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Double Standards: The Suppression of Abortion Protesters' Free Speech Rights

Christopher P. Keleher

DOUBLE STANDARDS: THE SUPPRESSION OF ABORTION PROTESTERS' FREE SPEECH RIGHTS

> "We should be eternally vigilant against attempts to check the expression of opinions that we loathe."[1]
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> "A function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces . . . unrest . . . or even stirs people to anger."[2]

INTRODUCTION

Free speech is necessary for a democracy. It prevents government oppression and tyranny while permitting ideas to flow freely and uninhibited. It is important to keep free speech, from whatever source, unencumbered. Stifling free speech has resulted in devastating effects in other countries, eventually leading to their demise.[3] This issue takes on even greater importance in the United States because this country was founded on the principles of freedom of speech, press, and religion.[4]

Most Americans would agree that free speech is a fundamental right that deserves protection.[5] However, throughout this country's history, many issues have tested the boundaries of free speech, one of the most controversial being abortion. Abortion remains one of the most divisive issues our nation has ever faced. Both sides of the abortion debate firmly believe their position is correct. Further, the subject of abortion has permeated many aspects of our culture, including politics, medicine, law, women's liberation, and religion.[6]

Whether an individual is a staunch supporter of abortion rights, an advocate of the pro-life movement, or one who is oblivious to the issue, it is important to consider the implications of the United States Supreme Court's recent limitations on the free speech of abortion

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
2. Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (Douglas, J.).
3. *See* HARRISON E. SALISBURY, RUSSIA 39-43 (1965).
4. U.S. CONST. amend. I.
5. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH - A TREATISE ON THE FIRST AMENDMENT 1-2 (1994).
6. *See generally* ABORTION, MEDICINE, & THE LAW (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) (examining the various legal, political, ethical, religious, and medical aspects surrounding abortion).

protesters. The Court has gradually limited free speech over a period of six years through three separate cases.[7] In each consecutive case, the Court seemed to go one step further than before, as if it were attempting not to suppress too much free speech at once. The Court's willingness to severely limit the speech of the pro-life movement serves as a warning to any protest group that may one day find itself on the wrong side of the Court.

Part II of this Comment will explore the history of free speech from its origin to the present, as well as the Supreme Court's role in shaping that right.[8] This section will also examine the history of the pro-life movement and abortion clinic violence.[9] In addition, Part II will examine free speech cases concerning several contexts, such as the issues of abortion and civil rights.[10] Part III will analyze the Court's treatment of free speech in the context of abortion, comparing it to the treatment of non-abortion free speech cases.[11] Part IV will discuss the actual impact this line of cases has had on lower courts throughout the country and whether these restrictions are warranted.[12] Part IV will then discuss the potential impact this line of abortion protest cases might have, not only for the pro-life protesters, but also on the First Amendment itself.[13]

II. BACKGROUND

A. The History of Free Speech

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the court for redress of grievances."[14] With these words, the First Amendment to the Constitution of the United States defined several principles upon which this nation was founded. The First Amendment protects many of the rights Americans value most, such as freedom of speech, press, religion, assembly, and petition.[15] While these freedoms are highly valued, the amount of protection ac-

7. *See* Madsen v. Women's Health Ctr., 512 U.S. 753 (1994); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Hill v. Colorado, 530 U.S. 703 (2000).

8. *See infra* notes 14-85 and accompanying text.

9. *See infra* notes 86-214 and accompanying text.

10. *See infra* notes 215-343 and accompanying text.

11. *See infra* notes 344-504 and accompanying text.

12. *See infra* notes 505-596 and accompanying text.

13. *See infra* notes 597-623 and accompanying text.

14. U.S. CONST. amend. I.

15. SMOLLA, *supra* note 5, at 1-2. *See, e.g.*, Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989) (discussing the importance and reasoning behind the

corded to these rights has become controversial because of issues such as hate speech,[16] pornography,[17] and other offensive speech.[18]

1. *The Early Years*

The First Amendment to the Constitution has been a controversial principle throughout the history of this country.[19] In fact, before the writing of the Constitution, many states refused to ratify the Constitution without a Bill of Rights.[20] The states did not ratify the Bill of Rights until 1791, fifteen years after the signing of the Constitution.[21]

While the enactment of the First Amendment granted the right of free speech, it did not define what speech was included or the limitations upon it.[22] Thus, since the inception of the Bill of Rights, there have been different interpretations[23] as to exactly how far this right extends.[24] Most of the debate about the First Amendment and the breadth of its protection revolves around the history of the First Amendment.[25]

First Amendment and the background justification for it); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

16. Charles R. Lawrence III, *Frontiers Of Legal Thought II, The New First Amendment: If He Hollers Let Him Go: Regulating Racist Speech On Campus,* 1990 DUKE L.J. 431 (1990) (discussing racist speech on college campuses and the regulation of such speech).

17. *Compare,* CATHARINE A. MACKINNON, ONLY WORDS 25 (1993) (arguing that pornography should not be considered in light of the First Amendment, but rather through the Fourteenth Amendment), *with* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 14 (1995) (stating that "we adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms . . . but also because it would undermine our equality, our status, our dignity, and our autonomy").

18. SMOLLA, *supra* note 5, at 1-2. *See also* Alan C. Kors & Harvey A. Silverglate, *Codes of Silence, Who's Gagging Free Speech on Campus—And Why*, REASON, Nov. 1998, at 22 (observing First Amendment infringements at universities across the country); Nadine Strossen, *Political Correctness: Avoiding Extremism in the PC Controversy*, *in* VISIONS OF THE FIRST AMENDMENT FOR A NEW MILLENNIUM 14, 14 (Fred H. Cate ed., 1992) (considering free expression in light of the political correctness phenomena).

19. O. JOHN ROGGE, THE FIRST & THE FIFTH 12 (1971).

20. *Id.* It was argued that since the federal government had enumerated powers, a Bill of Rights was not necessary; many also felt the state governments would protect individual rights. *Id.*

21. NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 74 (1980).

22. DANIEL A. FARBER, THE FIRST AMENDMENT 9 (1998). The legislative history surrounding the Amendment is incomplete and answers very little. *Id.* at 9-10.

23. Some argue that the words 'no law' contained within the First Amendment mean exactly that. *See generally* TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS (1988) (evaluating Justice Black's judicial and constitutional philosophy, along with the arguments raised by his critics).

24. SMOLLA, *supra* note 5, at 1-2. For the history regarding free speech prior to enactment of First Amendment, see VINCENT BURANELLI, THE TRIAL OF PETER ZENGER (1957).

25. FARBER, *supra* note 22, at 9-10.

One of the first tests of the interpretation of the First Amendment came only a few years after the adoption of the Bill of Rights.[26] In 1798, Congress passed the Sedition Act,[27] which prohibited certain speech against the United States government.[28] The Act was extremely oppressive to free speech, severely limiting all citizens' right to free speech.[29] While debates surrounding the Act are unreliable as evidence, some view the passing of the Sedition Act as an indication that the Framers wanted to maintain the English Common Law[30] notions of freedom of the press and speech.[31] Despite this argument, others claim that the Sedition Act had no bearing on the meaning of the First Amendment.[32] This dispute concerning the appropriate interpretation of the First Amendment continues because there is still no consensus on the issue.

After the Sedition Act expired in 1801,[33] the debate over freedom of speech quieted.[34] The courts paid little attention to the First Amendment between the Act's expiration and the mid-1850s.[35] It was not until the approach of the Civil War that the scope of First Amendment protection again became an issue.[36] During this time, there were widespread efforts by slavery supporters to suppress the free speech of abolitionists.[37] Both in the South and in the North, members of the

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26. SMOLLA, *supra* note 5, at 1-3. For the history leading up to the inception of the Bill of Rights, see ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 (1955).

27. The Sedition Act "punished false, scandalous, and malicious writings against the government, either House of Congress, or the President, if published with intent to defame any of the them, or to excite against them the hatred of the people, or to stir up sedition or to excite resistance of law . . . ." ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 27 (1969).

28. ELDER WITT, THE SUPREME COURT AND INDIVIDUAL RIGHTS 24 (2d ed. 1988). For a history of free speech and state regulation, see ROGGE, *supra* note 19, at 35-53.

29. WITT, *supra* note 28.

30. The major authority on common law, William Blackstone, stated that there could be no previous restraints on speech by the government, but once something was disseminated, the government could restrict it. SMOLLA, *supra* note 5, at 1-7.

31. SMOLLA, *supra* note 5, at 1-3-1-4. *See also* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 249-309 (1960) (explaining that these debates are unreliable as evidence).

32. SMOLLA, *supra* note 5, at 1-4.

33. In 1801, when Thomas Jefferson became President, he pardoned the ten people convicted under the Act, and Congress later paid back the fines they were charged, with interest. WITT, *supra* note 28, at 24.

34. FARBER, *supra* note 22, at 10-11.

35. *Id.*

36. *Id.*

37. *See* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 798 (1995). For example, "Louisiana made it a capital offense to use language in any public discourse, from the bar, the bench, the stage, the pulpit, or in any place whatsoever" that might produce "insubordination among the slaves."

abolitionist movement were often silenced by the court system, public mobs, and police arrests.[38]

Most of the southern states' legislatures were also involved in the suppression of speech.[39] For example, the Georgia legislature passed an act awarding five thousand dollars to anyone who arrested the editor of the abolitionist newspaper, *The Boston Liberator*.[40] Further, grand juries in many states also played a role in suppressing abolitionist speech by indicting publishers of abolitionist newspapers, ministers who spoke out against slavery, and anyone else opposed to their point of view.[41] While there were violations of the First Amendment during this time, the Supreme Court never addressed the constitutionality of these events.[42] After the Civil War, there was very little serious judicial attention paid to the First Amendment until the 1920s.[43]

2. *World War I*

As the United States prepared to enter World War I, the right to free speech again became a public issue, but this time the highest court in the country became deeply involved.[44] With the country in the throes of war, Congress, worried about the dangerous voices of dissenters to the war effort, enacted statutes to address this concern.[45] The Espionage Act of 1917 was one of these statutes.[46] The Act made

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KENNETH M. STAMPP, *Chattels Personal, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 203, 209 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

38. *See, e.g.*, Lynn D. Wardle, *The Quandary Of Pro-Life Free Speech: A Lesson From The Abolitionists*, 62 ALB. L. REV. 853, 922-24 (1999); Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185 (1998).

39. Wardle, *supra* note 38, at 916-21. Every slave state made it a felony to say anything that could cause discontent among slaves. *Id.* However, border states and northern states were also guilty of serious free speech suppression of abolitionists. *Id.*

40. WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY; A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES: WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES 410 (Negro Univ. Press 1968) (1852).

41. Wardle, *supra* note 38, at 916-25. *See also* Curtis, *supra* note 37, at 805 (noting that an Alabama grand jury indicted the publisher of the New York newspaper, *The Emancipator*); DWIGHT LOWELL DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 142 (1961) (noting that a Maryland county grand jury indicted a Methodist minister for speaking out against slavery during a sermon).

42. WITT, *supra* note 28, at 24. The main reason there was little national attention was because at the time, the First Amendment did not apply to state and local governments. FARBER, *supra* note 22, at 62.

43. FARBER, *supra* note 22, at 12. *But see* David M. Rabban, *The First Amendment in the Forgotten Years*, 90 YALE L.J. 514 (1981).

44. FARBER, *supra* note 22, at 12.

45. *See* HENTOFF, *supra* note 21, at 108-09. These new laws were in addition to a growing number of state sedition laws. *Id.*

46. *Id.* at 109. During World War I, there were more than two thousand convictions under the Espionage Act. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1018 n.3 (12th ed. 1991).

it a crime to cause disloyalty, mutiny, or insubordination in the armed forces.[47] Congress went even further a year later by enacting the Sedition Act of 1918, which made it a crime to speak or write anything against the United States government, the Constitution, or the flag.[48] Challenges to these laws eventually reached the United States Supreme Court.[49] Six major cases between 1919 and 1920 dealt with these Acts of Congress, presenting the Court with its first opportunities to define the limits of protection afforded to speech by the First Amendment.[50]

In these cases, a majority of the Court believed that preserving the government policies at issue deserved more recognition than the First Amendment rights of Americans.[51] However, a minority of justices, most notably Justice Oliver Wendell Holmes and Justice Louis Brandeis, grew concerned over the course of these cases, becoming staunch defenders of the First Amendment and consistently chiding the majority for its willingness to restrict speech.[52] These cases represented the first time that the Supreme Court explored the boundaries of free speech, and it has continued to wrestle with this issue ever since.[53]

3. *The Later Years*

In the series of early free speech cases, the Court developed the "clear and present danger" test.[54] Yet, as the Court progressed, to the dismay of Justice Holmes, it expanded the test to restrict more speech

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47. WITT, *supra* note 28, at 24. The punishment was a twenty-five year jail term or a $10,000 fine. HENTOFF, *supra* note 21, at 109.

48. WITT, *supra* note 28, at 24-25. This Act was an amendment to the Espionage Act. *Id.* This Act along with the Sedition Act, according to Hentoff "clearly reflected the will of the majority of Americans." HENTOFF, *supra* note 21, at 110.

49. Schenck v. United States, 249 U.S. 47 (1919) (affirming the conviction of a socialist party leader for obstructing enlistment after printing leaflets opposing the draft); Frohwerk v. United States, 249 U.S. 204 (1919) (affirming the conviction of a newspaper publisher whose articles allegedly caused disloyalty and insubordination among the armed forces); Debs v. United States, 249 U.S. 211 (1919) (affirming the conviction of Socialist Eugene V. Debs for violating the Espionage Act after a speech he gave about socialism); Abrams v. United States, 250 U.S. 616 (1919) (affirming the conviction of five Russian immigrants for writing two allegedly seditious pamphlets critical of the United States Government); Schaefer v. United States, 251 U.S. 466 (1920) (affirming the conviction of an officer of a German language newspaper which published articles unfavorable to the war effort); Pierce v. United States, 252 U.S. 239 (1920) (upholding the convictions of Socialist party members after distributing pamphlets critical of the armed forces and the war effort).

50. WITT, *supra* note 28, at 24-27, 30.

51. *Id.* at 24.

52. *Id.*

53. The First Amendment, as a legal doctrine is only around eighty years old. FARBER, *supra* note 22, at 12.

54. WITT, *supra* note 28, at 25.

than originally intended.[55] The dissenting opinions of Justices Holmes and Brandeis, which expressed concerns about being too willing to restrict speech, initially had little impact.[56] It was only as time passed that the Court began to shift its stance on free speech.[57]

This shift began in the 1925 case *Gitlow v. New York*,[58] which concerned the publication of *The Left Wing Manifesto*.[59] In upholding the conviction, the Court made it clear for the first time that the First Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[60] Throughout the 1930s, the Court began taking a more temperate look at the right of free speech, rendering decisions protecting free speech but also taking into consideration extreme speech such as "fighting words."[61]

This reversal of the Court's theory of First Amendment protection was short-lived.[62] In the 1950s, it was the "Red Scare"[63] which caused the Supreme Court to narrow its interpretation once again.[64] The threat of communism permeated the American psyche in the early 1950s and resulted in political witch-hunts, loyalty oaths, and other restrictions on the freedom of expression.[65] These cases surrounding McCarthyism[66] revived the debate over the scope of First Amendment protection.[67] In this debate two disparate sides emerged, one arguing for a balancing test, the other lobbying for an absolutist ap-

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55. *Id.*

56. FARBER, *supra* note 22, at 12.

57. *Id.* at 13.

58. 268 U.S. 652 (1925).

59. The Left Wing Section of the Socialist Party published the book, which advocated revolutionary mass action. *Id.* at 658-59.

60. *Id.* at 666.

61. FARBER, *supra* note 22, at 62. Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See, e.g.*, CHAFEE, *supra* note 27, at 357-493 (examining the right of free speech in the 1930s); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1729-34 (1991).

62. FARBER, *supra* note 22, at 63.

63. For further reading on the suppression of rights during this time, see BURT HIRSCHFELD, FREEDOM IN JEOPARDY: THE STORY OF THE MCCARTHY YEARS (1969); R. CONRAD STEIN, THE GREAT RED SCARE (1998).

64. FARBER, *supra* note 22, at 63. *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951) (upholding the conviction of Communist party leaders who advocated the overthrow of the government); Garner v. Bd. of Pub. Works of Los Angeles, 341 U.S. 716 (1951) (upholding the requirement of a loyalty oath for public employees).

65. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIC RIGHTS AND LIBERTIES IN THE UNITED STATES 190-92 (7th ed. 1998).

66. *See generally* ELLEN SCHRECKER, MANY ARE THE CRIMES (1998) (explaining how the McCarthy era is considered one of the most widespread episodes of political repression in the history of the United States).

67. FARBER, *supra* note 22, at 66-68.

proach.[68] Although there was no clear resolution to the debate, commentators decided the relevant points of both sides must be considered.[69]

During this period of renewed suppression of speech, Justices Hugo Black and William Douglas argued that the Court's application of the clear and present danger test made it too easy to restrict speech.[70] Both Justices Black and Douglas had an extensive view of the First Amendment and believed the Court should regulate speech only if it was mixed with conduct.[71] Following in the tradition of the spirited dissents of Justices Holmes and Brandeis, the dissents of Justices Black and Douglas in the 1950s would also prove to make a lasting impression on the Court's jurisprudence.[72]

However, in the late 1950s, with Earl Warren taking over as Chief Justice of the Supreme Court, the Court again began to change its treatment of free speech, expanding First Amendment protection to the press[73] and protesters.[74] One of the Warren Court's most important free speech cases was *Brandenburg v. Ohio*[75] in which a unanimous Court reversed the conviction of a Ku Klux Klan leader.[76] The Court indicated that because the statute punished the mere advocacy of violence, it fell within "condemnation" of the First Amendment.[77] Thus, while the Court fought segregation and protected civil rights, it still recognized the free speech rights of its own enemies.[78] While the Warren Court consistently protected freedom of speech and laid out several free speech doctrines, it often dealt with cases according to their specific facts.[79]

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68. *Id.* at 68. Justice Black was a renowned absolutist. *See* YARBROUGH, *supra* note 23, at 133-34. *See generally* Patricia R. Stembridge, Note, *Adjusting Absolutism: First Amendment Protection For The Fringe*, 80 B.U. L. REV. 907 (2000) (considering the fringe protection theory in light of the absolutist view of free speech).

69. FARBER, *supra* note 22, at 68.

70. *Id.* at 66-67.

71. *Id.*

72. FARBER, *supra* note 22, at 13. *See, e.g.*, Yates v. United States, 354 U.S. 298, 339-44 (1957); Beauharnais v. Illinois, 343 U.S. 250, 267-87 (1952); Dennis v. United States, 341 U.S. 494, 579-91 (1951).

73. New York Times Co. v. United States, 403 U.S. 713 (1971).

74. *Id. See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). (holding that one could not be punished for advocating unlawful actions unless the speech actually incited the unlawful activity).

75. 395 U.S. 444 (1969).

76. *Id.* at 449. The man was convicted under an Ohio criminal syndicalism statute for advocating violence. *Id.* at 444-45.

77. *Id.* at 449.

78. FARBER, *supra* note 22, at 68.

79. *Id.* at 13.

4. *The Modern Era*

The modern era of First Amendment cases began in 1969 with the replacement of Chief Justice Warren with Chief Justice Warren Burger and has continued to the present day.[80] The Burger Court picked up where the Warren Court left off, further expanding the protections given to the First Amendment.[81] Unlike the cases from the 1960s, however, the Court developed a set of rules to deal with free speech cases.[82] The Burger Court's most important contribution to the free speech jurisprudence was the distinction between content-based and content-neutral regulations.[83] While the concept actually dated back to the 1930s, the Court did not actively distinguish between the restrictions until the 1970s.[84]

Since 1917, the Supreme Court has decided many free speech cases. These cases constitute some of the most controversial decisions handed down by the Court. The combination of free speech, a divisive issue in and of itself, and the subject of abortion, an even more controversial issue, creates emotionally charged Court decisions. The Supreme Court did not decide any free speech cases concerning the issue of abortion protest until the late 1980s.[85] Like the First Amendment itself however, once the Court began considering abortion protest cases, it never stopped.

B. History of the Pro-Life Movement

The pro-life movement, like any other protest group, relies on the First Amendment to pursue its goals and survive.[86] For democracy to function, it requires that protest not only be allowed to flourish, but also that it be protected from prohibition by both those holding op-

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80. *Id.*

81. *Id.* But for a criticism of the Burger Court's treatment of other Constitutional rights, see JOHN F. DECKER, REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA (1993).

82. FARBER, *supra* note 22, at 13.

83. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). "Content-neutral restrictions limit communication without regard to the message conveyed. . . . Content-based restrictions, on the other hand, limit communication because of the message conveyed" *Id.* at 189-90. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Carey v. Brown, 447 U.S. 455 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

84. Stone, *supra* note 83, at 189. For a more in depth analysis, see Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214-31 (1982).

85. The first abortion protest case the Supreme Court heard was *Frisby v. Schultz*, 487 U.S. 474 (1988).

86. *See* Sidney Hook, *Social Protest and Civil Obedience, in* CIVIL DISOBEDIENCE & VIOLENCE 54-55 (Jeffrie G. Murphy ed., 1971). "[T]he Bill of Rights was adopted not only to make protest possible but to encourage it." *Id.*

posing views, as well as the government.[87] Thus, pro-life advocates who are opposing a government-backed position must be aware of efforts to suppress their speech,[88] which have also occurred against others in conflict with the government.[89]

1. Early Opposition to Abortion

Opposition to abortion dates back to colonial times.[90] At common law, the act of abortion was considered homicide, but over time the severity of the crime lessened.[91] By the early 1800s, many states had officially made abortion illegal, due to the medical industry's concern about abortions performed by unlicensed abortionists.[92] During this time, the government was also concerned about the dangerous risks women were taking to perform self-abortions, such as ingesting poison or sticking sharp objects into the uterus.[93] The number of illegal abortions that occurred during the nineteenth century remains disputed; different studies estimate the number of illegal abortions at anywhere from 200,000 to 1.2 million per year.[94]

During the late 1840s, The American Medical Association (AMA) voiced its concern about abortion, not only because of the danger to women, but also because of the possibility of a woman "overlooking the duties imposed on her by the marriage contract."[95] As a result, by the middle of the century, abortion was illegal in almost every state.[96] Correspondingly, in 1873, Congress passed the Comstock Law, which made it a criminal offense to import, mail, or transport any item used

87. *Id.*

88. *See generally* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541 (2000) (considering whether a website that approved taking the life of abortion doctors constituted threats).

89. For example, civil rights and anti-war demonstrators.

90. For information on the history of abortion in the United States, see JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978). *See also* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867-1973 (1997).

91. Lynn D. Wardle, *The Quandary of Pro-Life Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853 (1999). *See also* Mark S. Scott, Note, *Quickening in the Common Law: The Legal Precedent* Roe *Attempted and Failed to Use*, 1 MICH. L. & POLICY REV. 199, 224-30 (1996) (examining in great detail the abortion laws in the common law).

92. CATHERINE WHITNEY, WHOSE LIFE?: A BALANCED, COMPREHENSIVE VIEW OF ABORTION FROM ITS HISTORICAL CONTENT TO THE CURRENT DEBATE 44 (1991).

93. *Id.*

94. EVA A. RUBIN, ABORTION, POLITICS, AND THE COURTS; ROE V. WADE AND ITS AFTERMATH 17 (Robert H. Walker ed., Rev. ed. 1987). There was also a study that reported five thousand women died each year because of abortions. *Id.*

95. *Id.*

96. Note, *The Evolution Of The Right To Privacy After* Roe v. Wade, 13 AM. J. L. & MED. 368, 370 (1987).

for contraception or abortion.[97] Further, by the end of the nineteenth century, the Catholic Church also began to voice its opposition to abortion.[98] Along with the medical establishment and government, the Church publicly condemned the performance of abortions, going so far as to call it "the evil of the ages."[99] Thus, this early opposition to abortion arose from a combination of concerns about morality, safety, and the emancipation of women.[100]

Abortion laws in the United States remained relatively stable until the late 1950s when Planned Parenthood and the postwar population control movement began to lobby for changes.[101] In 1955, Planned Parenthood held a conference titled "Abortion in the U.S.," which addressed the dangers and problems surrounding illegal abortions.[102] The conference subsequently influenced the American Law Institute (ALI) to consider reforming abortion laws for its model legislation.[103] These factors were influential in shifting Americans' attitudes toward the liberalization of abortion laws.[104]

The ALI legislation,[105] coupled with the AMA's new stance on abortion[106] and the women's liberation movement,[107] prompted

97. WHITNEY, *supra* note 92, at 46. The Comstock Law was named after Henry Comstock, head of the New York Society for the Suppression of Vice who personally enforced the law. *Id.*

98. *Id.* at 45.

