CONSTITUTIONAL LAW — FREEDOM OF SPEECH — THIRD CIRCUIT STRIKES DOWN PROPHYLACTIC REGULATIONS GOVERNING SPEECH SURROUNDING HEALTH CARE FACILITIES PROVIDING ABORTIONS. — *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009).

Courts must make difficult choices when significant government interests conflict with free speech rights. One aspect of this debate concerns regulations restricting expression outside of abortion-providing facilities. The Supreme Court has upheld several regulations establishing prophylactic "zones" around such facilities,[1] recognizing "unquestionably legitimate" interests in "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."[2] Recently, in *Brown v. City of Pittsburgh*,[3] the Third Circuit struck down a regulatory scheme that barred demonstrating and approaching other individuals within two prophylactic zones surrounding abortion clinics. Coupling the fact that this regulation placed only minor restrictions on speech with a realization that balancing public safety interests against First Amendment rights cannot be achieved by mere judicial reasoning indicates that the *Brown* court erred in failing to show greater deference to the city council's determinations. As a result, judicial ideology undesirably displaced democratic processes.

"In response to concerns about aggressive protests and confrontations at health care facilities providing abortions,"[4] Pittsburgh adopted Ordinance No. 49,[5] which created two types of "zones" outside such sites. The one-hundred-foot "bubble zone" around a facility entrance prohibited an individual from approaching "within eight feet . . . of [another] person, unless such other person consent[ed], 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."[6] The bubble zone did not prevent leaflet distributors from merely standing

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[1] *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (upholding a Colorado abortion-facility eight-foot bubble zone regulation); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (upholding a New York abortion-facility fifteen-foot injunction-created "fixed" buffer zone but striking down a fifteen-foot injunction-created "floating" buffer zone); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (upholding in part a Florida abortion-facility thirty-six-foot buffer zone created by injunction but striking down a ban on approaching without consent within three hundred feet of the facility).

[2] *Hill*, 530 U.S. at 715.

[3] 586 F.3d 263 (3d Cir. 2009).

[4] *Id.* at 266.

[5] PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, §§ 623.01–.07 (2005).

[6] *Id.* § 623.03.

near the path of an oncoming pedestrian.[7] The "buffer zone" established a fifteen-foot area surrounding facility entrances within which it was illegal to "congregate, patrol, picket or demonstrate."[8] Mary Kathryn Brown filed suit against the City seeking to prevent enforcement of the Ordinance due to its interference with her "sidewalk counseling" efforts against abortions.[9]

The district court denied Brown's motion for a preliminary injunction and with minimal analysis found the Ordinance facially valid.[10] After Brown's appeal, the Third Circuit reversed in part and remanded.[11] Writing for the panel, Chief Judge Scirica[12] noted that "[t]his case implicate[d] fundamental First Amendment interests" and that it presented the difficulty of "operationaliz[ing] First Amendment doctrine in terms of metes and bounds."[13] The court held that while neither of the restrictions posed a constitutional problem when considered individually, their combination violated the First Amendment.[14]

Declaring that the bubble zone was "materially indistinguishable" from that upheld by the Supreme Court in *Hill v. Colorado*,[15] the panel consequently recounted the *Hill* analysis.[16] It first considered whether the restriction was content-based or content-neutral,[17] noting that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[18] The court looked to *Hill*'s holding that the identical Colorado regulation's "goals of protecting access to medical facilities and providing clear guidelines to police are 'unrelated to the content of the demonstrators' speech,' its 'restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the

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[7] *See Brown*, 586 F.3d at 270, 272 (noting that the nearly identical statute at issue in Hill v. Colorado, 530 U.S. 703 (2000), allowed such activities).

[8] PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, § 623.04.

[9] *Brown*, 586 F.3d at 267. Brown is a registered nurse who has spent fifteen years distributing pamphlets outside three abortion clinics covered by the Ordinance. *Id.* She "ha[d] never been arrested for violating the Ordinance," but "[o]n two occasions the police warned her to abide by its terms." *Id.* at 268.

[10] *See* Brown v. City of Pittsburgh, No. 06-393, 2008 WL 509227, at *3 (W.D. Pa. Feb. 22, 2008).

