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Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions About the Proper Scope of Government Regulations

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Nonviolent Abortion Clinic Protests:
Reevaluating Some Current Assumptions
about the Proper Scope of Government
Regulations

Leslie Gielow Jacobs

Regulation of nonviolent political-protest activities outside abortion clinics must
balance the constitutional rights to free speech and to choose abortion, and the social value of
nonviolent political protest. This Article examines and questions two current assumptions
about the proper scope of government regulations. The first assumption is that, absent a
constitutional obstacle under prevailing free speech jurisprudence, it is appropriate to enjoin
or statutorily enhance sanctions for any variety of nonviolent political-protest activities that
block access to clinics or constitute illegal trespasses. This Article argues that for a particular
type of nonviolent political protest—conduct that is equivalent to speech on a public issue—the
general, but rebuttable presumption should be that neither of these extra burdens is
appropriate. The second assumption is that restrictions on “harassing” speech, absent
threatened or actual physical harm, necessarily conflict with the values that underlie the First
Amendment. This Article argues that current constitutional analysis places disproportionate
weight on the free speech right and insufficiently recognizes the equality interest that underlies
the right to choose abortion. The Article concludes that a slight shift in focus would
accommodate both interests more fully, allowing regulation more freely where political-protest
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I. INTRODUCTION

Despite the fact that the United States Supreme Court has recently reaffirmed the constitutional right to choose abortion—or

perhaps more accurately because of it—abortion protests staged outside of abortion clinics continue to grab the headlines. Although news of the most violent protest activities, particularly the killing of abortion doctors, shock and appall even most pro-life activists, reports of these and other acts of protest inform the public about the nature of the protesters' views and thereby contribute to an ongoing national debate about the justice of permitting or restricting access to abortion. This contribution to political discussion places abortion protest activities in the sphere potentially protected by the Constitution's free speech guarantee. But abortion protest has nonspeech effects as well.

2. See id. at 1002 (Scalia, J., concurring in part and dissenting in part) (comparing the Court's decision to reaffirm a constitutional right to choose abortion to the Dred Scott decision, and noting that continued judicial involvement in the abortion question "merely prolongs and intensifies the [country's] anguish").


5. See, e.g., Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) (noting that "political speech is entitled to the fullest possible measure of constitutional protection" and that speech such as "Abortion is Murder" might be entitled to an exemption from a speech-restrictive ordinance as well); Schultz v. Frisby, 807 F.2d 1399, 1344 (7th Cir. 1986) ("The Supreme Court has often stated that speech on issues of
One obvious effect of violent activities is injury to the victims. In addition, consistent with their aim, abortion protesters often stop abortions from being performed, either temporarily, by blocking access to abortion clinics, or permanently, by causing some women not to obtain abortions because of delay, fear of violence from the protesters or others, or lack of services in the area. Even if they do not ultimately stop particular abortions from occurring, these protest activities exact great physical, financial, and psychological costs from individuals seeking abortion services.
These various effects of abortion protest activities set up the perceived conflict between the constitutional rights to free speech and to choose abortion.\textsuperscript{15} Moreover, even though there is not a constitutional right to engage in nonviolent political protest that blocks access to abortion clinics\textsuperscript{16} or constitutes illegal trespass,\textsuperscript{17} such activities may constitute an extraordinarily powerful means of expression and thus have social value that should be considered by legislatures and courts in deciding whether and how to restrict the participants.

Congress, local legislative bodies, and courts have struggled to reconcile these apparently competing rights and values. A recent federal statute, the Freedom of Access to Clinic Entrances Act (the FACE Act),\textsuperscript{18} provides heavy criminal and civil sanctions for protest activities that involve violence or threats of violence, or which have the effect of blocking access to abortion services. The statute also prohibits protest activities that “intimidate” abortion seekers and providers,\textsuperscript{19} defining “intimidate” as to require a reasonable fear of physical harm.\textsuperscript{20} Courts have followed similar guidelines in reviewing local ordinances and state-court injunctions. That is, where restrictions on abortion protests are necessary to prevent threatened or actual violence or to guarantee clinic access, courts have upheld them. But courts have by and large invalidated restrictions on “harassing” conduct that is not deemed to constitute a threat of physical violence.

The boundaries of the new federal statute and judicial review of other abortion protest regulations mirror the assumptions that underlie current Supreme Court doctrine. This Article focuses on two of these assumptions. The first assumption is that absent a constitutional obstacle under prevailing free speech jurisprudence, it is appropriate to enjoin or statutorily enhance sanctions for any variety of nonviolent

\textsuperscript{15} See, e.g., Mississippi Women's Med. Clinic v. McMillan, 866 F.2d 788, 795 (5th Cir. 1989) (“This case presents a conflict between the First Amendment rights of the protesters to advocate a right-to-life position and the privacy interests of women who seek to have abortions performed at the clinic, while being insulated from the protesters' advocacy.”).

\textsuperscript{16} See Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2527 (1994) (holding that an injunction is appropriate to “protect[] unfettered ingress to and egress from the clinic”).

\textsuperscript{17} See, e.g., Lloyd Corp. v. Tanner, 407 U.S. 551, 567-68 (1972) (stating that the First Amendment does not create a right to trespass on private property).


\textsuperscript{19} Id. § 248(a)(1)-(2).

\textsuperscript{20} Id. § 248(e)(3).
political-protest activities that block access to clinics or constitute illegal trespasses. The second assumption is that restrictions on “harassing” speech, absent threatened or actual physical harm, necessarily conflict with the values that underlie the First Amendment. This Article evaluates and harmonizes the scope of the free speech right, the right to choose abortion, and the social value of nonviolent political protest, thereby questioning both of these assumptions.

Part I provides a brief outline of the perceived conflict between the right to choose abortion, the right to free speech, and the social value of nonviolent political protest. Part II examines the values that underlie these rights and interests, redefining the constitutional rights to include commitments to substantive equality among citizens and identifying the social value of protest activities as stemming from their communicative impact on political debate.

Part III takes a close look at the two assumptions that dictate the scope of current abortion protest restrictions and then proposes the proper scope of the rights and interests in the context of particular protest activities. More specifically, Part III.A identifies the assumptions that underlie the current scope of restrictions on abortion protests. Part III.B compares the social value of nonviolent political protest with the equality value that underlies the right to choose abortion and reveals that current law sweeps too broadly in restricting nonviolent political-protest activities. Although the Constitution as currently interpreted does not prohibit such regulations, they conflict as a matter of wise policy with the social value of nonviolent political protest. Parts III.B.1 and .2, respectively, examine both the propriety of granting injunctive relief and enhancing retrospective relief for nonviolent lawbreaking. After isolating the type of nonviolent political protest entitled to special regard—conduct that is equivalent to speech on a public issue—this Part concludes that, consistent with both the social value of nonviolent political protest and the constitutional right to choose abortion, the general presumption should be that neither of these extra burdens are appropriate. This presumption leaves open the possibility that particular facts would make an injunction appropriate in specific circumstances.

Part III.C further demonstrates that current constitutional doctrine is unduly narrow in allowing regulation of harassing abortion protest speech only when it is connected with physical threats or injury or occurs immediately outside private residences. Part III.C.1 details
current Supreme Court free speech doctrine and explains why this
doctrine places disproportionate weight on the free speech right and
insufficiently recognizes the equality interest that underlies the right to
choose abortion. Part III.C.2 then proposes a slight shift in focus that
would allow regulation more freely where the activities are targeted at
specific individuals or occur in close proximity to the targets. This
Part concludes that by allowing for greater government regulation of
certain abortion protest activities that harass abortion seekers,
constitutional doctrine would more fully accommodate both the
important social interests in free and open political discussion that
underpin the free speech right and the similarly important social
interest in effectuating the equality interest that defines the scope of the
right to choose abortion.

II. BRIEF OUTLINE OF THE PERCEIVED CONFLICT OF THE RIGHTS AND
INTERESTS

Recent activities by abortion protesters at abortion clinics and
the legislative and judicial responses to those activities present a
potential conflict between the right to choose abortion, the free speech
right, and the social value of nonviolent political protest. The

21. Sometimes the protest activities extend beyond the vicinities of abortion clinics
to the neighborhoods and homes of clinic employees. See, e.g., Madsen v. Women's Health
Ctr., Inc., 114 S. Ct. 2516, 2521 (1994) ("Doctors and clinic workers, in turn, were not
immune even in their homes. Petitioners picketed in front of clinic employees’ residences;
shouted at passersby; rang the doorbells of neighbors and provided literature identifying
the particular clinic employee as a ‘baby killer.’ Occasionally, the protestors would confront
minor children of clinic employees who were home alone."). Protest activities also include
the establishment of phony abortion counseling clinics advertised in the yellow pages and
elsewhere to lure prospective patients in for aggressive antiabortion persuasion. See, e.g.,
Lewis v. Pearson Found., Inc., 908 F.2d 318 (8th Cir. 1990) (denying woman’s claim for
Problem Center” listed in the yellow pages under “Abortion Information and Services” but
run by an organization opposed to abortion), vacated on reh’g en banc, 917 F.2d 1077 (8th
Cir. 1990) (en banc), cert. denied, 501 U.S. 908 (1993); Rebecca S. Eisenberg, Beyond
Bray: Obtaining Federal Jurisdiction to Stop Anti-abortion Violence, 6 Yale J.L. &
Feminism 155, 167-71 (1994) (detailing the activities of fake abortion clinics).

22. See Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993) (“Our sister circuit
described a similar abortion protest case as a ‘clash . . . between constitutional rights defined
by the Supreme Court: an old one tracing its roots to the speech clause of the First
Amendment and before, and a new one stemming from Roe v. Wade.’” (quoting Mississippi
Women’s Med. Clinic v. McMillan, 866 F.2d 788, 791 (5th Cir. 1989)), vacated on reh’g en
banc, 41 F.3d 1421 (11th Cir. 1994) (en banc).

23. See, e.g., Michael S. Paulsen & Michael W. McConnell, The Doubtful
tactics of Operation Rescue\textsuperscript{24} are perhaps most well-known and provide the subject matter of much abortion protest-related litigation.\textsuperscript{25} A primary activity of this organization is to stage demonstrations at abortion clinics, the purpose of which are to close the clinics and thereby "rescue" the fetuses scheduled for abortion.\textsuperscript{26} These clinic demonstrations—and other antiabortion protests—include a host of more specific activities, ranging from picketing,\textsuperscript{27} distribution of literature,\textsuperscript{28} chanting,\textsuperscript{29} and attempts at sidewalk persuasion—also called "counseling"\textsuperscript{30}—to trespasses on clinic property to blockade it.\textsuperscript{31}

\footnotesize{(noting, with respect to abortion protests, that "[t]his is not the first time in this nation's history that street demonstrations, sit-ins, and civil disobedience have been in the forefront of political activity on a particular issue").}

\textsuperscript{24} Operation Rescue is an organization dedicated to demonstrate for the antichoice position. See infra notes 26-34 and accompanying text (describing Operation Rescue's tactics).


\textsuperscript{26} NOW, 726 F. Supp. at 1487.

\textsuperscript{27} See, e.g., Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2521 (1994) (noting that petitioners "picketed and demonstrated where the public street gives access to the clinic"); Riely v. Reno, 860 F. Supp. 693, 696-99 (D. Ariz. 1994) (noting that petitioners "sit[ted] in anti-abortion picket lines that impeded the most direct and convenient access to the facility"); Hoffman v. Hunt, 845 F. Supp. 340, 343 (W.D.N.C. 1994) ("Plaintiffs' efforts outside the abortion clinics have [included] ... 'protest marches, ... display of signs and placards, ... [and] organized picketing ... '.")

\textsuperscript{28} See, e.g., Edwards v. City of Santa Barbara, 883 F. Supp. 1379, 1382 (C.D. Cal.) (describing how plaintiffs sought to "engage in peaceful hand-to-hand leafletting"); vacated, 70 F.3d 1277 (9th Cir. 1995); Riely, 860 F. Supp. at 696-99 (stating that plaintiffs' activities included "distributing literature"); Hoffman, 845 F. Supp. at 343 ("Plaintiffs' efforts outside the abortion clinics have [included] ... leafletting ... ").

\textsuperscript{29} See, e.g., Madsen, 114 S. Ct. at 2521 (noting, as to the abortion protests at issue, that "the noise varied from singing and chanting to the use of loudspeakers and bullhorns").

\textsuperscript{30} See, e.g., id. (noting that the lower court "found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, 'sidewalk counselors' would approach and attempt to give the vehicle's occupants antiabortion literature"); Edwards, 883 F. Supp. at 1382 (explaining that plaintiffs sought to provide "one-on-one counseling about abortion alternatives"); Riely, 860 F. Supp. at 696-99 (stating that plaintiffs' activities included "sidewalk counseling in opposition to abortion on public ways and sidewalks outside of abortion facilities").

\textsuperscript{31} See, e.g., NOW v. Operation Rescue, 726 F. Supp. 1483, 1487 (E.D. Va. 1989) ("[D]emonstrators ... intentionally trespass on the clinic's premises for the purpose of..."
name-calling,\textsuperscript{32} destruction of clinic property,\textsuperscript{33} threats of violence,\textsuperscript{34} and actual violence directed at clinic patients and personnel.\textsuperscript{35}

In reaction to these activities, Congress recently enacted the Freedom of Access to Clinic Entrances Act (FACE Act).\textsuperscript{36} This statute prohibits anyone, by force or threat of force or by physical obstruction, from intentionally attempting or actually injuring, intimidating, or interfering with anyone seeking or providing reproductive health services or damaging or destroying the property of facilities that blockading the clinic's entrances and exits . . .

\textsuperscript{32} See, e.g., Libertad v. Welch, 53 F.3d 428, 449 (1st Cir. 1995) ("[P]rotesters who blockade the clinics scream discriminatory epithets to women attempting to enter, such as 'lesbians, killers ... lesbians can't have babies '.")

\textsuperscript{33} See, e.g., NOW, 726 F. Supp. at 1489 ("'Rescuers' did more than trespass on to the clinic's property and physically block all entrances and exists [sic]. They also defaced clinic signs, damaged fences and blocked ingress into and egress from the Clinic's parking lot by parking a car in the center of the parking lot entrance and deflating its tires. On this and other occasions, 'rescuers' have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars."); S. REP. No. 117, supra note 6, at 5 ("Facilities at which abortion services are provided have increasingly been the target of arson fires, bombings, firebombings and chemical attacks.").

\textsuperscript{34} See, e.g., id. at 7 ("These human barricades [created by anti-abortion protesters] often involve pushing, shoving, destruction of equipment and other violent acts as blockaders try to keep patients and staff from entering the clinic."); id. at 3 ("From 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder."); Katherine A. Hilber, Note, Constitutional Face-Off: Testing the Validity of the Freedom of Access to Clinic Entrances Act, 72 U. DET. MERCY L. REV. 143, 149-50 & nn.53-54 (1994) (detailing the additional murders of abortion practitioners and clinic employees since the 1993 Senate Report); Evelyn Figueroa & Mette Kurth, Recent Development, Madsen and the FACE Act: Abortion Rights or Traffic Control?, 5 UCLA WOMEN'S L.J. 247, 248 n.5 (1994) ("During clinic invasions abortion providers have been 'pinched, hit, grabbed, kicked,' slammed against walls, dragged outdoors, crushed by crowds, and terrorized with drive-by shootings." (citing Brief of the Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League (NARAL), Women's Law Project, Women's Legal Defense Fund, National Women's Law Center, and American Jewish Committee at 6 n.10, as Amici Curiae in Support of Respondents, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880))).

\textsuperscript{35} See, e.g., id. at 7 ("[D]uring clinic blockades [t]ypically, dozens of persons—and in some cases hundreds or even thousands—trespass onto clinic property and physically barricade entrances and exits by sitting or lying down or by standing and interlocking their arms.").

provide reproductive health services. The FACE Act empowers courts to grant injunctive relief and damages in private suits brought by persons protected by the statute, and also authorizes the Attorney General of the United States to seek injunctive relief or the imposition of civil or criminal penalties against those who violate the Act. Prior to the enactment of the FACE Act, a series of federal courts had interpreted another federal statute, 42 U.S.C. § 1985(3), as a potential source of both injunctive relief and damages for women whose access to abortion was impeded by the activities of antiabortion protesters. The United States Supreme Court, however, held that abortion protests are not directed at women as a class and therefore do not satisfy this prerequisite for relief under § 1985(3).

37. Id. § 248(1), (3). The FACE Act also prohibits the same activities directed at “any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship,” id. § 248(2), or at the property of a place of religious worship, id. § 248(3).

38. Id. § 248(c)(1).

39. Id. § 248(2). The FACE Act also authorizes state attorneys general to bring parens patriae actions seeking the civil remedies authorized in the statute. Id. § 248(3).

40. Section 1985(3) provides relief to “any person or class of persons” deprived by a conspiracy of two or more persons “of the equal protection of the laws, or of equal privileges and immunities under the laws.” Courts that found women to constitute a class against which the requisite animus was directed by antiabortion protesters found the right deprived to be either the right to travel, or a privacy right, or both. See Georgia M. Sullivan, Note, Protection of Constitutional Guarantees under 42 U.S.C. Section 1985(3): Operation Rescue’s “Summer of Mercy”, 49 WASH. & LEE L. REV. 237, 242-46 (1992) (outlining the development of § 1985(3)).


42. Bray, 506 U.S. at 269.
Also prior to the enactment of the FACE Act, a few courts interpreted the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), as a potential source of injunctive relief and damages for clinics whose business or property were disrupted or damaged by abortion protest activities. In one such case, the Supreme Court affirmed that an “enterprise” within the meaning of the statute did not need to have an economic motivation, thus leaving this statute as an avenue of relief against abortion protests in addition to the FACE Act.

In addition to federal relief, courts have used state law as the basis for issuing injunctions against the activities of abortion protesters. Specifically, these courts have mandated buffer zones around abortion clinic premises and the residences of clinic staff, in which a broader range of activities than those set out in the FACE Act are prohibited. Because the Supreme Court recently upheld such a state-court order, these buffer-zone injunctions remain a potential alternative or supplement to FACE Act remedies.

Defenders of the FACE Act and the judicial responses to abortion protests argue that such restrictions are necessary to protect abortion seekers and providers from physical and emotional injury, and to vindicate the constitutional right to choose abortion, which the protests

45. NOW v. Scheidler, 114 S. Ct. 798, 803-05 (1994); Pro-Choice Network v. Schenck, 34 F.3d 130 (2d Cir. 1994) (invalidating an injunction provision that required sidewalk counselors to “cease and desist from such counseling” upon an indication from the prospective counselee that she did not want to receive such counseling), vacated in part on reh’g en banc, 67 F.3d 377 (2d Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1260 (1996).
46. The Court in Scheidler did not decide the questions “whether the respondents committed the requisite predicate acts, and whether the commission of these acts fell into a pattern.” Id. at 806.
47. Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516, 2530 (1994); Pro-Choice Network v. Schenck, 34 F.3d 130 (2d Cir. 1994) (invalidating an injunction provision that required sidewalk counselors to “cease and desist from such counseling” upon an indication from the prospective counselee that she did not want to receive such counseling), vacated in part on reh’g en banc, 67 F.3d 377 (2d Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1260 (1996).
threaten to render practically unavailable. 49 By contrast, advocates of vigorous abortion protest argue that the bulk of the protesters' activities are constitutionally protected forms of expression 50 or at least constitute socially valuable political protest. 51 For this reason, protest should not be chilled by the threat of harsh statutory penalties 52 or enjoined before the expression inherent in the protest can occur. 53

Factually, both sides appear to be correct. That is, vigorous abortion protests will most likely burden a woman's right to choose to have an abortion. 54 Laws and judicial orders restricting protest activities in order to reduce that burden will limit some otherwise protected speech and restrict abortion protesters' ability to convey their message by their chosen means. 55 Thus, the resolution requires an evaluation and reconciliation of the two constitutional rights and the social value of nonviolent protest in the context of the particular acts that the protesters seek to undertake and others seek to limit.

A. The Right to Choose Abortion

In Roe v. Wade, the United States Supreme Court held that a woman's right to decide whether to terminate a pregnancy is fundamental and that any governmental interference with the right must be justified by a compelling interest. 56 The Roe Court held that a

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49. See, e.g., Laurence H. Tribe, The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993, 1 VA. J. SOC. POL'Y & L. 291, 307 (1994) (noting that a purpose of the FACE Act is "to ensure that women, who have the theoretical right to abortion, in fact have access to that right"); Kelly, supra note 48, at 434-40 (detailing the impacts of abortion protest as limiting the supply of abortion services and adversely affecting patients).

50. See, e.g., Paulsen & McConnell, supra note 23, at 263 ("The vast majority of abortion protests are conducted nonviolently and within the bounds of the law . . .").

51. See, e.g., Hilber, supra note 35, at 170 ("Supporters of the abortion clinic protesters liken their activity to that of civil rights protesters throughout American history.").

52. See, e.g., Paulsen & McConnell, supra note 23, at 286 ("The sweeping and overbroad terms of [the FACE Act] would impose severe punishments and create an enormous chilling effect even entirely lawful (as well as unlawful) public advocacy.").

53. See, e.g., Bruce Ledewitz, Civil Disobedience, Injunctions, and the First Amendment, 19 HOFSTRA L. REV. 97, 69 (1990) (arguing that the First Amendment should be interpreted to prohibit injunctions of nonviolent abortion protests).