99. *Id.* The press also condemned abortion; in an 1871 article entitled "The Evil of the Age," a newspaper stated that "thousands of human beings are . . . murdered before they have seen the light of this world." *The Evil of the Age*, N.Y. TIMES, Aug. 23, 1871, at 6.

100. WHITNEY, *supra* note 92, at 45.

101. JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 10 (1998). The American Birth Control League, founded by Margaret Sanger in 1921, was the forerunner to Planned Parenthood. *Id.* at 10.

102. *Id.* One important issue discussed was illegal abortions. *Id.* While there was no hard evidence about the exact number of illegal abortions performed, the conference estimated there were between 200,000 and 1.2 million performed per year. *Id.* at 11. Organizers and speakers at the conference included Alan Guttmacher, one of the first physicians to support abortion, Alfred Kinsey, the sex researcher, and G. Lotrell Timanus, a retired abortionist. *Id.*

103. RISEN & THOMAS, *supra* note 101, at 10-11. The 1959 legislation approved an abortion if two doctors agreed it was necessary because a woman's health was in danger, or in cases of rape, incest, or fetal abnormalities. *Id.* at 10-11.

104. *Id.* at 11. For a look at the impact of feminist activism on the repeal of abortion laws during the 1960s, see Katha Pollitt, *Abortion History 101*, THE NATION, May 2000, at 10.

105. The ALI had revised the Model Penal Code to include three defenses to abortion: fetal abnormality, rape or incest, and danger to the physical or mental health of the woman. KERRY N. JACOBY, SOULS, BODIES, SPIRITS: THE DRIVE TO ABOLISH ABORTION SINCE 1973 3 (1998).

106. In June of 1967, the AMA endorsed "less restrictive state abortion laws in its first policy change on the subject since 1871." CARL N. FLANDERS, ABORTION 38 (1991).

107. For a thorough look at socialist feminism and its relation to reproductive rights, see Lesley Hoggart, *Socialist Feminism, Reproductive Rights and Political Action*, CAPITAL & CLASS, Spring 2000, at 95.

twelve states to begin to liberalize their abortion laws.[108] By March of 1970, Hawaii, New York, and Alaska had become the first states to make serious inroads in repealing their abortion laws, with New York becoming the first state to legalize abortion without exception.[109]

As the number of states reforming abortion laws increased, the opposition, generated mainly from Catholic doctors and lawyers, remained scattered.[110] By the mid-1960s, however, the Catholic Church began to actively oppose abortion law reform.[111] This opposition was nothing new; it dated back centuries to the early Christian era.[112] For example, in 1679, Pope Innocent XI ruled that abortion was wrong in all circumstances, even when it was necessary to save the life of a mother.[113] The underlying basis for the Church's stance was that ensoulment, God's granting of a soul, occurred at the moment of conception.[114] While the Catholic Church had historically opposed abortion, it had never been an outspoken activist on the issue; however with the reformation of abortion laws, this attitude changed.[115]

As the Church attempted to influence state legislatures, reports of scattered public protests began to appear.[116] For example, in early 1970, a group of University of Dallas students conducted a six hour sit-in at a Planned Parenthood office in Dallas, which served as an abortion referral service.[117] The protest ended without any arrests and went virtually unnoticed, except by Brent Bozell, the editor of the

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108. RISEN & THOMAS, *supra* note 101, at 14-15. By November of 1969, a Gallup poll survey showed that forty percent of adults supported first trimester abortions. FLANDERS, *supra* note 106, at 38.

109. RISEN & THOMAS, *supra* note 101, at 15. Behind much of these states' legislation was the AMA, the National Organization for Women, and the National Association for Repeal of Abortion Laws. *Id.* at 14-15. In New York, the National Association for Repeal of Abortion Laws, cofounded by obstetrician Bernard Nathanson, played a critical role in legalizing abortion in New York. WHITNEY, *supra* note 92, at 81.

110. RISEN & THOMAS, *supra* note 101, at 16. *See also* Note, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1214 (2000) ("[W]hile abortion was the subject of considerable legislative action, historical records again indicate no anti-abortion violence.").

111. JACOBY, *supra* note 105, at 38-39.

112. *Id. See also* MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA 40-41 (1992) (surveying abortion in the United States from Colonial times through the early 1960s and concluding abortion was rare and considered immoral). *But see* MOHR, *supra* note 90, at 75 (examining history of abortion in early America and concluding abortion was common and not considered immoral).

113. RISEN & THOMAS, *supra* note 101, at 16.

114. *Id.*

115. *But see* BARBARA FERRARO, PATRICIA HUSSEY & JANE O'REILLY, NO TURNING BACK (1990) (featuring Catholic women explaining their opposition to their church's stand on abortion).

116. RISEN & THOMAS, *supra* note 101, at 20-21.

117. *Id.* at 21.

Catholic magazine *Triumph*.[118] Mr. Bozell's interest, sparked by the Dallas incident, prompted him to plan a protest in Washington D.C., a city with a high abortion rate.[119]

In June 1970, Mr. Bozell and 250 other abortion protesters staged a peaceful protest at George Washington University Health Clinic.[120] During the protest, Mr. Bozell and four others entered the clinic and engaged in a sit-in.[121] The police arrived quickly and arrested the five demonstrators.[122] This was the first time that protesters were arrested in connection with the movement against abortion.[123] The Catholic press, including the conservative newspaper *The Wanderer*, shocked at these actions, denounced the manner of the protest.[124] Despite the publicity, these early sit-ins were isolated incidents that were quickly forgotten.[125] However, it was during this time, when more states were considering possible amendments to their abortion laws, that the Supreme Court stepped into the controversy.[126]

2. Roe v. Wade[127]

On January 22, 1973, the Supreme Court decided the seminal abortion case, *Roe v. Wade*. In *Roe*, the Court considered whether the right to choose to have an abortion was a fundamental right protected by the Constitution.[128] The Court acknowledged that the right to privacy existed in part in the First, Fourth, and Fifth Amendments, along with its recognition in the concept of liberty guaranteed in the Fourteenth Amendment.[129] The Court then noted that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" by abortion.[130] The Court limited this right to the first trimester, noting that for the stage subsequent to viability, the state may regulate abortion, thus legalizing abortion in all fifty states.[131]

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118. PHILIP F. LAWLER, OPERATION RESCUE: A CHALLENGE TO THE NATION'S CONSCIENCE 16 (1992).
119. *Id.* at 16-17.
120. *Id.*
121. *Id.* at 17.
122. *Id.*
123. *Id.*
124. LAWLER, *supra* note 118, at 17.
125. *Id.*
126. *See* BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 75 (1993) (presenting a table of state abortion laws before *Roe v. Wade*).
127. 410 U.S. 113 (1973).
128. FLANDERS, *supra* note 106, at 8. Roe v. Wade, 410 U.S. 113 (1973).
129. *Roe*, 410 U.S. at 152.
130. *Id.* at 153-54.
131. *Id.* at 164.

Although many considered *Roe v. Wade* a victory for those who supported the right to choose, the decision actually galvanized the pro-life movement.[132] Opponents of *Roe v. Wade* raised money, held rallies, wrote books, and lobbied legislators.[133] Shortly after *Roe*, the Catholic Church increased its pressure against legislatures and over the next twelve months alone, the Church spent over four million dollars in lobbying against abortion.[134]

Justice Ruth Bader Ginsburg, reflecting on the *Roe* opinion, said, "it invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislator's court . . . . Around that extraordinary decision, a well-organized and vocal right to life rallied."[135] Thus, the strong opposition, which sent protesters into the streets, was the inevitable consequence of *Roe*; furthermore, "*Roe's* recognition of a constitutionally protected right . . . shut the door to direct political action to restrict abortion . . . ."[136]

With abortion legal in all fifty states, the pro-life movement needed to shift its goals and methods of protest. After *Roe*, the abortion opponents had only two options to eliminate legalized abortion, either ratification of a constitutional amendment to overturn *Roe* or election of political candidates who would attempt to have pro-life justices appointed to the Supreme Court.[137] In the wake of *Roe*, abortion slowly became a mainstream political issue and a fundamental part of the political process.[138]

In 1976, the pro-life movement received an unexpected boost from an unlikely source.[139] Dr. Bernard Nathanson, a doctor who had led the drive to liberalize abortion laws in New York, began to have serious doubts about his stance on abortion and later became a staunch

132. RISEN & THOMAS, *supra* note 101, at 39. *See also* ABORTION: FREEDOM OF CHOICE & THE RIGHT TO LIFE 23-38 (Lauren R. Sass ed., 1978) (summarizing the newspaper articles printed the week after the Court handed down its decision in *Roe*).

133. LAWLER, *supra* note 118, at 17.

134. WHITNEY, *supra* note 92, at 78.

135. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992).

136. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 16 (2d ed. 1992). *But see* Michael W. McConnell, Review, *How Not To Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181 (1991) (criticizing *Clash of Absolutes* and stating that Tribe did not give enough serious attention to the pro-life side).

137. RISEN & THOMAS, *supra* note 101, at 39. *See also* Wardle, *supra* note 38, at 876 ("Persons subject to *Roe* had no opportunity in 1973 to help create or modify the law, and they have had no realistic opportunity since. . . . Public policy on such a fundamental and controversial question affecting the whole of society ought to be established through democratic processes.").

138. KAREN O'CONNOR, NO NEUTRAL GROUND: ABORTION POLITICS IN AN AGE OF ABSOLUTES 72 (1996).

139. WHITNEY, *supra* note 92, at 81.

opponent of abortion.[140] Dr. Nathanson's change of position on the issue, coupled with the passage of the 1976 Hyde Amendment, which cut off federal funds for abortions, gave the right to life movement new impetus.[141] As a result, by the late 1970s, the pro-life movement began to attract other religious denominations.[142] Catholics knew they could not win the fight alone, and soon, large numbers of Evangelical Protestants, Orthodox Jews, and Mormons joined the movement.[143]

The pro-life movement became even stronger in 1980 with the election of President Ronald Reagan, a strong opponent of abortion.[144] Reagan used an abortion litmus test not only for judicial appointments, but also for members of his cabinet.[145] Reagan went on to appoint three justices to the Supreme Court, heavily changing the makeup of the Court with the hope of reversing *Roe*.[146] Despite his attempts to end legalized abortion, Reagan's actions yielded few short-term gains and, in the long run, proved to accomplish very little.[147] Eventually, the mainstream pro-life movement revised its focus and began concentrating on smaller steps such as eliminating federal funds for abortion,[148] requiring parental notifications for minors seeking abortions,[149] and placing restrictions on the promotion of abortion by government programs, such as the military and federal employees' health plans.[150]

The slow progress and minimal gains of the movement eventually caused some in the pro-life movement to consider "direct action,"

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140. *Id.* Doctor Nathanson explains his change in BERNARD NATHANSON, THE HAND OF GOD: A JOURNEY FROM DEATH TO LIFE BY THE ABORTION DOCTOR WHO CHANGED HIS MIND 125-39 (1996).

141. WHITNEY, *supra* note 92, at 78-82. By 1976, Medicaid was funding almost 300,000 abortions a year. *Pro-Life Responses to Roe: Federal Legislation*, NATIONAL RIGHT TO LIFE NEWS, Jan. 1998, at 12.

142. JACOBY, *supra* note 105, at 37.

143. RISEN & THOMAS, *supra* note 101, at 39-40. For a look at abortion and different religious denominations, see Christian Smith, *Abortion and Religious Beliefs*, CHRISTIANITY TODAY, April 28, 1997, at 84.

144. O'CONNOR, *supra* note 138, at 88.

145. *Id.* at 90-91.

146. *Id.* at 94-95, 100-101. President Reagan's appointees to the Supreme Court included Justice Sandra Day O'Connor (1981), Justice Antonin Scalia (1986), and Justice Anthony Kennedy (1988).

147. RISEN & THOMAS, *supra* note 101, at 131.

148. *See* Harris v. McRae, 448 U.S. 297 (1980).

149. *See* H.L. v. Matheson, 450 U.S. 398 (1981).

150. *Pro-Life Responses to Roe: Federal Legislation*, NATIONAL RIGHT TO LIFE NEWS, Jan. 1998, at 12.

rather than just marches and lobbying.[151] Those activists who grew impatient with the mainstream efforts began looking for more radical ways to protest abortion. Catholic leftists, using their experience from the civil rights and anti-war demonstrations, initially led the activists,[152] and later militant Christians, to interfere with abortion clinics through mass demonstrations and sit-ins.[153]

As the early 1980s passed, some members within the National Right to Life Committee also became dissatisfied with the slow pace of the fight against abortion.[154] As a result, some members splintered off to form more militant groups.[155] These groups increased activism by staging blockades, participating in sit-ins, and in some cases, provoking arrest.[156] Despite the "direct action" taken by these more militant groups, the number of abortions per year did not decline.[157] In fact, the number remained consistent; there were approximately 1.5 million abortions each year throughout the 1980s and into the mid-1990s.[158]

In 1987, many pro-life supporters met with Pope John Paul II during his visit to various cities across the United States.[159] Calling the campaign "We Will Stand Up," the pro-life activists succeeded in closing down abortion clinics in many cities through mass protests and sit-ins.[160] As a result of their activities, the members of the campaign received media attention and caused some discomfort in the more mainstream pro-life groups.[161] Accordingly, the leaders of the National Right to Life Committee "took great pains to distance themselves from anyone who refused to work within the system."[162]

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151. RISEN &THOMAS, *supra* note 101, at 39. *See also* ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 17-39, 128-30 (1984).

152. RISEN & THOMAS, *supra* note 101, at 49-51.

153. *Id.*

154. *Id.* at 240.

155. *Id.* at 241. For example, Joseph Scheidler organized the Pro-Life Action League in Chicago. *Id.* For more on the inner workings of Joseph Scheidler and the Pro-Life Action League, see JOSEPH M. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION (1993). In St. Louis, John Ryan started the Pro-Life Direct Action League and John O'Keefe founded the Pro-Life Non-Violent Action Project. RISEN & THOMAS, *supra* note 101, at 164, 168. John O'Keefe was greatly influenced by Thomas Merton and Daniel Berrigan, two anti-war activists who preached civil disobedience. *Id.* at 49.

156. By 1985 almost half of all abortion providers had experienced some form of protest by pro-life groups. *Id.* at 241.

157. *Id.* at 240.

158. O'CONNOR, *supra* note 138, at 93.

159. LAWLER, *supra* note 118, at 21.

160. *Id.*

161. *Id.* at 23.

162. *Id.*

In response to the success and exposure of these more aggressive abortion protesters, other groups began to organize. In February of 1987, Randall Terry, a young Protestant fundamentalist, began plans for a new pro-life organization called Operation Rescue.[163] The organization's main activity was to participate in nonviolent sit-ins outside abortion clinics.[164] Mr. Terry and Operation Rescue burst onto the national scene soon after participating in successful sit-ins in New Jersey and New York.[165] They gained further national attention in 1988 at the Democratic National Convention in Atlanta.[166] Spurred by these successes, local affiliates of Operation Rescue spread across the country, staging even more protests.[167] However, a power struggle between Randall Terry and other leaders of the group began to take its toll on Operation Rescue.[168] As quickly as it had burst onto the scene, Operation Rescue faded away due to these internal problems along with mounting lawsuits and jail terms.[169]

3. Planned Parenthood v. Casey[170]

By the beginning of the 1990s, it was clear that the long-term goals of President Reagan concerning legalized abortion would never reach fruition, highlighted by the 1992 case *Planned Parenthood v. Casey*.[171] In *Casey*, the Court considered the Pennsylvania Abortion Control Act of 1982, which had been amended in 1988 and 1989 to include five new provisions, each of which were challenged by various abortion clinics and physicians as facially unconstitutional.[172]

In a plurality opinion, the Court noted the privacy of the decision to obtain an abortion and that the Constitution protects personal deci-

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163. RISEN & THOMAS, *supra* note 101, at 258. For more insight into the methods and beliefs of Operation Rescue, see John Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991).

164. RISEN & THOMAS, *supra* note 101, at 260. *See also* O'CONNOR, *supra* note 138, at 118 (containing a copy of an Operation Rescue pledge for non-violence).

165. RISEN & THOMAS, *supra* note 101, at 262-70. Both sit-ins resulted in closing down those abortion clinics for the day. *Id.*

166. *Id.* at 271.

167. *Id.* at 294. The most notable Operation Rescue protest took place during the summer of 1991 in Wichita, Kansas. *See* Jon D. Hull, *Whose Side Are You On?*, TIME, Sept. 9, 1991, at 19.

168. RISEN & THOMAS, *supra* note 101, at 317-38.

169. *Id.* at 314. *See* John Kendall, *Operation Rescue, in Debt Will Close National Office*, L.A. TIMES, Feb. 1, 1990, at A24.

170. 505 U.S. 833 (1992).

171. Three years earlier in *Webster v. Reproductive Health Serv.*, the Court approved of some state restrictions on abortions. 492 U.S. 490 (1989).

172. *Casey*, 505 U.S. at 844-45; 18 Pa. Cons. Stat. §§ 3203-3220 (1990).

sions relating to procreation.[173] The Court upheld four out of the five provisions, but it reaffirmed *Roe v. Wade,* basing its decision on the protection of personal liberty and stare decisis.[174] Many in the pro-life movement had hoped *Casey* would provide the answers to their prayers. Unfortunately for them, the *Roe* decision was left standing in the wake of the *Casey* decision. While this was a substantial setback to pro-life groups, the fact that the Court permitted state limitations on abortion gave the movement some hope.[175] Either way, most commentators would agree that *Casey* set the framework for a flurry of legislative action concerning abortion.[176] Before *Casey*, the main focus of pro-life groups had been to overturn *Roe.*[177] In the aftermath of *Casey*, many of these groups realized that this goal was out of reach and that their energies would be better utilized if they focused on passing restrictions on abortion.[178]

After *Casey*, the pro-life movement staggered through the early 1990s with minimal gains, yet it did garner enough support to help defeat the Freedom of Choice Act.[179] This bill would have preserved the holding in *Roe* as codified law, even if the Supreme Court eventually watered down *Roe.*[180] However, in *National Organization for Women v. Scheidler,*[181] a unanimous Court held that abortion protesters were liable under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO).[182] The Court reasoned that a financial

173. *Casey*, 505 U.S. at 851 (citing Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977)).

174. *Casey,* 505 U.S. at 853.

175. *See, e.g.,* Nadine Strossen & Ronald K. L. Collins, *The Future of an Illusion: Reconstituting* Planned Parenthood v. Casey, 16 CONST. COMMENT. 587, 591 (1999) (noting that *Casey* provided "for such real-world threats and restrictions on reproductive freedom"); Kelly Sue Henry, Note, Planned Parenthood of Southeastern Pennsylvania v. Casey*: The Reaffirmation of* Roe *or the Beginning of the End?,* 32 J. FAM. L. 93 (1993/1994).

176. Christopher Swope, *Abortion: Chapter II*, GOVERNING, May 1998 at 44. *See also* Mark H. Woltz, Note, *A Bold Reaffirmation?* Planned Parenthood v. Casey *Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787 (1993).

177. Swope, *supra* note 176, at 44.

178. *Id.* at 44, 46.

179. S.25, 103d Cong., 1st Sess. (1993). *See* Peggy S. McClard, Comment, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041 (1994) (explaining that Congress, under the Commerce Clause and the Fourteenth Amendment has constitutional authority to enact the Freedom of Choice Act).

180. *Pro-Life Responses to Roe: Federal Legislation*, NATIONAL RIGHT TO LIFE NEWS, Jan. 1998, at 13. Another victory for the movement was the 1993 defeat of an attempt to repeal the Hyde Amendment. *Id.*

181. 510 U.S. 249 (1994).

182. *Id.* at 262.

motive was not required in proving a pattern of racketeering activity.[183]

On the heels of this decision, pro-life advocates suffered yet another loss with the passing of the Freedom of Access to Clinics Entrances Act of 1994 (FACE).[184] This Act provided for criminal penalties against anyone who "by force or threat of force or by physical obstruction, intentionally injure[s], intimidate[s] or interfere[s]" with anyone who was obtaining or providing abortion services.[185] FACE also provided for civil remedies such as injunctive relief and civil penalties against those who violated the Act.[186] Despite this series of defeats, the pro-life movement continued to focus on lobbying, and its efforts began to pay off in the 1994 elections when many pro-life candidates won seats in both the United States Senate and House of Representatives.[187]

In the late 1990s, the focus of pro-life groups shifted to a new goal: the abolition of partial-birth abortions.[188] Pro-life advocates began a campaign to abolish this procedure with a bill passed by a large majority in Congress; however, President Clinton vetoed it twice.[189] Throughout the 1990s, while mainstream groups such as The National Right to Life Committee and American Life League made strides in getting the pro-life message to the public, a few violent individuals began resorting to even more drastic methods of stopping abortion.

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183. *Id.* at 258. For criticism of the Court's reading of RICO, see Neil Feldman, *Spiraling Out of Control: Ramifications of Reading RICO Broadly*, 65 DEF. COUNS. J. 116 (1998); Lawrence Criner, *Rein in RICO Before it Rewrites the Constitution*, INSIGHT ON THE NEWS, June 1998, at 28.

184. 18 U.S.C. 248 (2000). For criticism of this Act, see *Freedom of Access to Clinic Entrances*, AMERICA, June 11, 1994, at 3. *But see* Joy Hollingsworth McMurtry & Patti S. Pennock, *Ending the Violence: Applying the Ku Klux Klan Act, RICO, and FACE to the Abortion Controversy*, 30 LAND & WATER L. REV. 203, 221-24 (1995) (explaining that FACE is viewpoint neutral, does not violate the overbreadth doctrine, and does not violate one's freedom of religion).

185. 18 U.S.C. § 248 (2000).

186. *Id.*

187. *See Shrinking Choice,* THE NATION, May 29, 1995, at 743 (considering the effects of the 1996 elections on the issue of abortion). *See also* Terry Sollom, *State Actions on Reproductive Health Issues in 1996*, FAMILY PLANNING PERSPECTIVES, March/April 1995, at 83.

188. *See* Ruth Padawer, *The Facts on Partial-Birth Abortion*, THE RECORD, Sept. 15, 1996, at R01.

189. H.R. 1833, 104th Cong. (2nd Sess. 1996); H.R 1122, 105th Cong. (1st Sess. 1997). *Compare* LaShunda R. Lowe, Note, *An Inside Look At Partial Birth Abortion,* 24 T. MARSHALL. L. REV. 327 (1999) (questioning the constitutional validity of the partial-birth abortions and calling for an end to partial-birth abortions), *with* Nadine Strossen & Caitlin Borgmann, *The Carefully Orchestrated Campaign*, 3 NEXUS 3 (1998) (arguing that a ban on partial-birth abortions is unconstitutional).

C. *Abortion Clinic Violence*

In the late 1970s, violent incidents at abortion clinics were scattered and limited to property fires that caused little damage.[190] Yet, by the early 1980s, clinic violence, including arson and bombings, escalated both in severity and in occurrences.[191] Between 1977 and 1983, there were eight clinic bombings, while in 1984, the number jumped to eighteen.[192] This escalation continued in 1985 and 1986 with over 130 incidents of clinic violence reported in each year.[193] This disturbing trend began to decrease by 1988 when the number of violent incidents plummeted by almost seventy percent.[194]

This decrease in violent incidents stemmed in part from the popularity and success of Randall Terry and Operation Rescue.[195] Peaceful civil disobedience became the trend within the movement. As a result, many of the violent extremists began to reconsider their tactics, eventually participating in sit-ins and other forms of nonviolent protest.[196] As National Abortion Federation figures illustrated, the drop in the number of violent incidents correlated with the increase in the number of nonviolent protests.[197] Although clinic violence had actually decreased in 1988, there were more than eleven thousand protesters arrested at abortion clinics that year.[198]

While nonviolent protests increased, Congress, courts, and state legislatures began to express concern over the mass nonviolent civil disobedience.[199] This concern prompted stricter clinic access laws, larger court fines, and the 1994 Freedom of Access to Clinic Entrances Act

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190. RISEN & THOMAS, *supra* note 101, at 74. The first reported act of clinic violence occurred in March of 1976 in Oregon, where a man was sentenced for five years after setting fire to a Planned Parenthood office. *Id.*

191. *Id.* at 75. In January of 1983, Dan B. Anderson was sentenced to thirty years in prison after kidnapping an abortion doctor. FLANDERS, *supra* note 106, at 49. For other theories on abortion clinic violence, see Joni Scott, *From Hate Rhetoric to Hate Crime: A Link Acknowledged Too Late*, THE HUMANIST, Jan. 1999, at 8.

