Honk to Remove This Demonstration: The Eighth Circuit Adopts a Heckler's Veto

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Frye v. Kansas City Missouri Police Department¹

I. INTRODUCTION

Saturday mornings in the Midwest. One usually associates this time with sleeping late, taking the family to the park, and doughnuts. Normally a time reserved for taking the edge off of the week’s work, Saturday morning, for most of us, is the time when we do not like to be challenged, upset, stressed, or violated. Introduce screaming protesters brandishing violent images of mangled, aborted fetuses. Opposing American values collide. On the one hand, the virtue of free speech, an open forum of ideas, public dialogue; on the other, the American worker’s simple desire to safely, peacefully, and without affront go for a drive or take a relaxing walk.

When should the majority’s desire for peace, silence, and stability overcome the individual’s right of expression? American courts have typically held that the state may silence an unpopular speaker only in the most limited circumstances. The First Amendment, especially the right to free speech, is generally viewed as a set of anti-majoritarian, anti-authoritarian guarantees to the individual. Neither the wishes of the majority nor the wishes of the state can suppress the rights of a minority because of simple disagreement with the speakers’ message.² Necessarily, the power to silence an unpopular, vulgar, or sometimes even dangerous speaker is therefore withheld from the citizenry. Mere majority disapprobation, even if such disapprobation manifests itself in actual, physical, or psychological harm, is insufficient justification to

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¹ 375 F.3d 785 (8th Cir. 2004), reh’g denied, No. 03-2134, 2004 U.S. App. LEXIS 19032 (8th Cir. Sept. 9, 2004) (Judges Wollman, Arnold, Gruender, and Benton would grant the petition for rehearing en banc and Judge Beam would grant the petition for rehearing by panel), cert. denied, 125 S. Ct. 1639 (2005).

² The First Amendment serves its highest purpose when it creates dispute, independent thought, and discussion. See Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."). See FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (holding "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.").
restrict a speaker’s rights. Stated simply, “[t]he First Amendment knows no heckler’s veto.”

In Frye v. Kansas City Missouri Police Department, the Eighth Circuit ignored this fundamental precept of First Amendment jurisprudence by holding that drivers passing a protest, disturbed or distracted by offensive signs, could limit the protesters’ message by driving erratically. As a result, the Eighth Circuit has greatly limited the very type of speech the First Amendment strives to protect—essentially, the Eighth Circuit has adopted a heckler’s veto.

II. FACTS AND HOLDING

On Saturday, June 23, 2001, at about 11:00 a.m., several anti-abortion protestors assembled near the busy intersection of North Antioch and Vivian Roads in Kansas City to picket and disseminate information concerning abortion. Several of the demonstrators carried extremely graphic three-by-five-feet signs that depicted aborted fetuses. Others carried smaller displays showing live babies and assorted anti-abortion slogans.

After receiving several complaints of “offensive signs,” the Kansas City Police Department dispatched several officers to the area. Upon arrival, the police noticed that the demonstration was impeding the orderly flow of traffic. Drivers were distracted by the signs and in several instances barely avoided collision with other automobiles. At least one driver was so affronted that she pulled over to the side of the road to recover. Others com-

3. Robb v. Hungerbeeler, 370 F.3d 735, 743 (8th Cir. 2004) (holding the possible, unintentional dangerous public reaction is insufficient rationale to bar the Ku Klux Klan from the adopt a highway program); see also Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (holding the county cannot assign costs upon demonstrators based upon the expected size of the counter-demonstration); Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) (holding “[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence”); Lewis v. Wilson, 253 F.3d 1077, 1081-82 (8th Cir. 2001) (holding possible violent reactions to the license plate “ARYAN-1” is an insufficient justification to deny petitioner said license plate).