54. See, e.g., S. REP. No. 117, supra note 6, at 11 (detailing "how the avowed purpose" of antiabortion protest activities "is to eliminate access to abortion services").

55. See, e.g., Ledewitz, supra note 53, at 81 ("One of our traditions, and one the courts could legitimately recognize, is that the protester have his forum and his say and then be arrested and punished.").

fetus is not a "person" within the meaning of the Fourteenth Amendment and consequently does not independently have constitutional rights that compete with those of the woman who bears it.\textsuperscript{57} The state, however, has an "important and legitimate interest in protecting the potentiality of human life," as well as in "preserving and protecting the health of the pregnant woman."\textsuperscript{58} To reconcile these rights and interests, the Roe Court constructed a trimester framework. During the first trimester, no state interest justifies interfering with the woman's decision.\textsuperscript{59} During the second trimester, protecting the woman's health may provide a compelling interest.\textsuperscript{60} And during the third trimester, defined as beginning at the onset of fetal viability, the state's interest in protecting that potential life could justify complete prohibition of the procedure, except where necessary to save the mother's life.\textsuperscript{61}

In Planned Parenthood of Southeastern Pennsylvania v. Casey,\textsuperscript{62} the Court reaffirmed certain aspects of the Roe decision, while modifying others.\textsuperscript{63} The Court affirmed "the right of the woman to choose to have an abortion before viability,"\textsuperscript{64} and it did not revisit the question of whether the fetus is a "person" protected by the Constitution.\textsuperscript{65} It abandoned Roe's trimester framework,\textsuperscript{66} however, replacing it with a standard that asks whether a governmental

\footnotesize
\begin{enumerate}
\item Id. at 157-59.
\item Id. at 163.
\item Id. at 164.
\item Id.
\item Id. at 164-66.
\item 505 U.S. 833 (1992).
\item A host of decisions between Roe and Casey had hinted that the Court would reconsider the Roe holding, and they cast doubt on the meaning of the right to choose abortion as well as the trimester framework. See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (featuring a majority of the Justices upholding a series of abortion restrictions and questioning the trimester framework); see also Casey, 505 U.S. at 922 (Blackman, J., concurring in part and dissenting in part) ("[I]n Webster ... four Members of this Court appeared poised to 'cast[i] into darkness the hopes and visions of every woman in this country' who had come to believe that the Constitution guaranteed her the right to reproductive choice. ... All that remained between the promise of Roe and the darkness of the plurality was a single, flickering flame. Decisions since Webster gave little reason to hope that this flame would cast much light." (citations omitted)).
\item Casey, 505 U.S. at 846.
\item See id. at 942 (Scalia, J., concurring in part and dissenting in part) (noting that the Court in Roe and subsequent cases "assume[d] that what the State is protecting is the mere 'potentiality of human life')."
\item Id. at 873.
\end{enumerate}
regulation imposed before viability places an undue burden on a woman's right to decide whether to terminate a pregnancy. The practical result of Casey is that states have greater latitude to regulate the abortion procedure by mandating, for example, that women receive information about the status of the fetus and options other than abortion, that they wait twenty-four hours between receiving the information and obtaining the procedure, or that they obtain parental consent if they are underage.

Casey also reaffirmed Roe's grounding in the substantive "liberty" guarantee of the Due Process Clause of the Fourteenth Amendment. Roe traced a "right of privacy" through a series of roots, honing in on personal rights relating to marriage, procreation, contraception, family relationships, and child rearing and education. Although eschewing reference to a privacy right as such, Casey affirmed this lineage, noting that because "[t]hese matters[] involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [they] are central to the liberty protected by the Fourteenth Amendment."

Certainly, protecting liberty is a crucial part of the explanation of why the Constitution guarantees the right to choose abortion. Standing alone, however, it is insufficient to define the right's scope. That is, the power to abort a fetus may be "a 'liberty' in the absolute sense," and even "a liberty of great importance to many women." But these facts do not demonstrate that it is "a liberty protected by the Constitution of the United States." Locating and justifying a constitutional "liberty" right requires a balance of a number of

67. Id. at 876-77.
68. Id. at 881-83.
69. Id. at 885-87.
70. Id. at 899.
71. Id. at 846-53.
72. 410 U.S. 113, 152 (1973) (noting that prior to Roe, the Court or individual Justices had found the privacy right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the Fourteenth Amendment).
73. Id. at 152-53 (citations omitted).
75. See, e.g., id. at 852 ("[W]here pregnancy and childbirth are concerned[,] the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.").
76. Id. at 950 (Scalia, J., concurring in part and dissenting in part).
77. Id. (Scalia, J., concurring in part and dissenting in part).
potentially absolute liberties—of the fetus and the state, as well as the pregnant woman—to determine the scope of the woman’s right to choose abortion. Although the Court has conducted this balance without explicit reference to gender equality, this value in fact provides the best justification for the existence and scope of the constitutional “liberty” to choose abortion.

It is indeed possible, and consistent with the current state of the law, to interpret the constitutional “liberty” guarantee to mean that an

78. See, e.g., id. at 852 (“Abortion is a unique act. It is an act fraught with consequences for others: ... for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.”).

79. But see id. at 928 (Blackmun, J., concurring) (“A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality.”). Abortion rights advocates have also rarely argued that the equality value should ground the right to choose abortion. See Laurence H. Tribe, American Constitutional Law § 15.10, at 1353 & n.109 (2d ed. 1988) (“The failure of both plaintiffs and courts to frame the abortion controversy in terms of sexual equality has profoundly affected the law in this area.” (footnote omitted)); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1288 n.34 (1991) (noting that few briefs filed in the Supreme Court asserted an equal protection grounding for the abortion right).

80. Since Roe, a number of commentators have criticized the Court’s decision to ground the right to choose in the privacy aspect of the liberty guarantee of the Fourteenth Amendment. See, e.g., Tribe, supra note 79, § 15.10, at 1354 (“A right to terminate one’s pregnancy might ... be seen more plausibly as a matter of resisting sexual and economic domination than as a matter of shielding ‘private’ transactions between patients and physicians from public control.”); Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 386 (1985) (“Overall, the Court’s Roe position is weakened, I believe, by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”); Kenneth Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 58 (1977) (stating that the issue in the Court’s pregnancy/abortion/birth control cases was “not so much in recognizing a woman’s interest in controlling the use of her body” as “an issue going to women’s position in society in relation to men”); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1020 (1984) (“The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied.”); MacKinnon, supra note 79, at 1319 n.163 (“The real constitutional issue raised by criminal abortion statutes like that in Roe is sex equality ....”); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 31 (1992) (noting the “serious difficulties ... in treating the abortion right as one of privacy”)

81. See DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189, 195-96 (1989) (holding that the liberty guarantee of the Fourteenth Amendment Due Process Clause does not impose an obligation on the government to protect a child from his father’s violent abuse; see also Ernest J. Weinrib, The Case for a Duty to Rescue, 90 Yale L.J. 247, 247 (1980) (noting that in the common law there is no duty to rescue absent a special relationship link between the person endangered and the potential rescuer).
individual has an absolute right not to make certain sacrifices, even if the sacrifice, to another, would preserve the other's life. Yet this possible interpretation of "liberty" is not the only one. It is, rather, a social choice, and one that is unclear about whether women, or anyone, should want to perpetuate such a choice by defining it as a constitutional ideal.

Rather than an objection to the sacrifice per se, the objection to prohibitions or burdensome restrictions on abortion is more appropriately characterized as the inequality of the sacrifice.

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82. Cf. McFall v. Shimp, 10 Pa. D. & C. 3d 90 (Allegheny County Ct. 1978) (answering the question "in order to save the life of one of its members by the only means available, may society infringe upon one's absolute right to his 'bodily security' [by compelling the donation of bone marrow]" in the negative, and noting that "[f]or our law to compel [an individual] to submit to an intrusion of his body would change the very concept and principle upon which our society is founded"), reprinted in DAVID M. ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW 551 (2d ed. 1996).

83. See, e.g., id. ("Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another. Many societies adopt a contrary view which has the individual existing to serve the society as a whole.").

84. See generally LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985) (illustrating in a number of different contexts how the Court's constitutional decisions represent choices among a variety of competing visions of constitutional meaning).

85. One strain of feminist thought argues that the "uncaring" state of the law is a result of its having been created and interpreted by men, and that injecting female values into the law would make it more centered on relationships rather than individual rights. See, e.g., Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 31-32 (1988) ("Tort law should begin with a premise of responsibility rather than rights, of interconnectedness rather than separation, and a priority of safety rather than profit or efficiency. The masculine voice of rights, autonomy, and abstraction has led to a standard that protects efficiency and profit; the feminine voice can design a tort system that encourages behavior that is caring about others' safety and responsive to others' needs or hurts, and that attends to human contexts and consequences."). But see CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW 39 (1987) ("Women value care because men have valued us according to the care we give them, and we could probably use some.").

86. Critiques of the no-duty-to-rescue doctrine abound. See, e.g., Weinrib, supra note 81, at 251. Many have argued that the constitutional liberty guarantee should not be understood as simply freedom from restraint. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 266-71 (1977) (arguing that if the constitutional liberty guarantee is properly understood, then there is not an inevitable conflict between equality and liberty, and using busing as an example where those who desire not to be bussed do not have a constitutional liberty interest). And as a matter of morality rather than constitutional law, others have argued that the obligations among human beings are broad. See, e.g., Peter Singer, Famine, Affluence, and Morality, 1 PHIL. & PUB. AFFAIRS 229, 230-35 (1972) (arguing that people in affluent countries are morally obligated to care for the less affluent).
demanded. 87 Maybe it would be acceptable for a majority of the population to decide to force women to carry conceived embryos to term if it were willing to impose a similar obligation on men to donate their body to the care of others in need. 88 Of course, childbearing is unique, so it is not possible to posit an exactly analogous male obligation. 89 But perhaps it would be acceptable for a majority of the

87. See supra note 80 and sources cited therein (arguing that the abortion right is better viewed as a question of equality than as one of privacy or liberty).
88. See, e.g., McFall v. Shimp, 10 Pa. D. & C.3d 40 (Allegheny County Ct. 1978) (denying equitable relief to compel the only compatible bone marrow donor to submit to a transplant to save the life of his blood relative), reprinted in Adams, supra note 82, at 551; Donald H. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979) (detailing how United States law does not require individuals to sacrifice their bodies to preserve the life of another and arguing that forced pregnancy and childbearing imposes this type of bodily sacrifice); Judith J. Thomson, A Defense of Abortion, 1 Phil. & Pub. Affairs 47 (1971) (comparing forced childbearing to a situation where an individual is involuntarily hooked up to a kidney dialysis machine to save the life of an ailing violinist and making the intuitive argument that the individual has the right to unhook himself even though it means that the violinist will die).
89. A law requiring all adult citizens to register their blood and bone-marrow types and to submit to extraction when needed to preserve the life of another would seem to come close. Moreover, it is telling that the government does not impose decidedly lesser obligations on men for the purpose of saving, or significantly improving the quality of, other lives. For example, the government could require adult citizens to give the portion of their income not required for their own sustenance to famine relief, or to serve as mentors for troubled youth, or to spend some time each day holding AIDS babies. Although surely different from forced childbearing, each of these requirements bears some resemblance to it, requiring a significant sacrifice of what has traditionally been conceived as individual liberty to promote the well-being of another.

The closest requirement that the government sometimes imposes upon men is the military draft. While it used to be possible to argue that the male-only draft served as a perfect analog to a necessarily female-only childbearing requirement, the combat restrictions have been substantially lifted. To the extent that sex-exclusion from the military remains, it illustrates, rather than justifies, the assumptions about the natural female role that make restrictions on the abortion choice a violation of equality. See Sunstein, supra note 80, at 36 ("[L]egal provisions ensuring that only men are drafted are part of a system of sex role stereotyping characterized by a sharp, legally produced split between the domestic and public spheres—with women occupying the first and men occupying the second. In this light, legal restrictions on abortion are an element in the legal creation of a domestic sphere in which women occupy their traditional role, and principally or exclusively that role. Male-only drafts are part of the legal creation of a public sphere in which men occupy their traditional role, and principally or exclusively that role.").

Note also that the rewards that accrue for rendering the forced service are vastly different for childbearing than for military service. Government pays for the period of military service, providing fringe benefits during and after service. Military service carries prestige in the social, political, and economic realms, thus often yielding benefits beyond those that the government explicitly provides. Compare these results to the consequences suffered by a woman, often poor to begin with, forced to bear an unwanted child. Try to imagine a state statute mandating that people who had borne children would receive
population to restrict access to abortion if it were willing to neutralize the social, economic, and political consequences of pregnancy and childbirth so that the “cost” in these areas to women forced to carry fetuses to term were the same as to all other citizens.\textsuperscript{90} Quite obviously, however, American society does not implement this type of equality.\textsuperscript{91} Instead, it by and large treats pregnancy and childbearing as a choice, the costs of which the individual parent is required to bear. It is this social fact and its consequences for women who bear children—not the simple biological facts about the nature of pregnancy and absolute preference in obtaining government jobs and receiving promotions once in them. \textit{Cf.} Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding such a veteran’s preference against a claim that it violated the constitutional guarantee of equal treatment because mostly men received the benefit of the preference).

\textsuperscript{90} See, e.g., Christine A. Littleton, \textit{Reconstructing Sexual Equality}, 75 \textit{Cal. L. Rev.} 1279, 1287 (1987) (“The focus of equality [should not be] on the question of whether women are different, but rather on the question of how the social fact of gender asymmetry can be dealt with so as to create some symmetry in the lived-out experience of all members of the community. . . . [According to] this view, the function of equality is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one.”); MacKinnon, \textit{supra} note 79, at 1316 (“If sex equality existed socially—if women were recognized as persons, sexual aggression were truly deviant, and childrearing were shared and consistent with a full life rather than at odds with it—the fetus still might not be considered a person but the question of its political status would be a very different one.”).

\textsuperscript{91} Prior to conception, women lack the same control over their bodies that men possess. \textit{See}, e.g., MacKinnon, \textit{supra} note 79, at 1312 (“Women often do not control the conditions under which they become pregnant . . . . Contraception is inadequate or unsafe or inaccessible or sadistic or stigmatized. Sex education is often misleading or unavailable or pushes heterosexual motherhood as an exclusive life possibility and as the point of sex.”). Even assuming a completely desired pregnancy, women experience burdens that men do not when women choose to have a child. There is no legal requirement that employers pay for any time that a woman takes off to give birth and immediately thereafter. California is quite liberal in mandating a four-month period of unpaid leave during which a woman’s job is guaranteed. \textit{Cal. Govt. Code} § 12945 (b)(2) (West 1992). After childbirth, women confront a workplace that is structured to reward a lifestyle that does not include primary childrearing responsibilities, which women disproportionately assume. \textit{See} MacKinnon, \textit{supra} note 79, at 1312-13 (“After childbirth, women tend to be the ones who are primarily responsible for the intimate care of offspring—their own and those of others. Social custom, pressure, exclusion from well-paying jobs, the structure of the marketplace, and lack of adequate daycare have exploited women’s commitment to and caring for children and relegated women to this pursuit which is not even considered an occupation but an expression of the X chromosome.”); Joan C. Williams, \textit{Deconstructing Gender}, 87 \textit{Mich. L. Rev.} 797, 822 (1989) (“Western wage labor is premised on an ideal worker with no child care responsibilities.”).
childbirth\textsuperscript{92}—that justly elevates the liberty to choose abortion to constitutional stature.\textsuperscript{93}

The gender equality supplement to the abstract liberty concept more solidly grounds the constitutional right to choose abortion in a number of respects. First, resting solely on a liberty justification, the right to choose abortion is particularly vulnerable\textsuperscript{94} to the critique that the existence and scope of privacy rights are a product of judicial whim.\textsuperscript{95} The equality focus explains the existence of the right as a

\textsuperscript{92} Law, supra note 80, at 1016 ("Nature demands that women alone bear the physical burdens of pregnancy, but society, through the law, can either mitigate or exaggerate the cost of these burdens.").

\textsuperscript{93} See, e.g., MacKinnon, supra note 79, at 1316-17 ("The legal status of the fetus cannot be considered separately from the legal and social status of the woman in whose body it is. . . . The relation of the woman to the fetus must be seen in the social context of sex inequality in which women have been kept relatively powerless compared with men.").

\textsuperscript{94} A constitutional right to privacy is not specifically mentioned in the constitutional text. Roe v. Wade, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy."). Instead, the Court initially found it in the penumbras surrounding other constitutional guarantees. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." (citation omitted)). The Court ultimately attached it to the Fourteenth Amendment liberty guarantee. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . The controlling word in the cases before us is 'liberty.'"); Roe, 410 U.S. at 153 ("[W]e feel that the right of privacy [is] founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."). Although substantive due process has a pedigree, Casey, 505 U.S. at 846 ("Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, . . . the Clause has been understood to contain a substantive component as well. . . ." (citation omitted)); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."), and other constitutional guarantees are indeterminate as well, see, e.g., Steven L. Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L.J. 821, 847 (1985) (noting that the constitutional text is "charitably described as indeterminate"); Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 649 (1993) ("[T]he Constitution . . . presents an easy case on which there is widespread agreement [about its indeterminacy]."), the absence of a more explicit constitutional reference has been perceived to render the privacy/liberty line of due process cases particularly susceptible to criticism that the constitutional right depends upon judicial preferences. See Sunstein, supra note 80, at 31 (noting that the fact that "the Constitution does not refer to privacy" is a "serious difficulty") with this constitutional theory.

\textsuperscript{95} See, e.g., Casey, 505 U.S. at 980-81 (Scalia, J., dissenting) (arguing that "the power of a woman to abort her unborn child" is not "a liberty protected by the Constitution of the United States" in part because "the Constitution says absolutely nothing about it," and
product of a strong and widely acknowledged constitutional value independent of the controversial privacy guarantee. It also provides a more appropriate and consistent means for interpreting the scope of the right to choose abortion in particular circumstances than does the abstract ideal of “liberty.”

The variations in the definition of the constitutional right to choose abortion since its articulation illustrate the need for a solid constitutional guideline to determine its scope. Decisions after Roe spoke of “a right to decide whether to have an abortion ‘without interference from the State,’” and interpreted this requirement quite strictly. Although ostensibly reaffirming the central holding of

further criticizing the majority as “not wish[ing] to be fettered by . . . limitations on its preferences”). The critique that a constitutional right depends upon judicial preferences, in turn, can undermine the perceived legitimacy of the constitutional decision, Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”); Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (defining the scope of the Due Process Clause “has at times been a treacherous field for th[e] Court,” giving “reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of th[e] Court”); Stephen Feldman, Republican Revival/Interpretive Turn, 1992 Wis. L. Rev. 679, 704 (noting the problem where “Justices inevitably seem to impose their personal values on society”); Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 12-13 (1979) (opining that judicial interpretation should not rely on “personal beliefs”), even in the eyes of those sympathetic to broad protection of personal liberties from governmental intrusion. Bowers v. Hardwick, 478 U.S. 186 (1986) (characterizing a challenge to an antisodomy statute as involving only homosexual sodomy and finding it not to be a fundamental right) and Michael H. v. Gerald D., 491 U.S. 110 (1989) (finding no fundamental liberty interest of biological father to paternal rights where the mother was married to another man) are two recent cases in which the Court declined to find a constitutionally protected liberty interest. In both, the dissenters criticized the majority for interpreting the constitutional guarantee according to its own preferences. See Bowers, 478 U.S. at 205-06 (Blackmun, J., dissenting) (accusing the majority of “willful blindness” in failing to see “the fundamental interest all individuals have in controlling the nature of their intimate associations with others”); Michael H., 491 U.S. at 137 (Brennan, J., dissenting) (criticizing the plurality’s contention that a determination of “tradition” can eliminate a situation where “judges . . . substitute their own preferences for those of elected officials” as not being “the objective boundary that it seeks”).

96. *Casey*, 505 U.S. at 875 (quoting Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61 (1976)).

97. Compare Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating an informed consent requirement), overruled by *Casey*, 505 U.S. 833 and *Akon* v. *Akon* Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983) (*Akron I*) (same), overruled by *Casey*, 505 U.S. 833 with *Casey*, 505 U.S. at 882 (“To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable
Roe, the Casey Court disavowed its language and redefined the boundaries of the constitutional right so as to significantly alter its practical effect. Even under the comparatively broader noninterference language between Roe and Casey, however, the government was not required to fund the abortion procedure for poor women, even though it would pay the significantly greater costs of childbirth. A decision not to fund an activity, the Court reasoned, was not an affirmative interference with a woman’s right to choose abortion, even though the practical effect might be that poor women could not exercise their right. The right to choose abortion before viability has thus always depended upon the Court’s choice of the baseline from which to assess the significance of the impact of a governmental action on a woman’s ability to choose to terminate her pregnancy.

Now, the abortion right depends upon the Court’s assessment of what constitutes a substantial burden or significant obstacle for a pregnant woman, but it is unclear what baseline the Court will use to make the evaluation. For example, the Casey Court showed significant sensitivity to the gender equality value in finding that a spousal notification requirement might pose a substantial burden for gestational age of the fetus, those cases go too far, are inconsistent with Roe’s acknowledgment of an important interest in potential life, and are overruled.