[11] *Brown*, 586 F.3d at 266–67.

[12] Chief Judge Scirica was joined by Judges Ambro and Smith.

[13] *Brown*, 586 F.3d at 269–70.

[14] *Id.* at 270–82.

[15] 530 U.S. 703 (2000).

[16] *See Brown*, 586 F.3d at 270–73.

[17] *See id.* at 270–71.

[18] *Id.* at 270 (alteration and omission in original) (quoting *Hill*, 530 U.S. at 719) (internal quotation marks omitted).

speech.'"[19] Thus the panel classified this bubble zone, like that in *Hill*, as content-neutral.[20]

The standard of review for content-neutral time, place, and manner regulations requires that they, first, be "narrowly tailored"; second, "serve a significant governmental interest"; and third, "leave open ample alternative channels for communication of the information."[21] The panel found that the "[o]rdinance here advance[d] a number of significant government interests, including 'protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy' and 'ensuring the public safety and order.'"[22] In finding the bubble zone narrowly tailored, Chief Judge Scirica acknowledged that a content-neutral time, place, or manner regulation need not be "the least restrictive or least intrusive means of serving the statutory goal."[23] The panel recited *Hill*'s conclusions that the bubble zone allowed for "ample alternative channels of communication" as "signs, pictures, and voice itself can cross an 8-foot gap with ease."[24]

The panel turned next to the buffer zone, which restricted demonstrations within fifteen feet of facility entrances. The court classified this regulation as content-neutral following a similar analysis.[25] Given that the Supreme Court upheld — under the more stringent standard of review applied to regulations established by injunction[26] — buffer zones extending thirty-six and fifteen feet from clinic entrances in *Madsen v. Women's Health Center, Inc.*[27] and *Schenck v. Pro-Choice Network*,[28] respectively, the panel concluded that "the buffer zone established by the Ordinance is *a fortiori* constitutionally valid."[29]

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[19] *Id.* at 271 (quoting *Hill*, 530 U.S. at 719–20).

[20] *See id.* at 273.

[21] *Id.* at 277 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

[22] *Id.* at 269 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767–68 (1994)). Chief Judge Scirica also assumed without deciding that the City's stated interest in deploying its police resources more efficiently was a significant interest. *Id.* at 270 n.7.

[23] *Id.* at 271 (quoting *Hill*, 530 U.S. at 726) (internal quotation mark omitted). "'[W]hether or not the 8-foot interval is the best possible accommodation of the competing interests at stake,' the [*Hill*] Court believed it was obliged to 'accord a measure of deference to the judgment of the Colorado Legislature.'" *Id.* at 272 (quoting *Hill*, 530 U.S. at 727).

[24] *Id.* at 272–73 (quoting *Hill*, 530 U.S. at 729) (internal quotation marks omitted).

[25] *See id.* at 275. This finding required the panel first to conclude that the Ordinance's exemption for safety personnel acting within the buffer zone was solely to "ensure that the Ordinance's restrictions do not impair the performance of those [safety] functions" and *not* to make a content-based distinction. *Id.*

[26] Content-neutral restrictions established by injunction are evaluated by "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 276 (quoting *Madsen*, 512 U.S. at 765) (internal quotation marks omitted).

[27] 512 U.S. 753.

[28] 519 U.S. 357 (1997).

[29] *Brown*, 586 F.3d at 276.

After deeming the buffer and bubble zones individually constitutional, Chief Judge Scirica then considered the collective effect of the two restrictions.[30] Because the zones were content-neutral in isolation, their combination was also classified as content-neutral.[31] Having already decided that the City's interests were significant, the panel addressed the "narrowly tailored" and "alternative channels for communication" requirements.[32] Whereas the restriction in *Hill* entailed only the one-hundred-foot bubble zone, allowing leaflet distributors to stand at the entrance to a facility and access approaching visitors, the Ordinance included both the bubble zone and a fifteen-foot buffer zone prohibiting congregation around entrances.[33] Due to worries in *Hill* about problems created by bubble zone restrictions around clinics with "particularly wide entrances,"[34] Chief Judge Scirica concluded that the Ordinance at least "severely curtail[ed]" leafleting, if it did not "effectively foreclose leafleting entirely."[35] Acknowledging that "[t]he burden is on the City to demonstrate the constitutionality of its actions,"[36] the panel found no support "either in the record or in case law, for the factual proposition that both zones are needed to achieve the City's legitimate interests in preventing harassment and obstruction of entrances."[37] Despite acknowledging the discretion afforded governments in crafting regulations,[38] the panel determined the com-

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[30] *Id.*

[31] *Id.* at 277.