4. Frye, 375 F.3d at 792.
5. Id. at 788. See also Appellants’ Brief at 7, Frye (No. 03-2134).
6. Frye, 375 F.3d at 788. For example, one of these large signs depicted “the head of a decapitated fetus on one side [of a demonstrator] and a photograph of the parts of the dismembered fetus on the other side.” Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
plained that their children ought not to be exposed to such graphic pictures.\textsuperscript{12} Police warned the protestors that they would be liable if their demonstration caused an accident.\textsuperscript{13} However, the police allowed the demonstration to continue so long as they moved the offensive signs away from traffic.\textsuperscript{14} When the protestors refused to move the pictures of aborted fetuses away from traffic, the police arrested five protestors and cited several others for loitering.\textsuperscript{15}

Plaintiff Frye and ten of his fellow demonstrators sued the Kansas City Police Department\textsuperscript{16} ("KCPD") for unlawfully infringing upon their exercise of constitutionally protected speech by disrupting their roadside demonstration.\textsuperscript{17} The KCPD claimed that it disrupted the demonstration because the signs were upsetting drivers and creating potential for traffic accidents.\textsuperscript{18} The KCPD also claimed that it employed the least restrictive means available to ensure the safe flow of traffic.\textsuperscript{19}

Frye and his cohorts filed this civil rights action in March 2002 in the U.S. District Court for the Western District of Missouri.\textsuperscript{20} The KCPD promptly filed a motion for summary judgment and the court granted that motion, holding that "the First Amendment does not entitle citizens to create safety hazards."\textsuperscript{21} The Eighth Circuit affirmed the district court's decision, holding that the KCPD's interruption of the protest was content-neutral and thus did not violate the First Amendment as it only limited "the deleterious

\textsuperscript{12} Id.
\textsuperscript{13} Appellees' Brief at 10, Frye (No. 03-2134).
\textsuperscript{14} Frye, 375 F.3d at 788.
\textsuperscript{15} Id. That ordinance creates criminal penalty for whoever "'stand[s] . . . either alone or in concert with others in a public place in such a manner so as to [o]bstruct any public street, public highway . . . by hindering or impeding the free and uninterrupted passage of vehicles, traffic, or pedestrians." Id. (quoting KANSAS CITY, MO., ORDINANCES § 50-161(a)).
\textsuperscript{16} Also named as defendants in this action are the Board of Police Commissioners, several of the commissioners serving on that board, police officers individually, and police officers acting in their official capacities. Id. at 785.
\textsuperscript{17} Id. at 788-89. Frye also claimed additional causes of action sounding in state tort including false imprisonment, assault, battery, malicious prosecution, trover, and conversion. Appellants' Brief at 5, Frye (No. 03-2134). Five of the protestors were arrested. Frye, 375 F.3d at 788.
\textsuperscript{18} Appellees' Brief at 12-13, Frye (No 03-2134).
\textsuperscript{19} Id.
\textsuperscript{20} Frye, 375 F.3d at 788. The district court did not address the state law claims and dismissed them without prejudice. Frye v Kansas City Police Dep't, 260 F. Supp. 2d 796, 800 (W.D. Mo. 2003), aff'd, 375 F.3d 785 (8th Cir. 2004).
\textsuperscript{21} Id. at 799. The court noted the police "reasonably interpreted the ordinance as prohibiting conduct that distracted motorists and thereby obstructed a public street by impeding the safe flow of traffic" Frye, 375 F.3d at 789 (citing Frye, 260 F. Supp. 2d at 799).
effects of the manner in which they chose to express their message," 22 not the "anti-abortion message" 23 itself. 24

III. LEGAL BACKGROUND

A. Content-neutral Restrictions

In traditional public forums such as sidewalks and roadways, 25 the state can normally limit speech on matters of public interest 26 only after a signifi-

22. Frye, 375 F.3d at 789 (quoting Frye, 260 F. Supp. 2d at 799); see also id. at 790 (agreeing with reasoning of trial court).
23. Id. at 790.
24. The remainder of this Note will omit discussion of the qualified immunity and will focus solely on the plaintiff's actual rights. The qualified immunity standard presented by both the district court and the circuit court seems not to be in contention. The circuit court stated that standard as follows:

	[taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? If so, the next inquiry is to ask whether the right was clearly established . . . , [or] whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.]