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98. Casey, 505 U.S. at 846 (“[T]he essential holding of Roe v. Wade should be rethought and once again reaffirmed.”).
99. Id. at 875 (describing the noninterference language as “an overstatement”).
100. See supra 97 and comparisons therein (noting the different results that Casey’s undue burden standard produces).
102. Id. at 473-74.
103. See Cass: Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 620 (1990) (“Viewed through the lens of the New Deal period, the failure to fund is not inaction at all. It represents a conscious social choice . . . .”); Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Independence, 99 Harv. L. Rev. 330, 330 (1985) (challenging the baseline assumption that the right to choose abortion is only negative, “imposing on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another’s needs”).
women in abusive relationships. 104 Yet in the same decision, it declined to recognize a twenty-four hour waiting period as the same type of substantial burden for women who increasingly must travel great distances to have access to the abortion procedure. 105 An explicit focus on the gender equality value would help to explain and harmonize these results.

Another problem with basing the abortion right solely on a liberty interest without an equality supplement is that the woman’s superior right to bodily autonomy hinges so crucially upon the determination that the fetus does not have a competing constitutional right to life. 106 Although the Roe Court stated that it “need not resolve the difficult question of when life begins,” 107 its decision that the woman, and not the fetus, holds the constitutional right can be viewed as just that. 108 Like the standard used to assess the abortion right, the decision can be criticized as grounded in judicial preference rather than constitutional command. 109

Because it provides a different explanation of the values that underlie a constitutional abortion right, the equality focus addresses the

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104. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 894 (1992) (“We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion [by a spousal notification requirement] as surely as if the Commonwealth had outlawed abortion in all cases.”).

105. Id. at 886 (finding the 24-hour waiting period not to constitute a substantial obstacle despite the increased costs and potential delays it would impose and despite the district court’s finding that “for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, [the waiting period] will be ‘particularly burdensome’”).

106. Roe v. Wade, 410 U.S. 113, 156-57 (1973) (“If the suggestion of [fetal] personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”).

107. Id. at 159.

108. See Casey, 505 U.S. at 982 (Scalia, J., dissenting) (accusing the Court in Roe and subsequent cases of “begging the question” by “assuming that what the State is protecting is the mere ‘potentiality of human life.’”).

109. Id. at 983 (Scalia, J., dissenting) (accusing the Court of “ratt[ing] off a collection of adjectives that simply decorate a value judgment and conceal a political choice”). But see Laurence H. Tribe, Abortion: The Clash of Absolutes 120-25 (1990) (arguing that the word “person” in the Constitution is most logically read as not including embryos or fetuses and detailing the wide-ranging legal consequences if the word were to be read in this way).
question of the status of the fetus in a less problematic way.\textsuperscript{110} Specifically, where the value to be vindicated is equality, the constitutional status of the fetus is not dispositive. Even were the fetus a "person" with a right to life, it would not be allowed to demand the co-optation of another human body to sustain it.\textsuperscript{111} Or at least under the existing state of the law, it would not be allowed to do so.\textsuperscript{112} The

\textsuperscript{110} See, e.g., Sunstein, supra note 80, at 42 ("[T]he equality argument ... freely acknowledges and, indeed, insists on the strength of the interest in protecting fetal life ....").

\textsuperscript{111} See, e.g., Tribe, supra note 79, at 1354 ("[T]he law nowhere forces men to devote their bodies and restructure their lives even in those tragic situations (such as organ transplants) where nothing less will permit their children to survive."); Sunstein, supra note 80, at 34 ("[N]o American legislature has imposed such a duty and ... courts have refused to do so as well.").

\textsuperscript{112} One counterargument is that even under the existing state of the law, pregnancy is different from other hypothetical instances of forced bodily sacrifice because it is the result of the voluntary act of engaging in sexual intercourse. Of course, this argument cannot apply to instances of rape or incest, and loses force where birth control has been reasonably, although ineffectively, employed. As to the failed birth control example, imagine a law that required all registered drivers to assume the risk that they would be one of the 5-10\% randomly picked for an organ donation to aid a traffic accident victim. This type of law, in the current legal environment, would be unthinkable. Yet restrictions on abortion premised on the idea that women assume the risk of pregnancy whenever they engage in sex have exactly the same effect. Even in instances where the sex is ostensibly voluntary and birth control not diligently used, the inequality between men and women remains. The law does not force men to donate parts of their bodies to protect children, even those whom they have fathered. See Sunstein, supra note 80, at 41 ("[T]he state's across-the-board failure to impose on men a duty of bodily use to protect children [constitutes an unconstitutional selectivity].").

Another counterargument is that if the fetus were deemed a person under the Constitution, its particular vulnerability would give it an unusually strong claim to an equal right to life, which would require a woman's sacrifice to bring it to term. But this hierarchy is not what equality currently demands. Men are not required to sacrifice their bodies to save other individuals, whether those individuals, as a class, are unusually vulnerable or not. See Sunstein, supra note 80, at 42 ("Even if fetuses are a vulnerable group, and even if they are entitled to special protection against discrimination, they do not have a claim to conscript bodies of another vulnerable group on their behalf."). Arguably, the individuals' very need for rescue defines the class as particularly vulnerable, rendering them indistinguishable from fetuses and highlighting the selectivity of an argument that women alone in the context of pregnancy are required to make the bodily sacrifice.

A final counterargument is that abortion represents an affirmative act of removing a living thing from a woman's body and thereby killing it, whereas instances in which men fail to make bodily sacrifices constitute less culpable instances of mere inaction. But a view that places constitutional weight on this difference assumes male biology as the natural baseline when it is not. Where equality with respect to reproductive conduct is at issue, the proper comparison is between its consequences for men and women. Because of their biology, men can simply refrain from donating needed bodily materials to save the fetus that they father. Women, by contrast, must seek the help of others to obtain an abortion. The equality focus, however, must remain on what is required to maintain each individual's bodily autonomy,
equality focus leaves open the possibility that laws could be changed so that forcing women to carry fetuses to term would not violate the Constitution by equalizing the sacrifices demanded of women and men when an innocent life needs help to be sustained.\textsuperscript{113}

The equality supplement also has the advantage of adding a forward emphasis to the Court's chosen backward focus in substantive due process jurisprudence. In deciding whether an asserted interest is a fundamental liberty right deserving of heightened constitutional protection, the Court asks whether it is "'implicit in the concept of ordered liberty,'"\textsuperscript{114} which in turn requires a determination of whether protection of the interest is "'deeply rooted in this Nation's history and tradition.'"\textsuperscript{115} But if the crucial problem with abortion restrictions is that they force women into their traditional devalued role,\textsuperscript{116} then the focus on tradition may reinforce exactly what needs to be overcome.\textsuperscript{117} At the very least, the doctrinal requirement forces the Court to strain to find the abortion right entitled to constitutional protection.\textsuperscript{118} By

\textsuperscript{113} See Tribe, supra note 79, at 1355 ("There is a constitutionally problematic subjugation of women in the law's indifference to the biological reality that sometimes requires women, but never men, to resort to abortion if they are to avoid pregnancy and retain control of their own bodies.").


\textsuperscript{116} See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part) ("Th[e] assumption [of abortion restrictions]—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.").

\textsuperscript{117} See id. at 896-97 ("There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed... Only one generation has passed since this Court observed that 'woman is still regarded as the center of home and family life,' with attendant 'special responsibilities' that precluded full and independent legal status under the Constitution... These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution." (citation omitted)).

\textsuperscript{118} Compare Roe, 410 U.S. at 129 ("It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively
contrast, the constitutional equality right was born out of a desire to change the status quo, and particularly in the context of a gender-based differentiation, the Court has interpreted it to condemn government actions that reflect an “accidental byproduct of a traditional way of thinking about females.” Despite the Court’s imperfect understanding of the necessary scope of this guarantee, the recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman’s life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.” with id. at 174 (Rehnquist, J., dissenting) (“The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

119. The Fourteenth Amendment was enacted to change the previously socially accepted subordinate role of African-Americans. See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67, 71 (1873) (“The most cursory glance at [the Civil War Amendments] discloses a unity of purpose ... [which is] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”).

120. Califano v. Goldfarb, 430 U.S. 199, 233 (1977) (Stevens, J., concurring); see Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 472 n.7 (1981) (missing the fact that the statutory rape statute at issue was based upon traditional ideas about the roles of men and women in sexual encounters, but acknowledging that the statute could not stand if it were based upon “archaic stereotypes”); Orr v. Orr, 440 U.S. 268, 283 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection.”); Craig v. Boren, 429 U.S. 190, 202 n.14 (1976) (noting that “social stereotypes ... [may] distort the accuracy of ... comparative statistics”); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (condemning the “old notions” upon which a Utah statute mandating longer parental support of boys than girls and noting that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas”).

121. One key example of the Court’s failure to recognize the necessary scope of the equality guarantee is its adherence to a definition of inequality that requires proof of discriminatory intent on the part of the governmental decisionmaker. See Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (ruling that the disproportionate effect of veterans’ preferences on women does not establish a prima facie case of unequal treatment); Washington v. Davis, 426 U.S. 229, 245-50 (1976) (holding that the disproportionately disadvantageous effect of police officer qualifying test on African-Americans does not establish a prima facie case of unequal treatment). Requiring proof of a conscious discriminatory intent ignores the stereotypes and assumptions that underlie decisionmaking and are often subconsciously held. See, e.g., Barbara J. Flagg, “Was Blind But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 980 (1993); Leslie Gielow Jacobs, Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses, 7 Yale J.L. & Feminism 137, 150 (1995) (“Because the class of men, by and large, have created the
potentially forward-looking nature of the ideal of equality holds more promise of explaining and preserving the abortion right than the liberty ideal, whose very definition reinforces tradition.

Although the equality rationale provides a more satisfying explanation for the existence and scope of the constitutional right to choose abortion than does the liberty guarantee, it too faces a doctrinal hurdle in the current Supreme Court. According to the Court's understanding, inequality occurs only when "similarly situated" individuals are treated differently.122 Because only women can get pregnant, the Court has held that different treatment of women who do get pregnant does not violate the Constitution because there are no similarly situated men whose treatment can serve as a basis for comparison.123

But this view misperceives the appropriate scope of the equality guarantee.124 Where treatment of different sexes is at issue, equality for women must mean more than getting what men already receive. A limited equal treatment ideal fixes a male baseline as inherent in the Constitution. Instead, equality should allow for different treatment to

standards of legal treatment, these standards often correspond more directly to the interests and needs of men, rather than those of women. Truly equal treatment requires revising the standard of treatment so that it meets equally the interests and needs of both classes of people, rather than simply treating women according to the preexisting standard." (footnote omitted)).

122. Reed v. Reed, 404 U.S. 71, 76 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."); (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); see also Craig, 429 U.S. 190 (establishing intermediate scrutiny for gender-based classifications).

123. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) (citing Geduldig and noting that because only women get pregnant, abortion clinic protesters cannot have the antiabortion animus required for a civil rights violation); Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removed one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons . . . . The fiscal and actuarial benefits of the program thus accrue to members of both sexes."); see also Harris v. McRae, 448 U.S. 297, 322-23 (1980) (similar analysis with respect to abortion restrictions).

achieve the same result—equal citizenship. Consequently, where
government actions with respect to pregnancy are at issue, the proper
comparison is between women and men who have engaged in
reproductive behavior. Under this view, additional burdens imposed
on women, just because nature has dictated that they physically bear
the child, violate the ideal of equality. The Supreme Court has
shown itself in some instances to be able to view the demands of
gender equality in this light. To clarify its understanding and
analysis of the abortion right, it should view it this way as well—that
the abortion right is constitutionally required so long as pregnancy
remains the exclusive instance where the law requires the bodily
sacrifice of one individual to save the life of another.

B. The Free Speech Right

Unlike the abortion right, the right to free speech is explicitly
guaranteed by the Constitution. Thus, there is no need to search for
a more fundamental, specifically enumerated right upon which to
ground the guarantee. Still, the right is not self-explanatory. To
operate, government must pass a wide variety of laws that "abridge the
freedom of speech." Because the practical needs of modern

125. TRIBE, supra note 79, at 1584.
126. See id. ("If no man loses his job or his seniority as a result of [engaging in
reproductive activity], neither should any woman. A program of pregnancy leave and
benefits removes this inequity.").
(explaining that the California statute that mandates a four-month period of job security for
women after childbirth does not violate Title VII's command of equal treatment of men and
women because "by 'taking pregnancy into account,' California's pregnancy disability
leave statute allows women, as well as men, to have families without losing their jobs").
128. U.S. CONST. amend. I.
129. Perhaps the right was intended to protect primarily against government-imposed
prior restraints on speech. See Schenck v. United States, 249 U.S. 47, 51-52 (1919)
(opinion of Holmes, J.) ("It well may be that the prohibition of laws abridging the freedom
of speech is not confined to previous restraints, although to prevent them may have been the
main purpose . . . ").
130. The Court has distinguished between content-based and content-neutral
government actions. See Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2459
(1994) ("[L]aws that by their terms distinguish favored speech from disfavored speech on
the basis of the ideas or views expressed are content-based. . . . By contrast, laws that confer
benefits or impose burdens on speech without reference to the ideas or views expressed are
in most instances content-neutral."). Although both have the effect of "abridging freedom of
speech," see Martin H. Redish, The Content Distinction in First Amendment Analysis, 34
STAN. L. REV. 113, 128 (1981) ("[E]ither [type of] restriction reduces the sum total of
information or opinion disseminated.")., the Court will strictly scrutinize only content-based
government dictate that the provision should not be read literally,\textsuperscript{131} some definition of its scope is required, which in turn demands an examination of the values that underpin the free speech guarantee.

Numerous justifications have been offered for the special value that the Constitution places on freedom of speech.\textsuperscript{132} These justifications are primarily utilitarian. That is to say, free speech is valued not so much as an individual good, but because of the social goods that flow from it.\textsuperscript{133} Probably none of the justifications are exclusive,\textsuperscript{134} although they necessarily interrelate.\textsuperscript{135}

speech, \textit{Turner Broadcasting}, 114 S. Ct. at 2459 ("Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. ... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, ... because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (citations omitted)). The Court has also distinguished between government regulation of speech and conduct, applying a lenient balancing test where a government restriction on conduct has the incidental effect of limiting expression. \textit{See, e.g., United States v. O'Brien}, 391 U.S. 367 (1968) (holding that laws which criminalize draft card destruction are constitutional even as applied to an individual who burned his card to protest the Vietnam War).

\textsuperscript{131} The absolutist view of Justices Black and Douglas has never been embraced by a majority of the Court. \textit{See, e.g., Konigsberg v. State Bar of Cal.}, 366 U.S. 36, 56 (Black, J., dissenting).

\textsuperscript{132} \textit{See, e.g., Kent Greenawalt, Free Speech Justifications}, 89 COLUM. L. REV. 119, 131-34 (1989) (surveying the many proffered justifications for the free speech guarantee); Frederick Shauer, \textit{Must Speech Be Special?}, 78 NW. U. L. REV. 1284, 1284-89 (1983) (noting that because speech can cause harm equal to actions that the government may regulate, some explanation for the extraordinary scrutiny of government regulation of speech is required).

\textsuperscript{133} \textit{See, e.g., Alan E. Brownstein, Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution}, 51 OHIO ST. L. J. 89, 114 (1990) ("The core meaning of the constitutional right to speak is instrumental ... "); Greenawalt, \textit{supra} note 132, at 130 ("During most of the twentieth century, consequentialist arguments have dominated the discussion of freedom of speech ... "); Stanley Ingber, \textit{The Marketplace of Ideas: A Legitimizing Myth}, 1984 DUKE L.J. 1, 4 ("\cite{Courts} that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit.").

\textsuperscript{134} \textit{See, e.g., Greenawalt, supra} note 132, at 125-27 (arguing that the free speech guarantee is best explained by reference to "a plurality of values"); Board of Educ. v. Grumet, 114 S. Ct. 2481, 2498-99 (1994) ("It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. ... But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. ... [The different tests] simply reflect the necessary recognition that the interests relevant to the Free Speech clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context.").
One common justification for a regime of free speech is that it results in a marketplace of ideas in which truth is most likely to emerge.\textsuperscript{136} Even for those skeptical of the existence, or possibility, of identifying objective truths,\textsuperscript{137} the marketplace ideal may be the best practical model from which socially constructed truths may emerge.\textsuperscript{138} This may be so despite defects in people's abilities to communicate, assess, or understand what is "true."\textsuperscript{139} Even apart from the perceived truth of the speech, other values that freedom of speech may serve include promoting social stability by providing a public outlet for numerous competing points of view\textsuperscript{140} and promoting tolerance of differing points of view.\textsuperscript{141}

\textsuperscript{135}: For example, the justification that a regime of free speech promotes truth discovery relates as well to the justifications that it aids the proper functioning of democracy by creating an active and informed citizenry, and that it promotes individual autonomy, understanding, and rationality. See infra text accompanying notes 136-139.

136. Whitney v. California, 274 U.S. 357, 375 (1927) ("Those who won our independence...believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."); see New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). See generally John S. Mill, On Liberty (1859) (articulating the "search for truth" rationale for prohibiting government suppression of speech).

137. See Ingle, supra note 133, at 25 ("[A]lmost no one believes in objective truth today.").

138. See Kathleen M. Sullivan, Resurrecting Free Speech, 63 Fordham L. Rev. 971, 986 (1995) ("[E]ven if we were as socially constructed as the new speech critics say, and even if the sources of our social construction were readily identifiable, it simply does not follow that speech regulation by the government will reconstruct us in a better way.").

139. Greenawalt, supra note 132, at 135 ("The critical question is not how well truth will advance absolutely in conditions of freedom but how well it will advance in conditions of freedom as compared with some alternative set of conditions.").

140. See, e.g., Thomas I. Emerson, The System of Freedom of Expression 7 (1970) ([F]reedom of expression is a method of achieving a more adaptable and hence a more stable community...[T]he process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process...Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society"); Greenawalt, supra note 132, at 142 ("Though liberty of speech can often be divisive, it can, by forestalling the frustration caused when people believe they have been denied the opportunity to present their interests in the political process, also contribute to a needed degree of social stability.").

141. See Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 10 (1986) ("The free speech principle involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose
Free speech, it is also argued, promotes the system of liberal democracy, both by exposing abuses of political power and by enabling citizens to engage in the reflective self-governance that democracy is supposed to represent. Although under this view the scope of the right could be limited to speech that involves political action, adding the value of individual self-understanding and fulfillment expands its scope beyond protection only of speech that furthers collective self-government.

of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."


143. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) (“When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion . . . which is relevant to that issue, just so far the result may be ill-considered. It is that mutilation of the thinking process of the community against which the First Amendment . . . is directed.”).

144. See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 27-28 (1971) (“[T]he protection of the first amendment . . . must be cut off when it reaches the outer limits of political speech. . . . The notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives.”).

145. See, e.g., Greenawalt, supra note 132, at 144-45 (“[I]n addition to promoting independent judgment and considerate decision[,] the practice of free speech enhances the lives of those who seek to communicate in various other ways. For the speaker, communication is a crucial way to relate to others; it is also an indispensable outlet for emotional feelings and a vital aspect of the development of one’s personality and ideas. The willingness of others to listen to what one has to say generates self-respect. Limits on what people can say curtail all these benefits. If the government declares out of bounds social opinions that a person firmly holds or wishes to explore, he is likely to suffer frustration and affront to his sense of dignity.” (footnote omitted)); David A.J. Richards, A Theory of Free Speech, 34 UCLA L. REV. 1837, 1896 (1987) (“The priority of free speech is . . . coextensive with . . . the communicative independence of willing speakers and audiences when they are exercising the critical moral powers of the inalienable right to conscience; that is, they are engaged in sincere discussion of the facts and values central to the exercise of our moral powers of rationality and reasonableness.”).

146. See, e.g., EMERSON, supra note 140, at 7 (“[T]he principle of freedom of expression] carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all of the areas of human learning and knowledge.”); Martin H. Redish, The Value of Free Speech, 130 U. PA. L. REV. 591, 604 (1982) (“[D]emocracy is merely a means to—or, in another sense, a logical outgrowth of—the much broader value of individual self-realization . . . . Free speech aids all life-affecting decisionmaking, no matter how personally
Although this individual value is a factor in the Court's analysis, protection of speech because of its potential to contribute to political discussion remains primary. The Court's core distinction between content-based and content-neutral government regulations hinges on the public value of speech. Content-based regulations are "presumptively invalid" because they constitute "government censorship" that "may effectively drive certain ideas or viewpoints from the marketplace." This public focus is also evident in the few narrow categories of speech that the Court has identified as exceptions to the general rule that the government may not regulate speech because of its content. Crucial to the Court's line drawing has been the determination that the isolated categories of speech constitute "no essential part of any exposition of ideas" and are "of such slight social value" that other societal interests outweigh those of the speaker. Content-neutral regulations are less troublesome to the Court. Therefore, they are subject to less exacting judicial scrutiny, since they

147. See Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("To 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.").

148. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Core political speech occupies the highest, most protected position in the constitutional hierarchy.").

149. See Mosley, 408 U.S. at 95 ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

150. R.A.V., 505 U.S. at 382.

151. Mosley, 408 U.S. at 97.

152. R.A.V., 505 U.S. at 387.

153. See, e.g., Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) ("There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, see, e.g., Miller v. California, 413 U.S. 15 (1973), defamation, see, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), incitement, see, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969), or situations presenting some grave and imminent danger the government has the power to prevent, see, e.g., Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931)."), Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or 'fighting' words ...." (footnote omitted)).

exist for some reason other than their speech content, which constitutionally renders their effect on public debate less pernicious.