192. O'CONNOR, *supra* note 138, at 108-09.

193. National Abortion Federation: Incidents of Violence and Disruption Against Abortion Providers, *at* http://www.prochoice.org/default7.htm (last visited Nov. 1, 2001).

194. *Id.*

195. Note, *Safety Valve Closed: The Removal of Non-Violent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1217-18 (2000). *See also* DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST 54 (1994) (noting that Operation Rescue emerged at the same time as a "leveling off of bombings and arsons" occurred).

196. BLANCHARD, *supra* note 195, at 54.

197. National Abortion Federation: Incidents of Violence and Disruption Against Abortion Providers, *at* http://www.prochoice.org/default7.htm (last visited Nov. 1, 2001).

198. *Id.* In 1989, there was more of the same: high numbers of clinic blockades with a reduction in the number of violent incidents. *Id.*

199. Note, *Safety Valve*, *supra* note 195, at 1217-19.

(FACE).[200] These led to a dramatic decline in the number of clinic blockades.[201]

After a steady drop in clinic violence in the late 1980s, there was a slow but steady increase in the early 1990s.[202] With the disbanding of Operation Rescue, there was a further splintering of groups, which some insiders believe led to the increase in violence.[203] For instance, in 1992, the number of violent incidents more than doubled from that of the previous year.[204] Despite this alarming statistic, the worst was yet to come.

In 1993, violent incidents rose to a startling 437, a far cry from the fifty-three incidents reported in 1988.[205] Not only had the number of violent incidents skyrocketed but the level of violence was also far more intense.[206] An illustration of the seriousness of the violence was the March 1993 murder of David Gunn, a doctor who performed abortions.[207] A few months later, Shelly Shannon shot and wounded Dr. George Tiller outside of his abortion clinic in Wichita, Kansas.[208] Since these shootings, there have been seven other abortion clinic employees murdered, including Dr. Barnett Slepian in 1999.[209] The 1990s also included various firebombings of clinics throughout the country, from Newport Beach, California to Lancaster, Pennsylvania.[210] Damages from these and other related crimes range from hundreds of thousands of dollars to 1.4 million dollars.[211]

Due to the rise in the number of violent outbursts by some individuals, the bargaining power of mainstream abortion opponents has been greatly compromised.[212] Along with this loss of power, pro-life groups

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200. 18 U.S.C. § 248. *See generally* Regina R. Campbell, Comment, *"FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech?*, 64 U. CIN. L. REV. 947 (1996) (arguing that due to the violence of abortion protest, FACE is necessary, and does not violate the First Amendment freedom of speech).

201. *See* Note, *Safety Valve, supra* note 195, at 1219. Since the 1994 passing of The Freedom of Access to Clinic Entrance Act, clinic blockades have been less than ten in almost every year. *Id.*

202. *Id.* at 1219-20.

203. RISEN & THOMAS, *supra* note 101, at 314.

204. Note, *Safety Valve, supra* note 195, at 1220-21.

205. *Id.*

206. *Id.*

207. Scott, *supra* note 191, at 11.

208. *Id.*

209. Note, *Safety Valve, supra* note 195, at 1210-11.

210. *See* Greg Hernandez & Eric Young, *Bombing Hits Newport Beach Abortion Clinic*, L.A. TIMES, Sept. 11, 1993, at A1, and Tamar Lewin, *Clinic Firebombed in Pennsylvania*, N.Y. TIMES, Sept. 30, 1993, at A16.

211. *See* Jo Ann Zuniga, *Arson Attacks on Abortion Clinic Show Pattern, Landlord Says*, HOUSTON CHRONICLE, March 8, 1993, at A9, and *California City's Abortion Clinic Burns, and Police Suspect Arson*, N.Y. TIMES, Sept. 21, 1993, at A19.

212. SCHEIDLER, *supra* note 155, at 300-01.

have suffered a decline in sympathy, credibility, and legislative influence.[213] Simultaneously, courts throughout the United States have treated nonviolent protesters more harshly, often handing down the stiffest penalties possible.[214] Thus, abortion opponents have not fared well in the United States court system, including the highest court in the country. These results must be considered in light of how other protest groups and their First Amendment rights have fared with the Supreme Court.

D. Non-Abortion Protest Cases and the Court

This section examines three separate free speech cases that involve other protest movements and how the Supreme Court has treated their free speech rights. These cases illustrate the serious commitment of the Court with regard to the free speech rights of these protesters.

1. NAACP v. Claiborne Hardware Co.[215]

In 1966, the Claiborne County Branch of the National Association for the Advancement of Colored People (NAACP) formed a Human Relations committee that petitioned elected officials with twenty-one specific demands.[216] The community did not meet these demands and consequently, on April 1, 1966, the County Branch instituted a boycott of the white merchants in the area.[217] During this meeting, the field secretary, Charles Evers, warned those in attendance that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[218]

The boycott continued throughout 1968 with the assassination of Dr. Martin Luther King, Jr. and the shooting of a young black man, Roosevelt Jackson, giving it further strength.[219] In the meantime,

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213. Wardle, *supra* note 38, at 882. "The violent fringe . . . discredits the entire pro-life cause because they are not pro-life, but are violent, dysfunctional, dangerous hypocrites whose acts are not representative of pro-life values." *Id.*

214. *See, e.g.*, Opinion of the Justices to the Senate, No. SJC-08145, 2000 WL 108886 (Mass., Jan. 24, 2000) (considering a proposed Massachusetts bill which would have stiffer penalties for protesting within twenty-five feet of an abortion clinic).

215. 458 U.S. 886 (1982).

216. *Claiborne Hardware*, 458 U.S. at 899-900. Some of those demands included hiring blacks for employment, desegregation of public schools, and integration of bus stations. *Id.* at 898-99.

217. *Id.* at 900.

218. *Id.* Sheriff Don McKay, present at the speech reported this information. Similar statements were recorded at later meetings; also, the local NAACP secretary testified that Charles Evers had made threatening statements. *Id.* at 900-02, 925.

219. *Id.* at 901-02. This shooting occurred on April 18, 1969 during an encounter with two Port Gibson police officers. *Claiborne Hardware*, 458 U.S. at 902. The assassination of Dr. King occurred on April 4, 1968. *Id.* at 901.

some of those who had been patronizing white merchants were punished in various ways.[220] There were ten reported incidents of violence against those who ignored the boycott, including gunshots fired into homes, broken windows, and beatings.[221]

Seventeen white merchants filed a complaint in Chancery Court that named two corporations and 146 people as defendants and sought injunctive relief and damages.[222] In August of 1976, the chancellor found the defendants liable for malicious interference, as well as violating both a statute prohibiting secondary boycotts and a state antitrust statute.[223] The chancellor awarded over 1.25 million dollars plus interest to twelve merchants who had sustained lost profits and goodwill.[224]

In December of 1980, the Mississippi Supreme Court reversed most of the trial court's ruling, but upheld the imposition of liability, rejecting the First Amendment claims of the petitioners.[225] The United States Supreme Court granted certiorari to consider whether the First Amendment protected the petitioners' actions.[226] The Court examined the diverse nature of the boycott, all aspects of which were a form of free speech.[227] Justice John Paul Stevens, writing for a unanimous Court, made two important points.[228] First, Justice Stevens stated that the fact that members of a group have acted violently in the past does not mean the right to associate with them has no constitutional protection.[229] Second, Justice Stevens noted that members of the boycott used speech to attain its goals through social pressure, persuasion, and by threat of noncompliance.[230] The Court, in examin-

220. *Id.* at 903. A group called the "Black Hats" or "Deacons" often inflicted the punishments. *Id.*

221. *Id.* at 904. James Gilmore, whose home had been shot at, apprehended the shooters, who were supporters of the boycott. *Id.* One beating occurred between four men and a fisherman who had ignored the boycott. *Claiborne Hardware*, 458 U.S. at 905.

222. *Id.* at 889-90. Included as defendants were the NAACP, Charles Evers, and others who had participated in the boycott. *Id.* at 889-90.

223. *Id.* at 890-92.

224. *Id.* The chancellor also entered a permanent injunction against the defendants. *Id.* Of the original seventeen merchants, five failed to offer any showing of losses. *Claiborne Hardware*, 458 U.S. at 893.

225. *Id.* at 894-95. The Mississippi Supreme Court remanded for recomputation of the damages. *Claiborne Hardware*, 458 U.S. at 893.

226. *Id.* at 896. The Court noted that their jurisdiction was limited to the federal questions and that the remand of the Mississippi Supreme Court was final in terms of their jurisdiction. *Id.* at 907.

227. *Id.* It involved speeches, picketing, and meetings with civic and business leaders. *Claiborne Hardware*, 458 U.S. at 907.

228. *Id.* at 908.

229. *Id.*

230. *Id.* at 909-10.

ing the First Amendment principles at stake, stressed that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[231]

The Court held that because the merchants did not demonstrate that their losses resulted from the acts of violence, the petitioners were not liable for the consequences of their nonviolent actions.[232] The Court found that the First Amendment protected the nonviolent activities and that "through exercise of those First Amendment rights, petitioners sought to bring about political/social/economic change."[233] Thus, the Court was adamant in its view that past misconduct does not necessarily nullify one's right to free speech.

2. Organization for a Better Austin v. Keefe[234]

In the 1971 case *Organization for a Better Austin v. Keefe*, the plaintiff, Jerome Keefe, was a real estate broker who had an office in the Austin neighborhood of Chicago and lived in Westchester, a suburb of Chicago.[235] The defendant, Organization for a Better Austin (OBA),[236] accused Keefe of actions known as "blockbusting" or "panic peddling," which consisted of scaring white residents into selling their property to an agent who would subsequently sell the homes to black buyers.[237]

In response to these alleged tactics, OBA began distributing leaflets in the town of Westchester, specifically to Keefe's neighbors and the fellow members of his church.[238] Keefe sought and won a temporary injunction enjoining OBA from handing out leaflets or literature in the town of Westchester.[239] On appeal, the Appellate Court of Illinois affirmed the granting of the injunction, noting that the First Amendment did not protect OBA's actions because they were coercive and intimidating, rather than informative.[240]

The United States Supreme Court granted certiorari and, with only Justice John Marshall Harlan in dissent, recognized that distributing leaflets was a form of expression protected by the First Amend-

231. *Id.*

232. *Id.* at 923.

233. *Claiborne Hardware*, 458 U.S. at 911, 915.

234. 402 U.S. 415 (1971).

235. *Id.* at 415-16.

236. OBA was a racially integrated community group in the Austin neighborhood of Chicago. *Id.* Their stated purpose was to "stabilize the racial ratio in Austin." *Id.*

237. *Id.* at 416.

238. *Id.* at 417. Keefe met with the organization, but denied the allegations and refused to agree to refrain from soliciting property in Austin. *Keefe*, 402 U.S. at 416.

239. *Id.* at 417.

240. 253 N.E.2d 76 (Ill. App. Ct. 1969).

ment.[241] The Court noted that the fact that the leaflets had a coercive effect was not relevant with regard to the First Amendment analysis.[242] Specifically, the Court stated that speech "intended to influence a coercive impact on [listeners] does not remove them from the reach of the First Amendment."[243] The Court then noted, "[A]ny prior restraint of expression comes to this Court with a 'heavy presumption' against its constitutional validity."[244] The Court also found that the one challenging the speech must carry the "heavy burden" of showing the necessity of such a restraint, and because Keefe did not, his claim failed.[245] The Court concluded that the basis of the injunction, the right to privacy, was not enough for an injunction.[246]

3. Boos v. Barry[247]

In the 1988 case *Boos v. Barry*, three individuals had planned to demonstrate on public sidewalks in front of the Soviet Union and Nicaraguan embassies in Washington D.C.[248] However, a District of Columbia statute prohibited them from protesting within five hundred feet of the embassies.[249] In response to the prohibition, the demonstrators brought a First Amendment challenge against the provision.[250] The United States District Court for the District of Columbia granted the government's motion for summary judgment, a decision affirmed by the Court of Appeals for the District of Columbia.[251] The Court of Appeals held that the statute was constitutional due to the compelling governmental interest of foreign relations.[252]

Granting certiorari, the Supreme Court reversed in part and affirmed in part the Court of Appeals' decision.[253] The Court first con-

241. *Keefe*, 402 U.S. at 418. Justice Harlan's dissent was based on procedural grounds of appellate jurisdiction. *Id.* at 420.

242. *Id.* at 419.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Keefe*, 402 U.S. at 420.

247. 485 U.S. 312 (1988).

248. Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986).

249. D.C. Code 22-1115 (1981). The pertinent part of the statute states:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, . . . within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government . . . or to congregate within five hundred feet of any such building or premises.

Finzer, 798 F.2d at 1452.

250. *Id.*

251. *Id.* at 1453.

252. *Id.* at 1455.

253. *Boos*, 485 U.S. at 318.

sidered the provision that outlawed the display of anything coercive within five hundred feet of an embassy.[254] The Court then focused on three important factors when analyzing the provision; it prohibited political speech, it barred such speech on public sidewalks, and it was content-based because it regulated speech due to its primary impact.[255] The Court further found that the provision was not viewpoint-based because it determined which viewpoint was acceptable in a neutral way.[256] The Court noted that content-based restrictions on political speech in a public forum must be examined under "the most exacting scrutiny."[257]

The government argued that the reason for the statute was the secondary effect of offending the dignity of diplomats.[258] The Court considered this argument, coupled with the long tradition of protecting international relations,[259] "compelling," yet still found that the provision violated the First Amendment.[260] The Court stated 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" and that no difference should be drawn between American citizens and foreign officials.[261] Thus, in *Claiborne Hardware, Keefe*, and *Boos*, the Court was very protective of the First Amendment and skeptical of government restrictions on speech.

E. Abortion Protests and the United States Supreme Court

The Supreme Court has addressed the issue of abortion many times since it legalized the procedure in 1973.[262] In fact, the Court has heard no less than forty abortion-related cases,[263] with the two most

254. *Id.* at 316-18.

255. *Id.* at 318-19.

256. *Id.* at 319.

257. *Id.* at 321.

258. *Id.* at 320. The government relied on *Renton v. Playtime Theatres*, 475 U.S. 41 (1986). *Boos*, 485 U.S. at 318.

259. This tradition dated back to the Federalist Papers and the Continental Congress. *Id.*

260. *Id.* at 322-23.

261. *Id.* at 322 (citing Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1987)).

262. In the federal courts, *Roe* opened up the floodgates for abortion cases, as there were only eighteen abortion related cases heard before *Roe*, but over two hundred in the decade after it. *Legal Ramifications of the Human Life Amendment: Hearings on S.J. Res. 3 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th CONG. 47, 55 (1983). For a look at abortion as a constitutional issue, see MARK TUSHNET, ABORTION 1-29 (1996).

263. *See* Wardle, *supra* note 38, at 959-60 (listing the major Supreme Court cases involving the issue of abortion).

recent cases decided in the October 2000 term.[264] Since abortion remains such a controversial topic, the abortion cases themselves have been among the most closely watched in the last twenty years. In addition to cases concerning abortion, the "abortion litmus test" is often used on potential nominations to the United States Supreme Court. Months before a presidential election, candidates are scrutinized as to what role the issue of abortion will play when they appoint a justice.[265] No other single issue has a more divisive effect on the Court today than abortion.

1. Madsen v. Women's Health Center[266]

In September of 1992, a Florida state trial court permanently enjoined certain pro-life protesters from engaging in blockades at an abortion clinic.[267] Soon after the court granted the injunction, clinic owners saw that the initial injunction had not produced the desired effect, forcing them to request an amended injunction.[268] Accordingly, the court granted an amended permanent injunction prohibiting protesters from entering a thirty-six foot buffer zone surrounding the clinic, along with other restrictions.[269] The protesters appealed the decision.[270]

On appeal, the Florida Supreme Court certified the injunction for immediate review and subsequently affirmed the district court's opinion, declaring the injunction constitutional.[271] The United States Supreme Court granted certiorari to the case and held that the thirty-six foot buffer zone and noise restrictions were constitutional, while the other provisions within the injunction were unconstitutional.[272]

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264. Hill v. Colorado, 530 U.S. 703 (2000); Stenberg v. Carhart, 530 U.S. 914 (2000); *infra* notes 363-383 and accompanying text.

265. *See* Julie Mason, *Abortion Issue May Sway Crucial, Undecided Voters*, HOUSTON CHRONICLE, Oct. 16, 2000, at A4.

266. 512 U.S. 753 (1994).

267. *Madsen*, 512 U.S. at 758. For a more in depth look at the facts leading up to the *Madsen* case, see John W. Bencivenga, Comment, *Constitutional Law-When Rights Collide: Buffer Zones and Abortion Clinics*-Madsen v. Women's Health Ctr., Inc., 22 FLA. ST. U. L. REV. 695, 696-706 (1995).

268. *Madsen*, 512 U.S. at 758.

269. *Id.* at 757. The other restrictions prohibited petitioners from interfering with access to the building or the parking lot. *Id.* at 758. Also, during specified hours, there could be no singing, chanting, whistling, shouting, bullhorns, or other sounds or images observable to or within earshot of the patients. *Id.* at 760-61.

270. *Id.* at 761.

271. Operation Rescue v. Women's Health Center, 626 So.2d 664 (Fla. 1993). Meanwhile, the United States Court of Appeals for the Eleventh Circuit heard a separate challenge to the same injunction and held it unconstitutional. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993). The Supreme Court granted certiorari to resolve the conflict.

272. *Madsen*, 512 U.S. 753 (1994).

Chief Justice William Rehnquist, writing for the majority, reasoned that an injunction restricting speech was not a prior restraint and strict scrutiny was unnecessary.[273] He supported this by noting that the injunction was by nature applied specifically to certain individuals who in the past had acted contrary to the law.[274] In place of strict scrutiny, the Court relied on general First Amendment principles along with the conclusion that the injunction did not burden more speech than necessary.[275] The Court held that since the noise restrictions and the thirty-six foot buffer zone burdened no more speech than necessary, they were constitutional.[276]

Despite its holding concerning the noise restrictions and thirty-six foot buffer zone, the Court struck down the three other provisions in the injunction because they burdened more speech than necessary.[277] The first provision, the "images observable provision," was a blanket ban on all "images observable" from the clinic.[278] The Court noted that because the clinic merely had to draw the curtains to avoid seeing signs and placards that they found disturbing, the provision constituted an unconstitutional restriction on speech.[279] The Court found the second provision, a restriction on all uninvited approaches of women within three hundred feet of the clinic, was unconstitutional based on First Amendment principles.[280] The Court found that prohibiting contact, even if it was peaceful, in order to prevent intimidation burdened more speech than necessary.[281]

The third provision held unconstitutional under the First Amendment dealt with a prohibition on picketing within three hundred feet of the homes of clinic employees.[282] The Court noted that while the home has a "unique character,"[283] it struck down the three hundred foot zone surrounding the home because it was too broad and would even prohibit marches through a residential neighborhood.[284] Justice John Paul Stevens, in concurrence, stated that the test used for injunc-

273. *Id.* at 762.
274. *Id.*
275. *Id.* at 765.
276. *Id.* at 769-71.
277. *Id.* at 776.
278. *Madsen*, 512 U.S. at 773.
279. *Id.*
280. *Id.* at 774.
281. *Id.*
282. *Id.* Petitioners had protested in front of clinic workers' houses and distributed anti-abortion leaflets to their neighbors. *Id.* at 759.
283. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988) (prohibiting a picket at a residential home and stating the home is the "last citadel of the tired, the weary, and the sick").
284. *Madsen*, 512 U.S. at 775.

tions should be judged by a "more lenient standard than legislation" because injunctions are based on a person's illegal conduct.[285]

Justice Antonin Scalia, concurring as to the provisions struck down and dissenting to those that were upheld, charged that the Court had gone astray from its normal jurisprudence simply because the case involved abortion.[286] He noted that "[t]oday the ad hoc nullification machine claims its latest, greatest . . . victim: the First Amendment."[287] Justice Scalia argued that at the least, strict scrutiny should have been applied to the provisions.[288] He based the strict scrutiny argument on the possibility that content-based injunctions might be used to suppress a particular group's ideas.[289] He further noted that injunctions are more powerful than legislation and are usually the product of a single judge.[290] Justice Scalia's final point was that even in cases involving violence, the Court had used a much stricter test than the one used in this case.[291] In situations involving violence, the Court used "the precision of regulation" test because peaceful individuals of a group should not lose their constitutional protections simply because others in the group have acted illegally or violently.[292]

2. Schenck v. Pro-Choice Network of Western New York[293]

Although the Court had already decided the issue of buffer zones and other restrictions on pro-life protesters, the controversy continued. With the issue of abortion at the center of media attention and touching many people's lives, it was virtually inevitable that the Court would have to confront the issue of abortion protest once again. The Court's next consideration of the matter occurred in the 1997 case of *Schenck v. Pro-Choice Network of Western New York*.[294]

In *Schenck*, three abortion doctors and four abortion clinics had filed a complaint requesting a temporary restraining order (TRO) to stop a planned blockade by abortion protesters, as well as a permanent injunction and monetary damages from three pro-life organiza-

285. *Id.* at 778 (Stevens, J., concurring).
286. *Id.* at 785 (Scalia, J., dissenting).
287. *Id.*
288. *Id.* at 792.
289. *Id.*
290. *Madsen*, 512 U.S. at 793.
291. *Id.* at 798. Justice Scalia also noted that the videotape shot by the clinic showed neither violence nor attempts by protesters to block access to the clinic. *Id.* at 790.
292. *Madsen*, 512 U.S. at 798-99. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
293. 519 U.S. 357 (1997).
294. *Id.* For a more detailed look at the facts leading up to the case and the lower courts' treatment of the case, see Michael L. Utz, *Recent Decisions*, 36 DUQ. L. REV. 229 (1997).

tions.[295] The abortion clinics had been the subject of massive demonstrations and large-scale blockades.[296] The day before the scheduled blockades, the United States District Court for the Western District of New York issued a TRO that prevented protesters from "demonstrating within fifteen feet of any person" who was entering or leaving the clinics.[297] The TRO did permit two sidewalk counselors to go within the fifteen-foot zone to attempt to speak with people who were entering or leaving the clinic.[298] However, these counselors were limited in what they could do; the injunction required that they refrain from speaking immediately if the individuals indicated they did not want the counseling.[299]

After the court issued the TRO, the protesters stopped the physical blockades, but continued to demonstrate, sidewalk counsel, and congregate in the driveway entrances of the clinic.[300] Based on these facts, the district court issued a permanent injunction five months after it had handed down the TRO.[301] The permanent injunction was similar to the TRO, but it also banned demonstrations within "fifteen feet around people and vehicles seeking access to or leaving such facilities."[302] In other words, it established floating buffer zones. The court held that the injunction was necessary because the buffer zones prevented protesters from "crowding patients and invading their personal space."[303] Yet, the court upheld the two-person exception to the floating buffer zone as "an attempt to accommodate fully the defendants' First Amendment rights."[304]

On appeal, the United States Court of Appeals for the Second Circuit applied *Madsen v. Women's Health Center*[305] in reversing the district court's decision.[306] The case was then reheard en banc, and the court affirmed the district court by a divided vote, using reasoning

295. Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1422 (W.D.N.Y. 1992).

296. *Id.*

297. *Id.* at 1440.

298. *Id.* at 1437.

299. *Id.* at 1440.

300. Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y., 828 F. Supp. 1018 (W.D.N.Y. 1993).

301. *Id.* at 1032.

302. 799 F. Supp. at 1434.

303. *Id.*

304. *Id.*

305. 512 U.S. 753 (1994).

306. Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 359 (2d Cir. 1994) (reversing the fifteen-foot buffer zone and cease and desist order to sidewalk counselors).

similar to the district court.[307] Before the United States Supreme Court, the protesters challenged three parts of the injunction: the fifteen-foot floating buffer zone, the fixed fifteen-foot buffer zone, and the cease and desist provision.[308] The Court applied the reasoning of *Madsen*[309] to the three challenged provisions of the injunction, looking to see whether each burdened more speech than necessary to serve a significant government interest.[310]

The Court held that the fifteen-foot floating buffer zones were unconstitutional under the First Amendment because they burdened more speech than necessary.[311] Chief Justice Rehnquist noted that "leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."[312] The Court also noted that because it struck down the floating buffer zones, the cease and desist provision need not be addressed.[313] The Court then considered the fixed buffer zone provision, which encompassed fifteen feet around the doorways and driveways of the clinic.[314] The Court upheld these zones as constitutional based on the conduct of protesters who purposely blocked the entrances of clinics, making this buffer zone the only way to ensure access to the clinic.[315]

Justice Scalia, joined by Justice Thomas and Justice Kennedy, concurred in the decision as to the fifteen-foot floating buffer zone, but dissented as to the fifteen-foot fixed buffer zone, as well as the cease and desist provision.[316] Justice Scalia, as he did in *Madsen*, chided the Court for its treatment of the pro-life protesters' free speech rights.[317] He argued that it was a mistake to think that one has a right to be free of unwanted speech.[318] Justice Scalia then stated that the reasoning

307. Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 377, 388-92 (2d. Cir. 1995). The court affirmed, using reasoning similar to the district court. *Id.* at 388-92.

308. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 371 (1997).

309. For an analysis and critique of the application of the *Madsen* case to *Schenck*, see Amber M. Pang, Comment, *Speech, Conduct, and Regulation of Abortion Protest by Court Injunction: From* Madsen v. Women's Health Center *to* Schenck v. Pro-Choice Network, 34 GONZ. L. REV. 201 (1998/1999).

310. *Schenck*, 519 U.S. at 371.

311. *Id.* at 377.

312. *Id.*

313. *Id.* at 379.

314. *Id.* at 380-85.

315. *Id.* at 381.

316. *Schenck*, 519 U.S. at 385-95 (Scalia, J., concurring in part, dissenting in part).

317. *Id.* at 386.

318. *Id.*

behind the injunction's cease and desist provision was "the right to be left alone."[319]

According to the dissent, the majority had taken new and unwarranted steps in its decision.[320] The dissent further stated that the Court should not decide as to what the trial court "might reasonably have found as to necessity, rather than on the basis of what it in fact found."[321] Justice Scalia further admonished that the district court, in granting the injunction, cited to an interest, "not listed anywhere in respondents' complaint."[322] However, despite the concerns of the dissent, the Court upheld even greater restrictions on speech three years later.

3. Hill v. Colorado[323]

The 2000 case *Hill v. Colorado* represents the Court's latest foray into abortion jurisprudence.[324] *Hill* involved a Colorado statute prohibiting anyone within one hundred feet of a health care facility's entrance to "knowingly approach" within eight feet of another person in order to pass "a leaflet or handbill, to displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person . . . " without that person's consent.[325] A group of individuals challenged the statute, claiming it was facially unconstitutional under the First Amendment.[326]

The District Court of Jefferson County granted summary judgement to the state, holding that the statute's restrictions were content-neutral; moreover, as a time, place, and manner restriction, it was sufficiently tailored to serve a significant government interest.[327] The Colorado Court of Appeals affirmed, holding that the statute served a compelling state interest of ensuring the safety of women entering health clinics and that it did not burden more speech than necessary.[328] The Supreme Court of Colorado subsequently affirmed the lower courts' rulings based on the same reasoning.[329] The United

319. *Id.* at 387.
320. *Id.* at 390.
321. *Id.* at 394.
322. *Schenck*, 519 U.S. at 392.
323. 530 U.S. 703 (2000).
324. *See also* Stenberg v. Carhart, 530 U.S. 914 (2000) (striking down a Nebraska statute banning partial-birth abortions as unconstitutional). The *Stenberg* and *Hill* opinions were issued on the same day.
325. *Hill*, 530 U.S. at 703 (citing COLO. REV. STAT. 18-9-122 (3) (1993)).
326. Hill v. City of Lakewood, 911 P.2d 670, 673 (Colo Ct. App. 1995).
327. *Id.* at 674.
328. *Id.*
329. Hill v. Thomas, 973 P.2d 1246, 1248 (Colo. 1999).

States Supreme Court granted certiorari and found the Colorado statute constitutional, affirming the Colorado Supreme Court's ruling.[330]

Justice Stevens, writing the majority opinion, phrased the issue as "whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener."[331] The majority focused on the listener's "right to be let alone" and held that this right extended to access to a medical facility.[332]

The Court then moved on to consider whether the statute was content-neutral in time, place, or manner, using the test derived from *Ward v. Rock Against Racism*[333] of "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[334] The Court held that the statute passed the test because it was a regulation of places where speech could occur, applying equally to protesters of all viewpoints and protecting the states' interests in privacy.[335] The Court concluded by stating that there must be an "opportunity to win their attention" and that the Colorado statute enabled one to do so through signs, pictures, or voice, all of which can cross an eight-foot gap.[336]

In dissent, Justice Scalia, joined by Justice Thomas, again accused the Court of using an "ad hoc nullification machine."[337] Further, the dissent argued that the standards used by the majority were in "stark contradiction" of those used in other cases.[338] Justice Scalia believed that there was a double standard because the protesters before the Court were pro-life.[339] He underlined his accusation by first focusing on the Court's assertion that the statute was not content-based because it did not discriminate among viewpoints nor place restrictions on "any subject matter that may be discussed by a speaker."[340] Justice Scalia noted that the Court had never previously held that content-based restrictions are limited to these two categories, and he called this limitation "absurd."[341] He also claimed that in no other free

330. Hill v. Colorado, 530 U.S. 703, 735 (2000).

331. *Id.* at 708. *See* Steven Chapman, *Turning the Right to be Left Alone into a Muzzle*, CHI. TRIB., July 2, 2000, at 15C (criticizing the majority opinion for being contrary to earlier Supreme Court opinions).

332. *Hill*, 530 U.S. at 716-17.

333. 491 U.S. 781 (1989).

334. *Hill*, 530 U.S. at 719.

335. *Id.* at 719-20.

336. *Id.* at 728-30.

337. *Id.* at 741 (Scalia, J., dissenting).

338. *Id.* at 742.

339. *Id.*

340. *Hill*, 530 U.S. at 742.

341. *Id.* at 743.

speech case had the Court relied on the governmental interest of protecting its citizens' right to be left alone.[342] Finally, Justice Scalia argued that as applied in other free speech cases, there was a presumption "that speakers, not the government, know best both what they want to say and how to say it."[343]

Madsen, *Schenck*, and *Hill* have been crushing defeats for the pro-life movement, not only in their campaign to end abortion but also in their attempt to dissuade women from getting abortions. The rulings of these three cases gradually encompassed greater restrictions on the First Amendment activities of pro-life protesters outside abortion clinics.

III. ANALYSIS

Abortion protest cases have become a recurrent theme in the Court's docket over the last decade. With the recent rash of abortion clinic violence, many state legislatures and courts have supported laws that curtail pro-life protesters.[344] Thus, with the rise in the number of restrictions on free speech, the Supreme Court, as a standard bearer, must not ignore the controversial, yet protected First Amendment rights of pro-life protesters.

The First Amendment applies equally to all citizens, and it cannot be disregarded when it does not fit the needs of certain individuals. The rights protected by the First Amendment remain the very foundation of this country.[345] Accordingly, these rights cannot be swept aside by the waves of political expediency and controversy. While it is understandable for legislators and judges to use caution when confronted with issues arising from abortion protests, one would hope the United States Supreme Court would look beyond the emotional aspects of this issue and evaluate it simply on the First Amendment merits. Instead, the Court has quietly avoided decades of precedent in upholding these restrictions on speech.

The reasoning the Court has used in deciding the abortion protest line of cases contains several flaws that have resulted in a dangerous infringement of free speech rights. The Court's groundbreaking interpretation of the First Amendment is also troublesome. The double

342. *Id.* at 750.

343. *Id.* at 756.

344. *See, e.g.*, Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991) (limiting the number and location of pro-life demonstrators); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988) (sustaining 12½ foot 'free zone' around abortion clinic).

345. *See supra* notes 3-5 and accompanying text.

standard used by the Court when cases involve pro-life protesters is not only disturbing, but unconstitutional.

One prevalent characteristic found in the Court's decisions in *Madsen*, *Schenck*, and *Hill* was a sense of urgency. The Court seemed uncomfortable with the cases, trying to decide them as expediently as possible. Gone are the days of rigorous scrutiny and the presumption that laws curtailing speech are unconstitutional. Instead, the Court has created a new set of tests to quell the facts at hand. The Court is too quick and too willing to uphold statutes restricting the speech of pro-life activists. The possible reasons for this willingness to restrict speech and whether they are justified will be considered next.

A. Taking Violence into Consideration

While the Court has never explicitly discussed abortion clinic violence, the issue seems to underlie much of its reasoning. Of the three abortion protest cases, only in *Schenck* did the protesters commit any lawlessness.[346] In *Madsen*, for example, videotape shot by clinic employees showed peaceful picketing.[347] While in these instances, the protesters had likely caused discomfort and anxiety to both clinic employees and patients, they had not violated any laws. Of course, this will not always be the case. A few extremists have chosen to take a different route, using death to advance "life."[348] This, however, is a contradiction in terms. To the extent that this violence continues, pro-life groups, no matter how far attenuated from these extremists, will suffer immeasurably.[349] This violence prevents those who waver on the abortion issue from aligning with the pro-life movement. For every violent incident, pro-life groups must defend their reputation and distance themselves from fanatics who are diametrically opposed to their message of life.[350]

This notwithstanding, a comparison of the pro-life movement with other protest groups clearly indicates that many social movements have ties with violence, whether close knit or attenuated.[351] For example, extremists of the civil rights, anti-war, and labor movements created tension, but did not detrimentally affect or seriously taint the

346. *Schenck*, 519 U.S. at 365.

347. *Madsen*, 512 U.S. at 785-90.

348. *See supra* notes 202-211 and accompanying text.

349. *See* John Leo, *Not the Way to Stop Abortions*, U.S. NEWS & WORLD REPORT, March 29, 1993, at 17.

350. *See* JOHN W. WHITEHEAD, ET AL., ARRESTING ABORTION: PRACTICAL WAYS TO SAVE UNBORN CHILDREN 40-42 (John W. Whitehead ed., 1985) (arguing that violence is wrong and counterproductive).

351. *See infra* notes 565-596 and accompanying text.

outcome of their missions.[352] As the Court made clear in *Claiborne Hardware*, simply because an organization has extreme elements does not mean that the whole group should be judged accordingly.[353]

While the Court, in this abortion line of cases, only upholds legislation suppressing speech at certain times and places, it further extends these times and places in each subsequent case. In no other free speech context have the Court's rulings been so draconian. Some argue that these rulings are necessary in light of the past violence and threats of violence to abortion providers.[354] Despite this valid point, it is clear that violent extremists do not worry about floating buffer zones or fret about whether they are standing too close to a clinic driveway. A bullet or fire knows no boundaries and has no problems with trespassing. If someone wants to kill a person or to destroy a building, getting caught for trespassing or violating an injunction will do little to deter him from his ultimate goal. While what the Court may be trying to do is understandable, it remains oblivious to the real effects these restrictions will have on free speech. Another dangerous consequence of the increase in the number of restrictions is the rise in violent incidents at clinics.[355] During the early 1990s, the increase in restrictive laws paralleled an increase in the number of violent incidents.[356] While there is no clear answer to this phenomenon, legislators and courts should not ignore it.[357]

Another argument exists that, at the least, these restrictions on speech will stop the harassment of women entering the clinic.[358] This point, although valid, ignores the fact that people bent on harassing a woman or clinic employee can still succeed in their goal, notwithstanding these buffer zones. These restrictions will not deter anyone with a loud voice or an amplifying device. Those more likely affected by these restrictions are sidewalk counselors or those hoping to influence a woman by giving her a pamphlet. While most of the sidewalk counselors use peaceful and polite methods, it is clear that this will not always be the situation. But someone who is trying to get another person to listen or consider her viewpoint does not do so through

352. *See infra* notes 565-575 and accompanying text.

353. *Claiborne Hardware*, 458 U.S. at 908-09.

354. Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones And Broken Bones: Balancing Access To Abortion And Antiabortion Protesters' First Amendment Rights In* Schenck v. Pro-Choice Network, 62 BROOK. L. REV. 547, 548-50 (1996).

355. *See supra* notes 190-211 and accompanying text.

356. *See supra* notes 202-211 and accompanying text.

357. For more on this phenomenon, see Note, *Safety Valve*, *supra* note 195, at 1221-27.

358. Amy E. Miller, Note, *The Collapse and Fall of Floating Buffer Zones: The Court Clarifies Analysis for Reviewing Speech-Restrictive Injunctions in* Schenck v. Pro-Choice Network, 32 U. RICH. L. REV. 275, 275-76 (1998).

screaming and harassing. Sidewalk counselors trying to convince a woman to consider other options than abortion do so through a calm and kind voice, not through insults and bullhorns.

B. Possible Viewpoint Differences Behind the Restrictions

A second point to consider as to why the Court has been so willing to restrict speech is the controversial message of the pro-life protesters. The fact that someone disagrees with the views expressed by pro-life activists or is disturbed by them does not mean that a court can restrict protesters' rights. One constitutional scholar points out that "outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life."[359] Entering an abortion clinic is vastly different from walking down the street and seeing a lurid advertisement because when someone enters a health clinic for an abortion, as with any medical procedure, it involves a degree of risk and uncertainty. Thus, protesters outside an abortion clinic can make an already stressful situation even worse.

While there is little doubt that it is more difficult for a woman entering the clinic to ignore abortion protesters, this recognition is exactly what protesters against perceived misconduct want. Whether demonstrating for a pro-life group, a union, a civil rights group, or for any other issue, the demonstrator wants the listener to hear and recognize her. A protester wants those people who she thinks are doing something wrong to recognize her and to consider, at least for a brief moment, that the protesters might be right. In the wake of the Supreme Court decisions concerning abortion protests, people can still demonstrate and inform others of their viewpoint, but where they can do so has changed. Location is of the utmost importance because the farther the distance, the more ineffective a protester's message becomes. For instance, a one hundred-foot buffer zone presents a serious obstacle to any protest group by restricting the location of the protest and proximity to the audience. However, when the issue is abortion, the Court has become less concerned with the effectiveness of a protester getting her message out and more concerned with the feelings of the listener.

Historically, the Court has been the guardian of free speech rights.[360] Over time, the Court has developed a doctrine that has

359. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 948 (2d ed. 1988).

360. *See supra* notes 57-84 and accompanying text.

slowly evolved into a standard that makes it very difficult to constitutionally restrict speech. Yet, the Court has chosen to abandon this doctrine as applied to abortion protesters.[361] In the face of other more extreme and unpopular cases such as flag burning,[362] cross burning,[363] and pornography,[364] the Court has consistently protected these activities.[365] While most disagreed with the actions in question, the Court took the route of protecting controversial speech by ignoring public pressure and showing the importance of being an unelected governmental body. Immune, for the most part, to the popular sentiment of the time, the Court chose to follow the letter and spirit of the Constitution and protect the controversial First Amendment rights of these citizens.

However, when legislators dealt with issues like flag burning or pornography, they went with popular opinion and suppressed these forms of speech through legislation. Similarly, responding to the justified uproar over the extreme acts of violence against abortion providers, many legislators have cracked down on abortion protesters. County and statewide restrictions exist in a majority of jurisdictions throughout the country. Yet contrary to its stance on similarly unpopular positions, the Court did not come to the rescue.

Civil rights activists, anti-war protesters, and the women's liberation movement were all fighting for a change, wanting to be heard. They were heard and they got their message across, helping to change history forever. If the Court had been more willing to restrict these views, these movements may not have attained what they did. The Court's more protective stance regarding the rights of these groups helped them greatly, while the Court's less protective approach for abortion protesters' free speech rights has made it more difficult for people to effectively protest against abortion. Analyzing cases involving other protest movements and those cases concerning pro-life groups reveals a blatantly inconsistent approach by the Supreme Court.

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361. *See infra* Part IV and accompanying text.

362. *See* Texas v. Johnson, 491 U.S. 397 (1989).

363. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

364. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

365. For a look at the Court's protections of symbolic speech, see Christopher LaVigne, Comment, *Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment?*, 51 BAYLOR L. REV. 389, 391-93 (1999).

C. Comparing Abortion and Non-Abortion Protest Cases

The line of cases previously examined illustrates the stark contradiction of how the Court applied free speech principles and public policy to the facts at hand. In *Boos*, *Claiborne Hardware*, and *Keefe*, the Court took a very protective stance toward free speech. The Court's analysis in each of the three non-abortion cases will be compared with the three abortion protest cases.

1. Organization for a Better Austin v. Keefe

a. The Coercive Impact of Speech

In *Keefe*, decided in 1971, the Supreme Court responded to lower courts that had restricted the right to distribute literature deemed "coercive" with an eight to one reversal.[366] The Court noted that although the speech had "a coercive impact" on people, it did not mean that the speech lost First Amendment protection.[367] The literature itself, advocating the stabilization of the racial makeup of the town, was considered offensive, but was still not restricted.[368]

In contrast, in the abortion cases, the Court never reached the question of whether the pamphlets that pro-life protesters distributed were offensive, because the restrictions prevent the protesters from distributing them. In *Keefe*, the Court did not even consider whether the right to distribute a leaflet could be restricted because the First Amendment protected it. Rather, the Court was concerned about intimidating literature that might influence someone.[369] Thus, the distribution of racist pamphlets was protected in *Keefe*, while in the three abortion protest cases, the Court heavily restricted the right to hand out informational leaflets against abortion. The Court explained in *Keefe* that even though the pamphlets had a coercive impact, they could not restrict the protesters from distributing them.[370] Yet, in the abortion cases, the impact of speech or its disturbing nature is precisely the subtle, and sometimes not so subtle, reasoning behind the Court's upholding of restrictions on pro-life speech. The content and the materials used by the pro-life protesters often include plastic replicas of unborn babies, pictures of aborted fetuses, and references to abortion as the equivalent of murder.[371] This speech undoubtedly affects the listener. While the Court in *Keefe* had little trouble finding

366. *Keefe*, 402 U.S. at 419-20. *See supra* notes 234-246 and accompanying text.
367. *Keefe*, 402 U.S. at 419.
368. *Id.* at 416.
369. *Id.* at 419.
370. *Id.*
371. SCHEIDLER, *supra* note 155, at 18, 23-24.

that the impact of the speech was not a valid reason to suppress speech, in the abortion cases it focused heavily on the impact speech has on the listener.

b. The Prior Restraint Doctrine

In *Keefe*, the Court relied on the doctrine of prior restraint to protect the speech, however, this same standard seems to have disappeared in the abortion protest cases.[372] The Court explained in *Keefe* that anyone who brought an action to restrict speech carried a "heavy burden" of proving the necessity of the statute when there had been a prior restraint.[373] Yet, in the three abortion protest cases, the Court does not even accept the prior restraint argument.

In *Madsen*, for example, the Court found that the court-ordered injunction limiting future protests was not a prior restraint.[374] Now compare this holding to *Keefe*, in which the Court invalidated the permanent injunction as a restraint on future speech. Indeed, the Court has noted that "a court order limiting speech in the future . . . is a classic form of prior restraint."[375] This comparison is disturbing, precisely because the acceptance of a prior restraint argument depends upon the message the speaker is advocating. While prior restraint is an elusive concept applied by the Court in an inconsistent manner,[376] it is clear that in light of the narrow free speech protections this Court has given when dealing with abortion protest, it would not give pro-life protesters the benefit of a prior restraint argument. This approach is a perfect example of the Court making it easier to restrict speech. In *Keefe*, the respondents did not come close to meeting the "heavy burden" of showing the need for a speech restriction.[377] Yet, in the abortion cases, the Court made it easier for the government to carry its burden in restricting speech by never accepting the prior restraint concept.[378] This is understandable because once the regulation has overcome the litmus test of content neutrality, the remaining obstacles to restricting speech are much easier to pass.

372. *Keefe*, 402 U.S. at 418-19.

373. *Id.* at 419.

374. *Madsen*, 512 U.S. at 761-63. *See supra* note 273 and accompanying text.

375. Alexander v. United States, 509 U.S. 544, 550 (1993).

376. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 770-71 (1997).

377. *Keefe*, 402 U.S. at 419.

378. *See, e.g., Madsen*, 512 U.S. at 764 n.2; *Schenck*, 519 U.S. at 374; *Hill*, 530 U.S. at 733.

2. Claiborne Hardware v. NAACP

The unanimous decision of the Court in *Claiborne Hardware* offers an insight into the willingness of the Court to protect free speech and how far the Court has distanced itself from this principle when dealing with pro-life protesters.[379] In *Claiborne Hardware*, there were reports of shootings, beatings, and threats, all with the approval of the boycott leader.[380] Yet, the Court did not hold this eight thousand-member boycott responsible for the trouble caused by a handful of people.[381]

a. Violence Within the Protests

Given the policy considerations, the Court's treatment of the protesters in *Claiborne Hardware* was understandable, even in light of the violence, yet the three abortion protest cases before the Court did not involve acts remotely close to the lawlessness reported in *Claiborne Hardware*.[382] Of the three abortion cases, only in *Schenck* were any laws broken, and the only criminal activities were the civil disobedience tactics of sit-ins, blockades, and pushing and shoving.[383] However, in *Claiborne Hardware* there were shootings, beatings, and threats of bodily injury.[384] While the NAACP as an organization did not advocate or promote violence in *Claiborne Hardware*, certain members took it upon themselves to incite injury and cause damage.[385] The Court recognized this principle and did not restrict the free speech rights of the organization and its peaceful members.[386] In contrast, with abortion protest cases, the Court seemed to automatically consider that anyone with a pro-life view is a dangerous extremist who will stop at nothing to shut down an abortion clinic. Because certain people who oppose abortion have acted violently in the past, the Court, in a sense, punished the rest of those who oppose abortion by limiting their First Amendment rights.

b. Comparing the Court's Analyses in *Claiborne Hardware* and the Abortion Protest Cases

The Court in *Claiborne Hardware* began its analysis with the recognition of the rights of assembly, association, and petition and their

379. *See supra* notes 215-233 and accompanying text.
380. *Claiborne Hardware*, 458 U.S. at 903-05.
381. *Id.* at 918-19.
382. *Id.* at 903-05.
383. *Schenck*, 519 U.S. at 363.
384. *Claiborne Hardware*, 458 U.S. at 903-06.
385. *Id.* at 923, 931.
386. *Id.* at 918-19.

connection to free speech.[387] In none of the three abortion cases, however, did the Court dwell on or even mention these additional rights and their importance. The author of the *Claiborne Hardware* opinion, Justice John Paul Stevens, made scant references to the rights of threatened blacks or white storeowners, and when he did, it was not until the end of the opinion.[388] This same Justice, the author of the *Hill* opinion, could not even finish the first paragraph of his analysis before recognizing "the interests of unwilling listeners."[389] This observation does not suggest that the woman's interest is neither valid nor important. Rather, it addresses the fact that Justice Stevens' First Amendment analysis depends on at whom the speaker is directing the speech. This would not be troublesome if it were not for the conclusion that he reaches. It would make more sense if the case involving the threats and the violent activity began with and focused on the recognition and importance of the listeners' rights, and the case without violence or threats emphasized the speaker's First Amendment rights. However, Justice Stevens declined to follow this approach and instead focused on the protesters' rights when violence was involved in *Claiborne Hardware* and ignored the protesters' rights when no violence was involved in *Hill*.[390] There is no justifiable defense for this inconsistent approach.