Id. at 789 (internal quotations and citations omitted). At its core, both Frye opinions are concerned with a determination of actual constitutional rights. Discussion of the reasonableness of the officer's conduct is only secondary.
25. The standard by which the courts may uphold a limitation of speech in some locations is more stringent than in other locations. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985) (holding "protected speech is not equally permissible in all places and at all times"). The Supreme Court designated areas in "which by long tradition or by government fiat have been devoted to assembly and debate," afforded speakers additional measures of protection from censorship. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Here, "the rights of the State to limit expressive activity are sharply circumscribed." Id. "At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939). See Int'l Soc. for Krishna Consciousness, Inc. v Lee, 505 U.S. 672, 678 (1992) (holding "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny"); Frisby v. Schultz, 487 U.S. 474, 480 (1988) (holding that a public street does not lose its status as a "traditional public forum" if it runs through a residential neighborhood). See also Boos v. Barry, 485 U.S. 312 (1988) (holding sidewalks fall within the traditional public forum category and thus restrictions on speech thereon are subject to intensified scrutiny); Christina E. Wells, Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence, 32 HARV. C.R.-C.L. L. REV. 159, 171 n.49 (1997). Neither party in this case disputed the fact that the demonstration occurred in a traditional public forum. Frye, 375 F.3d at 789.
cant showing that the proposed restrictions “are [1.] content-neutral, are [2.] narrowly tailored to serve a significant government interest, and [3.] leave open ample alternative channels of communication.” Moreover, the state may be able to proscribe additional speech if the speech targets a so-called “captive audience.”

1. Content-Neutral

A speech restriction is content-neutral only if it is “justified without reference to the content of the regulated speech.” The Supreme Court has advanced several variations of this test. Nevertheless, the Court has consistently

26. Boos describes the distinction between high and low value speech. “[T]he First Amendment reflects a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open,’ and have consistently commented on the central importance of protecting speech on public issues.” Boos, 485 U.S. at 318 (citation omitted). Other courts have found robust and often caustic public policy speech the very core of American democracy.

[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. . . . [it is therefore protected] unless shown likely to produce a clear and present danger of some serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (partially referring to Chief Justice Hughes’s opinion in De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937)). See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 n.2 (1986) (“[I]t is manifest that society’s interest in protecting this type of expression [(pornography)] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .”)(quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976)). Therefore, even in identical locations, speech on matters of public concern is allotted more protection than other forms of lower-value speech. Furthermore, while authority is sparse, debate over abortion is almost certainly a form of public policy debate. See Frisby v. Schultz, 487 U.S. 474, 479 (1988). See also Feminist Women’s Health Ctr. v. Blythe, 39 Cal. Rptr. 2d 189, 213 (Cal. Ct. App. 1995) (holding “[c]itizens dissatisfied with public policy governing abortion can no longer look to their legislators for change. But the high court did not and could not foreclose further political debate on the subject.”). But see Lynn D. Wardle, The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists, 62 ALB. L. REV. 853, 957 (1999) (arguing many courts, including the Supreme Court, have by “careful neglect” failed to expressly designate anti-abortion speech as political speech).


held 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. The government's purpose is the controlling consideration."30

The Supreme Court discussed the analytical differences between content-neutral and content-based restrictions on speech in Madsen v. Women's Health Center31 in some detail.32 In Madsen, a group of protestors blocked access to and physically abused people entering and leaving a women's health clinic.33 The trial court issued an injunction to prevent some of the protestors' disruptive activities.34 But the court's order was so broad that it actually prohibited all protests within the vicinity of the clinic—even demonstrations that had a pro-abortion-rights message.35 The Court held this to be a content-neutral restriction because the government's purpose operated independently of the content of the protestors' speech.36 A proscription of speech is not content-based simply because it has a disparate impact on certain viewpoints or subject matters; rather, content-based restrictions reference the message of the speaker.37