In drawing the various lines used in its free speech analysis, the Court has used the language of equality. "There is," the Court has said, "an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." Despite this apparent centrality of equality in free speech analysis, the Court's recognition of the degree to which equality concerns should influence First Amendment doctrine remains unduly limited. The Court's subsequent free speech jurisprudence confirms its first articulation—that the equality important under the First Amendment is formal equal government treatment. Except in the limited circumstances of the established low-value categories, the Court has been un receptive to claims that conflicting liberties of different citizens justify government regulation.

The Court's overly restrictive view of the extent to which the equality value should influence First Amendment analysis is particularly evident in its invalidation—on free speech grounds—of efforts by government to equalize the abilities of various speakers to communicate their points of view, specifically by attempting to limit the distorting effect that concentrated wealth has on public debate.

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155. Mosley, 408 U.S. at 96 (footnote omitted).
157. Even where the government does not distinguish on the basis of content, equality of opportunity to speak can be a concern if a seemingly content-neutral speech restriction has the effect of abridging certain types of speech disproportionately. See, e.g., Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) ("Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus, ... laws like [the ordinance at issue which prohibited the use of sound amplification equipment on public streets] can give an overpowering influence to views of owners of legally favored instruments of communication. ... There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. ... [T]ransmission of ideas through public speaking is ... [thus] essential to the sound thinking of a fully informed citizenry."); Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 81-86 (1987) (arguing that content-neutral analysis should include the factor of disproportionate impact); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991) (arguing that cases of disproportionate impact should be analyzed under the rigorous scrutiny applied to content-based speech restrictions).
158. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978) (invalidating a state criminal law prohibiting certain expenditures by banks and corporations...
According to the Court, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources ...'" 159 Under the Court's view of the meaning of equality, it is most important for the government to preserve equal opportunity for everyone to speak, regardless of their actual abilities to do so. Where a government restriction is at issue, the Court's focus is on the loss of the speech burdened rather than on the potential social value of the speech enhanced and preserved. 160

This same formal view of equality is apparent in the Court's evaluation of "hate speech" restrictions. In R.A.V. v. City of St. Paul, the Court further extended the formal treatment requirement, holding that even within the proscribable category of "fighting words," government cannot "impose special prohibitions on those speakers who express views on disfavored subjects." 161 Such government to influence the vote on referendum proposals); Buckley v. Valeo, 424 U.S. 1, 58 (1976) (striking down political campaign expenditure limitations).

159. Buckley, 424 U.S. at 48-49.

160. Contrary to the Court's reasoning, government efforts to equalize the speech opportunities of all citizens would further the values that underpin the free speech right. First, the marketplace of ideas, in order to be a constitutional ideal, must mean something other than a competition of ideas that operates under the same rules as the economic marketplace. Its point as a metaphor must be that the largest possible range of ideas are offered for sale, not that ideas with relatively small consumption or those offered by inefficient means are forced to leave the market entirely. Under this view, it is a proper government role to preserve the "shelf space" of less richly supported ideas against those supported by concentrations of wealth garnered in the economic sphere that would otherwise squeeze them out.

Allowing concentrations of wealth and power to dominate political debate disserves the stability-creating function of the free speech guarantee because the frustration of less powerful speakers will mount due to the perception that their views are being drowned out. A regime that encourages presentation of a greater range of views also serves the goal of promoting tolerance more than when fewer, well-financed views can dominate. The same is true of the self-governance and checking values of free expression, since more views are more likely to lead to reflection about the goals and purposes of democracy and critical evaluation of those in power. Finally, ensured presentation of all points of view aids individual autonomy and self-understanding by presenting a greater range of ideas, particularly values not well-represented in the economic sphere. For all of these reasons, government efforts to lessen the power of accumulated capital on the exchange of ideas should be compatible with the free speech guarantee, not in violation of it.

selectivity, according to the Court, poses the “danger of censorship” and is therefore antithetical to the Constitution.\textsuperscript{162}

Regardless of the propriety of the particular result, the Court’s emphasis on formal equal treatment as the equality value that underpins the First Amendment insufficiently recognizes the extent to which substantive equality concerns should influence the analysis as well. Proponents of hate speech restrictions agree that equality is a central First Amendment value, but disagree with the Court’s traditional interpretation of that value. Equality, they argue, is not always best achieved by limiting government regulation of speech. Instead, speech such as hate speech effectively silences the speech of others, who presumptively have an equal right to speak.\textsuperscript{163} To those who would restrict certain types of racist or sexist speech, the equality value provides the crucial counterweight to the usually assumed value of unrestricted free speech.\textsuperscript{164} Therefore, government regulation may enhance equality by suppressing some speech and thereby allowing all to contribute to public debate. In certain circumstances, the social value gained from the preservation of less powerful voices in public debate will outweigh the social dangers of speech restrictions. The Court should be open to the many different meanings of equality and should evaluate in each circumstance what type of equality should define the scope of the free speech guarantee.

In sum, the equality that is central to the First Amendment is in need of some redefinition. Certainly, equality of government treatment is an important safeguard against state-imposed censorship that inhibits the value of robust public dialogue. Sometimes, however, the requirement of formal equal treatment will not best achieve that goal. Instead, equality concerns, which also stem from the Constitution,

\textsuperscript{162. Id. at 395.}
\textsuperscript{163. See, e.g., Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 468 (“[Racist speech] decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets.”); Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 B.U. L. Rev. 793, 801 (1991) (“Pornography makes men hostile and aggressive toward women, and it makes women silent.”).}
\textsuperscript{164. MacKinnon, supra note 163, at 806 (“The First Amendment frame on the issue, taken as exclusive, sees what is said but not what is done [by pornography]. When the traditions of defamation and discrimination confront each other, the First Amendment questions how equality can exist without free expression, and the Fourteenth Amendment questions how expression (or anything else) can ever be free without equality.”).}
must temper the absolute rule to lead to the most equitable balance of individual rights and social good.

C. The Social Value of Nonviolent Political Protest

Nonviolent political protest, addressing as it does "issues of public concern [that] occupy[y] the 'highest rung of the hierarchy of First Amendment values,'" ordinarily is entitled to First Amendment protection. When such speech activities block access to property, or constitute independent acts of lawbreaking, such as trespass, the Constitution no longer shields them from government regulation. Although a court should look particularly carefully to determine that a government regulation appropriately draws the line between protected and unprotected protest activities, this determination will constitute the extent of its review. That is, under the Constitution, government actors need not consider the social value of otherwise prohibitable nonviolent protest activities in crafting legal restrictions of such conduct.

Despite this constitutional rule, a certain range of presumptively proscribable protest activities do indeed have social value. Consistent with many definitions of socially valuable civil disobedience, potentially valuable protest activities are...

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167. See, e.g., Ledewitz, supra note 53, at 68 (noting that civil disobedience is "not understood as protected by the First Amendment").
168. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 105 (1985) ("Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community."); Ledewitz, supra note 53, at 68 ("[C]ivil disobedience nevertheless has become an established part of American political life.").
169. An important distinction exists between direct and indirect civil disobedience. Direct civil disobedience occurs when individuals violate laws that their consciences forbid them to obey. Indirect civil disobedience occurs when individuals violate laws that they believe to be wrong, even though the laws do not directly require or prohibit actions of individuals that conflict with their moral beliefs. Abortion protests involve indirect civil disobedience, and so references in this Article will be to this type only.
170. In this discussion, "nonviolent political-protest activities" refers to conduct that is proscribable because of its affect on the rights of others, such as blocking access to facilities, or because it violates preexisting laws, such as laws against trespass. The latter constitutes civil disobedience or deliberate lawbreaking, whereas the former may or may not constitute civil disobedience depending upon whether a preexisting law proscribed such conduct. Despite this potential difference, both types of conduct involve deliberately infringing upon the legal rights of others for the purpose of making a political statement.
nonviolent,\textsuperscript{171} openly conducted,\textsuperscript{172} motivated by disagreement with the law as morally unjust,\textsuperscript{173} and engaged in for the purpose of advertising the law's injustice in order to change it.\textsuperscript{174} 

For this reason, observations about the social value and negative social consequences of civil disobedience apply to both types of conduct referred to in this discussion as "nonviolent political-protest activities."


\textsuperscript{172} See, e.g., COHEN, supra note 171, at 39 ("Civil disobedience is an act of protest . . . publically performed."); RAWLS, supra note 171, at 366 ("[C]ivil disobedience is a public act."); van den Haag, supra note 171, at 27 ("[C]ivil disobedience [occurs] when a law is deliberately disobeyed to publicly demonstrate opposition . . . to laws or policies of the government."); Frank M. Johnson, Civil Disobedience and the Law, 44 Tul. L. Rev. 1, 6 (1969) (stating that civil disobedience is "an open, intentional violation of a law"); Morris Keeton, The Morality of Civil Disobedience, 43 Tex. L. Rev. 507, 508 (1965) ("[T]he act of civil disobedience [is] . . . an act of deliberate and open violation of law . . ."); Ledewitz, supra note 53, at 71 ("[T]he conduct must be open."); Martha Minow, Breaking the Law: Lawyers and Clients Struggle for Social Change, 52 U. Pitt. L. Rev. 723, 733 n.38 (1991) ("Civil disobedience . . . is . . . undertaken in a public way."); Sanford J. Rosen, Civil Disobedience and Other Such Technicalities: Lawmaking Through Law Breaking, 37 Geo. Wash. L. Rev. 435, 442 (1969) ("Civil disobedience may be defined as open."); Katz, supra note 171, at 905 (stating that civil disobedience is "a form of . . . public . . . protest"). But see Michael J. Perry, Morality, Politics, and Law 118 (1988) ("The position that disobedience must be open or public to be legitimate is also untenable.").

\textsuperscript{173} See, e.g., COHEN, supra note 171, at 39 ("Civil disobedience is . . . conscientiously . . . performed."); RAWLS, supra note 171, at 364 (explaining that civil disobedience is "a . . . conscientious . . . act"); van den Haag, supra note 171, at 27 ("[C]ivil disobedience [occurs] when a law is deliberately disobeyed to publicly demonstrate opposition, on moral grounds, to laws or policies of the government."); Johnson, supra note 172, at 6 (stating that civil disobedience occurs "under a banner of morality or justice"); Keeton, supra note 172, at 508 ("[T]he act of civil disobedience [is] . . . to protest a wrong"); Levitin, supra note 171, at 1225 n.15 (suggesting that civil disobedience is "is . . . noncompliance with laws believed to be unjust"); Rosen, supra note 172, at 442 ("Civil disobedience . . . normally is accompanied by the actors' sense of moral indignation and duty."); Katz, supra note 171, at 905 (stating that civil disobedience is "a form of conscientious . . . protest against a law or policy that the actor considers unjust").

\textsuperscript{174} See, e.g., RAWLS, supra note 171, at 364 (stating that civil disobedience is a "political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government"); HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY 119 (1968)
A great part of the perceived value of nonviolent political protest comes from retrospective recognition of the salutary legal changes such activities helped to effect.\textsuperscript{175} In the United States, nonviolent political protest began before the American Revolution with protests by individual dissenters to perceived violations of the principle of religious liberty.\textsuperscript{176} Later, in 1846, Henry David Thoreau spent a night in jail for refusing to pay the Massachusetts poll tax.\textsuperscript{177} Soon after that, nonviolent protest activities by abolitionists opposed to slavery in general, and specifically to laws that required nonslaveowners to facilitate the apprehension of fugitive slaves,\textsuperscript{178} became widespread.\textsuperscript{179} In 1873, Susan B. Anthony was convicted of illegally voting, an act she and a number of other women undertook pursuant to a conviction (asserting that civil disobedience is "the deliberate, discriminate violation of law for a vital social purpose"); van den Haag, supra note 171, at 27 ("Selective resistance to law enforcement ... constitutes civil disobedience, when a law is deliberately disobeyed to publicly demonstrate opposition ... to laws or policies of the government."); Keeton, supra note 172, at 508 ("[T]he act of civil disobedience is ... an act of deliberate and open violation of law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in the society."); Ledewitz, supra note 53, at 71 ("[T]he protestor must intend that the community take notice of the illegal action."); Levitin, supra note 171, at 1225 n.15 (explaining that civil disobedience is "usually defined as peaceful, noncompliance with laws believed to be unjust in an effort to change them"); Rosen, supra note 172, at 442 ("Civil disobedience ... is politically motivated.").

\textsuperscript{175} It is not possible to demonstrate a direct link between civil disobedience and legal change. See, e.g., Ledewitz, supra note 53, at 84 ("No one can show that civil disobedience actually hastened the end of segregation, helped win women the vote, or helped bring an end to the Vietnam War."). It is possible, however, to say that positions advocated and publicized by civil disobedients have come to be accepted as correct interpretations of justice worthy of being embodied in law. See, e.g., U.S. CONST. amends. XIII, XIV, XV (abolishing slavery and granting African-Americans full rights of citizenship); id. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); see also Dworkin, supra note 168, at 105 ("Few Americans now either deplore or regret the civil rights and antiwar movements of the 1960s.").

\textsuperscript{176} See, e.g., CIVIL DISOBEDIENCE IN AMERICA, supra note 171, at 20 ("American civil disobedience begins ... with resistance to specifically religious persecution or harassment ... ").


\textsuperscript{178} The Fugitive Slave Law of 1850, Act of Sept. 18, 1850, ch. 60, § 5, 9 Stat. 462 (repealed 1864), "commanded [all good citizens] to aid and assist in the prompt and efficient execution of that law, whenever their services may be required.

that the current judicial interpretation of the Fourteenth Amendment was wrong and that the constitutional provision, in fact, authorized them to vote. More recently, nonviolent protest was the bulwark of the civil rights movement, with individuals sitting in at lunch counters, taking freedom rides, and otherwise trespassing and breaking laws they claimed unjustly enforced racial segregation. Those protesting the United States' arguably illegal involvement in the Vietnam War also used nonviolent protest extensively.

These historical circumstances suggest that nonviolent political protest has been a crucial tool for politically less powerful minorities to bring their views of justice to the consciousness of the majority who has the power to make the law. The social value of nonviolent political protest is thus akin to the social value of free speech. Its value is the primarily instrumental one of promoting full and robust political dialogue. It is this communicative aspect that makes

180. See CIVIL DISOBEDIENCE IN AMERICA, supra note 171, at 184-85.
181. See, e.g., Lippman, supra note 179, at 328-41 (chronicling the civil disobedience of the civil rights movement and the judicial response).
182. See, e.g., United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (holding that the First Amendment free speech guarantee does not immunize a draft card burner from criminal prosecution).
183. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) ("Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.").
184. See, e.g., RAWLS, supra note 171, at 366 ("One may compare [civil disobedience] to public speech, and being a form of address, an expression of profound and conscientious political conviction . . . ."); Ledewitz, supra note 53, at 122-23 ("Civil disobedience illustrates depth of commitment by the minority—a factor the majority should wish to consider in setting policy. Civil disobedience grabs the attention of the majority, thus promoting debate and lessening public apathy. Because of these communicative aspects, civil disobedience should be viewed as speech."); David F. Freeman, Note, Press Passes and Trespasses: Newsgathering on Private Property, 84 COLUM. L. REV. 1298, 1342 (1984) ("Civil disobedience is a particularly powerful form of symbolic speech.").
185. See, e.g., Blasi, supra note 142, at 640 ("The kind of stimulus necessary to activate the political conscience of a privately oriented populace sometimes can be created only by transcending rationality and appealing to more primitive, more basic instincts."); Shelton L. Leader, Free Speech and the Advocacy of Illegal Action in Law and Political Theory, 82 COLUM. L. REV 412, 420-25 (1982) (arguing that civil disobedience has an educative function in a political system rooted in a social contract because society may learn of a breach only by resistance to questionable laws); David A.J. Richards, Rights, Resistance, and the Demands of Self-Respect, 32 EMORY L.J. 405, 433 (1983) ("[T]he arguments of civil disobedience often . . . motivate constitutional elaboration of values . . . ."); Karl S. Coplan, Note, Rethinking Selective Enforcement in the First Amendment Context, 84 COLUM. L. REV. 144, 171 (1984) ("The communication of one's refusal to comply with a law fits within the framework of preferred political expression. Civil
nonviolent political protest valuable and distinguishes it from any other presumptively proscribable conduct.\textsuperscript{186}

The analogy between the social values of free speech and presumptively proscribable political-protest activities raises the question of whether the legal system should treat such acts differently from otherwise similar conduct.\textsuperscript{187} Although some argue that those who deliberately violate the rights of others or break the law to make a political statement deserve no punishment for their lawbreaking,\textsuperscript{188} this position stands in great tension to the structure of our constitutional democracy and the national commitment to the rule of law.\textsuperscript{189} That is,

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...
absent a constitutional prohibition, the majority is allowed to decide what the rules will be and whether to enforce them—in the interests of peace, order, and stability—against the minority of individuals who do not like the law but whose views did not prevail in the political process.\footnote{\textit{See, e.g., Rawls, supra note 171, at 363 ("The question of when civil disobedience is justified involves the nature and limits of majority rule.")}.} Allowing nonviolent political protesters to intrude upon the legal rights of others or to break preexisting laws with impunity would upset this majority privilege and undermine the democratic structure.\footnote{\textit{See, e.g., Civil Disobedience in America, supra note 171, at 21 ("Throughout much of our history . . . the advocates of civil disobedience have been accused of holding principles that lead straight to disorder, anarchy, or subversion . . .").}} For this reason, definitions of socially valuable civil disobedience often contain the requirement that the actors should accept the lawful punishment for their actions.\footnote{\textit{See, e.g., Rawls, supra note 171, at 367 ([Civil disobedience] expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct." (footnote omitted)); Ledewitz, supra note 53, at 71 ("[T]he protester must be willing to accept punishment."); Johnson, supra note 172, at 6 (arguing that a civil disobedient must be "willing to accept punishment for the violation"); Minow, supra note 172, at 733 n.38 (asserting that civil disobedience is usually defined to include "a willingness to accept official sanction"); Bauer & Eckerstrom, supra note 188, at 1189-94 (summarizing the reasons that have been advanced as to why willingness to accept punishment is a necessary element of civil disobedience).}} Where the protesters are willing to accept legal punishment for their actions, they can be said to be acting within, rather than outside of, the democratic structure.\footnote{\textit{See, e.g., Rawls, supra note 171, at 365-66 ("It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution. . .").}} Where their acts are intended to
persevere the majority that the judgments reached through the political process are wrong, the fact that punishment exists—and that the protesters are willing to accept it—becomes a powerful part of the expression that the civil disobedience represents. Their acts of protest, combined with the hardships they will suffer thereafter, illustrate to the majority the depth of their commitment, and thereby render their acts of protest a unique means of conveying their message.

Several threshold requirements significantly narrow the scope of political-protest activities entitled to respect as important additions to the democratic process. Activities carried out secretly do not have the expressive weight that comes from a willingness to accept the punishment that the democratic system has decreed. In addition, with public activities, it is important to distinguish between those genuinely intended to inform or persuade and those intended to change the law by other means, such as raising the economic cost of a societal commitment to the challenged activity, thereby changing the societal commitment for reasons other than the moral wisdom of the policy.

Truly expressive protest activities thus have social value that should impact legal judgments about those activities. Removing all punishment, however, would detract from the valuable expression that

194. See, e.g., id. at 367 (“We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.”).

195. See, e.g., Charles R. DiSalvo, Abortion and Consensus: The Futility of Speech, the Power of Disobedience, 48 WASH. & LEE L. REV. 219, 226 (1991) (“Civil disobedience can move people when argumentation and exhortation fail. But not all disobedience is so capable. Only civil disobedience that is characterized by sacrificial, redemptive, suffering [which includes willingly accepting punishment] is effective.”); Ledewitz, supra note 53, at 122-23 (“[The minority’s depth of commitment is] a factor the majority should wish to consider in setting policy. [Civil disobedience] grabs the attention of the majority, thus promoting debate and lessening public apathy.”).

196. See RAWLS, supra note 171, at 366 (“[Civil disobedience] is not covert or secretive.”).

197. Abortion protest activities specifically designed to overburden and incapacitate local law enforcement fall within this category. See, e.g., State Report-Vermont: Pro-Lifers “Clog Vermont Courts”, 1990 AM. POL. NETWORK ABORTION REP, May 8, 1990, available in Westlaw, ALLNEWS database, 5/8/90 APN-AB 6 (quoting Felicity Barringer of the New York Times describing the “plan of attack developed by Operation Rescue in Atlanta in 1988 and since expanded elsewhere: first block the clinics, then clog the courts”); Max Boot, Race Is On for Injunctions As Operation Rescue Starts Offensive Against Clinics, THE CHRISTIAN SCI. MONITOR, July 9, 1993, at 1 (quoting a pro-choice activist as saying, “There’s been a deliberate attempt by Operation Rescue to flood courts and overwhelm local law enforcement . . . .”).
such protest activities represent. Nevertheless, there are a number of ways for the legal system to consider and potentially recognize the social value of expressive political protest short of immunizing the activities entirely. The possible instances for such consideration include when defining offenses, establishing penalties, and evaluating the propriety of injunctive relief. Legislatures, executive officials, and judges routinely weigh the social value of the speech protected by the Constitution against the value of restricting that speech. The same balancing would be possible with acts of expressive political protest.