Another problem with the comparison between *Claiborne Hardware* and the abortion protest cases is the difference in how the Court views the protesters' conduct. In cases such as *Madsen*, where no laws were broken and protesters only obstructed access to the driveway, and *Schenck*, where there were blockades, pushing, and yelling at women, the Court focused almost exclusively on these actions of the protesters. In *Claiborne Hardware,* the Court focused almost entirely on the constitutionally protected actions of the protesters; it admitted, "there is no question that acts of violence occurred."[391] Yet one sentence later, the Court noted that because violence was mixed with free speech, "precision of regulation" was necessary and that because there was constitutionally protected activity, it "imposes restraints on the grounds that may give rise to damages liability . . . ."[392] Instead of taking the *Claiborne Hardware* approach, the Court, in the three abortion cases, magnified the abortion protesters' conduct that offended

387. *Id.* at 911-12.

388. *Id.* at 921.

389. *Hill*, 530 U.S. at 714.

390. *See supra* notes 228-233, 325-343 and accompanying text.

391. *Claiborne Hardware*, 458 U.S. at 916.

392. *Id.* at 916-17.

the women entering the clinic and never came close to making a concession to the constitutionally protected activity as it did with *Claiborne Hardware*, even though there was no actual violence by the abortion protesters.

The *Claiborne Hardware* Court continued its concern for those in the boycott who had not engaged in violence, noting that the First Amendment does not enable the government "to impose liability on an individual solely because of his association with another."[393] To punish a person because of his association with a group, it must be clear that the person intends to achieve that group's goals through illegal means.[394] However, this person's intent must be analyzed "according to the strictest law."[395] While the *Claiborne Hardware* Court was concerned about holding individuals accountable for mere sympathy or association with a group, in *Madsen*, the Court upheld an injunction which not only applied to those who were members of the named pro-life groups but also to anyone who had the same beliefs.[396] Thus, as the trial transcripts show, those who were within the thirty-six foot buffer zone were arrested even though they had no association with the groups who were the target of the injunction.[397] Hence, in *Madsen*, where no laws had been broken and no violence had been committed, the Court upheld an injunction aimed at restraining people not just associated with the targeted groups but anyone with the same viewpoint.[398] In *Claiborne Hardware* however, the Court did not hold other members of the NAACP responsible for violence and vandalism even though members of that same group had committed the crimes.[399]

In *Claiborne Hardware*, the protesters were engaging in actions more violent than anything occurring in the three abortion cases. As the Court noted in *Claiborne Hardware*, members of the boycott used "social pressure and the 'threat' of social ostracism"[400] to persuade blacks to not patronize the white merchants. The boycott leader would often threaten those who did not follow the boycott, warning they "would have their necks broken."[401] Apparently, the Court be-

393. *Id.* at 918-19.

394. *Id.* at 920.

395. *Id.* at 919 (quoting Noto v. United States, 367 U.S. 290, 299 (1961)).

396. *Madsen*, 512 U.S. at 775, 795-97.

397. *Id.* at 795-96 (quoting transcript of Tr. 104-05 Appearance Hearings held before Judge McGregor, Eighteenth Judicial Circuit, Seminole County, Florida).

398. *Madsen*, 512 U.S. at 770.

399. *Claiborne Hardware*, 458 U.S. at 925-26.

400. *Id.* at 910.

401. *Id.* at 927.

lieved having one's neck broken is merely "social pressure."[402] There were not just verbal threats though; numerous instances of assaults, vandalism, and beatings occurred pursuant to the boycott.[403] Yet the Court still referred to these actions as "'threat[s]' of social ostracism."[404] It is doubtful that the Court would couch similarly worded threats from pro-life protesters in such polite terms as "social pressure" or "social ostracism." Thus, this is another example of the Court bending the rules and throwing out First Amendment doctrine when it does not fit its agenda.

Comparing these facts and the Court's analysis to the *Madsen* facts and its analysis again reveals a troubling pattern. The Court in *Madsen* decided that protesters, who had engaged in no illegalities while congregating at the driveway leading to an abortion clinic, warranted a thirty-six foot buffer zone.[405] However, in *Claiborne Hardware*, notwithstanding various acts of violence and vandalism, the Court found that those participating in the boycott were merely exercising their First Amendment freedoms.[406] Again, this contradiction is difficult, if not impossible, to reconcile.

The final issue examined in considering the Court's analysis in *Claiborne Hardware* is the state interest behind the free speech restrictions. In *Claiborne Hardware*, the Court considered the government interest of economic regulation, but decided that it was not compelling enough to restrict free speech.[407] The Court cited a number of cases that dealt with the interest of economic regulation and prohibiting speech.[408] In *Hill,* however, the Court relied upon the state interest of protecting a person's "right to be let alone."[409] Yet the precedent for this government interest was a single case, *Olmstead v. United States*,[410] where as Justice Scalia noted, the right which Justice Brandeis was speaking of was the right to be left alone "as against the government."[411] Thus, the state interest in *Claiborne Hardware* was

402. *Id.* at 910.

403. *Id.* at 903-06.

404. *Id.* at 910.

405. *Madsen*, 512 U.S. at 770.

406. *Claiborne Hardware*, 458 U.S. at 928.

407. *Id.* at 912-13.

408. *Id.* at 912. *See e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); NLRB v. Retail Store Employees Union, 447 U.S. 607 (1980); Int'l Longshoremen's Ass'n. v. Allied Int'l, Inc., 456 U.S. 212 (1982).

409. *Hill*, 530 U.S. at 716.

410. 277 U.S. 438 (1928) (holding that wire tapping of telephone conversations did not amount to a search or seizure within the meaning of the Fourth Amendment).

411. *Hill*, 530 U.S. at 751 (quoting Olmstead v. United States, 277 U.S. 438, 478, (1928) (Brandeis, J., dissenting)).

an uncontested government interest that had substantial precedent, however, it was not compelling enough, even in the face of speech mixed with violence.[412] Whereas in *Hill*, the governmental interest in protecting one's "right to be let alone," cited in no previous case law, was compelling enough to withstand a facial challenge to a statute that made it unlawful to approach a person closer than eight feet when within one hundred feet of a health care facility. Comparing *Claiborne Hardware* with *Hill*, *Schenck*, and *Madsen* reveals some staggering holes in the Court's First Amendment jurisprudence and disappointment in the Court's notion of equality under the law.

3. Boos v. Barry[413]

The final non-abortion case considered in light of the abortion protest cases is the 1988 case *Boos v. Barry*. One of the first considerations the Court made in *Boos* was that the statute prohibited protesters from engaging in "classically political speech" on public streets and sidewalks, a location in which the "government's ability to restrict expressive activity is 'very limited.'"[414] In none of the abortion cases does the Court stress the relevance that the restrictions on abortion protesters occur on public streets and sidewalks. The fact that all three abortion protest cases concerned speech occurring in public forums make the decisions all the more dangerous. As the Court in *Boos* noted, the government's power to restrict speech is the least strong in a public forum. But the Court fails to emphasize the importance of this element because doing this would hinder the Court's ability to reach its desired end of suppressing the free speech rights of pro-life protesters. It appears that the Court, in these abortion protest cases, understands the principle of the path of least resistance.

In *Boos*, the Court noted that prohibiting speech that "does not favor either side of a political controversy is nonetheless impermissible" because the First Amendment does not permit restrictions on an entire subject.[415] Yet in defending the content neutrality of the statutes and injunctions in the abortion cases, the Court notes that it does not favor one side over the other, but rather treats all abortion protesters the same by restricting any speech about abortion.[416] Assuming arguendo that these restrictions treated pro-life and pro-choice groups

412. *Claiborne Hardware*, 458 U.S. at 912-14.
413. *See supra* notes 247-261 and accompanying text.
414. *Boos*, 485 U.S. at 318 (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).
415. *Id.* at 319.
416. *Hill*, 530 U.S. at 719-20.

equally, a big leap of faith itself, this violates the principle in *Boos* about prohibiting discussions on an entire issue.

In examining the content neutrality of the statute in *Boos*, the Court considered the government's argument that the real concern behind the restriction was the "secondary effects" of protecting diplomats from offensive speech.[417] The Court disagreed, stating that this justification behind the statute "focuses *only* on the content of the speech and the direct impact that speech has on its listeners."[418] Thus, since the statute restricted speech because of its primary impact, the Court deemed it content-based.[419]

This conclusion in *Boos* was in sharp contrast to the abortion protest cases. In all three cases, the Court was adamant about the content neutrality of each of the restrictions. Yet in *Schenck* and *Hill*, the justifications for these prohibitions were the emotional impact and distress caused by the pro-life protesters.[420] Thus, these restrictions were regulating speech based on its primary impact of causing anxiety and discomfort to the female patients. There is little doubt that the protesters, whether intending to or not, made the situation extremely stressful for women entering the clinic. To remedy this problem, a state legislature enacted a restriction to shield women from speech critical of their right to have an abortion. However, according to the analysis in *Boos*, "[t]his justification focuses *only* on the content of the speech and the direct impact that speech has on its listeners."[421] Therefore, because the reasoning behind the restriction concerns the content of the speech and the restriction regulates speech due to its primary impact on the women, these restrictions on abortion protesters are content-based.

Finally, in *Boos*, the Court concluded that the statute was content-based and that a content-based restriction on political speech in a public forum had to be held to the most exacting scrutiny. If the Court had used a similar approach in determining if the restrictions were content-based in the abortion protest cases, it would have likely found them to be content-based. The content-based restrictions on political speech in a public forum in the three abortion cases would likely not stand under the most exacting scrutiny. The Court avoids this conclusion, however, by using an approach hostile to free speech in that it determines a statute to be content-neutral no matter what the lan-

417. *Boos*, 485 U.S. at 321.
418. *Id.* (emphasis in original).
419. *Id.*
420. *Hill*, 530 U.S. at 710, 729; *Schenck*, 519 U.S. at 363.
421. *Boos*, 485 U.S. at 321 (emphasis in original).

guage of the statute states or its effects on free speech.[422] This point will be considered more fully as each of the three abortion protest cases is examined in greater depth.

D. Madsen v. Women's Health Center

In *Madsen*, the Court held that a thirty-six foot buffer zone surrounding the entrances to an abortion clinic and its driveway was constitutional.[423] Because the *Claiborne Hardware* Court had acknowledged that commenting on public issues remained the most important First Amendment value, it seemed logical to expect that the Court would do everything in its power to prevent restrictions on such expression.[424] Indeed, this had been the case, as decades of precedent would attest. Using the strictest form of scrutiny within reason, the Court has followed through on its promise of being committed to the ideal that "debate on public issues should be uninhibited, robust, and wide-open . . . ."[425]

1. The Creation of a New Test

Unfortunately, the *Madsen* Court applied a new, less rigorous standard when considering content-neutral injunctions.[426] The strict scrutiny test, used in many other cases, required the Court to determine "whether a restriction is 'necessary to serve a compelling state interest and [is] narrowly drawn to achieve that end.'"[427] In contrast, the test used in *Madsen* required that the restriction "burden no more speech than necessary to serve a significant government interest."[428] This change is an unfortunate turn that the Court could have avoided but did not.[429] This test makes it even easier for the government to curtail free speech rights by watering down the standards that the government must meet.

One hypothesis for this change in the test is the Court's concern with the rash of clinic violence that increased during 1994.[430] How-

422. *Hill*, 530 U.S. at 719-20.

423. *Madsen*, 512 U.S. at 776.

424. *Claiborne Hardware*, 458 U.S. at 908.

425. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

426. *Madsen*, 512 U.S. at 765.

427. *Id.* at 766 (quoting Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)).

428. *Madsen*, 512 U.S. at 765.

429. For a contrary view of this case, see William C. Plouffe, Jr., Note, *Free Speech v. Abortion: Has The First Amendment Been Expanded, Limited, Or Blurred?*, 31 TULSA L.J. 203, 225 (1995) (noting that *Madsen* was a "weak decision by the Court 'protecting' women seeking abortions" and that it illustrates that the right to abortion is eroding).

430. *See supra* notes 202-211 and accompanying text.

ever, the Court has never specifically stated this, possibly because it has addressed this issue in other cases and it was never bothered by the mix of violence and speech. *Claiborne Hardware* illustrates the Court's willingness to accept the fact that some violence cannot be prevented and to deny that violence automatically allows the government to restrict a group's right of free speech.[431] In past cases, the Court has taken the exact opposite approach of that used when dealing with abortion protest cases. Thus, the Court has taken an even more protective stance of a group's First Amendment rights when there is violence involved. The reasoning for this approach is quite simple; the government and people in opposition to the speech will be even more adamant about restricting the speech because it is intertwined with lawlessness. But if there is closer scrutiny by the courts, the illegal activity may be separated and punished, while preserving the right of free speech.

Very often, the Court has gone out of its way to protect speech mixed with violence.[432] In fact, the Court stated that "when such [violence and threats of violence occur] in the context of constitutionally protected activity, . . . 'precision of regulation' is demanded."[433] Somehow, Chief Justice Rehnquist believes that "precision of regulation" is a matter of mere semantics, exemplified by his statement that it should "burden no more speech than necessary."[434] Consider the fact that Chief Justice Rehnquist did not explain how the protesters' violent actions in *Claiborne Hardware* were protected by the First Amendment under the "precision of regulation" test, yet the protesters' peaceful actions in *Madsen* were not protected under the standard of "burden no more speech than necessary."[435]

2. *The Use of Permanent Injunctions*

Another example of the Court's more narrow view of free speech when abortion protesters are involved is the continued use of perma-

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431. *See supra* notes 229-231 and accompanying text.

432. *See supra* notes 364-367 and accompanying text. *See, e.g., Claiborne Hardware*, 485 U.S. at 916 (1982); United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 248 n.6 (1959); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957). One could also make an argument that the Court's protection of pornography in cases such as Reno v. ACLU, 521 U.S. 844 (1997) or Erznoznik v. Jacksonville, 422 U.S. 205 (1975), is in a sense protecting speech mixed with violence. *See* Attorney General's Comm'n on Pornography, U.S. Dept. of Justice, Final Report 326 (1986) (concluding that "substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence").

433. *Claiborne Hardware*, 458 U.S. at 916 (quoting NAACP v. Button, 371 U.S. at 438 (1963)).

434. *Madsen*, 512 U.S. at 767.

435. *See, e.g., Id.* at 776.

nent injunctions.[436] In other situations, the Court has stated that permanent injunctions are "classic examples"[437] of prior restraints. Further, the Court even concluded in *Organization for a Better Austin v. Keefe* that "prior restraint[s] on expression come to this Court with a 'heavy presumption' against [their] constitutional validity."[438] Yet in *Madsen*, the Court refused to consider this analysis and instead claimed that injunctions were not prior restraints.[439] As a result, the Court did not examine the injunctions at a level of heightened scrutiny.[440] As in other abortion protest cases, the Court in *Madsen* was eager to take shortcuts and apply watered down standards, even though First Amendment rights were at stake. What the Court was doing is quite clear, for under the less rigorous tests, it was much easier for the Court to find the restrictions on the speech constitutional.[441]

3. *Justice Stevens' Dissent*

Possibly the most disturbing element in the *Madsen* case, from a free speech perspective, was the position taken by Justice Stevens, who concurred in part and dissented in part. Justice Stevens believed that the Court should have upheld the three hundred-foot buffer zone.[442] This is a perfect example of how an alleged time, place, and manner restriction is so great that it becomes a suppression of speech in and of itself. Justice Stevens believed the three hundred-foot buffer zone was warranted despite the fact that no incidents of violence were ever cited.[443] His basis for upholding this zone was that some patients felt higher levels of anxiety.[444] Using this reasoning as the basis for a restriction of this magnitude leaves little doubt about Justice Stevens' disagreement with the pro-life message. In no other First Amendment case has he supported such a blatant suppression of one our

436. *Id.* at 763-65.

437. Alexander v. United States, 509 U.S. 544, 550 (1996) (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH 4.03, 4-14, 4-16 (1984)).

438. *Madsen*, 512 U.S. at 797-98 (quoting *Keefe*, 402 U.S. at 419).

439. *Madsen*, 512 U.S. at 763-64.

440. *Id.* at 764.

441. For a more thorough analysis and criticism of the current Court's application of the content-neutral and content-based distinctions in four recent free speech cases, including *Madsen*, see Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69 (1997).

442. *Madsen*, 512 U.S. at 782 (Stevens, J., dissenting).

443. *Id.* at 781-82.

444. *Id.* at 782 n.5.

most basic civil liberties.[445] But everything is upside down when the issue is abortion.

E. Schenck v. Pro-Choice Network of Western N.Y.

In the next abortion protest case considered, *Schenck*, the Court upheld the fixed buffer zone provision of the injunction, struck down the floating buffer zone provision, and avoided the constitutionality of the cease and desist provision.[446] The Court, while not considering the cease and desist aspect itself, addressed some of the petitioners' arguments concerning the provision.[447] The Court was not concerned that the basis behind the cease and desist provision was the right of someone entering the abortion clinic to be left alone.[448] Correspondingly, it seems that an abortion clinic has an elevated status beyond anything else, save for a personal residence. In case after case dating back to the dissents of Justice Holmes, the Court has realized that at times, people may find speech, literature, or actions offensive or immoral, yet the Court has counseled that the constitutional response is to ignore it and walk away.[449]

In deciding *Schenck*, the first thing the Court should have considered troublesome was the lower courts' cavalier attitude towards the protesters' free speech rights. For example, the district court stated it was "bending over backwards to accommodate" the First Amendment rights of the protesters.[450] This accommodation has never been, nor should it be viewed as a goodwill gesture, for it remains the job of the courts to uphold and defend the rights ensured by the Constitution. In recent times, the Supreme Court has been the sole bastion of the rights and liberties of all people, regardless of race, creed, or viewpoint. After installing floating and fixed buffer zones surrounding abortion clinics and instituting other numerous regulations, the belief

445. *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 886; City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (In striking down a Chicago loitering ordinance, Justice Stevens noted "that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside [this country]."); Reno v. ACLU, 521 U.S. 844, 872 (1997) (In striking down the Communications Decency Act, Justice Stevens noted that "the severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.").

446. *Schenck*, 519 U.S. at 379.

447. *Id.* at 383.

448. *Id.* at 383-84.

449. *See e.g.*, Boos v. Barry, 485 U.S. 312, 322 (1988); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978); Street v. New York, 394 U.S. 576, 592 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

450. Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1434 (W.D.N.Y. 1992).

of the courts that they are making an "extra effort," as Chief Justice Rehnquist calls it, is very questionable.[451]

In many other contexts, the Court has afforded greater protections and opportunities for groups to exercise their First Amendment rights and express their opinions. For example, in *Boos*, the Court felt that the fixed buffer zone infringed upon the protesters' free speech rights, yet never claimed it was doing the protesters a favor. Thus in *Schenck*, the Court, in light of this backdrop, should have considered more carefully what the trial court was trying to do. As Justice Scalia stated, "courts have an obligation to enhance speech rights."[452]

The Court applied the test devised in *Madsen* to the *Schenck* case.[453] While there were some similarities between the cases, such as abortion protests and injunctions limiting demonstrations, there were also vast differences. For example, one difference was that the injunction in *Madsen* applied to a single clinic,[454] while the injunction in *Schenck* applied to every clinic in the Western District of New York.[455]

A second difference was the government interests involved. The basis for the injunction in *Madsen* was a number of different governmental interests, including the rights and health of women who were obtaining abortion services, public safety, and the free flow of traffic.[456] In *Schenck*, many of the government interests from *Madsen* were not applicable because the main government interest was public safety.[457]

Besides the question of whether *Madsen* was inapplicable to *Schenck*, another problem with the decision in *Schenck* is the reasoning behind the fixed buffer zone. As Justice Scalia's dissenting opinion notes, the one purpose behind this provision of the injunction was "to protect the right of people approaching and entering the facilities to be left alone."[458] Taking this one step further, the reasoning behind the cease and desist provision was also the right to be left alone.

Obtaining an abortion, as well as most other medical procedures, is a stressful situation. However, out on the streets or on a sidewalk, the Court has always recognized that people must shut their eyes and

451. *Schenck*, 519 U.S. at 381 n.11.
452. *Id.* at 390.
453. *Id.* at 371.
454. *Madsen*, 512 U.S. at 758.
455. *Schenck*, 519 U.S. at 366 n.2.
456. *Madsen*, 512 U.S. at 767-68.
457. *Schenck*, 519 U.S. at 376.
458. *Id.* at 387.

close their ears.[459] It is quite understandable that a woman entering an abortion clinic would not want to be told what she should or should not do. However, in a country that protects the free speech rights of everyone, including those who have opposing opinions, these women must accept the fact that there are people who strongly disagree with what they are doing and have a right to voice their opinions about it.

The Court's acknowledgement of the "right to be left alone" is something very different from anything the Court has done in past cases. Relying on this reasoning in First Amendment cases is very dangerous, especially when this right to be left alone is invoked in a public forum. People do not want to be intimidated or annoyed by people who want to impose their point of view on them. However, this discomfort cannot supersede the right of free speech. Of course, the scope of protected speech must be within reason, for any type of unwanted touching or threats have no place in the First Amendment.

F. Hill v. Colorado

The final case analyzed is the most recent of the three abortion protest cases. The majority opinion in *Hill,* upholding the one hundred-foot buffer zone, was quick to point out the First Amendment rights of the protesters at stake.[460] The Court then went on to admit that the constitutionally protected action of handing out leaflets was "unquestionably lessened by this statute."[461] Given those considerations, one might think that the Court would have been more skeptical of the restriction in question. For this was not a case of symbolic speech or speech mixed with violence or lawlessness, it was purely "high value" speech taking place in a public forum. Unfortunately, the majority never acknowledged this point. While one could argue that areas surrounding abortion clinics are a limited-public forum, rather than a public forum, in either case, the Colorado legislature overstepped its boundaries. There is, however, no argument over whether noise statutes can and should be in place, a point the protesters do not challenge as silence is necessary at clinics and hospitals. However, trying to distribute a pamphlet to someone is a far cry from violating a noise statute.

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459. *Hill,* 530 U.S. at 752-53 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 948 (2d ed. 1988)).

460. *Hill,* 530 U.S. at 708.

461. *Id.* at 715.

1. Applying the Ward *Test*

In determining whether the statute was content-neutral, the Court applied the test from *Ward v. Rock Against Racism*,[462] which stated that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[463] The Court concluded that the Colorado statute passed this test for three separate reasons.[464] All three reasons found by the Court for determining the content neutrality are subject to serious questions.

The first reason the statute passed the test from *Ward* was that it was not a regulation of speech but "[r]ather, it [was] a regulation of the places where some speech may occur."[465] However, the Court did not consider that at some point, a regulation of the places where some speech may occur becomes a regulation of speech itself.

For example, restricting protests within a one-mile radius of the Supreme Court does not restrict speech per se; it only restricts the places where speech may occur. Yet, for all intents and purposes, it remains a regulation of the speech itself since it has diffused the effect of the speech. Thus, although the Court couches this restriction in terms of being only a "regulation of the places where some speech may occur,"[466] the result is the same: infringement of First Amendment rights. While it can be argued that this could be said for any place restriction, the statute at hand restricted so much First Amendment activity that it became a restriction of speech, rather than of a place where it could occur.

The second reason the Colorado statute passed the *Ward* test was that "it was not adopted 'because of disagreement with the message it conveys.'"[467] The Court believed the statute was content-neutral even though it depended on the content of the message. The Court stated that "it [was] common in the law to examine the content of a communication to determine the speaker's purpose."[468] It then gave a number of examples, such as "blackmail [or] an agreement to fix prices,"

462. 491 U.S. 781 (1989).
463. *Id.* at 791.
464. *Hill*, 530 U.S. at 719-20.
465. *Id.* at 719.
466. *Id.*
467. *Id.* (quoting *Ward*, 491 U.S. at 785).
468. *Id.* at 721.

in which the Court looked at the content of a statement to see if a law had been broken.[469]

These comparisons are suspect because each of the violations mentioned is a separate crime. Blackmail has no First Amendment protection and is a crime punished in and of itself.[470] Speaking with a woman entering an abortion clinic has First Amendment value and, absent the statute, is not a crime by itself. Thus, the Court used a faulty comparison to hide behind an even faultier rule of law; violating the statute depends on the content of the speech within the restricted area.

The third reason the statute passed the *Ward* test was because the states' interests were unrelated to the content of the protesters' speech.[471] To consider whether this provision of the test was satisfied, the interests of the state must be considered first. The governmental interest which the Court relied on is protecting a person's "right to be let alone."[472] This "state interest" is patently at odds with First Amendment principles, but the reasoning the Court used to arrive at the legitimacy of this interest is even more at odds with prior case law. Relying on a right "to be let alone" on sidewalks and street corners is a dangerous precedent for which the Court has laid the groundwork in *Hill*.