In Renton v. Playtime Theatres, Inc.,38 the Supreme Court extensively discussed the differences between content-neutral and content-based restrictions of speech.39 The Renton Court analyzed a statute which restricted adult theaters yet allowed other types of theaters.40 The Court began by looking to the purpose of the restrictive statute and then asked if that purpose attempted to limit the direct or secondary effects of the speech.41 Applying this test, the Court found the statute to be content-neutral.42 The state's purpose was to combat the tangible secondary effects associated with adult theaters, such as increased crime, a decrease in property values, and protection of the sur-

32. Id. at 762-64.
33. Id. at 757-58.
34. Id.
35. Id. at 759-61.
36. Id. at 763.
37. Id.
39. Id.
40. Id. at 47.
41. Id. See also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (discussing the Renton test: "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others").
42. Renton, 475 U.S. at 48.
rounding neighborhood. The Court further noted that the primary purpose of the
description was not to limit the types of ideas generally conveyed at
adult theaters. Because the purpose of the statute was to deter the secondary
effects of the speech and not particular ideas or the primary effects of the
ideas, the statute was content-neutral and constitutional.

The Supreme Court expanded upon the Renton test in Boos v. Barry, providing several examples of content-neutral restrictions. If the restriction’s purpose is to limit the primary effects of the speech, namely the psychological or political damage it causes, then it is content-based. Conversely, if the purpose of a restriction is to limit the secondary effects of speech, such as “congestion . . . interference with ingress or egress . . . visual clutter, or . . . the need to protect . . . security,” then it is content-neutral.

The majority in Frye relied substantially upon the Ninth Circuit’s decision in Foti v. City of Menlo Park. In Foti, a local ordinance prohibited picketers from displaying any sign measuring larger than three feet by three feet. Plaintiff abortion protesters picketed with signs measuring three feet by five feet. The Ninth Circuit found the part of the ordinance that regulated the size and number of pickets to be content-neutral. By contrast, it found that the part of the ordinance that prohibited signs on vehicles parked in such a way as to attract attention was content-based. While discussing the test for

43. Id.
44. Id. at 47-48.
45. Id. at 54. Many scholars insist that Renton’s adoption of a secondary effects test is inconsistent with precedent and creates too great a risk of censorship. See Christina E. Wells, Of Communists and Abortion Protesters: The Consequences of Falling into the Theoretical Abyss, 33 GA. L. REV. 1, 55-56 (1998). Nevertheless, this seems to be the stricter manifestation of the content-neutral, content-based test. If a demonstration could be deemed content-neutral under Renton, that same demonstration would likely be deemed content-neutral under any other test as well.
47. Id. at 319-21.
48. Id. at 321.
49. Id. See also Justices Brennan and Marshall’s concurrence restating the majority’s holding as “[w]hatever ‘secondary effects’ means, I agree that it cannot include listeners’ reactions to speech.” Id. at 334 (Brennan, J., concurring in part). See also Lewis v. Wilson, 253 F.3d 1077, 1081 (8th Cir. 2001) (“Road rage, therefore, is a primary effect of the plate, a distinction that prevents the statute from being saved under the ‘secondary effects’ rationale . . . .”).
50. 146 F.3d 629 (9th Cir. 1998).
51. Id. at 633-34.
52. Id at 633. The content of the signs displayed by the picketers in Foti is extremely similar to the content of the signs held by the demonstrators in Frye. Compare id. with Frye v. Kansas City Mo. Police Dep’t, 375 F.3d 785, 788 (8th Cir. 2004), cert. denied, 125 S. Ct. 1639 (2005).
53. Foti, 146 F.3d at 640.
54. Id. at 636-38.
content-neutrality, the Ninth Circuit largely based its finding on the hypothetical experience of an imaginary police officer.\textsuperscript{55} The court tested the ordinance by asking whether a police officer who arrived at the scene of a demonstration would need to examine the message on a sign to determine whether the sign violated the ordinance.\textsuperscript{56} The court answered that the officer would not need to examine a sign’s message to enforce the ordinance’s size limit so that part of the ordinance was content-neutral.\textsuperscript{57} However, to enforce the second part, the officer would have to “decipher the driver’s subjective intent to communicate from the positioning of the tires and the chosen parking spot.”\textsuperscript{58} Requiring the police to delve into the driver’s intent rendered this part of the ordinance content-based and presumptively unconstitutional.\textsuperscript{59}