While the same type of evaluation is possible for governmentally imposed burdens on lawful free speech and expressive political protest, the content of the deliberations must differ fundamentally. A crucial difference between lawful free speech and otherwise proscribable protest is the social costs that the two activities exact. Although free speech may sometimes cause harm to some people, presumptively proscribable political-protest activities always carry with them the harms that come from invading the legal rights of others or disobeying preexisting law. Therefore, an initial hurdle in considering the value of political-protest activities in lawmaking must include overcoming these inherent negative consequences.

The social value of expressive political protest suggests that such activities should receive specially lenient lawmaking attention when the strong communicative function is served and the rights of others to communicate or to engage in other activities are not substantially adversely affected. That is, when the harms that flow from nonviolent political-protest activities are primarily the broadly diffused consequences that result from violation of law generally, the communicative value of the protest activities should result in special consideration and alteration of the presumptively applicable legal rules. When the protest activities result in more specific harms that impact the rights of particular individuals in the population, then its value as compared to the other rights lost must be carefully scrutinized and, at some point, such acts of protest should be treated like any other acts of lawbreaking.

198. See, e.g., CIVIL DISOBEDIENCE IN AMERICA, supra note 171, at 21 ("The advocates of civil disobedience have been accused of holding principles that lead straight to disorder, anarchy, or subversion, or at best to violations of law in support of less admirable causes than those of religious liberty, racial and sexual justice, and peace.").
III. RESOLUTION OF THE SCOPE OF THE RIGHTS IN THE CONTEXT OF PARTICULAR PROTEST ACTIVITIES

A. Isolating the Assumptions that Underlie the FACE Act and State-Court Injunctions against Abortion Protests

The crux of the dilemma with respect to regulating abortion clinic protests lies in the middle of two relatively undisputed extremes. At one extreme end of the range of abortion protest activities is violence directed at persons or property. Even most defenders of vigorous abortion protest agree that such actions may, consistent with the Constitution and respect for civil disobedience, be declared unlawful and punished. At the other end of the spectrum is nonviolent expressive conduct that does not block access to clinics or otherwise break the law, which is conceded by both sides of the abortion issue to be presumptively protected from government regulation.

Most of the FACE Act prohibitions fall within the first extreme. The FACE Act imposes its penalties and civil remedies upon

[w]hoever ... by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; ... or intentionally damages or destroys the property of a

199. The murders of abortion practitioners and the firebombing of abortion clinics are extreme examples within this extreme. See, e.g., S. Rep. No. 117, supra note 6, at 3-7 (detailing the violence directed against health care personnel and facilities).

200. See, e.g., Paulsen & McConnell, supra note 23, at 262 ("[N]o one is entitled to violate the rights of others by trespass, assault, violence, or threat of violence, merely because they are acting in pursuit of a cause that may be just."). But see S. Rep. No. 117, supra note 6, at 4 (quoting Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, May 6, 1992, at 170, and describing an Operation Rescue coordinator who testified that "there is a legitimate use of force on behalf of the unborn [as an ethical question]," including "destroy[ing] ... abortion facilities" and "terminate[ing] an abortionist").

201. See, e.g., 18 U.S.C. § 248(d)(1) (1994) ("Nothing in this section shall be construed ... to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution."). Injunctions establishing "buffer zones" around clinics restrict nonviolent expressive conduct, but only because of previous prohibitable conduct engaged in by the protesters. See, e.g., Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2527 (1994) ("The state court seems to have had few other options to protect access ... ").
facility, or attempts to do so, because such facility provides
reproductive health services.\footnote{202}{18 U.S.C. § 248(a)(1), (3) (1994).}
The prohibitions against the use of force or threat of force, and
intentional injury of a person or damage or destruction of facility
property, or attempts to do the same, are widely acknowledged not to
include presumptively protected protest activities.\footnote{203}{Paulsen & McConnell, supra note 23, at 267 ("We do not contend that the terms ‘force or threat of force,’ ‘injure,’ or ‘damage or destroy the property’ are vague or overbroad.").}

Moreover, in response to testimony on the proposed bills, the FACE Act defines “intimidate” as “plac[ing] a person in reasonable apprehension of bodily harm to him- or herself or to another.”\footnote{204}{18 U.S.C. § 248(e)(3) (1994).}

This definition locates the proscribed conduct in the concededly regulable range.\footnote{205}{See Paulsen & McConnell, supra note 23, at 271, 275 (criticizing the undefined use of the term “intimidate” because it “would unconstitutionally permit a violation to be based on the subjective reaction of abortion clinic patrons and personnel to anti-abortion speech” but acknowledging that “the state may punish actual assaults or physical interferences placing a person in reasonable apprehension of immediate bodily harm”).}

The remaining portion of the FACE Act that potentially falls
within the contested middle ground is that which prohibits
“interfer[ing] with any person” who seeks or has sought an abortion.


This definition addresses critics’ concerns that the term could prohibit mere speech without a physical obstruction.\footnote{207}{See, e.g., Paulsen & McConnell, supra note 23, at 275 (noting that a state had used a statute with language prohibiting “interfer[ence] with the lawful taking of wildlife by another person” to prosecute someone who spoke to duck hunters about the violence and cruelty of hunting).}

What the Act still prohibits, however, are nonviolent activities\footnote{208}{Arguably, any act of “physical obstruction” that “interferes with” people by “restrict[ing] their freedom of movement” contains some element of violence. The FACE Act, however, clearly indicates that it applies to “nonviolent physical obstruction.” 18 U.S.C. § 248(b)(2) (1994). Thus, “violent” conduct appears to refer to conduct that constitutes or threatens physical injury.} that have the effect of restricting the freedom of movement of health care providers or those seeking their services. These may be of several types. They may be activities already illegal under state law, in which case the FACE Act authorizes federal courts to grant injunctions and enhances the retrospective sanctions. They may also be acts not previously illegal but which have the effect of blocking
clinic access. In this case, the FACE Act provides a new ground for injunctive relief and retrospective punishment. Although not detailed in the FACE Act, examples of such nonviolent obstruction would include protesters locking themselves to clinic doors,\(^{209}\) parking cars so as to obstruct entrance to a clinic,\(^{210}\) and linking arms so as not to allow staff or patients to pass through.

State law supplements the FACE Act restrictions, potentially providing the basis for injunctions against a broader variety of protest activities than those prohibited by the FACE Act. To the extent that the activities involve violence or threatened violence against people or property, such injunctions reach concededly regulable conduct in the same way as the FACE Act prohibitions.\(^{211}\) These injunctions, however, may also apply to peaceful protest activities. They may apply to nonviolent lawbreaking, primarily trespass or harassment, whose illegality under generally applicable state laws justifies the injunction.\(^{212}\) They may also apply to acts that are not otherwise illegal, either because of previous violent activities engaged in by some of the abortion protesters or because previous protest activities had the effect of harassing abortion seekers\(^{213}\) or providers\(^{214}\) or blocking access to clinic facilities.\(^{215}\)

209. Kelly, supra note 48, at 429 n.3 (noting how the Lambs of Christ, a pro-life group, have gained notoriety for protest activities, including chaining their necks to clinic doors with kryptonite bike locks).


211. This is true even though the standard of review of legislation and an injunction would differ slightly. See Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524 (1994) ("We believe that these differences [between an injunction and a generally applicable ordinance] require a somewhat more stringent application of general First Amendment principles in the context of an injunction.").

212. Boot, supra note 197, at 1 ("Based on trespassing and harassment laws, a number of state judges have issued injunctions limiting Operation Rescue protests.").

213. See, e.g., Madsen, 114 S. Ct. at 2528 (upholding morning ban of "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds ... within earshot of the patients inside the [c]linic").

214. See, e.g., Matthew Bowers, Anti-Abortion Tactics Cut Availability Across U.S., THE VIRGINIAN-PILOT (Norfolk), Sept. 1, 1994, at B4 ("[At a Florida clinic] [p]rotesters followed one ... doctor['] 160 miles to his home. The children of other doctors have been followed to school. Someone called one doctor's 82-year-old mother and said he had died in a traffic accident, and two weeks later called him and similarly said his son had been injured.").

215. See, e.g., Madsen, 114 S. Ct. at 2527 ("We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic.").
Both the FACE Act and state-court injunctions against abortion protests evidence several threshold assumptions, which in turn raise several issues. The first issue is whether the law should distinguish and treat differently certain acts of nonviolent protest because of their social value. Resolution of this issue requires looking beyond the question of whether the Constitution requires such consideration to the broader question of whether, and in what circumstances, the social value of such protest activities should temper sanctions as a policy matter. The second issue is whether the Constitution forbids injunctions against “harassing” or “intimidating” conduct that does not necessarily result in or threaten physical injury. Resolution of this issue requires a determination of what constitutes injuring, prohibitable conduct as opposed to protected expression or valuable political protest.216

B. Nonviolent Protest Activities that Block Access to Abortion Facilities or Constitute Trespasses

Both the FACE Act and state-court injunctions render illegal nonviolent protest activities that block access to abortion clinics. State-law injunctions also prohibit nonviolent protest activities on other grounds, most frequently as trespass.217 Where a law prohibits conduct, rather than expression, and there are apparently valid nonspeech-related reasons for the restriction, the First Amendment will not privilege such conduct from regulation just because the actor

216. See Ledewitz, supra note 53, at 89-90 (“Undeniably, pro-life protests proceed through harassment. ‘Harassment’ is an appropriate term even for those, like myself, who sympathize with the tactics of these protests. The major tactic of such protests—legal or not—is to shame or disturb women seeking abortions so that they change their minds. Naturally, the resulting pain to pregnant women, including the women who go ahead with the abortion, is resented by pro-choice advocates.”); Paulsen & McConnell, supra note 23, at 263 (“Those who seek abortions have no constitutional right to be spared the indignity and distress of learning that many of their fellow citizens consider the act of abortion tantamount to murder.”).

217. See Allison v. City of Birmingham, 580 So. 2d 1377, 1381-82 (Ala. Crim. App. 1991) (citing numerous cases where abortion protesters were charged with criminal trespass and the courts rejected the necessity defense); Cecilia E. Cantrill et al., A Survey of Developments in Maryland Law, 1983-84, 44 Md. L. Rev. 439, 449 n.71 (same); Davis & Davis, supra note 188, at 955-56 (arguing that “the activities of Operation Rescue make evident the need to qualify the legitimate rights protected by criminal trespass statutes”); Levin, supra note 188, at 515 (noting that “[a]bortion clinic trespass is used as another weapon in the anti-abortionists’ fight to end legal abortions” and analyzing the necessity defense to such charges).
intended to express an idea. \textsuperscript{218} Restricting protest activities to ensure clinic access comports with the Constitution, \textsuperscript{219} as does enforcement of laws against trespass. \textsuperscript{220}

Although the constitutional balance authorizes legislators and judges to prohibit acts of nonviolent abortion protest that block access to abortion facilities or that constitute trespasses, the fact remains that such activities may constitute nonviolent protest that has recognized social value. This apparent contradiction raises the question of whether and how the social value of such activities should enter into legal judgments even apart from a constitutional mandate that such value be considered. This question is particularly acute because injunctions issued pursuant to the FACE Act or any state law and the FACE Act retrospective penalties will usually impose greater burdens on such activities than state-law retrospective sanctions. These additional burdens that the FACE Act and state-law injunctions impose on such nonviolent protest activities raise several subissues within the general question of how the law should treat them. First, should abortion protests, or at least certain types of abortion protest activities, be less susceptible to injunction because of their social value? Second, should the fact that certain abortion protest activities

\textsuperscript{218} See United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that a conduct regulation that incidentally prohibits symbolic speech is valid "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

\textsuperscript{219} See Madsen, 114 S. Ct. at 2527 (upholding a 36-foot buffer zone as "a means of protecting unfettered ingress to and egress from the clinic"); United States v. Brock, 863 F. Supp. 851, 858 (E.D. Wis. 1994) ("When a message is conveyed through an activity that 'bears no necessary relationship to the freedom to... distribute information or opinion,' the government may proscribe that activity notwithstanding the impact on the message.... Thus, courts have generally held that messages delivered via physical obstruction, like messages delivered through the use or threat of force, are not protected under the First Amendment." (citations omitted)).

\textsuperscript{220} See Armes v. City of Philadelphia, 7 6 F. Supp. 1156, 1165 n.7 (E.D. Pa. 1989) (citing cases where courts rejected abortion protesters' claimed right to trespass), aff'd sub nom. Armes v. Doe, 897 F.2d 520 (3d Cir. 1990); Antonio J. Califa, \textit{RICO Threatens Civil Liberties}, 43 VAND. L. REV. 805, 839 (1990) ("The right to exclude others is a fundamental element of private property ownership, and the first amendment does not create a right to trespass on private property." (citing Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972))); Ledewitz, \textit{supra} note 53, at 67-68 ("Civil disobedience... is expressive conduct even the participants admit is not protected by the First Amendment. The classic example of civil disobedience—a sit-in—is conduct the government has traditionally prohibited." (footnote omitted)).
constitute potentially valuable protest render unwise the imposition of enhanced retrospective sanctions? This section will address these questions in turn.

1. The Propriety of Injunctive Relief

Because both injunctive relief and legislation providing for retrospective sanctions deter nonviolent protest by attaching a cost to the activities, both will potentially result in the loss of socially valuable protest activities. Nevertheless, injunctions are likely to result in a greater loss of protest activities because they are more likely to stop nonviolent protest than is the threatened imposition of generally applicable retroactive sanctions. This is so because the sanctions for violating an injunction are likely to be more swift, sure, and severe than those for ordinary nonviolent lawbreaking. If the injunction effectively stops the protest activities, then the protesters’ expression occurs only in the context of the injunction hearing. By contrast, absent an injunction, protesters are more likely to decide to accept the normally low punishment for nonviolent lawbreaking, garnering significantly more media and public attention from the

221. Of course, it is not at all clear that an injunction will have its intended effect. See, e.g., “Bambi” Fugitive Seized, ST. PETERSBURG TIMES, Oct. 18, 1990, at 7A (“Leaders of the anti-abortion group Operation Rescue burned a court order on the steps of the U.S. Courthouse . . . accusing the judge who signed it of violating their constitutional rights.”); Efrain Hernandez, Jr., 16 Abortion Protesters Arrested in Brookline, THE BOSTON GLOBE, Sept. 9, 1992, at 47 (“[A] spokeswoman for Operation Rescue in Boston said members of the group will continue nonviolent protest to prevent abortions, including actions that violate [an] injunction.”).

222. Contempt proceedings usually involve fewer issues than criminal trials and so happen more quickly after the lawbreaking and take less time to complete.

223. Once an injunction has been properly issued, the guilt issue in many jurisdictions is whether the protesters violated its terms, not its propriety as an initial matter. See Walker v. City of Birmingham, 388 U.S. 307, 318-21 (1967) (holding valid a state-law rule that the unconstitutionality of a court order is no defense in a contempt proceeding). But see In re Berry, 436 P.2d 273, 282 (Cal. 1968) (rejecting argument that petitioners may not raise constitutional objections to the court’s order because the California rule is that “an order void upon its face cannot support a contempt judgment”).

224. Contempt sanctions are usually more severe than the penalties for nonviolent lawbreaking, and because of the personal nature of an injunction, both with respect to those enjoined and the issuing judge, imposition of the penalty is more likely. See Ledewitz, supra note 53, at 100-09 (detailing a number of differences between an injunction and a crime).

225. See, e.g., Pat Schneider, Panel Debates Limits on Abortion Clinic Protests, THE CAPITAL TIMES, June 25, 1994, at 3A (quoting Dr. Dennis Christensen, medical director of the Madison Abortion Clinic, as saying, “What the [clinic] demonstrations are really about
act of lawbreaking and the subsequent trial than they would from an injunction hearing alone.\textsuperscript{227}

These additional burdens that injunctions impose on protest activities require going beyond the question of whether the Constitution allows them to be restricted at all,\textsuperscript{228} to the question of whether, as a matter of social policy, some types of restrictions are more appropriate than others. As detailed earlier, nonviolent abortion protest is socially valuable to the extent that it constitutes political expression intended to persuade the public majority that its judgments about abortion are morally wrong.\textsuperscript{229} This qualification significantly narrows the scope of abortion protest activities entitled to special consideration in making or applying the law.

Many of the abortion protest tactics are acknowledged by the participants not to be intended as persuasive, but rather to halt abortions by other means.\textsuperscript{230} Most violent activities, like killings, physical violence, arson, bombings, and other acts of property destruction fall within this category.\textsuperscript{231} Their purpose is to physically

\begin{itemize}
\item is garnering media attention and contributions," and \"(t)hey go where they get the most attention\" and that he hopes \"that federal jurisdiction will help \"shut down the traveling road show.\"\textsuperscript{226}
\item Lawbreaking usually involves significantly more contact with the general public than courtroom hearings.
\item Because pre-trial injunction hearings are usually less thorough than criminal trials, injunctions lessen protesters' opportunities for expression of their views in the courtroom. See, e.g., Ledewitz, supra note 53, at 117 (\"The political theater of the courtroom is an important aspect of civil disobedience itself.\"); Carol Mc
graw, \textit{Abortion Protest Cases May Swamp Courts}, L.A. Times, Oct. 3, 1989, §2, at 1 (\"Members of [Operation Rescue] ... have found that they can effectively use the courts as a pulpit for their cause. In short, they demand trials.\"").
\item Abortion protesters subject to injunctions have challenged them on numerous specific grounds. Many relate to the terms of particular injunctions. The Supreme Court recently rejected a more all-encompassing ground that injunctions against abortion protesters constitute unconstitutional viewpoint discrimination. See Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524 (1994) (\"That petitioners [subject to the challenged injunction] all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order.\")
\item See supra notes 165-198 and accompanying text.
\item See, e.g., S. Rep. No. 117, supra note 6, at 11 (detailing how the avowed purpose of much antiabortion protest is to eliminate access to abortion services, and quoting the field director of Operation Rescue National as declaring, \"We may not get laws changed or be able to change people's minds, *** [b]ut if there is no one willing to conduct abortions, there are no abortions.\")
\item See, e.g., \textit{Rawls}, supra note 171, at 366 (\"To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.\"). Even if
stop access to abortion, not to convince people through reasoned argument or even emotional appeals that abortion is a morally wrong choice. The same is true of much of the nonviolent abortion protest activities. Although the actual motives are undoubtedly mixed, many of the “rescue” tactics appear primarily functional rather than persuasive. They are designed to close down abortion facilities by force, not by changing public opinions. This may or may not be a wise tactical judgment, given the apparent lack of effect of persuasive strategies on public opinion. But even wise tactics to achieve an

they are intended as expression, the high social costs of the conduct justify regulation. See, e.g., Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426 (S.D. Cal. 1994) (“The Court rejects as insupportable any suggestion that shootings, arson, death threats, vandalism, or other violent and destructive acts addressed by FACE are protected by the first amendment merely because those engaged in such conduct “intend[] thereby to express an idea.”” (quoting Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993) (quoting United States v. O’Brien, 391 U.S. 367, 376 (1968))))).

232. See, e.g., S. Rep. No. 117, supra note 6, at 11 (“The express purpose of the violent and threatening activity described [in this report] is to deny women access to safe and legal abortion services. Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors.”).

233. See, e.g., Arlene D. Boxerman, The Use of the Necessity Defense by Abortion Clinic Protesters, 81 J. CRIM. L. & CRIMINOLOGY 677, 696 (1990) (“Opposition to government’s current abortion policy lies at the root of virtually all abortion clinic demonstrations, even those demonstrations conducted by individuals who claim to have only non-political goals. . . . Unlike most political protesters, however, abortion-clinic trespassers do have an immediately realizable, non-political goal as well: they seek to prevent individual abortions, which they view as murders.”); Davis & Davis, supra note 188, at 1010 (noting that Operation Rescue’s goals are to stop individual abortions and to change public opinion).

234. See Davis & Davis, supra note 188, at 1010 (stating that Operation Rescue’s founder Randall Terry “indicates the short-term goal of Operation Rescue as stopping as many abortions as a direct result of the ‘rescues’ as possible, and the long-term goal as being a constitutional amendment prohibiting abortion” (citing THE NEW AM., Nov. 7, 1988, at 20)).

235. While “rescuers” may “hope . . . to dissuade women from seeking a clinic’s abortion services and . . . to impress upon members of society the moral righteousness and intensity of their anti-abortion views,” NOW v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), aff’d, 914 F.2d 5821 (4th Cir. 1990), rev’d in part sub nom. Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993), their blockade tactics constitute “a final expression of [their] case” and are therefore not respectfully expressive, see RAWLS, supra note 171, at 366; see also DiSalvo, supra note 195, at 225 (“Operation Rescue’s failure to recognize the existence of pro-choice moral claims is to treat the opponent without respect, as alien to the debate, as ‘other.’ By contrast, recognizing the existence of others’ claims (as distinct from recognizing their validity) would cause the public to view Operation Rescue as a reasonable endeavor and to listen more attentively and sympathetically to its claims.”).
extralegal aim are not entitled to special consideration in a constitutional democracy. Only to the extent that activities are genuinely expressive do they have social value that serves as a counterweight to the presumptively antisocial effect of lawbreaking.