Finding the Colorado statute content-neutral was the crucial factor in upholding the law, because courts subject content-neutral regulations to the less protective intermediate scrutiny standard. If the Court found the statute to be content-based, it would then use the more speech protective strict scrutiny. This distinction is often the decisive factor in a free speech case, and a perfect example is the conflicting holdings of the lower courts in *Madsen*.[473] The Florida Supreme Court found the injunction was content-neutral, used intermediate scrutiny, and upheld the constitutionality of the injunction.[474] The Eleventh Circuit also considered the constitutionality of the same injunction and found the injunction to be content-based.[475] It then

469. *Id.*

470. *See e.g.*, Gresham v. Peterson, 225 F.3d 899, 909 (7th Cir. 2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (quoting Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981)) ("Although the First Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.'").

471. *Hill*, 530 U.S. at 719-20.

472. *Id.* at 716.

473. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993); Operation Rescue v. Women's Health Ctr., 626 So. 2d 664 (Fla. 1993).

474. *Madsen*, 512 U.S. at 761-62.

475. *Id.*

applied strict scrutiny, found the injunction was not narrowly tailored to serve a compelling government interest, and held the injunction unconstitutional.[476] This is a concrete example of what can occur when a court finds a statute content-based. The *Hill* Court's ability to ignore the plain language of the statute and the implications of the law on the pro-life protesters and the First Amendment is simply amazing. The Court in *Hill* made an illegitimate use of a legitimate doctrine, content-neutrality, but unlike in *Madsen* and *Schenck*, it had nowhere to hide its convoluted approach.

2. *Giving Abortion Clinics the Status of a Home*

A disturbing factor in Justice Stevens' opinion was the application of the Colorado statute to privacy standards upheld in previous cases for residences.[477] For example, he stated, "protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[478] While many would agree with this point, it is difficult to extend this standard to public locations, especially since the proposition alluded to came from *Frisby v. Schultz*[479] in which the home of a doctor had been the subject of repeated picketing.[480]

Justice Stevens went on to use the home analogy again, citing *Rowan v. U.S. Post Office Dep't.*,[481] a case involving unwanted offensive material mailed to an individual's home, stating that "the right of every person 'to be let alone' must be placed on the scales with the right of others to communicate."[482] Thus, the *Rowan* case had a critically important factual distinction, which Justice Stevens failed to acknowledge. It is interesting to note that when the respondent in *Organization for a Better Austin v. Keefe* relied on *Rowan*, the Court said "[*Rowan*] is not on point; the right of privacy involved in that case is not shown here."[483] The Court then went on to distinguish *Keefe* from *Rowan* by showing that "respondent is not attempting to stop the flow of information into his own household, but to the public."[484] Yet the statute in *Hill* is doing exactly that, attempting to stop the flow of information to the public. It is disheartening to see that when a

476. *Id.* at 762.
477. *Hill*, 530 U.S. at 716-17.
478. *Id.* at 716.
479. 487 U.S. 474 (1988).
480. *Id.* at 476.
481. 397 U.S. 728 (1970).
482. *Hill*, 530 U.S. at 718 (quoting Rowan v. U.S. Post Office Dep't., 397 U.S. 728, 736 (1970)).
483. *Keefe*, 402 U.S. at 420.
484. *Id.*

party to a case relied on *Rowan*, it was strongly rejected in dicta, yet thirty years later, the Court itself relied on the same case as the underlying reasoning for its holding.[485]

It is unclear whether Stevens was attempting to compare an abortion clinic with a home, but if he were, it would be dangerous precedent. This is especially relevant with regard to the statute in *Hill* because the restricted area extended one hundred feet from clinics, encompassing all of the public right-of-ways.[486] For if places other than a home were subject to the same protections as a home, protesters of all movements would be in a difficult predicament and so would the First Amendment. The possibilities of further extension would be endless. Businesses, government buildings, or any other area could be protected under an elevated status. While this argument may seem far-fetched, it may not be because the issue is abortion. For it is clear that the Court has already shown its willingness to severely restrict speech in the area of abortion clinics.

3. Considering the Language of the Statute

Another problem with the majority's belief that the statute was content-neutral was that it failed to consider, or at least address, certain language within the statute. As Justice Scalia noted, the first section of the statute stated that "the right to protest or counsel *against* certain medical procedures."[487] Taken literally, it would be difficult to consider this a content-neutral statute. However, the majority not only refused to consider this but also acted as if this section were not in the statute. Throughout the majority opinion, Justice Stevens made a number of different arguments for upholding the statute, disregarding the "against" language. Justice Stevens stated that anyone who protested for abortion rights or handed out pamphlets praising *Roe* would be in violation of the statute if these actions were done in the restricted area.[488] However, he failed to note that the legislature enacted the statute for those protesting "against certain medical procedures."[489] It is also naive to think that abortion clinics and women entering clinics themselves would not want protesters who support

485. This right to privacy was not advanced by the State, which noted that the statute addressed the problems of interference with access to medical services and the health and safety of those entering the clinic. Brief for Respondents 15. Justice Scalia addressed this point in his dissent. *Hill*, 530 U.S. at 749-50 (Scalia, J., dissenting).

486. *Hill*, 530 U.S. at 707-08.

487. *Id.* at 744 (emphasis added) (quoting COLO. REV. STAT. § 18-9-122(1) (1999)).

488. *Id.* at 725.

489. COLO. REV. STAT. § 18-9-122 (3) (1999).

abortion to be present, giving them help and protection from unwanted advice of pro-life protesters.

It also appears that the statute singled out specific tactics used by pro-life groups, "passing a leaflet[,] . . . engaging in oral protest, education, or counseling."[490] The last element, counseling, remains for many pro-life groups the most important and most effective means of discouraging women from getting abortions.[491] Ignoring the "against medical procedures" language for a moment, the types of methods that the statute singled out were suspect. There is little doubt that the pro-life, and not the pro-choice side, relies on these means to protest abortion. Yet, the majority still claimed that the statute was content-neutral because it applied to all protesters, regardless of viewpoint.[492] However, the chance that a supporter of abortion rights would challenge this statute is highly unlikely. It is apparent that this statute was aimed at silencing the pro-life protesters because the statute is laden with content-based restrictions. Thus, while the Court claimed the statute is content-neutral, one need only consider the legislative intent and the fact that the Colorado legislature was motivated to control the speech of those protesting "against" medical procedures.[493] To think that this statute was aimed at and applied equally to those in support of abortion defies common sense.

4. Ample Alternatives

Free speech has its limits. However, the Court's rulings in the abortion context leave pro-life protesters with inadequate methods of communication. Handing a passerby a leaflet is impossible from eight feet away unless that passerby makes an affirmative effort to step closer and take the leaflet. Most people are unwilling to do this.[494] The eight-foot buffer zone prevents a sidewalk counselor from using softer, more effective tones of voice because she has to deal with the distance and other noise factors. The Court in the past has recognized such a situation and noted that "a restriction on expressive activity may be invalid if the remaining modes of communication are inade-

490. *Id.*

491. *See* JOSEPH SCHEIDLER, ARRESTING ABORTION 85-92 (John Whitehead ed., 1985) (noting that sidewalk counseling is the most effective and important method in protesting against abortion).

492. *Hill*, 530 U.S. at 725.

493. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 794 (2d ed. 1988) (explaining that statutes may be considered content-neutral but are motivated by the intent to restrict certain constitutionally protected speech).

494. *Hill*, 530 U.S. at 758 (Scalia, J., dissenting).

quate."[495] For example, in *Bay Area Peace Navy v. United States*,[496] a case dealing with anti-war protesters, the Ninth Circuit found that a seventy-five-yard "security zone" rendered the protesters' demonstration "completely ineffective."[497] It further noted that "an alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"[498] It then cited to a number of cases, also in the non-abortion context, in which courts have recognized that the intended message was rendered useless, even though the court permitted the speaker to communicate the message.[499] Considering this concern in the light of the warning by the Supreme Court in *Riley v. National Federation of the Blind*[500] that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it"[501] reveals serious deficiencies in the protection of free speech when pro-life protesters are involved. As noted earlier, sidewalk counselors who wish to dissuade individual women from entering the clinic have no ample alternatives. Their method is to approach women at a distance closer than eight feet. This method is effective because it concentrates on quiet conversation between two individuals, not a crowd of people yelling and chanting. The decisions in the abortion protest cases not only disallow the message from reaching the intended audience but also imply that there are methods other than sidewalk counseling that the protesters may use, violating the principles from *Riley* and *Bay Area Peace Navy*.

G. Summary

1. The Double Standard Question

There is clearly some difficulty in reconciling the abortion and non-abortion protest cases. Stripping away all the language about buffer zones, free speech, and a listener's right to be left alone, there is a

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495. City Council of Los Angeles v. Taxpayers For Vincent, 466 U.S. 789, 812 (1984).

496. 914 F.2d 1224 (1990).

497. *Id.* at 1229.

498. *Id.* (quoting Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 339-40 (W.D. Va. 1987)).

499. *Id.* (citing Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 339-40 (W.D. Va. 1987) (school regulation prohibiting protest shanties on lawn of building where Board of Visitors meets is not rendered valid by permission to erect shanties in other places not visible to members of Board, who were the intended audience); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 674 (N.D. Ill. 1976) (permitting a parade route through black neighborhood not a sufficient alternative to a route through white neighborhood when white people were the intended audience).

500. 487 U.S. 781 (1988).

501. *Id.* at 790-91.

double standard lurking beneath all of the Court's faulty reasoning and illogical rhetoric.

Some might argue that it is difficult, if not impossible at times, to reconcile Supreme Court case law, even from one year to the next. They might also add that the First Amendment is a difficult area of the law, often depending heavily upon the facts of the case. While these points are true, they are a last ditch effort to cloud the real issue: blatant double standards. The Court goes from a position of fervent protection of speech to one of almost complete lack of protection. What is worse is that this wavering approach depends on who the speakers are and what their message is. Those espousing a pro-life view, or worse, those who may air this view, are politically and judicially expedient; however, the groups and their messages in the non-abortion context were not expedient. The issue of whether the cases analyzed can be viably compared is simple. These cases highlight the double standards applied to pro-life groups because *Claiborne Hardware*, *Keefe*, and *Boos* dealt with, respectively, violent protests, offensive messages, and concerns for the listener, reasons used by those willing to restrict the First Amendment rights of pro-life protesters. Thus, the speech protective analyses used by the Court in the non-abortion context cannot be reconciled with the speech abrasive analyses used by the Court in the abortion context.

2. *Balancing Rights*

Traumatic and trying as an abortion is for a woman, the right to choose does not trump another woman's right to explain other alternatives or that she herself was in that exact position and can help. On the other hand, abortion providers or women seeking an abortion must not be denied their constitutionally protected rights. There must be a balance between the right of a woman to choose to have an abortion and the freedom of others to voice their opinion on this right to choose. The Court recognizes the two sets of rights at issue, but only pays lip service to the free speech rights of the pro-life protesters. Balancing the rights of both sides is difficult, but one thing is certain, both groups' rights deserve protection. Women entering clinics should not have to be subjected to threats or insults, while abortion protesters should not have their message obstructed by overly broad injunctions and statutes.

The First Amendment dates back to 1791, while a woman's right to choose to have an abortion was made law by the Supreme Court in 1973. While the point of this article is not to argue the validity of *Roe* or whether abortion is right or wrong, it must be remembered that this

is the First Amendment that is being expounded. Burning crosses, burning flags, offensive racial epithets, degrading religious art, and insulting pornography are things Americans must tolerate in order to maintain First Amendment freedoms. While it is a fact that at times a small percentage of abortion protesters have gotten out of hand, except for illegal behavior, this must be tolerated as well. As highly valued as this right to choose is by many women, this does not automatically mean that others in disagreement lose their right to criticize it or to influence others about it.[502]

Since the founding of this nation, groups protesting for social change have been met with harassment, opposition, and sometimes a government that secretly or even explicitly opposed their movement and what it stood for.[503] The times have changed and the issue has changed, but the scenario remains the same. The government has no qualms about passing legislation or issuing injunctions restricting someone's free speech rights when the movement is controversial. If the courts are ready to defend the position that an injunction can be based on one's right to be left alone, then protesters from whatever interest group may as well stay home because it undermines the whole idea of trying to affect change. The issue of abortion differs from other protest subjects because it encompasses other important issues such as the health of a woman, a doctor's job, and the safety of abortion providers and patrons. However, the underlying theme is still the same: a group fervently opposed to something it believes is wrong and tries to affect change through constitutionally protected methods such as leafleting, protesting, and educating. Unfortunately, extremists have placed First Amendment rights in jeopardy and law-abiding citizens suffer because of them. Both sides of the picket line need to recognize and respect the interests and liberties of the other. Finding a balance between both groups' rights remains elusive, but it is not an unattainable goal.

After twenty-nine years of legalized abortion, many Americans are still uncomfortable confronting this issue. The very thought of people vocally telling a woman entering an abortion clinic that she is a "murderer" or various other pro-life mantras is difficult to digest. Abortion, like any other medical procedure, involves a certain degree of

502. Michael Stokes Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y & L. 261, 263 (1994) ("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.").

503. For example, the anti-war movement or the abolitionists during the pre-Civil War period. *See supra* notes 44-79 and accompanying text.

risk and uncertainty. Therefore, there is an even higher degree of anxiety when a woman enters an abortion clinic. It is easy to conclude that any kind of embarrassment or anxiety felt when one encounters protesters should account for some type of restriction on those protesters. However, there is obvious danger to this "leaving people alone" approach because the First Amendment would be, as Justice Scalia said, "a dead letter."[504] For if the feelings of anxiety or embarrassment were more important than the First Amendment and the right to express oneself, society would have difficulty remaining free and democratic.

A person's feelings cannot be the gauge by which to determine whether speech should be restricted. For if this becomes the test, it would eliminate a vast number of Constitutionally protected activities. At a time when experts and politicians tell us what we should and should not say or do, the First Amendment must lend a voice of reason to the fray. The First Amendment has gone through difficult times, including slavery, world wars, and the turbulent 1960s; after 210 years, it must not be compromised solely because a person's speech causes someone discomfort.

IV. IMPACT

The impact of the line of abortion cases dealing with the First Amendment has been profound, both in the courts and the streets. State legislators and courts have taken the Supreme Court's cue and declared open season on the free speech rights of abortion protesters.[505] Some restrictions have been intolerable. Some of the reasoning behind restrictions has been absurd. Thus, it is important that citizens, no matter what their feeling on abortion, put their prejudices aside and consider the restrictions from a First Amendment standpoint. Laws restricting the size or number of pro-life signs are unwarranted and unconstitutional. Using anthropological studies and social science experiments as the motivation for laws restricting pro-life

504. *Hill*, 530 U.S. at 748-49.

505. For example, in California, SB 780, which was passed into law on October 14, 2001, puts the penalties of the Federal Access to Clinics Act into California law. 2001 CA S.B. 780. In addition, the bill "would allow specified persons to use pseudonyms in civil actions related to prohibited acts." *Id.* The bill also requires law enforcement agencies to address "hate crimes motivated by hostility to real or perceived ethnic background or sexual orientation, commonly committed by some of the same persons who commonly commit anti-reproductive-rights crimes of violence." 2001 CA S.B. 780 (2). Not only does the bill single out anyone with a pro-life viewpoint and subject them to harsher crimes than someone without a pro-life viewpoint, it adds insult to injury by clearly accusing them of being hateful. Apparently, there is no end to what some will resort to in order to dismantle the pro-life message. Katie Short, CALFACE Update, *at* www.lldf.org, Summer 2001 (last visited November 1, 2001).

protesters is disturbing.[506] These are not hypotheticals; these are real life instances initiated and approved by entities of the United States Government.[507] Only time will tell how devastating an effect these cases will have on First Amendment jurisprudence.

A. Lower Courts and Abortion Protests

Lower courts are now using cases such as *Madsen*, *Schenck*, and *Hill* to restrict the free speech rights of abortion protesters across the country. It is likely that many courts will explicitly rely on the cases, considering them licenses to suppress speech. This, of course, will continue as long as the Supreme Court continues to apply a different set of standards to pro-life protesters.

1. Foti v. City of Menlo Park[508]

One of the more blatant examples of the disregard for pro-life protesters' free speech rights occurred in *Foti v. City of Menlo Park.* In this case, two protesters were picketing on a public sidewalk in front of a Menlo Park, California Planned Parenthood Facility.[509] The sidewalk bordered a four-lane roadway.[510] The two people carried signs displaying pictures of aborted fetuses and other pro-life messages.[511] One of the defendants also attached pro-life signs on his legally parked car.[512]

Soon after receiving complaints from motorists about the two protesters, the City of Menlo Park adopted an ordinance that limited

506. See Hearings on Motion for Preliminary Injunction at 173-74, at Buchanan v. Jorgensen, No. 87-Z-213 (D. Colo 1987) (argument regarding the need for a city ordinance that created an eight-foot buffer zone around clinic patrons who are within one hundred feet of the clinic). *See also*, Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1860 (1988).

507. For various lower courts treatment of pro-life protesters, see e.g., NOW, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (upholding a permanent, nationwide injunction prohibiting protesters from interfering with the rights of the clinics to provide abortion services, by obstructing access to the clinics or trespassing on clinic property); Gynecology Clinic, Inc. v. Cloer, 334 S.C. 555 (S.C. 1999), *cert. denied*, 528 U.S. 1099 (2000) (affirming a lower court decision that ruled pro-life protesters engaged in a civil conspiracy even though the protesters' activities were protected by the First Amendment); Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir. 1995) (upholding city ordinance requiring demonstrators within one hundred feet of a health care facility to honor the request of individuals in the area who ask them to withdraw a distance of at least eight feet from the person); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126 (N.J. Sup. Ct. 1994) (upholding a permanent injunction for protesters picketing on sidewalks surrounding the clinic, reasoning the restriction was content-neutral and served significant state interests).

508. 146 F.3d 629 (9th Cir. 1998).

509. *Id.* at 633.

510. *Id.*

511. *Id.*

512. *Id.*

each picketer "to carrying a single sign no larger than three square feet" and required that "the picketer must actually move while carrying the sign."[513] The ordinance also restricted a protester from posting signs on public property or in a public right of way.[514] The two protesters continued to picket, although one had his sign confiscated by a police officer because it violated the size requirements.[515] The police also warned the protester that they would confiscate his car if he placed any signs on it.[516]

The two protesters filed suit, claiming the ordinance violated their free speech rights, but the district court refused to grant a temporary restraining order after finding the ordinance facially constitutional.[517] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.[518] The court upheld the ordinance's restriction on the size and number of signs carried by a protester, accepting the city's substantial interests in protecting the aesthetic appearance of the town and the "pedestrian circulation on the sidewalk."[519] The court reasoned this part of the regulation was narrowly tailored and left open alternative means of communication.[520]

The Ninth Circuit struck down the second part of the ordinance, which required protesters to actually be moving while demonstrating.[521] The court reasoned that it was not narrowly tailored to the city's interest and remanded to the district court to issue a preliminary injunction against the city ordinance because the plaintiffs prevailed on some of their claims.[522]

This case is the perfect example of how some courts are out of touch with the First Amendment, at least when pro-life speech is involved. The fact that a city council could, in light of absolutely no reports of violence or intimidation by protesters, enact restrictions so illogical and unrelated to anything except to harass and abridge the free speech rights of pro-life protesters is troubling. However, what is even worse is that a federal district and appellate court could uphold some of these restrictions based on the important state interests of

513. *Id.* at 634 n.3.
514. *Foti*, 146 F.3d at 633-34.
515. *Id.* at 634.
516. *Id.*
517. *Id.*
518. *Id.* at 643.
519. *Id.* at 640-41.
520. *Foti*, 146 F.3d at 641.
521. *Id.* at 642.
522. *Id.* at 643.

"pedestrian circulation" and the "aesthetic appearance" of the town.[523] One can only hope that this case and the state interests relied upon do not give the Supreme Court any ideas the next time it considers an abortion protest case.

2. Planned Parenthood Shasta-Diablo, Inc. v. Williams[524]

A second example of a lower court restricting free speech rights is the California Supreme Court case, *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, in which the court upheld a permanent injunction against pro-life protesters.[525] In *Williams*, a group of pro-life protesters had picketed the respondent's abortion clinic with groups of picketers ranging from six to one hundred people.[526] They demonstrated on the public sidewalk in front of the clinic and in the parking lot and mainly focused on distributing literature and plastic replicas of fetuses to clinic patients.[527]

Based on the findings that the petitioners intimidated women entering the clinic, interfered with entrance to the clinic, and caused some of the women to become emotionally distraught, the trial court granted a permanent injunction against the petitioners.[528] After the California Supreme Court affirmed this decision,[529] the United States Supreme Court vacated and remanded it in the light of the *Madsen* case.[530] On remand, the California Supreme Court again upheld the injunction.[531] The California Supreme Court, applying *Madsen*, found *Madsen* analogous to the case and held that the place restrictions were content-neutral, they served significant state interests, and they burdened no more speech than necessary.[532]

The court, after concluding that the injunction restricting the pro-life protesters was content-neutral, noted only two sentences later that the purpose of the injunction "was to ameliorate the confrontational tactics of petitioners and to prevent the physical intimidation that re-

523. *Id.* at 640-41.

524. 10 Cal. 4th 1009 (Cal. 1995).

525. *Id.* at 1012. For a more thorough analysis of this case, see Ronnie Beth Nadell, Comment, Planned Parenthood Shasta-Diablo, Inc. v. Williams: *Anti-Abortion Protesters, Injunctions, And The Suffocation Of Free Speech In California*, 28 SW. U. L. REV. 627 (1999).

526. *Williams*, 10 Cal. 4th at 1012.

527. *Id.* at 1013.

528. *Id.* The injunction restricted the protesters' picketing and counseling activities to the sidewalk across the street from the clinic. *Id.*

529. Planned Parenthood Shasta-Diablo, Inc. v. Williams, 7 Cal. 4th 860 (Cal. 1994).

530. Williams v. Planned Parenthood Shasta-Diablo, 513 U.S. 956 (1994).

531. *Williams*, 10 Cal. 4th at 1012.

532. *Id.* at 1019-24.

sulted in higher stress and anxiety."[533] The court next stated that the statute equally applied to pro-choice protesters.[534] The court based its conclusion that the statute was content-neutral on the false premise that the statute also applied to pro-choice protesters.[535] This is difficult to comprehend because the basis for the injunction was the tactics of the pro-life protesters that caused high stress and anxiety. It is highly unlikely, and borders on the absurd, that the court could honestly believe the clinic owners would enforce the injunction against pro-choice protesters. There were no reports of any type of threats or touching, and yet an injunction was still warranted because of high stress and anxiety. The troubling aspect about this case was that a permanent injunction banning all demonstrations by any pro-life protester was issued because of conduct that was absent of any physical threats, violated no laws, and was based on the government interest of preventing "heightened stress and anxiety."[536]

Many critics like to point out that abortion protest involves the conflicting constitutional rights of two different groups: women seeking abortions and protesters expressing their disagreement with this action.[537] However, as these last two cases illustrate, this is not always the situation. It is difficult to explain how a woman's right to choose is infringed when a peaceful protester carries a sign exceeding a certain limit or carries multiple signs. There is no balance of rights necessary because only one party, the protesters, and their free speech rights are at issue. While there is no conflict of rights between the women and the protesters in these instances, courts restrict free speech rights regardless of this point.

3. McGuire v. Reilly[538]

A little over one year after the Supreme Court handed down *Hill v. Colorado*, the aftershocks are just beginning to be felt.[539] In *McGuire*

533. *Id.* at 1020.

534. *Id.*

535. *Id.* at 1014, 1019.

536. *Id.* at 1020-24.

537. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 553-54 (1996).