[32] *Id.*

[33] *Id.* at 278–79. The court also noted that "*Schenck* upheld a fixed buffer zone while invalidating the bubble-zone portion of an injunction." *Id.* at 276. "But as the *Hill* Court later explained, the constitutional defect in the *Schenck* bubble zone lay in its specific attributes; it imposed a fifteen-foot separation between speaker and listener and otherwise represented an excessive burden on speech." *Id.* (citing Hill v. Colorado, 530 U.S. 703, 726–27 (2000)).

[34] *See id.* at 278. The panel's thought was that, like clinics with "wide entrances," a fifteen-foot buffer zone around entrances would prevent leaflet distributors from having "arm's-length access to all entering patients" when combined with the bubble zone regulation. *Id.* at 279.

[35] *Id.* at 281. The panel asserted that if the City worried that a bubble zone would not prevent individuals from blocking clinic entrances, "such conduct could be regulated — with less impact on expression than the buffer zone — by a law directly proscribing obstruction or blockading of entrances." *Id.* at 281 n.18.

[36] *Id.* at 279–80 (alteration in original) (quoting Startzell v. City of Philadelphia, 533 F.3d 183, 201 (3d Cir. 2008)) (internal quotation marks omitted).

[37] *Id.* at 279. The panel did, however, recognize that "[i]n secondary effects cases such as this, where a regulation is justified on the basis of conduct that is associated with certain types of protected expression (but is not the direct result of the expression's content), courts owe deference to legislative judgments" with respect to the factual basis motivating legislation, *id.* at 280 n.17, and that "individual legislators [may] base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised," *id.* (quoting Phillips v. Borough of Keyport, 107 F.3d 164, 178 (3d Cir. 1997) (en banc)) (internal quotation mark omitted).

[38] *See id.* at 277. The court described *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), as "explaining that courts may not second-guess the government's decision 'concerning the most ap-

bination of the two zones created an insufficiently tailored restraint on speech.[39]

Although the *Brown* court rightly classified the Pittsburgh Ordinance as content-neutral, its failure to defer to the City's regulatory scheme was inappropriate for two reasons. First, the court overestimated the Ordinance's speech restrictions and too quickly dismissed the City's justifications for the regulation; the Ordinance did not totally foreclose leafleting outside abortion clinics and therefore had only a modest effect on speech, warranting a deferential standard of review. Second, given this limited impact on speech, the court should have deferred to the judgments of more democratic institutions. The *Brown* court's analysis typifies judicial overreach and resulted in an undesirable constriction of the legislature's ability to set social policy.[40]

Applying a deferential standard in cases like *Brown* has the potential to create a more desirable institutional allocation of duties. Professor Geoffrey Stone has observed that the Supreme Court "applies a broad range of standards to test the constitutionality of content-neutral restrictions" that in practice "actually represent three distinct standards, which correspond roughly to deferential, intermediate, and strict review."[41] In choosing a standard, the Court's "general pattern is clear: as the restrictive effect increases, the standard of review increases as well."[42] Accordingly, when a regulation has a "relatively modest effect" on speech,[43] the Court applies the deferential standard of review, which "resembles the rational basis standard of equal protection review."[44] The Supreme Court adopted this approach in, for example,

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propriate method for promoting significant government interests or the degree to which those interests should be promoted.'" *Brown*, 586 F.3d at 277 (quoting *Ward*, 491 U.S. at 799).

[39] *Brown*, 586 F.3d at 280. The panel went on to reject Brown's federal free exercise challenge — stemming from the religious motivations of her advocacy — because the ordinance was a neutral one of general applicability subject only to rational basis review. *Id.* at 284. It rejected her state free exercise claims by holding that only those burdens on religious speech that would trigger heightened First Amendment speech scrutiny count as substantial burdens on religious exercise triggering heightened scrutiny under Pennsylvania law. *See id.* at 285–88. It then dismissed Brown's two as-applied challenges to the Ordinance. *Id.* at 289–96.