While government purpose is the controlling factor in determining content-neutrality, a statute can still be content-based even if the state and its agents are indifferent to the message of the speaker. “The 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 \textit{because of disagreement} with the message it conveys.”\textsuperscript{60} A speech restriction may be content-based even if the government officials that enacted the restriction think that the prohibited speech is the correct viewpoint.\textsuperscript{61}

For example, in Boos the Supreme Court held unconstitutional a statute that prohibited the display of anything that may “bring [a foreign government] into public odium” within five hundred feet of a foreign embassy.\textsuperscript{62} The Court stated that the regulation was intended to directly limit the adverse

\textsuperscript{55} \textit{Id.} at 636.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} A police officer attempting to determine if picketers were violating this section of the law would not need to determine what ideas were expressed, or in what manner they were expressed, before making a determination that the law had been violated. \textit{Id.} at 639.
\textsuperscript{58} \textit{Id.} at 638.
\textsuperscript{59} \textit{Id.} at 639.

\textsuperscript{60} Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added); \textit{cf.} R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (Stevens, J., dissenting in part) (stating “[t]hese bases for distinction refute the proposition that the selectivity of the restriction is ‘even arguably conditioned upon the sovereign’s agreement with what a speaker may intend to say.’” (quoting Metromedia Inc. v. City of San Diego, 453 U.S. 490, 555 (1981)) (emphasis added) (citation omitted). While we do have scattered dicta which would limit content-based restrictions to those instances in which the government, and not a private individual, disapproves of the content of a speaker’s message, these seem to be more the product of rhetorical economy than intended holding.


\textsuperscript{62} \textit{Boos}, 485 U.S. at 316.
political effects of a certain class of ideas and was thus content-based. Congress's personal predilections towards the prohibited speech were neither critical nor supportive. Congress simply wanted to avoid the complications that this speech might have on foreign policy and uphold the United States' obligations under the Vienna Convention. This type of direct interference with speech is content-based, regardless of the fact that officials had no individual preference about the message of the picketers' signs.

In Forsyth County v. Nationalist Movement, the Supreme Court held unconstitutional a statute which varied the cost of a parade permit based on the cost necessary to secure the parade. The statute charged a higher price for a parade permit if more people were excepted to protest the parade. The state was entirely indifferent to the message of the protestors and counterprotesters. Nevertheless, the state's response to "[l]isteners' reaction to speech is not a content-neutral basis for regulation." In Lewis v. Wilson, the Missouri Department of Revenue refused to reissue a license plate reading "ARYAN-1," relying on a law which prohibited issuing personalized plates that were "obscene, profane, inflammatory or contrary to public policy." The state's argument focused mainly on the negative, or even violent, reactions other citizens may have in response to the ideas expressed on plaintiff's license plate. The Eighth Circuit held that these types of reactions may not enter our analysis of content-neutrality unless the expected violent reactions are an intentional byproduct of the speech. More specifically, the court said, "Even if we assume that the [Department of Revenue] made no judgment about the viewpoint of Ms. Lewis's speech [on her license plate] . . . we reject its attempt to censor Ms. Lewis's speech because of the potential responses of its recipients. The first amend-

63. Id. at 321.
64. Id. at 322-23. See The Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 3237-38, 500 U.N.T.S. 95, 108 (imposing upon each host state a "special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity").
67. Id. at 126-27, 137.
68. Id. at 134 (stating "[t]hose wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit").
69. The ordinance applied equally to both white supremacists and counter-demonstrators. See id. at 126-27.
70. Id. at 134.
72. Id. at 1078-79 (quoting MO. REV. STAT. § 301.144.2 (2000)).
73. Id. at 1081. The Department of Revenue also unsuccessfully argued that the license plates were not public forums because they are owned by the state. Id. at 1079.
74. Id. at 1081-82 (citing Cohen v. California, 403 U.S. 15, 20 (1971)).
ment knows no heckler’s veto.” The Lewis court made clear that a restriction on speech is not content-neutral even if the content bias stems not from the government but from the biases of the public at large.