Where acts of protest are genuinely expressive according to the conditions described above, their loss should be a factor in deciding whether injunctions against them are appropriate. This would be a change for courts that currently draw a stark line between expression protected by the First Amendment and lawbreaking that is not. That is, where the conduct at issue is an act of political protest designed to engage the public in debate, courts should not issue injunctions as readily as they would for any other type of threatened unlawful conduct. Instead, there should be a middle ground whereby courts weigh the expressive value of nonviolent lawbreaking in deciding if the injunction is warranted.

Another factor in the injunction balancing test, however, must continue to be the effect of the lawbreaking on the rights of other individuals. Physical blockades or trespasses that burden access to abortion services obviously affect a woman's right to choose abortion. To determine the propriety of injunctive relief, it is thus necessary to evaluate the scope of the respect for genuine political protest against the scope of the right to choose abortion. It is in the

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236. See DiSalvo, supra note 195, at 223-32 (detailing the reasons for Operation Rescue's lack of persuasiveness and arguing that continued violent and obstructive conduct would be an unwise strategy).

237. See, e.g., NOW, 726 F. Supp. at 1497 (“[I]n the circumstances of the case, it is not improper to issue an injunction to ensure and protect the security of the premises of the abortion clinic.”).


239. The hardship on the party seeking the injunction is a factor in the court's balance.

240. See S. REP. No. 117, supra note 6, at 14 (“By making clinics inaccessible to patients and staff alike, blockades and invasions deprive people of needed health care services.”).
interest of a healthy democracy to accommodate both of these interests.

When these interests are viewed as liberties (or licenses) vindicating primarily individual interests, they appear to clash. It is only when they are viewed in light of their functional values in a representative democracy that the conflict lessens. A focus on the core values that underlie the constitutional right to choose abortion and the societal respect for some acts of nonviolent protest can reconcile them.

The social value that supports some degree of respect for nonviolent protest activities comes from the fact that potentially persuasive communication occurs between the individual protesters and the majority of citizens who have chosen the state of the law. The individual protesters presumptively had a say in the political process equal to all other citizens. Respect for protest activities recognizes the potential fallibility of a judgment reached even through the democratic process. To the extent that governmental actors modify the reach of the law because of the expressive nature of the lawbreaking, it enhances the opportunity of the dissenter to convince the majority that its policy judgments are misguided, thus effectively giving the protesters another opportunity to participate in public debate. Although this opportunity is undoubtedly of value to the individual speakers, the social value stems from the fact that the speakers augment, and potentially change, public dialogue and judgments about an important issue of social policy.

241. See Dworkin, supra note 86, at 266-71 (rejecting a concept of “liberty as license” meaning “the absence of constraints placed by government upon what a man might do if he wants to” and noting that “[i]n this . . . all embracing sense of liberty as license, liberty and equality are plainly in competition”).

242. See id. at 268 (“I should want to claim . . . that people have a right to equality in a much stronger sense [than a right to liberty as license to act as they please without government restraint], that they do not simply want equality but that they are entitled to it, and I would therefore not recognize the claim that some men and women want liberty as requiring any compromise in the efforts that I believe are necessary to give other men and women the equality to which they are entitled.”).

243. Abortion protesters primarily target the Supreme Court’s interpretation of the Constitution, which is arguably distinguishable from a democratic decision. This fact perhaps enhances their claim to engage in nonviolent protest. Nevertheless, the fact that the interpretation is of the Constitution, which has a democratic pedigree, and that the Justices, who engage in interpretation, were put into place by elected officials, diminishes the significance of the distinction.
This understanding of the social value of protest activities leads to a qualification within the group of expressive protest activities entitled to special legal consideration. Nonviolent abortion protest conduct falls into two general categories—activities like sit-ins, picketing, prayer vigils which are designed to communicate with the public generally, sidewalk counseling, and other one-on-one communications which are designed to dissuade particular individuals from seeking or performing abortion services. An examination of the nature of the values that underpin respect for nonviolent protest and the constitutional right to choose abortion reveals that only abortion protests aimed at the majority in general are entitled to special consideration in the injunction inquiry.

Because the social value that supports limited respect for nonviolent protest is that of dissenting individuals as held against the majority, allowing a protester to break the law or significantly intrude on individual rights for the purpose of communicating with specifically targeted individuals about their private choices in particular circumstances does not further this social value in the same way as a publicly directed communication about public policy. This holds true despite the fact that one-on-one communications may serve other important interests, for example, ensuring that individual decisions are fully informed.\textsuperscript{244} The question is not whether these results are valuable in the abstract, but whether the value added to constitutional democracy by the protest activities justifies to some extent overlooking their negative effects.

Abortion protest activities have both public and private effects. The deleterious effects to the public come from the social and economic costs of tolerating any deliberate lawbreaking. Their impact is spread among the individual members of society. The adverse private effects, by contrast, are heavily concentrated on the targeted individuals. They are not abstract, like a change in the social attitude about respect for law, but are concrete, and include monetary loss, psychological wear and tear, and possible physical injury. Even in the context of constitutionally protected expression, the Supreme Court has recognized such specific expressions as more subject to regulation.

\textsuperscript{244} Davis & Davis, \textit{supra} note 188, at 1023 (arguing that the benefits of clinic trespasses "derive from enabling Operation Rescue participants (or anyone else) to provide information detailing the pros and/or cons of abortion (or any practical health choice) to persons so that a decision can be made on a more fully informed basis").
because the communicators "do not seek to disseminate a message to the general public, but to intrude upon [a] targeted individual." To the extent that the protest activities constitute lawbreaking before an injunction, a societal judgment has been made that the costs of such activities are such that citizens as individuals are not required to bear those costs alone. That the affected individuals seek an injunction against the conduct evidences a specific judgment that they perceive the costs of the conduct to outweigh any benefits that they might receive.

Because the private value of even expressive protest activities is low and their private costs are so great, or at least so disproportionate to what other members of society are required to bear, a justification for considering the value of nonviolent protest activities in the injunction inquiry that relies on the value to private individuals fails. The justification for such consideration must depend upon their value to the public at large. As noted above, when the expression is directed at public policy, this value does indeed exist and inheres in the unique form of communication of expressive protest activities and the political discussion that they may engender. So, the range of protest activities potentially subject to special consideration in the injunction inquiry includes only that which is directed at the public at large and challenges public policy generally rather than directed at specific members of the public as a challenge to their individual private choices.

Even with the category of abortion protest activities entitled to special treatment in the injunction inquiry so narrowed, the question remains whether factoring the social value of such protest activities into the injunction inquiry is consistent with the constitutional right to choose abortion. The equality interest that underpins the right to choose abortion is that between pregnant women who do not choose to

245. Frisby v. Schultz, 487 U.S. 474, 487 (1988). Although the Court in Frisby was speaking in the context of intrusions upon private residences, the Court has since made this distinction with respect to picketing targeted at particular individuals outside of an abortion clinic. See Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2527 (1994) ("We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation." (citing Frisby, 487 U.S. at 486)).
carry fetal life to term and all other citizens.\textsuperscript{246} The right to choose vindicates a right that all other citizens, but for a natural phenomenon, are presumed to have.\textsuperscript{247} Although only some individuals exercise the right, protecting the right to choose abortion serves the societal goal of a more equal citizenry. Abortion protest is troublesome to the extent that it interferes with this type of equality.

Certainly, there will be some private costs associated with even publicly directed abortion protest. Abortion seekers and providers may well feel more acutely the message of abortion protesters than will most members of the general public because of the seekers’ and providers’ closer involvement with the subject matter of the protest. But this cost is not enough to outweigh the social value of the protest. Rather, it is testimony to the strength of protest as communication and thus to its social value. Requiring abortion seekers and providers to tolerate this level of private impact is consistent with the equality interest that underlies the right to choose abortion because the equality value itself is a product of social judgments about the rights and responsibilities of individual community members vis-à-vis one and other.\textsuperscript{248}

Abortion seekers and providers have been the minority outside the law who have sought to change it. They could become so again. Preserving a right, like that to choose abortion, depends upon vigorous and continuing debate about the social meaning of equality. It depends upon listening and attempting to understand a wide range of views on the topic, as well as entering the dialogue with the possibility of fallibility. To the extent that the effects of abortion protest are generally diffused among the public, and it is solely the message that strikes abortion seekers and providers more severely, it is consistent with the equality interest that underlies the right to choose abortion to consider the social value of the protest activities in the injunction inquiry.


\textsuperscript{247} See supra notes 80, 88 and accompanying text (discussing the American-law presumption that individuals are not required to devote their body to save the life of another).

\textsuperscript{248} See Guerra, 479 U.S. at 289 (Brennan, J., dissenting) ("[D]iscrimination is a social phenomenon encased in a social context . . . ." (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 159 (1976))).
Although the value of publicly directed expressive abortion protest is significant enough to outweigh its generally diffused costs, including the costs on abortion seekers and providers of receiving the message of the protest, a more difficult question is whether the public value of such protest activities outweighs the other private costs that may occur even when the protest activities are not targeted at specific individuals. These private costs are particularly evident where abortion protests occur at abortion clinics. The costs of nonviolent physical blockades to abortion providers include the fees lost or incurred because of a delay in abortion services, or because of patients deterred from entering on the day of the protest or later, as well as the cost of repairing any damage to the premises or in seeking to hold the protesters responsible for their actions. For the abortion seekers, the costs include: the psychological trauma and potential adverse health effects either of delay in obtaining abortion services or of enduring the protest activities during the particularly vulnerable time before and after undergoing a medical procedure; the increased costs, both in terms of money and convenience; and the negative reactions of third parties, of returning for services, if necessary. As a matter of equal citizenship, everyone is required to put up with some degree of cost and inconvenience to further the value of free expression. That these costs exist, however, and are concentrated on particular individuals, indicates that the boundaries of consideration for the value of expressive protest in the injunction inquiry should be drawn with the purpose of minimizing these private impacts.

Once the social value of presumptively enjoinable abortion protests has been narrowed to expressions aimed at the majority at large which are designed to add to political debate, it becomes apparent that a number of limitations on the degree of special consideration would accommodate both the societal interest in free discussion and the private interests in access to abortion services. As an initial matter, the potentially high private costs of clinic protests should prompt inquiry as to why the activities must occur at that location. That is, a court should look closely at whether the “public message” threshold requirement for special consideration for otherwise enjoinable abortion protest activities is met. In the abstract, it is difficult to imagine why the public message of abortion protest depends upon its occurring at a clinic site. In most cases, the protesters’ message would seem to be as effectively delivered by
blockading or trespassing at city hall, a major thoroughfare, or the Supreme Court. In these situations, the choice of a clinic as the location for protest would appear directed at maximizing the private effects. If this is the case, then the abortion protest activities should be entitled to no special injunction consideration. There may, however, be special circumstances under which a court could find that a clinic location for abortion protest activities heightens or clarifies the public message or effect. In this situation, other limitations on the protest activities could accommodate their social value as well as the right to choose abortion.

No matter where it occurs, the strength of the message as expression would seem to depend primarily on its being said and received, not on its being said and received continuously. Where abortion protest impacts private rights adversely, such activities should be limited in timeframe. This means that individual abortion seekers and providers must suffer some hardship and inconvenience, like anyone else in the nation who chooses to participate in a controversial activity. But the limited timeframe of protest would limit the impact on particular individuals.

In addition, the expressive value of protest would seem to be aided, rather than impeded, by publicizing the times and duration of nonviolent protest. So, for example, a court could enjoin even peaceful protests during certain hours of the day or during certain days of the week. Publicizing these restrictions through an injunctive order would permit maximum attention on the protests, while allowing those seeking abortions to work around the protest activities.

Because of the private costs involved, an injunction inquiry should also be sensitive to the fact that certain individuals or facilities are not disproportionately chosen as sites for nonviolent lawbreaking. Limiting the duration of protest at any specific site would not seem to impact significantly on the communicative value of the protests, which would be better served by changing locations frequently so as to spread the message more broadly. Again, there may be special circumstances in which prolonged protest at one site significantly augments the message. In such cases, courts should be particularly sensitive to the heightened private costs as well.

With these considerations in mind, courts can fashion injunctions that best balance the social value of nonviolent abortion protest and the constitutional right to obtain abortion services. These considerations
center around the important recognition—largely absent from current legislation and judicial injunction decisions—that a court should be particularly wary of enjoining nonviolent protest activities that are designed to communicate a political message to the public at large. Preserving a place for nonviolent protest of existing laws is important not only to the current dissenters, but to the majority, which should be constantly questioning the wisdom of its policies, and to those who may dissent from other majoritarian decisions in the future.

2. The Propriety of Enhanced Sanctions for Political Protest

Although the practical effect of injunctions may be to increase the penalties that nonviolent protesters are likely to suffer for their lawbreaking, the FACE Act does so explicitly. The Act generally authorizes fines of $15,000 or one-year jail terms, or both, for first violations and $25,000 or three-year jail terms, or both, for subsequent violations. Although the Act reduces the fines for “nonviolent physical obstruction,” the fines are still substantial—$10,000 or six months, or both, for first violations and $25,000 or 18 months, or both, for subsequent violations. It also authorizes private civil actions for fees and damages according to proof or in a statutory amount of $5,000 per violation. The FACE Act thus authorizes fines, imprisonment, and damages greater than the typical state-law penalties for such actions. Because of its effect, the FACE Act raises a question beyond whether the nonviolent activities of abortion protesters should be punished like any other illegal act to whether enhanced penalties for such politically motivated conduct is appropriate.

Critics have challenged the constitutionality of the FACE Act on numerous grounds, including most frequently that its provisions are

249. See supra note 224 and accompanying text (noting how the effect of an injunction is to convert ordinary lawbreaking into contempt of court, for which the penalties are usually higher).
250. 18 U.S.C. § 248(b) (1994). If bodily injury results, the Act authorizes imprisonment of up to ten years, and if death results, it authorizes an unlimited term. Id.
251. Id.
252. Id. § 248(c)(1) (1994).
253. See S. REP. No. 117, supra note 6, at 20 (“Another problem with reliance on State and local laws is that the penalties for violations of these laws are often so low as to provide little if any deterrent effect.”).
254. See, e.g., Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (addressing claims that: (1) Congress lacked the authority under the Commerce Clause to enact the FACE Act;
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premised on unconstitutional viewpoint discrimination. Lower courts, however, have resolved these claims in favor of the constitutionality of the FACE Act. Evaluation of these court's analyses is beyond the scope of this Article. Instead, the focus here is on the question untouched in these judicial decisions because the congressional decision appears to have resolved it—whether the social value of nonviolent abortion protest activities, specifically nonviolent

(2) under the First Amendment, the Act is vague, overbroad, and effectuates viewpoint discrimination; (3) content-discrimination is protected by the First Amendment; (4) the FACE Act violates the Free Exercise Clause and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994); and (5) the FACE Act imposes excessive fines and cruel and unusual punishment prohibited by the Eighth Amendment.

255. See, e.g., United States v. Brock, 863 F. Supp. 851, 861 n.19 (E.D. Wis. 1994) ("The defendants also argue that FACE's obstruction provisions discriminate based on viewpoint. They argue FACE targets messages on one side of the 'reproductive health services' debate, i.e., anti-abortion messages."); Riely v. Reno, 860 F. Supp. 693, 702 (D. Ariz. 1994) ("Plaintiffs next contend that FACE is an impermissible viewpoint-based ban on speech because it discriminates only against anti-abortion expression."); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1427 (S.D. Cal. 1994) ("Plaintiffs further contend that FACE imposes content-based and viewpoint-based restrictions on protected expression because it singles out for special punishment acts committed in the course of anti-abortion protests.").

The FACE Act does not apply exclusively to activities that interfere with access to health care services. After testimony on the proposed bill, it was amended so that the final statute also contains a prohibition against interference with the exercise of "the First Amendment right of religious freedom at a place of religious worship." 18 U.S.C. § 248(a)(2) (1994). This may not, however, solve critics' objections. See Paulsen & McConnell, supra note 23, at 287 ("While the religious liberty amendment is thus a welcome and desirable change, we are not persuaded that it is sufficient to overcome the objection that the bill selectively targets pro-life advocacy on the basis of the viewpoint being expressed.").


physical blockages or trespasses, should affect the wisdom of enhancing the sanctions for engaging in them.

The analysis of injunctions distinguished first between protest acts that were expressive as opposed to functional, and then between the expressive acts directed at the public at large as opposed to targeted at specific individuals. With the question of enhanced sanctions, these distinctions are again appropriate. The reason to hesitate to impose enhanced sanctions on acts of nonviolent protest would be the same as that which would prompt hesitation to enjoin the conduct before it occurs—that enhanced sanctions strike the wrong balance, chilling valuable activity too severely. But this social value of the protest activities occurs only when it is primarily expressive. Although some social value exists when the expressive conduct is directed at particular individuals, the increased and highly concentrated effects of such targeted protests outweigh their value. Thus, again, only the range of nonviolent protest activities that are designed to communicate a political message to the majority at large should be candidates for special consideration in setting sanctions.

Viewed in the context of the entire scope of activities generally prohibited by the FACE Act, the restriction on the limited range—nonviolent lawbreaking intended to communicate a political message to the public at large—may appear incidental and presumptively

258. Cf. Brock, 863 F. Supp. at 859 (distinguishing nonviolent physical blockages for the purpose of constitutional analysis: "[T]he government and amici make a strong argument that, under the relevant case law, the defendants' actions in blockading the clinic are simply not entitled to First Amendment protection. I did not hesitate to apply such a categorical approach to the use of force or threats of force . . . . I do hesitate, however, to apply it to nonviolent 'physical obstruction.'" (citation omitted)).

259. See, e.g., Paulsen & McConnell, supra note 23, at 262-63 ("The proposed [FACE Act] should . . . be of grave concern to those who value our heritage of fair play toward political protests. . . . [T]he penalties required under [the FACE Act] are excessive. . . . Constitutional questions aside, members of Congress should think deeply about the injustice of imposing so severe a sanction on a person who has acted peacefully and out of conscience."); Schneider, supra note 225, at 3A (noting that a political science professor on the panel was "concerned about the [FACE Act's] potential impact on the nation's tradition of civil disobedience because of its severe penalties for nonviolent obstruction").

260. See supra notes 230-245 and accompanying text.

261. See supra notes 237-238 and accompanying text.

262. See supra notes 237-238 and accompanying text.

263. See supra notes 244-245 and accompanying text.
justified by the harms threatened by the other prohibited activities.264
When this pocket of activities is isolated, however, the different
treatment of minority political protesters and members of the majority
who break laws for other reasons becomes obvious and the
justification less apparent. The different treatment is even more acute
given that the justification for the enhanced punishment is inversely
proportionate to the amount of the enhancement. That is, the least
harmful acts of lawbreaking receive the most greatly increased
punishment under the FACE Act as compared to what the prior
penalty for such lawbreaking would likely be.265

The values that underlie both the right to choose abortion and
respect for nonviolent protest suggest that, for this limited range of
nonviolent protest, enhanced sanctions are inappropriate. When the
activities are nonviolent and publicly expressive, their social value is at
its peak, and the social costs are at their lowest. It is in this context
that limited consideration of the social value of such conduct is most
appropriate and serves the value of providing more equal voices for all
members of the citizenry. Enhanced sanctions stifle public debate.

Weighing on the other side of the balance are the costs that
individual abortion seekers and providers will suffer even when the
scope of protest activities potentially immune from enhanced sanctions
is limited. As noted above in the discussion of injunctions, individual
hardships might in particular cases lead to injunctions against
otherwise socially valuable political protest.266 But this balance will
not obtain in every case. Rather, the result will differ according to the
particular activities and hardships at issue.

By contrast, the FACE Act enhances sanctions for such protest
activities across the board. The nature of these costs, however,
suggests that they are not certain or severe enough to justify the FACE
Act's blanket imposition of enhanced sanctions. This fact is especially
ture where an alternate means to protect individual interests is

FACE Act impinged on constitutionally protected speech or expressive activity,] given
Congress' findings as to the need for protecting those seeking or providing abortion
services, the [FACE Act] restrictions on ... speech would be 'incidental to their anti-
abortion message' and, therefore, permissible.”).
265. Even though the FACE Act provides lesser penalties for “nonviolent physical
obstruction,” 18 U.S.C. § 247(b), (c)(2)(B) (1994), these penalties are still a greater
enhancement than that for violent activities.
266. See supra text and accompanying notes 247-248.
available. A better choice in the context of valuable protest activities than the FACE Act sanctions would be a middle ground, where only injunctions would be authorized beyond the other preexisting punishments. This alternative would preserve the ability of courts to make individualized determinations of hardship, thus, in effect, imposing the equivalent of enhanced sanctions only in cases where the circumstances change the presumed balance of values.

Eschewing enhanced sanctions for nonviolent publicly expressive protest is consistent with the equality value that underlies the right to choose abortion as well. This right is threatened when social rules impose burdens on pregnant women that other citizens do not have to bear. Usually, allowing the protest activities outlined above will not impose disproportionate costs on pregnant women. Where it does, the alternative of an injunction issued after a particularized inquiry is available.

Also weighing against the hardships that individual abortion seekers or providers will suffer in any particular case is their interest as citizens in free and full public debate. Abortion rights are in part the legacy of protesters who brought the unjust treatment of women into public debate. Who knows when these individuals will again need such a channel of expression to promote ideals of equality? Moreover, it is in the context of the least socially harmful protest activities that FACE Act critics’ charge of discriminatory treatment of only certain types of protesters is truly disturbing. 267 Although under current case law, it may not rise to the level of a constitutional defect with the statute, those in support of abortion rights should be concerned about this treatment as a matter of equality. The specter of the majority choosing and heavily penalizing disfavored protesters should justify at least some costs on abortion seekers and providers to preserve the American ideal of equal opportunity for nonviolent expressive protest for everyone.