[40] Professor Neil Komesar asserts the importance of institutional choice in this context: "Constitutional law cannot be divorced from institutional reality and, therefore, constitutional analysis ought not be divorced from institutional analysis. That such analysis is difficult and even troubling cannot be denied. But it also cannot be avoided." Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 721 (1988).

[41] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48, 50 (1987).

[42] *Id.* at 59.

[43] *Id.* at 58.

[44] *Id.* at 50. Further, in applying a deferential standard "the Court upholds . . . laws that rationally further legitimate governmental interests. The Court does not seriously inquire into the substantiality of the governmental interest, and it does not seriously examine the alternative means by which the government could achieve its objectives." *Id.*

Heffron v. International Society for Krishna Consciousness, Inc.,[45] in which it upheld a state law prohibiting leafleting at a state fair except within certain designated locations.[46] If the *Brown* court had chosen this deferential review — instead of the "intermediate" standard upon which it ultimately relied — the case would have likely had a different result, since "when the Court applies this standard, it invariably upholds the challenged restriction."[47] Such an approach would be desirable because of its limitations on judicial interference in the City's political process.

Given that the choice of standard of review turns on a regulation's restrictiveness, deferential scrutiny would have been appropriate in *Brown*; the panel's opinion overestimated the Ordinance's speech restrictions. The court's most significant concern was the effect the combination of the two zones had on Brown's ability to distribute leaflets. It is unclear why leafleting would have been "foreclosed"; outside the fifteen-foot buffer zone, nothing "prevent[ed] a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians [could] easily accept."[48] The Pittsburgh Ordinance may have also been less restrictive than the regulation upheld in *Heffron*, as it allowed distributors to stand anywhere outside of the buffer zone rather than confining them to designated static areas.[49] Moreover, under the Ordinance, speakers could continue to display their messages through the use of signs outside clinics, and so "alternative channels for communication" remained available. Thus the Ordinance had only a "relatively modest effect" on speech and accordingly warranted a deferential standard of review.

The court also too quickly rejected the City's justifications for its stated goals. The Third Circuit has said that in situations like *Brown* courts owe deference to legislators' "common sense."[50] It seems within the realm of this legislative "common sense" that both zones are necessary to achieve the City's interests in patient access and public order: the buffer zone prevents blocked entrances and the bubble zone maintains prophylactic spacing around patients. The panel suggested that the buffer zone could be effectively replaced with a law prohibiting "obstruction or blockading of entrances."[51] Unlike a preventive buffer,

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[45] 452 U.S. 640 (1981).

[46] *Id.* at 645; *see also id.* at 647 (stating that expressive rights are "subject to reasonable time, place, and manner restrictions"). Although as a technical matter it is unclear whether the Court adopted deferential or intermediate review, Stone, *supra* note 41, at 55 n.32, its overall approach to the challenged state policy was clearly deferential.

[47] Stone, *supra* note 41, at 50.

[48] Hill v. Colorado, 530 U.S. 703, 727 (2000) (footnote omitted).

[49] *Heffron*, 452 U.S. at 643–44.

[50] *See supra* note 37.

[51] *Brown*, 586 F.3d at 281 n.18.

such an approach cannot, however, achieve the purpose of avoiding the *possibility* of physical altercation. Further, the court largely ignored the City's interest in creating conditions for a more efficient deployment of police resources, effectively requiring City taxpayers to subsidize the expression of speakers outside clinics.[52] Ultimately, by allocating the burden of proving the necessity of the Ordinance to the City, the *Brown* court replaced the City's "common sense" judgment with its own.