However, speech intended to incite a crowd to violence receives little or no constitutional protection. In Terminiello v. City of Chicago, a speaker made incendiary racial and anti-Semitic comments to a crowd of his supporters. Outside the auditorium nearly one thousand counter-demonstrators became increasingly violent in direct reaction to the speaker. Nevertheless the inflammatory speech was protected. Just two years after the Supreme Court decided Terminiello, a similar case reached the Court. In Feiner v. New York, a speaker urged a violent conflict between races to a racially mixed crowd. While there was little probability of actual violence ensuing, the police arrested the speaker for violating an ordinance which made it a crime to intentionally provoke a breach of the peace. The Court upheld the ordinance as an appropriate restriction on speech. By contrasting these cases, we arrive at the conclusion that an intentional, bad-faith incitement to violence, even if unlikely to produce actual violence, receives little or no First Amendment protection. By contrast, a speaker who only incidentally provokes violence, without intending to do so, will be protected.

75. Id. at 1082.
77. 337 U.S. 1 (1949).
78. Id. at 2-3; Id. at 20 (Jackson, J., dissenting).
79. Id. at 3.
80. Id. at 5. While this case was decided on grounds that the statute in question was overbroad, considerable dicta leads to the conclusion that speech will be protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” Id. at 4.
82. Id. at 317.
83. Id. at 317-18.
84. Id. at 321. Even though the majority opinion in Feiner does not employ the phrase “fighting words,” it does insinuate that intentional incitement to violence is unprotected by the First Amendment. “It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and [incites a] riot, [the police] are powerless to prevent a breach of the peace.” Id. at 321.
2. Narrowly Tailored to Serve a Significant Governmental Interest

Even if a speech restriction is content-neutral, the state is not automatically entitled to abridge the speech without accounting for other, countervailing interests. If the state chooses to restrict speech in a content-neutral manner, it must still narrowly tailor any restrictions to serve significant government interests and ensure that sufficient alternative avenues of communication remain open to would-be speakers.86

The first step in this analysis is to determine whether the state has a significant governmental interest in restricting the speech. States have significant interests in ensuring that their streets are free from needless traffic hazards. "Cities do have a substantial interest . . . in assuring safe and convenient circulation on their streets. These substantial interests, however, may not be compelling."87 The Ninth Circuit in Foti stated "‘picketing and parading . . . is subject to regulation even though intertwined with expression and association.’"88 The city had a substantial interest in regulating the number and size of picketers because "[e]xtremely large or numerous picket signs nearby could well interfere with a bus’s operation or with pedestrian circulation on the sidewalk."89 While a state may, without great difficulty, be able to justify its proscription of speech if the speech poses a legitimate traffic safety concern, it is unlikely that the same proscription would be justified if the state proscribed speech bearing the same message.90

The next step is to determine whether the content-based restriction is well tailored to that significant governmental interest. A well tailored interest is neither excessively under inclusive or overinclusive. "[I]n determining whether a statute is narrowly tailored [the Court must] take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary."91 Narrowly tailored restrictions limit the type of speech that the state has a substantial interest in suppressing, while allowing speech that the state has little interest in suppressing. In Foti, the court held that a regulation forbidding the display of large signs was narrowly tailored to the state’s substantial interest in ensuring safe streets.92 "A fifteen square foot sign carried by a protester on a public sidewalk, when compared to a three square foot sign, may block drivers’ views of road signs and traffic conditions, intimidate pedestrians, and obstruct the safe and convenient circu-

87. Foti v. City of Menlo Park, 146 F.3d 629, 637 (9th Cir. 1998) (internal quotations and citations omitted).
88. Id. at 640 (quoting Cox v. Louisiana, 379 U.S. 559, 563 (1965)) (alteration in original).
89. Id. at 641.
90. See R.A.V., 505 U.S. at 383-86 (1992) (discussing alternative levels of government interests required to satisfy content-neutral and content-based restrictions).
92. Foti, 146 F. 3d at 641.
lation of pedestrians on the sidewalk.”93 Nevertheless, “each restriction may diminish the amount of speech . . . [each protestor may individually make, yet] ‘not reduce[e] the total quantum of speech on a public issue.’”94 While certain means of speech were proscribed in Foti, all forms of proscribed speech presented a traffic hazard, and those forms of speech which did not prevent traffic hazards, namely those less than three feet square, were permitted regardless of the message they conveyed.