C. The Definition of “Injury” vs. Protected Expression

Although the FACE Act defines the offense of intimidating health care seekers or providers to require a reasonable apprehension

267. See Paulsen & McConnell, supra note 23, at 282 (“Abortion protestors are not the only political protestors to obstruct others in an attempt to intimidate or prevent them from exercising their legal rights, but they would be the only ones singled out for special punishments as a matter of federal law.”).
of bodily harm, a threat of physical injury has not defined the outside scope of state-law injunctions or regulations against abortion protest. Instead, governmental entities have sought to regulate, and courts have been asked to enjoin, a variety of protest activities that do not directly threaten physical injury on the ground that they constitute “intimidation” or “harassment.” Several factual accounts illustrate the nature of these activities.

In one case, plaintiff Planned Parenthood sought to enjoin the following activities, which it characterized as “intimidating and harassing”:

[T]hrusting lurid literature at the patients..., accusing patients and staff of being ‘baby killers’ and ‘murderers’..., attempting to intimidate patients into abandoning their planned abortions..., chanting so loudly as to interfere with the operation of the clinic[...], shov[ing] plastic replicas of fetuses into the faces and cars of Planned Parenthood patients and staff[...], persist[ing] in following patients, shoving leaflets at them and harassing them despite patients’ frequent requests that the protesters leave them alone.268

In another suit, because of an atmosphere that allegedly “intimidated” women patients, a clinic sought an injunction “forbidding the use of such terms as ‘kill,’ ‘murder,’ and ‘butcher.’”269 Another court described how “peaceful [sidewalk] counseling, when conducted in the compressed space at the entrances of medical facilities, often erupts into a charged encounter between ‘sidewalk counselors,’ patients and patient escorts”:

During these encounters, “sidewalk counselors” often become angry and frustrated when patients and patient escorts persist in entering the clinics. The “counselors” then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The “sidewalk counselors” often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level. At times, the voices of “sidewalk counselors” can be heard inside the health care facilities, thereby disturbing the quiet environment necessary for providing safe and

269. Mississippi Women’s Medical Clinic v. McMillan, 866 F.2d 788, 790 (5th Cir. 1989).
efficacious health care. Some “counselors” have even used bullhorns to reach patients who have already entered the clinics.270

Other activities that courts have confronted include identifying and calling abortion seekers and providers by name,271 videotaping patients and their license plates,272 and protesting at abortion providers’ homes, with pickets and chanting that include the target’s name.273

Courts have struggled with whether and to what extent injunctions or regulations to protect abortion seekers and providers from such “intimidation” or “harassment” by abortion protesters are appropriate. Advocates of a broad scope of freedom for abortion protesters argue that “no citizen has the right to insulate herself from the opinions of others, however traumatic or offensive those opinions may be to her” and that “making a violation [of law] turn on the sense of affront, embarrassment, annoyance, intimidation, or chagrin experienced by the pregnant woman who encounters pro-life pickets


271. See, e.g., Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664, 668 (Fla. 1993) (“No picketer can force speech into the captive ear of the unwilling and disabled.”), aff’d in part and rev’d in part sub nom. Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516 (1994); see also Madsen, 114 S. Ct. at 2536 (Scalia, J., concurring in part and dissenting in part) (describing a videotape of the abortion protest activities at issue as follows: “The camera focuses on a woman who faces the clinic and, hands cupped over her mouth, shouts the following: ‘Be not deceived: God is not mocked . . . Ed Windle, God’s judgment is on you, and if you don’t repent, He will strike you dead. The baby’s blood flowed over your hands, Ed Windle . . . You will burn in hell, Ed Windle, if you don’t repent.’”).

272. Pro-Choice Network, 799 F. Supp. at 1426 (“Contrary to defendants’ claim that video cameras were “used solely for defensive purposes”), the evidence clearly shows that defendants use cameras as offensive weapons to harass and intimidate patients entering the clinics. Defendants have even pointed the cameras directly into the faces of patients seeking access to the clinics. They have also videotaped patient vehicles and their license plates as they enter the medical facilities. Defendants are well aware that women seeking abortions, especially younger women, are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion, and that the presence of cameras increases patients’ fear that their identities might be revealed.”), aff’d sub nom. Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), vacated in part on reh’g en banc, 67 F.3d 377 (2d Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1260 (1996).

273. See, e.g., Schultz v. Frisby, 807 F.2d 1339, 1340-41 (7th Cir. 1986) (describing acts at a doctor’s home that included tying red ribbons to the bushes and door of the house, carrying signs that said “baby killer,” shouting “Baby Killer, Dr. Victoria, you’re a killer, save our children,” and telling children in the neighborhood that the doctor killed babies), rev’d, 487 U.S. 474 (1988).
or sidewalk counselors as she is preparing to abort her fetus or unborn child ... is plainly unconstitutional. 274 They defend “forceful[] ... face-to-face” speech, 275 such as shouts of “baby killer” directed at individual women “by large crowds of people milling around” 276 and the aggressive activities of “sidewalk counselors.”

By contrast, those in favor of limits on abortion protest emphasize the effects of such strident and invasive activities on abortion seekers and providers. The trauma of confronting such protesters may make the abortion procedure more hazardous in a number of ways 277 and increase the recovery time from the procedure. It may cause both patients and providers to suffer emotional strain and distress, which may in turn cause prospective patients to choose not to get an abortion and providers to stop performing abortions for reasons other than a changed opinion about the morality of the procedure. 278

1. The Court’s Current Assumptions about the Intersection of the Free Speech Right and the Right to Choose Abortion

Several recent decisions indicate the Court’s assumptions about the intersection of the free speech right and the right to choose abortion. In Frisby v. Schultz, the Court reviewed a local ordinance that banned residential picketing. 279 The town enacted the ordinance in response to a series of protests staged by pro-life activists outside the home of a physician who performed abortions. “[T]he practice of picketing before or about residences and dwellings,” the town claimed,

275. Id.
276. Ledewitz, supra note 53, at 90.
277. See, e.g., Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992) (“[T]he risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.”), aff’d sub nom. Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), vacated in part on reh’g en banc, 67 F.3d 377 (2d Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1260 (1996); S. REP. No. 117, supra note 6, at 15 (“Women who do make it in [after confronting abortion protesters] have a heightened level of anxiety and a greater risk of complications.” (testimony of Dr. Pablo Rodriguez before the Senate Labor and Human Resources Committee, May 12, 1993)).
278. See, e.g., S. REP. No. 117, supra note 6, at 17 (detailing how abortion providers “have succumbed to ... intimidation and threats ... [and] stopped performing abortions”).
"causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants."  

The Court viewed the ordinance as "operat[ing] at the core of the First Amendment by prohibiting [the protesters] from engaging in picketing on an issue of public concern," and restricting speech in a traditional public forum. Because it deemed the ordinance a content-neutral restriction on the time, place, and manner of speech, it asked whether the ordinance was "narrowly tailored to serve a significant government interest" and whether it 'le[ft] open ample alternative channels of communication.' It addressed the second prong of the test first because it was "so easily answered." Construing the ordinance as prohibiting only picketing "directed at a particular residence," the Court noted that "the ordinance permits the more general dissemination of a message." Because the protesters were not barred entirely from residential neighborhoods, the ordinance "preserve[d] ample alternative channels of communication."  

The Court then turned to the question of whether the ordinance was narrowly tailored to serve a significant government interest. The Court found the significant government interest served by the regulation to be "the protection of residential privacy." An "important aspect of residential privacy," the Court noted, "is protection of the unwilling listener." In other locations, the burden is on the recipients to avoid speech that they do not want to hear.

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280. Id. at 477.
281. Id. at 479.
282. Id. at 481 ("[A]ll public streets are held in the public trust and are properly considered traditional public fora . . . . The residential character of . . . streets . . . does not lead to a different test.").
283. Id. at 482 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
284. Id.
285. Id. at 483.
286. Id. at 484 ("[P]rotesters] may enter [residential] neighborhoods, alone or in groups, even marching . . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment." (citation omitted)).
287. Id.
288. Id.
289. Id. (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Cohen v. California, 403 U.S. 15, 21-22 (1971)).
But "[t]here simply is no right to force speech into the home of an unwilling listener."290

As to the tailoring, the Court observed that the ordinance prohibited only picketing "directed at the household, not the public."291 Picketers who target a household, the Court noted, "generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."292 Even if some have "a broader communicative purpose," their activity "nonetheless inherently and offensively intrudes on residential privacy."293 As for the harms suffered by the targets, the Court observed, "'[t]he tensions and pressures may be psychological, not physical, but they are not; for that reason, less inimical to family privacy and truly domestic tranquility.'"294 "[B]ecause of the unique and subtle impact of such picketing," the Court reasoned, a resident "is left with no ready means of avoiding the unwanted speech."295 Therefore, the Court found the "complete ban of [a] particular medium of expression" to be narrowly tailored and upheld the ordinance against a constitutional challenge.296

Although not dealing specifically with abortion protest, the Court, in Planned Parenthood of Southeastern Pennsylvania v. Casey,297 resolved another question pertaining to the extent to which the right to choose abortion allows an abortion seeker to shield herself from undesired information. At issue in that case was a Pennsylvania statute that required, as a precondition to performing an abortion, that physicians inform patients "of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'"298 The statute also required that the physician inform the patient of the availability of state-published information "describing the fetus and providing information about medical assistance for childbirth, information about child support from

290. Id. at 485.
291. Id. at 486.
292. Id.
293. Id.
295. Id. at 487.
296. Id. at 488.
298. Id. at 881.
the father, and a list of agencies which provide adoption and other services as alternatives to abortion." The Court overruled prior cases and held that the state-mandated provision of "truthful, nonmisleading information" to abortion seekers did not substantially burden the right to choose abortion. The state's legitimate purpose of "attempting to ensure that a woman apprehend the full consequences of her decision," served the abortion seeker's interest as well by protecting her from the "devastating psychological consequences" of discovering "that her decision was not fully informed."

Most recently, the Supreme Court reviewed an injunction issued by a Florida state court designed to prevent the harassment and intimidation of abortion clinic staff and patients as well as to prevent violence and threats of violence against them. The Court upheld a thirty-six-foot buffer zone around the clinic's entrances and driveway, noting the "distinction between the type of focused picketing [directed primarily at patients and staff of the clinic] banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places," and also upheld a restriction on noise levels during surgery and recovery periods.

The provisions the Court invalidated included a ban on "'images observable' [to] ... the patients inside the clinic" during the hours of surgery and recovery, a 300-foot buffer zone around the clinic in which the protesters could not approach persons seeking services of the clinic unless such persons indicated a desire to communicate, and a 300-foot

299. Id.
300. Id. at 882.
301. Id.
303. The Court invalidated the buffer zone as applied to private property. Id. at 2528 ("Absent evidence that petitioners standing on the private property have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fails to serve the significant government interests relied on by the Florida Supreme Court.").
304. Id. at 2527. The Court also noted that "[t]he state court seems to have had few other options to protect access given the narrow confines around the clinic," that protesters standing outside the buffer zone "can still be seen and heard from the clinic parking lots," and that the original, more narrow injunction "did not succeed in protecting access to the clinic." Id.
305. Id. at 2528 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").
no-protest zone around the residences of clinic staff. The Court found the “images observable” provision too broad because it prohibited speech beyond “threats or veiled threats,” which are “clearly . . . proscribable.” Even if the ban “was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic,” it was unconstitutional because such patient reactions would be content-based, and the clinic had available the option of “pull[ing] its curtains.” As to the no-approach provision, the Court noted that the issuing court’s purpose was to prevent clinic patients and staff from being “stalked” or “shadowed” as they approached the clinic. Nevertheless, the Court found the absolute prohibition to “burden[] more speech than necessary to prevent intimidation and to ensure access to the clinic,” quoting again the oft-repeated principle 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.” Finally, the Court observed that the 300-foot residential buffer zone was “much larger than the zone provided for in the ordinance . . . approved in Frisby.” Because of its size, the Court concluded that the zone would prohibit general, as well as focused, protest, and that “a limitation on the time, duration of picketing, and number of pickets

306. Id. at 2528-29.
307. Id. at 2529.
308. Id. (“The only plausible reason a patient would be bothered by ‘images observable’ inside the clinic would be if the patient found the expression contained in such images disagreeable.”). Crucial to the Court is the distinction between government regulations “based on hostility—or favoritism—towards the underlying message expressed,” R.A.V. v. City of St. Paul, 505 U.S. 377, 401 (1992), and those enacted “without reference to the content of the regulated speech,” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Speech restrictions based upon the subjective reaction of listeners, such as their offense or discomfort, are suspect because the reactions depend upon the message conveyed and therefore the regulations are in fact content-based. See R.A.V., 505 U.S. at 414 (White, J., joined by Blackmun, O’Connor & Stevens, JJ., concurring) (“[S]uch generalized reactions [as anger, alarm or resentment] are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”).
309. Madsen, 114 S. Ct. at 2529 (noting that pulling the curtains “is much easier for the clinic . . . than for a patient to stop up her ears”).
310. Id.
311. Id.
312. Id. (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).
313. Id. at 2530.
outside a smaller zone could have accomplished the desired result [i.e., prohibiting targeted residential picketing].

These recent decisions reinforce, rather than revise, the Supreme Court's formal view of the equality that the First Amendment accommodates. They also reveal several reasonably bright lines that the Court will apply in the context of abortion protest. Abortion protest restrictions are unconstitutional if based on listener reaction to the message conveyed. Such restrictions may be appropriate if the speech falls into the "independently proscribable" categories of threats of violence or "fighting words." Those entering abortion clinics...

314. Id.
315. The Court's slightly revised standard for reviewing content-neutral injunctions that prohibit speech in public fora does not deviate from the traditional principles. Id. at 2524 ("We believe that the differences between generally applicable legislation and injunctions require a somewhat more stringent application of general First Amendment principles in the context of an injunction.").
316. Id. at 2529 ("Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment."). Although the Court indicated that speech may be restricted if "necessary to prevent intimidation," it defines intimidating speech as occurring only when it "is so infused with violence as to be indistinguishable from a threat of physical harm." Id.
317. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). When the Court created this exception, it stated that the prohibitable words were "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. Despite the disjunctive language, the Court has never upheld a conviction based on injury alone, leading to speculation that it has been "de facto overruled." Note, The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment, 106 HARV. L. REV. 1129, 1137 (1993). The "breach of the peace" prong has been criticized as reflecting the perspective only of persons with the social or physical power to dare or be inclined to fight, and thus not protecting less powerful individuals from the injuries that speech may cause. See, e.g., Cynthia G. Bowman, Street Harassment and the Informal Ghettoization of Women, 106 HARV. L. REV. 517, 560-61 (1992) ("The fighting words standard, as it has been interpreted thus far, is based upon a male stereotype; it presupposes an encounter between two persons of relatively equal power who have been socialized to respond to insults with violence."); Lawrence, supra note 163, at 453-54 ("The fighting words doctrine is a paradigm based on a white male point of view."). In fact, since its original application, the "fighting words" exception has been rarely used. Although the Court recently confronted the opportunity to review the scope of the "fighting words" doctrine, it declined to do so. See R.A.V. v. City of St. Paul, 505 U.S. 377, 377 (1992). It is thus unclear what exactly the modern fighting-words exception encompasses. See Note, supra, at 1138 (noting that in its most recent "fighting words" cases decided in the 1970s, the Court, in reciting the constitutional standard, alternately left out the "inflcit injury" prong and repeated the two-pronged definition). Unquestionably, however, the Court's concept of this exception to the general rule prohibiting content regulation remains narrow. R.A.V., 505 U.S. at 384-85 ("It is not true that 'fighting words' have at most a 'de minimis' expressive content, . . . or that their content is in all respects 'worthless and undeserving of constitutional protection . . . .'.") (citations omitted)).
cannot be protected from all unconsented-to approaches. Rather, the First Amendment guarantees the protesters access to such individuals, unless their speech or actions constitute physical threats or effectively block clinic access. The one exception that the abortion protest cases recognize to these general rules is that greater government regulation is constitutionally permissible when the listener is "captive" in the home and unable to avoid the speech.318

2. Revising the Formal Conception of Free Speech Equality to Accommodate the Equality Interest that Informs the Right to Choose Abortion

As outlined in the previous section, the Court has delineated a narrow scope of permissible restrictions of abortion-related speech. Lower courts, of course, are following, and in some cases arguably further narrowing,319 these guidelines in issuing state-law injunctions and in reviewing state and local abortion protest regulations. The FACE Act was drafted and revised to comport with this limited range of prohibitions as well. Accordingly, the effects of the Supreme Court's assumptions about the scope and demands of constitutional equality are broad.

This entire range of abortion protest law, however, is flawed by the failure of First Amendment doctrine to incorporate, as a counterbalance to the traditional formal equality assumptions, the substantive equality interest that informs the right to choose abortion. Adding this value to the constitutional balance would change several crucial assumptions that underlie current Supreme Court doctrine. First, the substantive equality interest would expand the current "captive audience" protection beyond the home to partially insulate abortion seekers from certain types of offensive speech within the immediate vicinity of abortion clinics. Second, this value would clarify the definition of what constitutes a threat to include the


319. See, e.g., Pro-Choice Network v. Schenck, 34 F.3d 130 (2d Cir. 1994) (invalidating an injunction provision that required sidewalk counselors to "cease and desist from such counseling" upon an indication from the prospective counselee that she did not want to receive such counseling), vacated in part on reh'g en banc, 67 F.3d 377 (2d Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1260 (1996).
particular circumstances of abortion seekers. Finally, this value would change the current presumption that the Constitution ensures peaceful abortion protesters close physical access to individual abortion seekers directly outside of abortion clinics.

a. Reevaluating Listener Captivity in Light of the Equality Value that Informs the Right to Choose Abortion

Although the Supreme Court and lower courts now talk generally about not regulating speech based upon listener reaction, the core case from which the principle stems dealt with speech of a different type and in a different context than the most potentially damaging speech that occurs in abortion protests. In *Cohen v. California*, the Court reversed the conviction for “disturbing the peace . . . by . . . offensive conduct” of a defendant who wore a jacket bearing the words “Fuck the Draft” in the Los Angeles County Courthouse. The Court emphasized first that the “conviction rest[ed] solely upon ‘speech,’ . . . not . . . conduct.” The Court then distinguished Cohen’s general use of the four-letter word as a vehicle of political protest from a use “directed to the person of the hearer,” which could be “personally provocative.” The principle that the government may regulate based upon general public offense “seem[ed] inherently boundless.” “[O]ne man’s vulgarity is another’s lyric,” the Court observed, noting as well that “words are often chosen as much for their emotive as their cognitive force.” The Court also addressed the state’s claim that it legitimately acted to protect “unwilling or unsuspecting viewers” from offense. “[W]e are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech,” the Court observed. “The ability of government,” it continued, “to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”

320. 403 U.S. 15, 16-17 (1971).
321. *Id.* at 18 (citation omitted). “The only ‘conduct’ which the State sought to punish is the fact of communication.” *Id.*
322. *Id.* at 20.
323. *Id.* at 25.
324. *Id.* at 25-26.
325. *Id.* at 21.
326. *Id.*
327. *Id.*
Offensive abortion protest speech directed toward individual abortion seekers in the immediate area surrounding abortion clinics differs from the offensive expression in *Cohen* in a number of respects. First, the most potentially injurious abortion protest speech is not directed to the public at large and designed to change a general public policy judgment as in *Cohen*, but is instead directed toward individual abortion seekers and designed to affect their personal choices. Second, the injured listeners of abortion protest speech, upon whose reactions regulations would be based, are medical patients about to undergo a surgical procedure. Third, the individual targets of the speech, because of their gender, cannot choose to avoid contact with the speakers, whereas other citizens can make private choices in their homes and thereby avoid criticism of their judgments. All of these differences between abortion protest speech directed at abortion seekers in the vicinity of abortion clinics and the offensive speech protected in *Cohen* and subsequent cases should affect the constitutional boundaries on such speech restrictions.

As to the nature of the speech, the Court has noted that abortion protest speech targeted at specific individuals is more subject to government regulation than generally directed political protest. The Court has emphasized the greater harm to the individual recipients of the speech as justifying greater government regulation. So also the lesser social value of unwelcome, individually directed speech should tip the scales in favor of greater government regulation. In *Cohen*, the speech was directed toward the entire public that might come in contact with the message during the course of the day. Presumably, some viewers would be offended and perceive the message to be unwelcome, but some would not. These latter listeners might well be stirred by the contribution to public debate. By contrast, individually directed speech has a sole target. Where the target does not want to receive the message, the message will likely not serve the purpose of enhancing any type of debate, much less one directed at the appropriate aims of public policy. Instead, it will result in the private


329. See, e.g., *Frisby*, 487 U.S. at 486 ("The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt.").
harm of personal offense. Moreover, where the purpose of the communication is to influence a particular private choice rather than a broad social policy, the expression is similarly less valuable as political speech. For these reasons, that certain abortion protest speech is (1) directed at individual abortion seekers (2) who have not chosen to receive the speech (3) for the purpose of changing their choices to have abortions should temper Cohen's general principle that the government may not regulate speech because of listeners' reactions to it.

