fo-

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nance at least puts the burden on the intended audience (or someone walking with her) to warn off the demonstrator. But while not determinative, the Supreme Court's unequivocal disapproval of the "no approach" provision does indicate that it is unlikely to view bubble ordinances with a friendly eye.

[230] *Id.* at 2528 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).

[231] Portland Feminist Women's Health Ctr. v. Advocates for Life, 859 F.2d. 681, 686 (9th Cir. 1988).

[232] *Id.* at 685.

rum allows the court to avoid the well-established rule that it is offended listeners, not the speakers, who generally have the burden to avoid "further bombardment of their sensibilities."[233] If the majority in *Sabelko* had correctly categorized the streets and sidewalks in front of medical facilities as a public forum, it would have had to focus on whether the special circumstances relating to the nature of the place justified reversing this burden. This inquiry, in turn, would have required an explanation of why other means more consistent with the usual constitutional norms for regulating speech in a public forum, such as a strict prohibition against following people who have indicated unwillingness to engage in conversation, would not have accomplished the city's legitimate objectives.

Related to the denial of full public forum status to the streets and sidewalks around abortion clinics is the Sebelko court's curious refusal to follow the case cited in *Madsen* for assessing the constitutionality of laws such as the bubble ordinance. In *Madsen*, Chief Justice Rehnquist explained that if the regulation in that case had been "a content-neutral, generally applicable statute," rather than an injunction, "its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*."[234] As discussed above, *Ward* teaches that a content-neutral law is narrowly tailored, and thus constitutional, if it does not "burden substantially more speech than is necessary."[235] The test appropriately focuses on the burden that the regulation places on protected speech, and while giving the state considerable leeway, also makes clear that the greater the burden on speech, the greater the burden on the state to justify it. Despite *Madsen's* direct citation to *Ward* as establishing the proper test, the majority in *Sabelko* does not even mention the "burden substantially more speech than necessary" test.[236]

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[233] Cohen v. California, 403 U.S. 15, 21 (1971).

[234] *Madsen*, 114 S. Ct. at 2524.

[235] *Ward*, 491 U.S. at 799. *See also supra* text accompanying notes 194-96.

[236] After finding the bubble ordinance to be a content-neutral, "time, place, and manner ordinance that serves several significant state interests," the *Sabelko* majority continued: "Under *Madsen*, [a regulation] is not violative of the First Amendment if it is narrowly tailored to serve those interests and leaves open ample alternative means of communication. *See Perry v. [Educations Ass'n v. Perry Local Educators' Assoc.]* at 45." (After citing to *Ward* with the signal "see," the *Madsen* Court cited to *Perry* with the signal "see also." *Madsen*, 114 S. Ct. at 2524.)

By ignoring the test laid down by the case directly invoked by the Court in *Madsen*, the *Sabelko* majority shifts the focus away from the crucial issue of the amount and nature of the speech burdened by the Phoenix ordinance and on to the more tangential issue of "alternative means of communication."[237] Unlike the dissent, which candidly recognizes both the legitimate interests served by the regulation and its impact on core First Amendment speech, the majority evades the hard question. Having defined the case as basically turning on the identification of legitimate state interests, rather than seeing it as one in which legitimate interests are served but at the cost of burdening core First Amendment rights, the majority purports to make a hard case easy. The court thus avoids grappling with the uncomfortable fact that the Phoenix ordinance, while impeding those who intend to harass and intimidate, also impedes peaceful demonstrators who want to offer a woman seeking an abortion a pamphlet or to engage in civil discourse.

What accounts for the majority's disappointing performance is difficult to say. *Sabelko*, of course, is not the only recent federal appellate decision that tendentiously frames the issue so as to avoid difficult issues. But given the intensity of emotion surrounding the issue of abortion, it is possible that the result in *Sabelko* has more to do with the judges' views on abortion rights or the goals of anti-abortion protests than with neutral application of free speech principles. Whether such judicial viewpoint discrimination actually infected the *Sabelko* decision I have no way of knowing. What I do know, however, is that the majority's departures from doctrine raises the suspicion that the result was driven by a desire to advance the "substantive agenda"[238] of "[its] friends."[239]

CONCLUSION

The abortion controversy has been one of the most prolonged and divisive issues in American history. As such, cases presenting a clash between anti-abortion protesters' speech rights and a

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[237] *See supra* note 236.

[238] *See supra* text accompanying note 25.

[239] *See supra* p.487.

woman's right to safe, unimpeded access to abortion services present fertile grounds for judicial viewpoint discrimination. In emphasizing that free speech doctrine should be shaped so as to minimize the opportunity for judges to inject their own attitudes towards the speaker's views into the free speech analysis, I do not mean to suggest that judges are, as a breed, ideological rouges whose discretion must always be closely confined. To the contrary, judges are on the whole dedicated professionals who follow doctrine and strive for principled results. The emotion surrounding abortion access cases, however, might tempt even the most principled judges to let their views on abortion influence the decision. Even more than in the typical free speech case, then, there is a need in the these cases for bright line rules rather than vague standards requiring ad hoc judgments. As the old saying goes, we put locks on doors not so much to keep thieves out, but to keep honest people honest.