3. Alternative Channels of Communication

Finally, content-neutral speech restrictions are only allowed if the government ensures that other sufficient means of communication are available.95 The speaker must be able to reach his intended audience.96 In Foti, the court held that “[r]egulations of size and number of picket signs are permissible as long as they are ‘not so restrictive as to foreclose an effective exercise of First Amendment rights.’”97 The Foti court found evidence of sufficient alternative avenues of communication because a substantial portion of the picketers’ targeted audience could see their signs, despite their limited size.98 To be constitutional, the state must allow protestors an appropriate means of conveying their messages.

B. Content-based Restrictions

Content-based restrictions are not automatically unconstitutional. However, a content-based proscription of speech requires strict scrutiny, a much more difficult standard to satisfy. Content-based restrictions are presump-
tively invalid\textsuperscript{99} and will almost always be deemed unconstitutional.\textsuperscript{100} "For the State to enforce a content-based exclusion it must show that its regulation is \textit{necessary} to serve a \textit{compelling} state interest and that it is narrowly drawn to achieve that end."\textsuperscript{101} Rather than require the proscription of speech to be well tailored to a significant governmental interest, as is the case with content-neutral proscription of speech, a content-based proscription must be necessary to achieve a compelling governmental interest.\textsuperscript{102}

\textbf{C. Captive Audiences}

Even if a restriction is content-based, it may be constitutional if the speaker's audience is captive, the audience has a particularly strong privacy interest, and the restriction on speech is minimal.\textsuperscript{103} In \textit{Cohen v. California},\textsuperscript{104} a Vietnam War protestor wore a jacket reading "Fuck the Draft" into a Los Angeles courthouse.\textsuperscript{105} Cohen was charged with violating a statute that criminalized any "offensive conduct" tending to provoke others.\textsuperscript{106} California argued that Cohen's vulgarity was improperly "thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive."\textsuperscript{107} Nevertheless, the Supreme Court held that


\textsuperscript{100} See \textit{R.A.V.}, 505 U.S. 377 (invalidating a statute which penalized racist ideas); Carey v. Brown, 447 U.S. 455, 465 (1980) (proscribing a statute which purportedly favored pickets of organized labor over other similarly situated types of picketers); Dimmit v. City of Clearwater, 985 F.2d 1565, 1569 (11th Cir. 1993) (invalidating a statute which prevented a car dealership from displaying several American flags); Krafchow v. Town of Woodstock, 62 F. Supp. 2d 698, 710 (N.D.N.Y. 1999) (invalidating a statute barring vending in a traditional public forum with an exception for political candidates); \textit{cf.} Forsyth County v. Nationalist Movement, 505 U.S. 123, 135 (1992) (holding "[t]his Court has held time and again: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'") (quoting \textit{Regan v. Time, Inc.}, 468 U.S. 641, 648-49 (1984)). This language seems to be absolute in its prohibition of content-based restrictions of speech while most other authority allows content-based restrictions in a very limited set of circumstances.

\textsuperscript{101} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (emphasis added); see also \textit{R.A.V.}, 505 U.S. at 395.

\textsuperscript{102} Content-based restrictions of political speech in public forums are exceedingly rare. \textit{But see} Burson v. Freeman, 504 U.S. 191 (1992) (upholding a state's "campaign-free zone," which prohibited partisan displays within 100 feet of a polling place).

\textsuperscript{103} Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970).

\textsuperscript{104} 403 U.S. 15 (1971).

\textsuperscript{105} \textit{Id.} at 16.

\textsuperscript{106} \textit{Id.} at 17.