538. 260 F.3d 36 (1st Cir. 2001)

539. *See e.g.*, McGuire v. Reilly, 260 F.3d 36 (1st Cir. 2001), *infra* notes 540-552 and accompanying text; Thorburn v. Austin, 231 F.3d 1114 (8th Cir. 2000) (relying on *Hill* to uphold an ordinance challenged by pro-life protesters); Veneklase v. City of Fargo, 248 F.3d 738, 743 (8th Cir. 2001) (en banc) (using *Hill* to "expand [the] reasoning" of the panel opinion in rejecting all of the pro-life protesters' claims). However, when the protesters are not pro-life, the *Hill* analysis seems to become less attractive. *See* Coalition for Humane Immigrant Rights v. Burke, CV 98-

v. Reilly, a group of pro-life protesters brought a facial challenge to a Massachusetts law that was modeled after the Colorado statute upheld in *Hill v. Colorado*.[540] The plaintiffs challenged that the law violated their rights to free speech and free association.[541] The law was similar to the Colorado statute and prohibited, absent consent, anyone to approach within six feet of a person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person" within eighteen feet from any entrance to an abortion clinic.[542] The district court struck down the statute, determining it violated the First Amendment because it was content-based and discriminatory on the basis of viewpoint.[543]

The United States Court of Appeals for the First Circuit reversed.[544] The court, relying heavily on *Hill*, noted its influence and similarities to the case at hand.[545] The court found the statute was a content-neutral regulation because it provided "a neutral justification—unrelated to the content of speech—for differential treatment."[546] The First Circuit then rejected the district court's finding that the law's exemption for clinic employees constituted impermissible viewpoint-based discrimination.[547] It held that the court's finding that viewpoint-based discrimination existed was "wholly unsupported and hence clearly erroneous."[548]

The Massachusetts statute is in some ways less restrictive than the Colorado statute, however, the ease in which the court upheld the speech restrictions is troubling. The court itself admitted, which is more than the *Hill* Court could do, that the law "clearly affects anti-abortion protesters more than other groups."[549] It then stated that this differential treatment does not result from a disagreement with

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4863-GHK(CTx), 2000 U.S. Dist. LEXIS 16520, *27 (C.D. CA. 2000) (finding that *Hill* did not apply because the targeted audience was not captive or unwilling). This is an interesting holding seeing that people walking or driving past day laborers (those challenging the speech restriction) are no more willing to listen than those entering abortion clinics. It is also interesting because there were various complaints by residents concerning physical threats, obstruction of traffic, and harassment of women by the day laborers. Coalition for Humane Immigrant Rights, 2000 U.S. Dist. LEXIS at *29.

540. *Reilly*, 260 F.3d at 40-41.
541. *Id.* at 41.
542. *Id.* at 40.
543. *Id.* at 41.
544. *Id.* at 42.
545. *Id.* at 40-41.
546. *Reilly*, 260 F.3d at 45.
547. *Id.*
548. *Id.*
549. *Id.* at 44.

the protesters' message.[550] It ignored its earlier point that the Massachusetts statute was enacted because of the "aggressive behavior" outside abortion clinics.[551] It also failed to give adequate consideration to the fact that clinic employees are exempt from the ban and that the statute applies only to "clinics that provide abortions."[552] The court did not address why an exemption for clinic employees is necessary if a buffer zone is already intact. Apparently, the court not only approved of hindering a patient's access to the pro-life message, but also simultaneously gave the pro-choice message an elevated position. Yet, the court held this position and still claimed the law is not viewpoint-based discrimination. It pointed out that the employee exemption has secondary effects, but this still does not answer the question of why employees are needed to escort patients if pro-life protesters are already prohibited by law from remaining inside the buffer zone. The court's observation that clinic employees do not counsel women to undergo an abortion defies common sense. The court ignored the fact that abortion is a business, and businesses that hope to survive encourage clients to partake in their goods or services.

As these examples show, lower courts around the country are restricting free speech rights even in the absence of harassment or civil disobedience tactics. These lower courts have taken the notion from the Supreme Court that the free speech rights of abortion protesters can be restricted, even for trivial concerns. If these stringent restrictions were placed on any other group, there would likely be civil lawsuits, national media attention, and finger pointing in Congress over who is to blame. Instead, these restrictions continue unabated, and worse, they continue to multiply.[553]

4. United States v. Lynch

The judicial climate of hostility to pro-life protestors First Amendment rights has even spilled over to other constitutional protections, like the Fifth Amendment. One glaring example is *United States v. Lynch*,[554] where a bishop and a monk were charged with violating the Freedom of Access to Clinics Entrances Act for praying in front of a

550. *Id.*

551. *Id.* at 39.

552. *Reilly*, 260 F.3d at 41.

553. *See* Steve Korris, *Judge Throws Cold Water on Abortion Protests*, CHI. TRIB., Feb. 6, 2002, at 1 (reporting how a judge issued a permanent injunction prohibiting two pro-life demonstrators from protesting within 1,500 feet of an abortion clinic worker's other place of employment).

554. United States v. Lynch, 162 F.3d 732 (2d Cir. 1998), *rehearing en banc denied*, 181 F.3d 330 (2d Cir. 1999).

New York abortion clinic.[555] The two pro-life protestors were acquitted in a bench trial after Judge John E. Sprizzo found that the government did not prove the necessary element of willfulness by the protestors.[556] But the government, likely confounded that it could lose a sure thing, appealed the acquittal, in spite of the Fifth Amendment's Double Jeopardy Clause which prohibits that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[557] It appealed not once, but twice to the Second Circuit Court of Appeals, which narrowly denied the appeal both times.[558] While it is troubling that the government would trample over the Constitution to pursue two men who were merely trying to peacefully exercise their First Amendment rights, it is more troubling how those judges willing to hear the appeal tried to circumvent the Constitution.

The six dissenting judges in the en banc hearing relied heavily on *United States v. Jenkins*,[559] which held that an avenue of appeal might be open if a trial judge prepares special findings of fact.[560] The dissent, which argued the appeal should be heard, relied on *Jenkins*, yet had no precedent applying *Jenkins* in this manner in the Second Circuit.[561] That is likely because the Second Circuit had not even cited the case, let alone relied on it for anything, in over twenty years. One judge noted that "there was only one case in this Circuit cited by the parties in which the government sought to overturn an acquittal," and this was almost thirty years ago.[562] Nevertheless, it is difficult to fathom why six judges on the Second Circuit Court of Appeals, along with the United States government would have no qualms about hijacking the Double Jeopardy concerns of two men praying inside a buffer zone. It would be difficult to argue that the fact the protestors were pro-life had nothing to do with this, especially in light of the language in the government's brief which stated, "The Court's ruling would make it impossible for the Government to enforce court orders in a variety of contexts, including the anti-abortion protests here."[563]

555. United States v. Lynch, 952 F. Supp. 167, 168 (S.D.N.Y. 1997).

556. *Id.*

557. U.S. CONST. amend. V.

558. United States v. Lynch, 162 F.3d 732 (2d Cir. 1998), *rehearing en banc denied*, 181 F.3d 330 (2d Cir. 1999).

559. United States v. Jenkins, 420 U.S. 358 (1975).

560. *Id.* at 367.

561. *Lynch*, 181 F.3d at 332.

562. *Id.* (Sack, Circuit Judge concurring in the denial of rehearing in banc).

563. Brief for the United States of America at 31-2; *Lynch* 162 F.3d at 732. *See also* Christopher J. Bellotti, Note: *The Double Jeopardy Category Is . . . Abortion Protest:* United States v. Lynch, *The United States' Appeal From a Criminal Acquittal In The Southern District of New York*, 45 N.Y.L. SCH. L. REV. 235 (2001).

Violent offenders who rape, steal, and murder are given the fullest protections possible under the Double Jeopardy Clause, yet when it comes to an elderly bishop and a young monk quietly praying the rosary, the United States government strong arms the two men in a "whatever it takes" approach to make the streets of New York safer. This is quite simply unexplainable.

B. Are the Restrictions Warranted?

One must consider why these limitations are placed on pro-life protesters, if they are warranted, and if the pro-life movement is actually different from any other protest group. It is unfair to judge a group based on its fringe elements, yet many claim that anyone picketing an abortion clinic is a dangerous person who advocates the use of violence.[564] Participants in the anti-war movement of the 1960s were rarely, if ever, labeled as murderers and arsonists even though some groups like the Black Panthers engaged in these crimes. Instead, for many people, the anti-war movement evokes romantic memories of taking an ideological stand against an oppressive government.

Abortion is a personal decision that rests solely with a woman. Some would contend that the intimacy of abortion makes it different from other issues subject to protest. However, in reality, every free speech issue is personal. A segregationist diner owner could personally be opposed to a black patron sitting at his lunch counter. A veteran who lost a leg in Vietnam could be personally opposed to flag burning. These are forms of protest that have personal effects on individuals; however, the speaker's First Amendment protections should not be superseded because of the intimate nature by which the speech affects them. Abortion is a very emotional issue that many people on both sides of the issue feel passionately about. However, a burning cross or flag, degrading religious art, or messages of hate, while not only personally offensive to many, also raise many people's emotional level. Like the personal nature of an issue, the emotional effects that speech may have on people cannot be the reason for restricting speech.

564. Recently, much has been made concerning the evils of racial profiling by law enforcement officials. John Clound, *What's Race Got to Do with It?*, TIME, July 30, 2001 at 42. But it appears that the courts and legislatures engage in a kind of ideological profiling when dealing with pro-life protesters. They are in effect reasoning that anyone with a pro-life view is immediately considered dangerous because some espousing the same viewpoint have acted violently in the past.

For those advocating restrictions on pro-life protesters, it appears that to them free speech is relative. When they agree with it, it should be protected; when they do not agree with the speech, it should not be protected. All the concerns about the feelings of the listener and the stress caused by protesters are just a smokescreen. They are the means to the end, which is to suppress, or at the least severely restrict the pro-life message. For it appears that these concerns only become important if it is speech they do not agree with.

An example of this double standard is the anti-war protesters who protested soldiers returning from Vietnam. Unlike abortion protest cases, courts gave serious consideration and protection to the free speech rights of anti-war protesters.[565] It is doubtful that a court would have upheld a buffer zone at airfields where soldiers were returning in order to protect them from unwanted literature, counseling, or protest against the war.[566] Returning soldiers experienced anxiety, grief, and shock after what they had experienced in Vietnam. It is obvious that the words of these protesters psychologically affected many of the soldiers who experienced the protests and caused them great stress and anxiety. It is also clear some of these men were already recuperating or still suffering from serious physical injuries. This was likely an extremely vulnerable period for some soldiers, as one soldier who had been spit on aptly noted, "I was in a state of shock. . . . My wounds were still raw."[567] Another man, who had stepped on a land mine and was mocked when he returned, remarked, "it hurt as much as the wounds I sustained."[568] Yet, these anti-war protesters were given free reign under the guise of the First Amendment to express their disdain for the soldiers and the war. The point here is not that anti-war protesters' free speech rights should have been restricted, the point is to show the blatant double standard of some who fervently support speech restrictions of pro-life protesters.

565. *See e.g.*, United States v. Gourley, 502 F.2d 785, 788 (10th Cir. 1973) (permitting anti-war protesters to demonstrate within Air Force base, including areas surrounding the Cadet Chapel because of its "public nature"); A Quaker Action Group v. Morton, 362 F. Supp. 1161, 1172 (D.D.C. 1973) (striking down limitations upon the number of demonstrators in front of the White House because it restricted more First Amendment freedoms than was "essential for the furtherance of the following governmental interests: Protection of the President and/or White House . . . [s]afety of citizens [using sidewalks and streets in front of White House]"); United States v. Spock, 416 F.2d 165, 170 (1st Cir. 1969) (noting that protesters "were not to be prevented from vigorous criticism of the government's program merely because the natural consequences might be to interfere with it, or even to lead to unlawful action"); Bond v. Floyd, 385 U.S. 116 (1966); Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1973).

566. *Id.*

567. BOB GREENE, HOMECOMING 76 (1989).

568. *Id.* at 75.

It is ironic that those supporting restrictions on pro-life protesters' free speech strongly object to terms used by pro-life demonstrators such as "baby killer" and that they find the accusation of abortion doctors as being "murderers" so offensive.[569] It is ironic that they object to the very same words some of them used while protesting servicemen returning from Vietnam.[570]

What about the feelings or anxiety of men who had just returned from the hellish experiences of the Vietnam War? The answers are clear: the anti-war protesters and their free speech rights trump these concerns. Nevertheless, when the tables are turned and pro-life people demonstrate in front of abortion clinics, free speech rights are out the window and the feelings of the listener are paramount. Thus, it appears that those supporting restrictions on pro-life speech either have a selective memory or just believe in free speech when it advances their goals.

Many argue that the pro-life movement is unlike other movements because of its strong religious ties and charge that it is trying to impose its morals or religious beliefs on others. However, many different religious denominations were closely associated with Dr. Martin Luther King and the civil rights movement.[571] One constitutional scholar, in considering the religious aspects behind different protest movements, noted "[t]here is little about the civil rights movement, other than the vital distinction in the ends that it sought, that makes it very different from the right-wing religious movements of the present day."[572] The Catholic Church, as well as other religions, was also an outspoken opponent of the Vietnam War.[573] Many different religious denominations have also consistently voiced their opposition to the death penalty.[574] But opponents of the pro-life movement like to focus on its ties to religion and the "religious zealots"[575] who oppose abortion, insinuating that when the subject is abortion, the religion

569. *See* Orin v. Barclay, 272 F.3d 1207, 1211 (9th Cir. 2001).

570. GREENE, *supra* note 567, at 38.

571. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 227-29 (1993); A. JAMES REICHELY, RELIGION IN AMERICAN PUBLIC LIFE 244-50 (1985); MORRIS, *supra* note 151, at 120-38.

572. CARTER, *supra* note 571, at 228-29.

573. ADAM GARFINKLE, TELLTALE HEARTS: THE ORIGINS OF THE VIETNAM ANTIWAR MOVEMENT 254-55 (1995).

574. HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994 104-105 (1996).

575. Lisa J. Banks, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449, 449 (1994). *See also* Constance A. Morella, *Clinics Under Siege*, WASHINGTON POST, Mar. 23, 1993, at A21.

factor becomes an issue and that religion is being forced down their throat.

Another often cited charge that supposedly differentiates pro-life groups and other social movements is that some of its members have resorted to violence. However, this accusation applies to many social movements. Anti-war demonstrators bombed buildings, burned draft centers, and shut down universities.[576] Even supporters of abortion rights have resorted to violence. These instances include a firebombing of a Gainesville, Florida Right to Life Office.[577] In another incident, a man was convicted under the Freedom of Access to Clinic Act after warning a pro-life crisis pregnancy center that he would shoot any protesters outside abortion clinics.[578]

Other examples of protest movements with violent elements are animal rights groups and environmentalists who have resorted to arson and other acts of vandalism.[579] One environmental group, The Earth Liberation Front, claimed responsibility for setting a ski resort in Vail, Colorado on fire, causing 12 million dollars in damages.[580] *The Oregonian* documented "100 major acts of suspected ecoterrorism—including arsons, bombings and other vandalism—in eleven

576. *See, e.g.*, TOM BATES, RADS 47-48 (1992) (describing the firebombing of various buildings on the University of Madison campus and surrounding towns). PETER COLLIER & DAVID HOROWITZ, DESTRUCTIVE GENERATION, SECOND THOUGHTS ABOUT THE SIXTIES 104 (1989) (highlighting the extreme elements of 1960s radicals, quoting a communiqué issued by Bernadine Dohrn, a leader of the leftist group, the Weathermen, "We chose only to become guerrillas and to urge our people to prepare for war. But . . . guard your colleges, guard your banks, guard your children. Guard your doors!").

577. Darryl E. Owens, *Abortion Foes' Office Hit By A Firebomb*, ORLANDO SENTINEL TRIBUNE, Feb. 15, 1993, at B6. *See also Orin*, 272 F.3d at 1213 (discussing how a crowd of students became "agitated to the point of physical violence against the [pro-life] protesters").

578. David Johnston, *Abortion Rights Advocate Is Accused of Threats*, N.Y. TIMES, Apr. 12, 1995, at A20. *See also Bomb Threats To a Church By a Protester Are Charged*, N.Y. TIMES, Jan. 17, 1995, at B5.

579. William W. Cason, Comment, *Spiking The Spikers: The Use Of Civil Rico Against Environmental Terrorists*, 32 HOUS. L. REV. 745 (1995). Some of these groups have resorted to tactics as extreme as sinking ships. *Id.* at 755.

580. Tom Detzel & Bryan Denson, *House Panel Subpoenas Eco-Terrorists' Ex-Spokesman*, THE OREGONIAN, Oct. 4, 2001, at B05. *See also* John McCaslin, *Inside The Beltway*, THE WASHINGTON TIMES, Oct. 3, 2001, at A9.

> ELF's web site boasts over 30 acts of ecoterrorism directed at agencies of federal and state governments, universities, corporations and private individuals that they and ALF have committed since 1996: On May 21 of this year, 13 trucks and research offices were burned at the University of Washington and Jefferson Poplar Farms in Clatskanie, Ore. On Dec. 29, 2000, four new homes on New York's Long Island were burned, while ELF also takes credit for a Dec. 19 torching of a nearby condominium project. ELF took credit for a 1999 fire at Michigan State University that destroyed years of crop-nutrition research.

Id.

Western states dating to 1980. Damages from those crimes totaled nearly $43 million."[581] An animal rights group, the Animal Liberation Front, firebombed a Tucson, Arizona McDonalds, causing $500,000 worth of damage.[582] Researchers who use animals in their experiments have "endured death threats, bomb scares and a torrent of obscene phone calls from increasingly militant activists committed to ending the use of laboratory animals in medical research."[583] The FBI considers the Animal Liberation Front among the nation's leading domestic terrorist threats.[584]

Thus, there seem to be many similarities between the fringe elements of the environmental and pro-life movements. However, one noteworthy distinction is hard to explain. Legislatures and courts across the country, along with the media, have no difficulty separating the extreme elements of a movement from the mainstream when the group supports a leftist cause such as environmental concerns or animal rights.[585] Nor do these entities brand anyone with the same

581. Bryan Denson, *Eco-Terrorists On The Attack*, THE OREGONIAN, Jan. 11, 2001, at A01. *See also* Hal Bernton, *Eco-Terrorists Release List of Targets in 2001*, THE SEATTLE TIMES, Jan. 16, 2002, at 1 (The groups claimed 137 acts of violence in 2001, and noted that in the wake of the September 11 terrorist attacks, "It would be irresponsible for animal and earth warriors to abandon their campaigns and actions at this time.").

582. M. Scot Skinner, *Activists Claim Responsibility for Tucson, Ariz., McDonald's Torching*, THE ARIZONA DAILY STAR, Sept. 12, 2001, at A2. *See also* Scott Sunde & Paul Shukovsky, *Elusive Radicals Escalate Attacks In Nature's Name; While Targets Burn, FBI Searches For Way To Strike Back*, THE SEATTLE POST INTELLIGENCER, June 18, 2001, at A1 ("Josh Harper, a Seattle animal rights activist who was hauled before a federal grand jury in Portland this year . . . [said], 'When you see the loss of 9 billion (animal) lives each year, it's inappropriate to hold a sign or pass out a petition. It's appropriate to go out and burn down the factory farm.'").

583. Michael Specter, *Animal-Research Labs Increasingly Besieged; Violence, Threats From Activists Force Institutions to Tighten Security*, THE WASHINGTON POST, May 30, 1989, at A1. *See also* Dan Gabriel, *Radical Environmental Groups Break Law To Make Their Points*, THE WASHINGTON TIMES, April 19, 2001, at 12 ("Extremist animal rights and environmental groups have targeted not only property and business, but also individuals. Rock star Ted Nugent, president of United Sportsmen of America . . . [and] his family have been threatened with murder, rape, and destruction of their home for Mr. Nugent's pro-hunting stance.").

584. Congressional Statement - 2001 - *Threat of Terrorism to the United States: Before the Senate Comm.'s on Appropriations, Armed Services, and Senate Comm. on Intelligence* (2001) (Statement of Louis J. Freeh, Director Federal Bureau of Investigation on the Threat of Terrorism to the United States before the United States Senate Committees on Appropriations, Armed Services, and Select Committee on Intelligence). "Some special interest extremists—most notably within the animal rights and environmental movements—have turned increasingly toward vandalism and terrorist activity in attempts to further their causes. In recent years, the Animal Liberation Front (ALF)—an extremist animal rights movement—has become one of the most active extremist elements in the United States." *Id. See also* Michelle Cottle, *House Arrest; The Terrorists Next Door*, THE NEW REPUBLIC, Aug. 6, 2001, at 18; Sally Ruth Bourrie, *Oregon Takes Fight To Eco Terrorists*, THE BOSTON GLOBE, July 22, 2001, at A7

585. For example, an HBO documentary entitled "Soldiers in the Army of God" focused solely on the violent fringe of the movement. The director of the documentary stated that the people he interviewed "[we]re all answering some psycho-pathological-spiritual-political call."

viewpoint as a violent extremist when the issue is something other than abortion. For example, the media viewed fringe elements of the civil rights movement like Malcolm X as just that, fringe, and took great pains to separate them from the mainstream movement.[586] Yet, somehow, when the issue is abortion, these same entities make the blanket assumption that anyone against abortion is capable of resorting to violence and destruction, a stereotypical insult to peaceful and law abiding people opposed to abortion.[587] There is little doubt that the media has an important impact on the issue of abortion and the free speech rights of pro-life protesters. There is also little doubt about which side the "mainstream" media takes. One newspaper study noted that "[m]ost major newspapers support abortion rights on their editorial pages, and two major media studies have shown that 80% to 90% of U.S. journalists personally favor abortion rights."[588] It also noted that "abortion-rights advocates are . . . characterized more favorably than are abortion opponents."[589] One veteran news correspondent at CBS wondered, "Why did we give so much time on the evening news to liberal feminist organizations, like NOW, and almost no time to conservative women who opposed abortion?"[590] The media's knack for showing pro-life protesters in a bad light undoubtedly adds fuel to the fire of opposition to them and their freedom of speech in legislatures and courts.[591]

Ann Marsh, *'Soldiers' Follows Violent Opponents Of Abortion*, L.A. TIMES, March 31, 2001, at F12. *See also*, Cal Thomas, *Media Persist in Featuring Extremists*, THE DES MOINES REGISTER, Apr. 6, 2001 at 21 ("The HBO script followed the usual line: Pick the most extreme form of behavior, do a documentary on it and leave the impression that all pro-lifers are just a hair-trigger away from snuffing out the life of their local abortionist.").

586. *See* Thomas, *supra* note 585, at 21. Consider, for example, militant elements of the civil rights movement, such as Malcolm X, who once noted that the struggle for racial equality "is a real revolution. . . . And revolutions are never waged singing 'We Shall Overcome.' Revolutions are based on bloodshed." MALCOLM X, *The Black Revolution, in* THE BLACK MAN AND THE PROMISE OF AMERICA 490, 493 (Lettie J. Austin et al. eds., 1970).

587. Michelle Malkin, *Ecoterrorists on the Loose*, WASHINGTON TIMES, Apr. 26, 2000, at A15 (When "abortion-clinic workers [are] threatened, the public embraces a zero-tolerance policy. When ecoterrorists run wild, the message is clear: Go soft on politically correct crimes, and let the victims burn."). For a look at media coverage on abortion and abortion clinic violence, see Tim Graham & Clay Waters, *Roe's Warriors: The Media's Pro-Abortion Bias*, *at* www.media research.org/specialreports/news/sr19980722html (last visited February 2, 2002).

588. David Shaw, *Abortion Bias Seeps Into News*, L.A. TIMES, July 1, 1990, at A1.

589. *Id.* The study also differentiated between the terms pro-choice and anti-abortion. One newspaper writer noted "In making one side 'pro' and the other 'anti,' we inevitably cast one in a positive light and the other in a negative." *Id.* A Washington Post writer stated, "to use the perferred terminology of one side and not the other . . . seems manifestly . . . unfair." *Id.*

590. BERNARD GOLDBERG, BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS 22 (2001).

591. *Id.* at 190. ("You don't see an articulate spokesman who's pro-life on the network evening newscasts. They'd rather show someone who just shot up an abortion clinic.").

It would be hard to believe that continuously showing pro-life protestors as violent extremists does not affect the public's views of pro-life protestors. Insinuating that a whole movement is violent or extreme because of a small fringe element goes against anything that the media has ever done in the past with regard to other protest movements. Highlighting the violent elements of the pro-life movement has severely hindered the movement's chances of any sympathy or support in the court of law or public opinion. Instead, the pro-life movement has two strikes against it every time it steps into court. Judges do not live in a vacuum; they, like anyone else, are susceptible to repeated reports sensationalizing the fringe elements of the pro-life movement. This is not to say that extremists and their actions should be ignored, however it is difficult to reconcile why other movements with fringe elements are not portrayed in such a negative light as the pro-life movement.