Although applying a more deferential standard in situations such as *Brown* would properly allow elected legislatures — and not courts — to set social policy, such an approach is susceptible to concerns about "majoritarian bias."[53] When the judiciary presumes the validity of legislative enactments, there is fear that the majority will trample upon the rights of the minority. Yet, promoting a "pervasive role [for] courts in promoting freedom of speech depends heavily on the belief that . . . judges can be trusted with the first amendment more than other officials."[54] Despite the convenience of this assumption, "[i]t is surely simplistic to assume that judicial review serves the larger purpose of reestablishing a climate for tolerance merely because judges respond differently than do the other institutions."[55] That is, even if judges respond differently to societal developments than do legislatures, this difference does not necessarily mean that courts will consistently protect against majoritarian bias. Belief in the checking function of the judiciary may be nothing more than "cheery faith."[56]

Moreover, there is reason to doubt a court's institutional competence in performing the particular task posed by *Brown* — "delineat[ing], in a quite literal sense, the boundaries of the First Amendment's protection of speech."[57] Specifically, the Ordinance at issue in *Brown* represented the City's attempt to craft a regulatory scheme that would effectively balance its goals concerning abortion facilities[58] with respect for freedom of expression.[59] Chief Judge Scirica himself recog-

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[52] Although the court did acknowledge this concern, it quickly dismissed it by once again claiming that the City had not provided enough factual information to prove the necessity of the Ordinance in achieving the City's goal. *Id.* at 282 n.20.

[53] *See* Komesar, *supra* note 40, at 671–72 ("The power of the many lies simply in their numbers and the bias arises because the few are disproportionately harmed." *Id.* at 672.).

[54] Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 334 (1984).

[55] *Id.* at 339. "It does not necessarily follow from the supposition that judges react to different pressures that their reactions will be useful." *Id.*

[56] *Id.* at 340.

[57] *Brown*, 586 F.3d at 266.

[58] *See id.* at 269.

[59] Further, the City sought to ensure the legality of its actions by choosing two regulations already validated as constitutional by the U.S. Supreme Court, namely the bubble zone upheld by *Hill* and the buffer zone upheld by *Schenck*.

nized the difficulty of "[r]econciling these competing values"[60] using the balancing test required for content-neutral regulations. Because attempting to prioritize the interests involved in this case is "like judging whether a particular line is longer than a particular rock is heavy,"[61] resolution of the issue will necessarily turn on the particular preferences of the decisionmaker.[62] Accordingly, recognizing the limits of judicial reasoning — which are especially noticeable when courts are called upon to perform the content-neutral balancing test — helps lead to the conclusion that this value judgment is better left to democratic political processes.[63]

Although courts should often be more accepting of legislative justifications for regulations, this deference argument does not extend to all content-neutral regulations; there is still a role for all three standards in content-neutral judicial review depending on the regulation's speech restrictiveness.[64] In *Brown*, however, the court exaggerated the Ordinance's speech effects, refused to accept the regulation as necessary to achieve the City's "significant" interests, and ultimately substituted its own "common sense" judgment for that of the City Council. Although majoritarian bias is a legitimate worry if courts continuously defer to legislative determinations, asking judges to find a principled balance between the interests at stake in *Brown* may be an impossible order.

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[60] *Brown*, 586 F.3d at 270; *see also id.* ("If a restrictive zone of some kind is constitutionally permissible, how large may that zone be, and what kind of restrictions may it impose?").

[61] Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

[62] *See* Komesar, *supra* note 40, at 666 ("Judicial review is judicial reconsideration of an issue already decided by another societal decisionmaker. When that reconsideration leads to invalidation of the governmental action, the courts are remaking social policy."). The *Brown* decision is thus a particularly poignant illustration of judicial review's inherent "countermajoritarian difficulty." "Briefly stated, the countermajoritarian problem is this: judicial review empowers unelected, largely unaccountable judges to invalidate the policy decisions of more majoritarian governmental institutions." Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768 (1991). Professor Michael Klarman further asserts that "[v]irtually all of modern constitutional theory consists of attempts to solve, or at least to ameliorate, the countermajoritarian difficulty by demonstrating that judicial review consists of something other than judges simply replacing legislative policy judgments with their own." *Id.*

[63] *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006) (arguing that "[d]isagreement about rights is not unreasonable" and that legislative procedures are superior to judicial review "for resolving . . . disagreements [in a manner] that respect[s] the voices and opinions of the persons — in their millions — whose rights are at stake in these disagreements and treat[s] them as equals in the process").

[64] *See* Stone, *supra* note 41, at 77 (asserting that the Court should not always apply a deferential standard nor always apply a rigid standard).