The Court has also noted that it is appropriate to "take account of the place to which the [speech] regulations apply in determining whether the[ ] restrictions burden more speech than necessary." In particular, hospitals and medical facilities constitute sites where greater than ordinary regulation may be necessary to reduce ""emotional strain and worry"" and to facilitate ""a restful, uncluttered, relaxing, and helpful atmosphere."" Protesters confront abortion seekers directly outside the facility in which the patients are soon to undergo a surgical procedure. Arguably, any sort of confrontation may be disturbing and distracting. A confrontation in which the speaker questions the very nature of the procedure, attempting to induce guilt and shame in the patient, is much more so. Moreover, the evidence indicates that the speech offered in these encounters is often not peaceful, quiet, or reasonable discussion, but includes name-calling and shouting as the speaker becomes frustrated at the lack of response. Obviously, the impact of such encounters on patients about to undergo medical procedures goes beyond disturbing and distracting to

330. Certainly, it is possible that some abortion seekers will find their opinions about abortion changed by information that they would not have chosen to receive. But elevating one individual's right to thrust unwanted information on another violates the equal respect for decisional autonomy to which each citizen is entitled. See Janet M. Cohen, A Jurisdiction of Doubt: Deliberative Autonomy and Abortion, 3 Colum. J. Gender & Law 175, 187-88 (1992). State-mandated information about the nature of the abortion process and the status of the fetus, see Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 882 (1992), is distinguishable because, by contrast to opinions held by other citizens, there is some guarantee that it will be ""truthful"" and not ""misleading."

331. See supra note 244 and accompanying text (making this point in the context of injunctions).

332. Madsen, 114 S. Ct. at 2528.

333. Id. (quoting NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-84 n.12 (1979) (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Black, J., concurring in judgment)).
extremely stressful, psychologically damaging, and deleterious to optimal surgery and recovery.\textsuperscript{334}

These effects of abortion protest speech on abortion seekers, although arguably dependent on the listeners' reaction to the content of the speech, are substantially more severe than the expected effects of the offensive speech in \textit{Cohen}. As a general matter, there is a significant difference in the potential health consequences of enduring psychological stress and anxiety before a court appearance and before undergoing surgery. Moreover, even if the importance of reducing stress and anxiety near courthouses were recognized, the nature of the speech in \textit{Cohen} was not such as to increase that stress unduly. Mr. Cohen delivered his message to the public at large, and he did so in a way that recipients could quite quickly turn away and avoid any further contact with the message. In addition, he challenged a public policy, rather than the recipients' personal choice to appear in the particular location. By contrast, certain abortion protest speech delivered immediately prior to a medical procedure: (1) targets the individual patients; (2) does so intrusively and pervasively; and (3) speaks directly to the propriety of the surgical procedure that the patients are about to undergo. All of these factors substantially increase the likelihood that the listener's reaction will go beyond general offense to severe stress and anxiety that, in turn, may result in physical manifestations before, during, or after the medical procedure.\textsuperscript{335} As with the personally directed nature of the speech, these vastly more severe effects of abortion protest speech should alter the \textit{Cohen} principle that the government cannot regulate speech based upon listener reaction.

The third reason for tempering the \textit{Cohen} rule in the context of abortion protest speech stems from the equality interest that informs the right to choose abortion. As detailed earlier,\textsuperscript{336} the equality interest is that between pregnant women who do not want to carry the fetus to term and all other citizens. Confining the free speech exception to targeted protest outside private residences has an unequal impact on pregnant women who want to choose abortion. Specifically, nonpregnant people can exercise their choice not to use their bodies to aid others in the privacy of their homes. They do not have to take to

\textsuperscript{334}. \textit{See supra} notes 12-14 and accompanying text.
\textsuperscript{335}. \textit{See supra} note 12.
\textsuperscript{336}. \textit{See supra} notes 87-93 and accompanying text.
the public streets to vindicate that choice. With particular respect to a
responsibility to aid unborn or born offspring, men can create such
offspring in private and decide to aid or refuse aid to such offspring
without any public manifestation of the choice. The possibility of
privacy does not exist for women, for whom conceiving a child must
be acknowledged in public at some point, either by using the public
streets to gain access to abortion or by the public display of carrying
the child to term. So a speech analysis that protects individuals from
painful, disturbing, or psychologically damaging expression only in the
home treats women who choose abortion differently from other
individuals who choose not to aid others and, thus, violates the
equality ideal that should underlie the right to choose abortion.

In sum, a number of crucial differences between the facts that
generated the general rule that speech may not be regulated based upon
listener reaction, and the circumstances that surround certain abortion
protest speech, dictate that the general rule does not properly resolve
the apparent tension between the free speech rights of those who
oppose abortion and the right to choose of those who seek to undergo
the abortion procedure. Instead, the following aspects of certain
abortion protest speech render it amenable to government regulation
based upon listeners' reactions: (1) It is directed at individual patients
challenging their personal choice to have an abortion; (2) it occurs
during the same timeframe in which they are to undergo the medical
procedure; and (3) it is possible because the biology of women forces
them into public view in order to make their choice not to use their
bodies to aid another human being.

b. Defining Threatening Speech in the Particular Context of
Abortion Protest

The impact of speech may differ according to the respective
social and political powers of the speaker and recipient.\textsuperscript{337}
Specifically, vehement exhortation targeted at individuals seeking
abortions may have a particularly painful or destructive impact

\textsuperscript{337} See, e.g., Lawrence, supra note 163, at 461, 472-73 ("There is a great difference
between the offensiveness of words that you would rather not hear—because they are
labeled dirty, impolite, or personally demeaning—and the injury inflicted by words that
remind the world that you are fair game for physical attack, evoke in you all of the millions
of cultural lessons regarding your inferiority that you have so painstakingly repressed, and
imprint upon you a badge of servitude and subservience for all the world to see.").
because of the historically subordinated role of women in American society. Abortion protesters are able to exploit the fears of stigma and discovery because these fears have particular significance in the context of abortion. For example, women who seek abortions are stigmatized in ways that people who refuse to give aid in other ways are not because of the social expectations about the appropriate role of women. Moreover, the fear of discovery is not just of stigma, but of physical violence or financial abandonment by male partners—both dangers experienced particularly acutely by women. In addition, women may generally perceive the mode of delivering messages differently than men; the more vulnerable position of women to male violence causes women to perceive threats more readily. All of these different effects of antiabortion speech on women seeking abortions mean that the Court’s current First Amendment assumptions require abortion seekers to bear a larger burden of the commitment to free speech than do individuals who otherwise choose not to use their bodies to enable others to survive. Consequently, the Court should ask whether particular speech constitutes a threat from the perspective

338. See id. at 453 (“The subordinated victim of fighting words also is silenced by her relatively powerless position in society.”).
339. See, e.g., Cohen, supra note 330, at 193-219 (chronicling the history of abortion restrictions with particular focus on the move toward government intervention in abortion seekers’ deliberative autonomy); Sunstein, supra note 80, at 36 (“[T]he history of abortion restrictions unambiguously supports the claim that in fact, such restrictions are closely tied up with, indeed in practice driven by, traditional ideas about women’s proper role.”).
340. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 893 (1992) (finding that a spousal notification requirement for women seeking abortions constitutes an undue burden on the right to choose abortion because many women “may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion,” including “fears of physical abuse,” fears of “provok[ing] further instances of child abuse,” fears of “devastating forms of psychological abuse … including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends”).
341. Cf. Bowman, supra note 317, at 535 (“[A]ny incident of street harassment] remind[s] women that they are vulnerable to attack and demonstrate[s] that any man may choose to invade a woman’s personal space, physically or psychologically, if he feels like it.”).
342. See Lawrence, supra note 163, at 472 (“Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society—to pay the price for the societal benefit of creating more room for speech. . . We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the fact that the cost will be borne by others.”).
of abortion seekers, rather than from the perspective of members of the general public who are generally expected to ignore harsh messages and turn away.

c. Reevaluating Abortion Protesters' Right of Access to Individual Abortion Seekers

The above analysis calls into question the Court's interpretation of the Constitution to require that abortion protesters have close physical access to abortion seekers directly outside of the medical facilities in which the abortion will immediately be performed. According to the Court, restricting such access would "burden[] more speech than necessary" to achieve legitimate governmental objectives. The Court's current understanding of appropriate governmental objectives, however, is unduly narrow, most notably omitting the equality interest that underlies the right to choose abortion. A different, more precise analysis than the Court's general rule would strike a better balance between the free speech right and the right to choose abortion.

Although the range of abortion protest activities varies, the acts can be divided into a number of categories according to two variables—the nature of the speech and the proximity of the speaker to the recipient. These categories are: (1) speech directed at individuals at close range; (2) speech directed at individuals from further away; (3) publicly directed speech in close proximity to particular abortion seekers or providers; and (4) publicly directed speech without close proximity. The constitutional analysis that best accommodates the free speech right and the right to choose abortion differs for each category.

(i) Targeted Speech in Close Proximity to the Recipient

Within the category of expression directed at particular abortion seekers or providers that involve close physical proximity are acts such as efforts to engage in face-to-face conversation, pressing the acceptance of literature, and displaying props such as fetus replicas in front of individuals' faces. That the speech is directed at certain individuals rather than the public generally reduces its First

Amendment protection under the Court’s current analysis. The addition of forced physical proximity should alter the Court’s current balance. Certainly, the mode of expression affects its communicative value, and those who want to engage in these activities argue that proximity helps them accomplish their objectives most effectively. But the question is whether they have a constitutional right to do so. For a number of reasons, they do not.

First, the constitutional right to physical access as an aid to speaking only even arguably attaches when the purpose of the access is communication. With abortion-related speech outside of health clinics, this will often not be the case. Close physical proximity has the potential to threaten as well as facilitate meaningful communication. To the extent that it is likely to be perceived as a threat, it is proscribable. If the Court’s analysis were to explicitly take into account the perspective of abortion seekers in making this determination of whether closely proximate communications constitute threats, a greater range of such speech would be proscribable even under current free speech doctrine. At a lesser, but still severe, level of potential injury than a physical threat, is speech that induces

344. Id. at 2527 (distinguishing between “focused picketing” and “generally disseminated communication”).

345. “Physical proximity” is obviously subject to definition, but the general guideline should be a distance that protects personal space—an approximately 8-12 foot radius around the intended recipient. “Forced” also requires definition because it can mean either seeking to communicate within the personal space without explicit permission or refusing to withdraw upon request. This section will argue that either type of forced physical access should be prohibitable.

346. See Cohen v. California, 403 U.S. 15, 26 (1971) (“[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.”).

347. See Note, Too Close for Comfort: Protesting Outside Medical Facilities, 101 Harv. L. Rev. 1856, 1862 (1988) (“[F]orced proximity combined with speech has expressive value [b]ecause it might serve to transmit and amplify speech, facilitate particular modes of expression, enhance the dramatic impact of speech, and convey symbolic messages . . . .”).

348. See, e.g., Melville B. Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. Rev. 29, 36 (1973) (“Whatever else may or may not be true of speech, as an irreducible minimum it must constitute a communication.”).

349. Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994) (“[T]hreats to patients or their families, however communicated, are proscribable under the First Amendment.”).

350. See supra notes 337-342 and accompanying text (arguing that the Court should consider the perspective of abortion seekers in evaluating whether particular speech is threatening).
stress and anxiety, with resulting physical effects before, during, or after the abortion procedure. Although the Court has recognized this possibility in the context of some protest regulations, the likelihood of such effects and the equality interest that underlies the right to choose abortion should cause the Court to extend its recognition to alter the presumption that abortion protesters should have close physical access to abortion seekers during the timeframe immediately surrounding the procedure. Even absent health effects, using words at close physical proximity to the recipient also has the potential to badger, distract, and annoy. These effects, too, are not communicative and do not contribute to meaningful public debate. The equality interest in allowing abortion seekers to avoid these effects should similarly upset the Court’s current presumption that permitting the opportunity to have such effects on the recipient is the constitutional norm.

Even if the purpose of close proximity is to communicate, the constitutional value of promoting equality among the recipients of disturbing or offensive speech outweighs the constitutional value of allowing the speakers close access to accomplish their purpose. Most important conceptually is the recognition that characterizing the lack of physical access as a burden on speakers takes as the baseline unimpeded access to abortion seekers. But, as pointed out earlier, this baseline incorporates physical and social inequalities. Therefore, it is restricting access to abortion seekers that in fact effectuates the equality of private decisionmaking and choice between abortion seekers and others.

And the loss of opportunity for the speakers, although perhaps felt as a severe impingement on their wishes, is not of the same constitutional weight as the equality interest of the recipient. Because of the socially lesser value of targeted speech challenging a particular personal choice, the location and timing of the speech, and the interest of the recipient in not receiving it, such speakers simply do not have a constitutional right to deliver their messages in their most preferred

351. See Madsen, 114 S. Ct. at 2528 (upholding “limited noise restrictions” as “necessary to ensure the health and well-being of the patients at the clinic”).
352. See supra note 336 and accompanying text (arguing that the equality interest that underlies the right to choose abortion should justify greater regulation of abortion protest activities outside abortion clinics).
353. See Cohen, supra note 330, at 175 (arguing that the Court insufficiently protects female decisional autonomy in the context of abortion).
way. Other options are available. Most notably, such speakers can advertise their desire to speak with individual abortion seekers from a further, but still visible or audible, distance. Those who want to hear the message can take advantage of the opportunity. Those who want to avoid the personal challenge at a particularly vulnerable time can do so. The particular messages of publicly directed speech may still be visible or audible, and may intrude on some abortion seekers’ sensibilities. Although it may frustrate some desires, this arrangement most fairly ensures that the constitutionally significant interests of both the speakers and the potential recipients are fulfilled.

Accordingly, abortion protest expression directed at particular individuals that involves close physical proximity should be proscribable—either statutorily or by injunction. In the area directly surrounding abortion clinics, rules requiring speakers to “cease and desist” upon the indication of the recipient that she does not want to hear the information should be constitutional.\footnote{But see Pro-Choice Network v. Schenck, 34 F.3d 130 (2d Cir. 1994) (invalidating such a restriction), vacated in part on reh'g en banc, 67 F.3d 377 (2d Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1260 (1996).} Moreover, the above analysis further indicates that the Court’s analysis of the no-approach zone in \textit{Madsen} was unduly weighed toward the speakers rather than the abortion seekers. In constitutional doctrine, the burden should shift from being on the target to avoid contact to being on the speaker to ascertain that communication has been requested. Under this view, sidewalk counselors may make clear that their services are available, but there should not be a constitutional difficulty with abortion seekers being the ones to instigate the personal contact. This same analysis should apply to displays, offering literature, and other personal encounters where the purpose is to challenge the individual’s medical choice. Communicative contact may be made available at a reasonable distance from potential recipients, but not forced upon them at close range.

(ii) Targeted Speech without Close Proximity to the Recipient

The next category of activities encompasses those directed at particular individuals questioning their individual medical choice, but without intrusive physical proximity. These activities include speech
directed at the individuals orally and through signs that use individual names. Because the adverse effects of close physical proximity are, by definition, not present with this type of speech, some of the strong reasons for restricting it disappear. Nevertheless, enough potential adverse effects remain to justify substantial regulation of such targeted speech.

In the context of targeted speech, whether or not it occurs within close proximity of the recipient, the question must always be the justification for the protesters’ claim that they have a constitutional right to locate their targets and communicate with them in their chosen manner. Medical and biological circumstances hold pregnant women captive to abortion protesters outside of health clinics. The equality value that underpins the right to choose abortion thus dictates that the protesters are not constitutionally entitled to force their message on these women. Proximity is one means of forcing a message, but loud, directed speaking, or signs identifying the target of the communication are others. The equality value indicates that the limit of directed communication should be a simple indication that the protester desires to engage in one-on-one communication about the abortion procedure. The pregnant woman, being as she is an equal citizen entitled to make her own choices with or without consultation as she deems appropriate, should then have the option of seeking the communication or refusing it, and not being personally pursued any further.

In addition to the equality value and the medical setting of the communications, a context-sensitive assessment of what constitutes a threat should lead to greater regulation of nonproximate targeted speech as well. In particular, signs or other means used by protesters to communicate with abortion seekers that they have learned and are willing to publicize their personal identities may reasonably be perceived as threats for several reasons. One source of the threat may be the abortion protesters. An indication to an abortion seeker that she, personally, is the object of the protest may reasonably cause her to fear for her safety, both outside the clinic and after she leaves. The size of the protesting crowd and the nature of its behavior may accentuate these fears. In addition, many abortion seekers may reasonably fear violence not only from abortion protesters, but from male partners at home. Protest actions that reveal their identities make such violence more likely and therefore may reasonably be perceived
as threats. For this reason as well, targeted communications to abortion seekers outside of abortion clinics should be proscribable even if they occur outside of a close physical proximity to the recipient.

(iii) Public Speech in Close Proximity to the Recipient

Abortion protest activities that constitute closely proximate public speech include holding signs, speaking in a general “soapbox” style, or chanting, singing, or praying within several feet of abortion seekers. Such speech about public issues directed toward the public occupies the “highest rung” of First Amendment protection.\(^{355}\) Government restrictions on such speech are suspect because they reduce the ideas available for public consideration and debate. Despite this high value, however, the proximity of protesters to abortion seekers may justify some regulation of this speech.

The question in this context is whether abortion protesters should be allowed to force proximity to deliver a public message. The social value in permitting the message to be delivered is strong. But the equality interest of the abortion seeker in avoiding unwanted speech—even that which is socially valuable\(^ {356}\)—remains strong as well. Moreover, close proximity adds to the likelihood that even publicly directed messages will be perceived as threatening, or that the mode of delivering the message will effectively impede access to abortion services. Protesters allowed close access to abortion seekers may also be strongly tempted to abuse it by engaging in personal confrontations, and, at the scene of a protest, enforcement of a rigid, public-message requirement may be difficult.

Consequently, where statutes or injunctions prohibit publicly directed protest activities within close proximity to abortion seekers, courts must look carefully at the particular circumstances to determine the appropriate constitutional balance. Where it appears possible to separate out and permit the delivery of nonthreatening and nonobstructive public messages in close proximity to abortion seekers,


\(^{356}\) See Rowan v. United States Post Office Dep’t, 397 U.S. 728, 738 (1970) (“[N]o one has a right to press even ‘good’ ideas on an unwilling recipient.”).
this balance may be appropriate. Where, however, the facts indicate that threats, obstruction, or targeted messages are reasonably probable, prohibition of such speech activities should be constitutionally permissible. Although the best context for this inquiry would be an injunction hearing where the parties and nature of the protest activities are clearly delineated, legislatures may also strike this balance based on the factual history of abortion protests within their jurisdiction, perhaps allowing for exemptions for particular pre-planned protest activities.

(iv) Public Speech without Close Proximity to the Recipient

It is in the context of publicly directed expression delivered at a reasonable distance from abortion seekers that the Court's current analysis should apply. That is, such speech should be regulable only to the extent necessary to preserve access to, or protect the healthful environment around, abortion facilities. Publicly directed speech about public issues is the paradigm of speech that all citizens, in the interest of full and open public debate, are expected to tolerate or ignore, even if they find the message offensive or disturbing. To be sure, abortion seekers will still be disproportionately subject to such messages because of physical and medical circumstances that they cannot avoid. But the value of the speech at issue, and the lower personal costs it is likely to impose because of its content and nature of delivery, dictate that the constitutional value of the speech outweighs the abortion seekers' interest in avoiding it.

IV. CONCLUSION

Unquestionably, violent abortion protest activities must be stopped. Neither the constitutional nor policy concerns about suppressing expression inherent in such conduct should stand in the way of government efforts to do so. At the same time, lines must be carefully drawn. Nonviolent, publicly expressive abortion protest,

357. A nonviolent sit-in outside of an abortion clinic by a group of protesters that does not have a history of abusing close physical access to abortion seekers is one possible example.

even if it invades some individual legal rights or involves lawbreaking, is socially valuable and is entitled to special consideration in the lawmaking process. Because it is possible to excise such valuable conduct from restrictions aimed at violent lawbreaking, policymakers should do so. Such an exception would not only realize the social value of nonviolent political protest, it is also consistent with the equality interest that underlies the right to choose abortion. Publicly directed protest activities impose costs that individuals can usually bear, and the possibility of an injunction in particular circumstances resolves the situations where the costs of the conduct on individuals is unusually high. Most important, those who have the majority on their side should remember the value of preserving the option of nonviolent political protest as a continuing guarantee of equality.

While in the above respect the assumption about the range of government restrictions is unduly broad, in another respect, it is too narrow. It is not only physically violent abortion protest that must be stopped, but also psychologically damaging, discomforting protest, when the social value of such protest does not outweigh the costs borne by individuals. The targeted nature of such abortion protest speech that is directed to patients about to undergo a medical procedure, and the equality value that underlies the right to choose abortion, suggest that limiting protection from such speech to the home is too narrow. Speech targeted at specific abortion seekers and made in close physical proximity to them should be prohibitable to varying degrees because it subjects abortion seekers to particular torments based on their sex and because such directed speech does not significantly contribute to public debate. Expanding the scope of government regulation in this respect would better serve the social value that underpins the free speech right and the equality interest that informs the right to choose abortion than does current constitutional doctrine.