The last consideration is the most serious and damaging element that has supposedly set the pro-life movement apart from other groups. This concerns the murders that a few extremists have committed for the cause of "life."[592] However, fringe elements of other groups have also on occasion resorted to murder. Extreme elements of the anti-war movement and other leftist groups took part in violence that resulted in deaths.[593] Offshoots of the mainstream civil rights movement advocated violence and shootings.[594] The animal rights group, Animal Liberation Front, killed two people in an arson at a USDA Research Facility in 1992.[595] Finally, the Ku Klux Klan has also participated in many murders and lynchings during its history. Despite this, the Ku Klux Klan still has its free speech rights protected by the Supreme Court.[596]

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592. *See supra* notes 205-209 and accompanying text.

593. PETER COLLIER & DAVID HOROWITZ, *supra* note 576, at 242. *See also* BATES, *supra* note 576, at 13; Robert Hanley, *State Jury Finds 3 Radicals Guilty in Brink's Killings*, N.Y. TIMES, Sept. 15, 1983, at A1; Robert D. McFadden, *Brink's Holdup Spurs U.S. Inquiry On Links Among Terrorist Groups*, N.Y. TIMES, Oct. 25, 1981 at A1. *See also* KENNETH J. HEINEMAN, CAMPUS WARS 245 (1993) (discussing student firebombing of the ROTC buildings at Maryland University, Michigan State, Washington University, Wisconsin, and Yale).

594. Nina J. Easton, *America The Enemy*, L.A. TIMES, June 18, 1995, at 8. Black militant leader H. Rap Brown was quoted as once saying, "Do what John Brown did, pick up a gun and go out and shoot our enemy." *Id.*

595. KATHLEEN MARQUARDT, ANIMAL SCAM 161 (1993). This same group also caused $100,000 in damages after firebombing a Swanson Meats facility and $5.1 million in damages after committing arson at an Animal Diagnostic Clinic at University of California at Davis. *Id.* at 164.

596. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (reversing the conviction of a Ku Klux Klan leader because the statute impermissibly restricted speed protected by the First

Thus, while the pro-life movement has many similarities to other groups, many still relegate this movement to a fringe status more radical than any other group. Yet, violence and death have been tied to several protest movements, and they were not branded as fanatics and suppressed like abortion protesters. The only differences between the pro-life movement and other social groups are that the issue and the times have changed; the First Amendment has not.

In light of these considerations, it is difficult to advance the argument that the First Amendment rights of abortion protesters should be restricted solely because some members have acted violently. If increased penalties for vandalism or destruction of health clinics is a strong deterrent to clinic violence, then this is definitely justified. There is also no question that individuals opposed to abortion who engage in any kind of illegal behavior should be punished to the fullest extent of the law. However, floating and fixed buffer zones only harm law-abiding citizens and, hence, are not warranted.

C. The Effects on Pro-Life Protesters

To better understand how *Madsen, Schenck*, and *Hill* will affect abortion clinic protests and the pro-life movement, the protesters' methods must be considered. While not every protest is the same, the general purpose of pro-life activists is to dissuade women from having abortions. Speaking with women entering the clinic, informing the general public that abortions are taking place at that site, expressing disagreement with abortion, or pressuring the clinics are some of the ways pro-life people protest abortion. Various methods of protest include silent vigils or prayer services, sit-ins, mass demonstrations, pickets, or sidewalk counseling.[597] While one may argue that protesters mingle threats and harassment with these practices, this can happen in the heat of any picket line.

The method of sidewalk counseling is especially important for two reasons. First, it can be very effective and is often the most peaceful way of persuading a woman to consider other alternatives to abortion. Amid all the arguments about abortion itself, clinic violence, free speech, and *Roe*, one must remember that abortion is a business run by people trying to make a profit. Sidewalk counselors prevent their business from running smoothly and sometimes cause potential customers not to go through with the abortion. Mass demonstrations and sit-ins will often cause some women to return to the clinic at another

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Amendment); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a statute which criminalized the burning of a cross because it violated the First Amendment).

597. *See infra* note 602 and accompanying text.

less hostile time, but sidewalk counseling can result in a woman never coming back, a point which may concern some abortion providers.

Second, the issue of sidewalk counseling is important because it has been hurt most by the three abortion protest cases. As Justice Scalia has noted, a floating buffer zone would not affect loud screams with bullhorns, but it does affect a sidewalk counselor from speaking with a woman entering the clinic.[598] Sidewalk counselors will be unable to use their persuasion once a patron of the clinic gets within a certain distance of the clinic. If the Court wanted to prevent reasonable conversation, its decision is sufficient, but if the Court was concerned about women being yelled at, threatened, or bothered by images or signs, the Court failed greatly.

When distributing leaflets, whether it is for a political candidate, a labor union, or a business, location is key. One needs to be able to move around quickly and get as close as possible to a passerby. This is no different when the issue is abortion, and it may take on even greater importance because of the nature of the subject and the surroundings. Again, the Court severely damaged this element of protest, another fairly peaceful way of dissuading a woman to reconsider her actions.

The underlying theory should be that if a message is wrong, unpopular, or hateful, then let it be heard so it can be exposed for what it really is. Bringing issues out into the open promotes discussion and progress, and as a country we can advance ourselves with the freedoms of thought and expression. Keeping a message suppressed can often produce adverse effects.[599]

Another important consideration of how the Supreme Court's three decisions will affect pro-life protesters is a point that surprisingly it does not address. These cases create a chilling effect on anyone who may want to validly exercise their First Amendment rights. In short, the Court's message to anyone who is interested in voicing her opposition to abortion, yet is concerned about not breaking the law, is simple: "Stay Home." Some may argue that this is a beneficial consequence to rulings of the Court. Yet, this is essentially the chilling of free speech in its most blatant form and it infringes on one of the most fundamental civil rights. Others may claim that this chilling argument is blown out of proportion. However, consider some of the restrictions upheld by the Supreme Court and lower courts previously

598. *Hill*, 530 U.S. at 757.

599. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 12 (1963) ("Suppression drives opposition underground, leaving those suppressed either apathetic or desperate. It thus saps the vitality of the society and makes resort to force more likely.").

discussed. These laws do not inhibit obvious crimes, such as trespassing or assault, rather they incriminate actions such as being within certain buffer zones or carrying signs that are too large. In *Madsen*, for example, trial transcripts showed individuals arrested for violating the injunction who were only exercising their free speech rights, were not acting in concert with those groups who had been enjoined, and were unaware that their actions were illegal.[600] It is unfortunate that the Court did not take into consideration the effects on other pro-life protesters, for these effects are so serious they are more aptly described as freezing rather than chilling.

D. The Effects on First Amendment Jurisprudence

Throughout the three cases, the Court has struggled with citing precedent for many of its innovative ideas for justifying new restrictions on speech. When the Court decided *Schenck*, it used *Madsen* for precedent. Likewise, in *Hill*, the Court relied predominantly on *Madsen* and *Schenck* to show prior case law that was similar to how the Court was deciding the case. While these three cases are factually similar, the point is that the Court has never had any case law during the last forty years that it could use in restricting speech so easily and severely. Unfortunately, in future cases involving not only pro-life protesters but also protesters for any issue, the Court now has a solid block of precedent in *Madsen*, *Schenck*, and *Hill* to use when it decides to curtail what was formerly viewed as constitutionally protected activity.[601]

Restrictions on free speech take into consideration a number of things: whether the restriction is constitutional, whether there is a valid state interest, and other factors. In supporting a restriction on free speech, people often look at the effects of the speech on its audience, the message itself, the location where the speech occurs, and the language of First Amendment. A valid analysis will balance all of these factors. Some sidewalk counselors, in their zeal to persuade patients, utilize extremely controversial materials. Many will complain about the methods used by sidewalk counselors, which include presenting women with plastic replicas of fetuses, displaying pictures of aborted babies, or warning them of the possible side effects of abor-

600. *Madsen*, 512 U.S. at 795.

601. For example, during the recent World Trade Organization protests in Seattle, the City cited *Madsen v. Women's Health Center* in its argument against an injunction filed by the ACLU. Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order, ACLU v. City of Seattle (W.D. Wash. Dec. 1, 1999) (No. C99-1938). *See also* Aaron Perrine, *The First Amendment Versus The World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. REV. 635, 640 (2001).

tions.[602] According to these critics, these types of actions are unconstitutional because patients who enter the clinics are often "visibly shaken, crying, and nervous . . . [and] sidewalk counseling clearly has a detrimental effect on the health of women entering abortion clinics."[603] The problem is that these people only consider the situation in which the listener finds herself. Communication is a two way street; there is both a speaker and a potential listener. To consider the situation from only one party's viewpoint is not a complete analysis, yet many would use this approach by only considering the feelings or position of a woman entering the clinic. However, First Amendment doctrine should not be viewed in this light. The situation of the speaker and her First Amendment rights must be considered and, in some ways, given more weight because free speech and the right to express oneself are so important in this country. Using the analysis of primarily contemplating only the audience's feelings or reactions to the speech in question would wreak havoc for anyone with a controversial message or an idea that was not in line with the status quo. Thus, analyzing free speech issues with regard to abortion protest mainly in terms of the recipient and the effect on her feelings is not only at odds with the basic principles of freedom but also very dangerous for civilization.

During the pre-Civil War period, slavery supporters, concerned about the effects of abolitionist speech on the slaves, made laws to restrict their speech.[604] Slavery owners feared the effects of these messages on slaves because it could have caused insubordination among the slaves.[605] Thus, restricting speech because of its effects on someone is nothing new. Women entering an abortion clinic are not always resolute in their decision to obtain an abortion; there may be some doubts in what they are about to do. Abortion protesters hope to seize on that hesitation and persuade them of the alternatives. Merely because this issue is extremely confrontational, emotional, divisive, and of the utmost importance to both sides of the picket line, does not mean that free speech restrictions can be implemented.

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602. *See* Jennifer Bullock, Note, National Organization for Women v. Scheidler*: RICO and the Economic Motive Requirement*, 26 CONN. L. REV. 1533, 1550 (1994) (noting a woman's testimony who was told by pro-life protesters that abortions could cause her to die, bleed internally, or go into a coma).

603. Lolita Youmans, Note, Operation Rescue v. Planned Parenthood, Inc.: *A Judicial Showdown Over Sidewalk Counselors and First Amendment Rights*, 37 HOUS. L. REV. 603, 623-24 (2000).

604. *See supra* notes 36-43 and accompanying text.

605. *Id.*

Abortion protesters have many critics, some of whom would sacrifice First Amendment rights in order to suppress their free speech. Taking a cue from the Supreme Court and its line of abortion protest cases, some legal scholars are attempting to devise new approaches to silencing the voices against abortion. One such example is using the theory of constitutional libel law to restrict pro-life speech. They argue that because pro-life speech causes significant emotional harm, the appropriate doctrine would be the libel law theory.[606] However, members of other protest groups would not have to be concerned because this theory conveniently suppresses only pro-life speech.[607] This idea would work under the assumption that because of the severe emotional impact on women entering the clinic, the government, through statutes and injunctions, would be able to dictate how the pro-life message is conveyed.[608] While leafleting would likely still be permitted, courts could restrict other things, such as pictures of aborted fetuses.[609]

Besides this analysis being unwarranted and unconstitutional, it has a basic flaw that strikes at the heart of the theory. Contrary to what some might believe, the pro-life message is not laden with lies and defamatory statements. The features of plastic replicas of fetuses are scientifically proven and pictures of aborted fetuses, although grotesque, are accurate. While the libel theory is unworkable, it is addressed to show how far some are willing to go to sacrifice the First Amendment in order to dismantle the pro-life message.

Another example of using the law to suppress the free speech of those opposing abortion is the use of antitrust law. It is argued that "anti-abortion protests corrupt the natural functioning of the marketplace" and therefore antitrust laws should be used to remedy this protest movement.[610] One author focuses the liability to antitrust claims based on violent protest and some non-violent yet illegal protest activity.[611] Again, the author fails to grasp the fundamental point that a small fringe element causes the destruction. The author also notes that pregnancy centers run by pro-life organizations that offer alterna-

606. *See* Laurence J. Eisenstein & Steven Semeraro, *Abortion Clinic Protest and The First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221 (1993). *See also* Angela Christina Couch, *Wanted: Privacy Protection for Doctors Who Perform Abortions*, 4 AM. U. J. GENDER & LAW, 361, 363 (1996) (arguing that doctors who perform abortions deserve the protection of various privacy torts to ensure the availability of abortion).

607. Eisenstein & Semeraro, *supra* note 606, at 239.

608. *Id.* at 240.

609. *Id.*

610. Melanie K. Nelson, Comment, *The Anticompetitive Effects of Anti-Abortion Protest*, 2000 U. CHI. LEGAL F. 327, 328 (2000).

611. *Id.* at 328-29.

tives to abortion are a restraint on competition.[612] It appears that anything that might make a woman think twice about getting an abortion is a restraint on competition. The author does not address whether churches that object to abortion are also engaging in anticompetitive actions.

The author also argues that these restrictions on speech are unrelated to the purpose of the law, which is to further "an important governmental interest by assuring a fair and competitive marketplace."[613] Suddenly, profits take precedence over our most basic fundamental freedoms. For if this analysis is extended, almost any type of protest that adversely effects a business could be slapped with an antitrust suit because the importance of a competitive marketplace is vaulted above all else, even the right to freedom of expression. The author herself admits that the antitrust theory would apply to non-violent, direct action types of protest: "Though civil disobedience may be an important method of addressing sociopolitical concerns, victims should not be required to shoulder the damages."[614]

If the use of antitrust law against organizations whose members are engaging in unlawful behavior were accepted, the chilling effect on free speech would be devastating. However, free speech advocates need not be concerned, because it appears that the application of this analysis would only be aimed at pro-life groups.[615] Nevertheless, if this analysis were applied to other issues, much of the civil rights and anti-war movements of the 1960s would have been severely hindered by antitrust suits. Thankfully, Southern restaurant owners refusing to serve blacks in the 1960s did not have the foresight and ingenuity that some legal scholars display today.

Another weapon in the arsenal of those in opposition to pro-life protesters is a novel concept of using state attorneys general to shut down any pro-life pregnancy crisis centers. These pregnancy centers do not stage mass blockades in front of abortion clinics or pass out pamphlets showing aborted fetuses. Instead, these centers were designed to advise pregnant women who choose to seek out information

612. *Id.* at 349.

613. *Id.* at 363.

614. *Id.*

615. Nowhere in the article does the author mention animal rights advocates and their effect on the fur or meat industries. While the author acknowledges some environmental protesters engage in anticompetitive conduct, she buries this concern in a footnote. *Id.* at 346 n.143. She notes protesters of abortion are "a prime example of the devastating economic consequences these activities can pose to consumers and businesses." Nelson, *supra* note 610, at 346-47.

on their options.[616] Thus, the usual rhetoric of a listener's right to be left alone cannot be used as a shield to those hoping to suppress the pro-life speech in this situation. The logic behind this move by abortion rights groups and the Attorney General of New York is that the pregnancy centers are "practicing medicine without a license."[617] One crisis pregnancy center founder noted, the move by the state of New York "is a triple attack on the First Amendment—on our freedom of assembly, religion, and speech."[618] Apparently, the National Abortion Rights Action League (NARAL), the group spearheading the push behind these restrictions is concerned not about the pro-life rhetoric of these pregnancy centers but the harsh reality that the centers' free ultrasound service shows.

If the line of reasoning used by New York was taken to its next logical step, "anything that touches on medical ethics could become the province of physicians, with everyone else gagged."[619] Examples of this kind of strong arm tactic by those supporting abortion prove that at some point the real motivation behind these restrictions was not due to fear of the messenger, but the message. The Supreme Court, in *Roe v. Wade*, never gave those opposing abortion any kind of say in the matter. Through the various abortion protest cases that have reached the Court, it has severely undermined protesters' ability to have any say on the subject. Despite these facts, pro-life groups attempt alternative methods of getting their messages across, such as crisis pregnancy centers, where they are met by states attempting to force them to be silent. This type of Gestapo tactic used by New York could only be bred in an environment hostile to anything pro-life, such as the one created by the Supreme Court. The Supreme Court, along with a multitude of lower courts throughout the nation, have gone so far astray from the true values of the First Amendment that ideas like the New York Attorney General's would even be possible.

Those supporting speech restrictions on pro-life protesters would claim that abortion is not only intimate, but also point out that abortion protest is directed at private decision makers and thus less deserving of First Amendment protection.[620] However, protests directed at

616. Marvin Olasky, *Fighting for life and informed choice*, *at* http://www.townhall.com/columnists/marvinolasky/mo20020122.shtml (Jan. 22, 2002).

617. *Id.*

618. *See* Michelle Malkin, *The Abortion Empire Strikes Back*, WASHINGTON TIMES, Jan 14, 2002, at A15.

619. Olasky, *supra* note 616.

620. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests — Section II*, 29 U.C. DAVIS L. REV. 1163, 1176-77 (1996).

private decision makers encompass almost any protest movement. Every demonstration is aimed at someone, whether it is private individuals or government policy makers. Animal rights activists address their protest at those who eat meat or wear certain clothing in order to raise awareness about the rights of animals. In the 1960s, civil rights advocates used lunch counter sit-ins directed at not only the government but also segregationists in the South. Thus, to isolate pro-life protesters as directing their message at private decision makers proves little, if anything, because almost every movement tries to influence the thoughts and actions of other people.

Another mistake people who wish to restrict pro-life speech make concerns the consideration of the message of the protesters. Generally, abortion protesters oppose the Supreme Court decision *Roe v. Wade* and abortion itself; they do not oppose or hate women entering an abortion clinic. Protesters in front of an abortion clinic mainly serve the purpose of trying to persuade women entering the clinic to consider alternatives to abortion. People hoping to get someone to agree with them do not hate that individual or oppose her personally, rather they oppose her actions. There is a significant difference, and accusing pro-life protesters of being people who hate women who get abortions[621] is not only baseless but also defies common sense.[622] Pro-life protesters, and sidewalk counselors in particular, are trying to explain to women the truthful facts surrounding abortion. A plastic replica of a fetus showing the size and distinctiveness of the unborn child is a scientific fact, and if it emotionally affects women, that is a human reaction that cannot be helped. Abortion is a medical procedure, and like any other medical procedures, there are dangers and possible side effects. While no one likely wants to be reminded of possible adverse consequences before undergoing a medical operation, the speaker can exercise her right to remind people. Again, these are not lies, but graphic, yet truthful descriptions of what may happen, expressed by counselors in hopes of getting a woman to change her mind. Informed consent, even if that information comes from sidewalk counselors, is an important factor that any patient should have before going into a medical procedure.

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621. *See* Marlene Gerber Fried, *The Mainstream Anti-Abortion Movement Must Be Held Accountable, in* ABORTION VIOLENCE & EXTREMISM 29, 32 (1997) (calling Operation Rescue demonstrations "hate rhetoric").

622. However, some states, in an effort to inhibit pro-life protesters in any way possible have included anti-discrimination statutes to their abortion clinic access laws, with the approval of the judiciary. *See* New York v. Kraeger, 160 F. Supp 2d 360, 376-77 (N.D.N.Y. 2001).

The first two abortion protest cases, *Madsen* and *Schenck,* had some disturbing analytical elements. To compound the previous two cases, the Court's decision in *Hill* contained even more flaws that undermined First Amendment jurisprudence. However, the Court must stop the bleeding by first taking the First Amendment claims of the protesters more seriously. The Court's attempts at striking a balance between recognizing both groups' rights are indefensible. It must honestly consider the chilling effect these restrictions have on protesters. The Court also must reinstate the prior restraint doctrine and step back from the notion that abortion clinics deserve the same level of protection as a residence.

In the three abortion cases, the Court applied brand new concepts within First Amendment jurisprudence to restrict pro-life speech. It is one thing to severely restrict free speech in a public forum, but it is quite another to do so with ad hoc applications. The Court must discontinue this standard and actually apply standard First Amendment doctrine to the cases. It may be, however, that doing so would result in striking down the restrictions, something the Court will not do, even if that means sacrificing First Amendment principles in the process.

In the *Hill* case, the four lower court opinions determining that the Colorado statute was content-neutral applied the test from *Ward v. Rock Against Racism.*[623] If a statute that is subtly, or not so subtly, directed at a particular group and its viewpoint is still believed to be content-neutral, the Court must reconsider this test. This analysis seems to lend itself to outcome determinative charges because it appears to allow courts to choose what language within the statute it wants to consider.

This result is not acceptable. The statute must be read as a whole, and a court must consider the real life consequences it might have on the free speech rights of the protesters. If these simple considerations were made, a court would likely comprehend that the statute is actually not content-neutral. Considering whether a statute is based on a particular group's viewpoint is very important and cannot be left in the hands of an analysis that does not consider the real world implications on the First Amendment and does not contemplate the underlying reason behind the statute.

Finally, if the Court continues to give serious weight to how the listener feels about speech, all protest movements are in jeopardy. The whole idea behind demonstrating is to express displeasure with

623. *See supra* notes 333-336 and accompanying text.

something to certain persons. This will frequently entail recipients of the speech becoming angry, embarrassed, or flustered. If the Supreme Court had always used the approach of considering how listeners feel or the effects of the speech on them, many cases would have been decided differently. Certain persons object to pornography because of social or religious beliefs. Others take offense to protected forms of expression such as flag desecration or cross burning. All of these examples have disturbing effects on people and yet, these actions were not restricted because of it.

Anyone can support free speech, especially when it is something one likes, agrees with, or supports. The true stalwarts are those who defend and protect speech when it is speech that they adamantly oppose, disagree with, or find offensive. This is very difficult to do; in fact, it is something most people have trouble doing. However, if individuals consider the importance and the effects the First Amendment has had throughout the history of this nation, one can better appreciate this great freedom and may hesitate before restricting speech. Those who agree with the outcomes in *Madsen, Schenck*, and *Hill* should not rejoice too much because one day, a change in the Court's composition may cause them to find their views being heavily suppressed through this same line of case law.

V. CONCLUSION

As shown by various elections for political candidates and confirmation hearings of various governmental appointees, the issue of abortion has not gone away and probably never will. As both sides of the issue continue to lobby government officials and the public to convince them that their side is "right," free speech will continue to be an important part of this debate. The First Amendment is the means by which these groups try to achieve their desired end. While the First Amendment can be looked at as a means to an end, we must remember it is a powerful end in and of itself. For the First Amendment gives ordinary citizens the ability to assemble and speak about necessary change or to protest the government.

The noble aspirations of freedom of speech, equal treatment under the law, and tolerance of other peoples' views get tossed quicker than spoiled milk when the issue is the First Amendment rights of pro-life protesters. But standards such as these cannot be applied only when it is expedient or convenient. Not upholding the principles of freedom of speech, equality, and tolerance of all people, regardless of their beliefs or viewpoints, shows how fickle these ideals really are to some people.

While pro-life and pro-choice groups disagree vehemently with one another, the only way to make any progress on the issue is to promote discussion and increase awareness of what is at stake. Silencing the opposition, whether through threats, violence, or buffer zones, does no one any good. The real victim of these types of actions is not only the group on the receiving end but also the First Amendment.

The cornerstone of any legal system is consistency. Inconsistency tends to breed disrespect, contempt, and lack of faith in the arbiter of justice. Following and administering the rule of law in a consistent fashion avoids chaos, creates equality, and promotes efficiency. Nowhere else is this principle more crucial than in First Amendment jurisprudence. For inconsistent application of these laws leads to a dangerous power that can be arbitrarily wielded against anyone. This has been evident from the very beginning of this nation. Through the years, many unpopular groups have been harassed and silenced through a system of laws whose purpose was to protect and defend the constitutional rights of all citizens. Letting the government decide what speech should be suppressed has been a tempting idea, dating back to the infancy of this nation. Time does not bode well for those advocating restrictions on free speech. The United States Supreme Court and this country have made too many advances since these early days to return to a time of suppressing speech because one disagrees with it. Justice Clarence Thomas once noted that the best way to have justice for all "is to apply one set of rules for everybody . . . to use one set of rulebooks."[624]

Christopher P. Keleher

624. Justice Clarence Thomas, Address at University of Louisville (Sep. 11, 2000).