\textsuperscript{107} \textit{Id.} at 21.
“the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.”108 Rather, the state must demonstrate an invasion of a substantial privacy interest in an essentially intolerable manner if it is to restrict speech based on the captive audience argument.109 The Cohen Court concluded that it was incumbent upon an overly sensitive public to avert their eyes from the offensive speech if it were offended.110

In Frisby v. Schultz,111 the Supreme Court employed the captive audience argument outlined in Cohen to uphold a statute prohibiting pickets near residences.112 The Court noted that each individual has “a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect.”113 The Court upheld the anti-picketing statute even though it substantially interfered with demonstrators’ ability to speak in a traditional public forum—the streets—because of the strong privacy interest associated with the home.114

The Supreme Court found a substantial privacy interest in the free ingress and egress of a medical clinic in Hill v. Colorado.115 There the Court found that an eight foot speech-free buffer zone around patients entering and exiting the clinic was acceptable even on a sidewalk—a traditional public forum.116 The Court based its decision on the justification that “[t]he statute seeks to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators.”117 These cases do not set forth an explicit test for when speech restrictions are justified because the audience is captive, but they do establish that some minimal restraints on speech are permissible when the audience is psychologically or physically vulnerable.118

108. Id.
109. Id.
110. Id.
112. Id.
113. Id. at 484.
114. Id. at 486-87.
116. Id.
117. Id. at 729. See also Madsen v. Women’s Health Ctr., 512 U.S. 753, 768 (1994) (finding a privacy interest similar to that in the home to the privacy in a hospital or clinic). “Furthermore, [the issue of] whether there is a ‘right’ to avoid unwelcome expression is not before us in this case. The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message.” Rather, it protects those who seek medical treatment and are thus already in a vulnerable physical and mental state from the potential harm suffered when from abrasive and discourteous messages. Hill, 530 U.S. at 718 n.25.
118. See Deborah A. Ellis & Yolanda S. Wu, Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-abortion Protestors’ First Amendment Rights
IV. INSTANT DECISION

A. Majority Decision

Judge McMillian, writing the majority opinion,119 began his discussion by acknowledging the demonstrators’ right to express their beliefs about abortion in traditional public forums.120 Quoting Hill v. Colorado,121 the court asserted that "'[t]he right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience.'"122 Furthermore, "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others.'"123 The court went on to hold, quoting Erznoznik v. City of Jacksonville,124 that prohibitions of "'deliberate verbal or visual assault[s]'" on unwilling listeners are legitimate and content-neutral proscriptions of speech.125

Next, the court stated that the key factor distinguishing between content-based and content-neutral restrictions is whether the government disagrees with the message conveyed by the speech. Citing Ward, the majority opinion stated the content-neutral test as "'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.' . . . In other words '[t]he government’s purpose is the controlling consideration.'"126 The court then went on to conclude that it agreed with the district court’s assessment that the KCPD’s proscription of speech was content-neutral.127

The court noted that the demonstrators were free to express their anti-abortion message; however, they were prohibited from displaying the graphic signs of aborted fetuses near traffic.128 These restrictions were "reasonable restrictions on the location of the signs in order to protect public safety" which did not close all alternative means of communication to the protes-
tors.129 Because some material with an anti-abortion message was allowed, while other less offensive anti-abortion material was not allowed, the censorship operated independently from the "anti-abortion message" and thus was content-neutral.130 

Noting that protestors do not have free rein to determine the time, place, and manner of their speech, the court blankly stated that the proscription of demonstrators' speech "did not provide for a "heckler's veto" but rather allow[ed] every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to "reasonable place and manner restrictions."131 Disagreeing with the demonstrators' argument that the KCPD impermissibly examined the content of their signs through the reactions the signs created, the majority quoted Hill, stating ""[i]t is common in the law to examine the content of a communication to determine the speaker's purpose' and that it had 'never held or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether the rule of law applies to a course of conduct.""132 According to the court, a passerby or officer's simple examination of the content of speech does not necessarily indicate a content-based restriction.

Assuming the state has an interest in protecting the health and safety of the citizenry, the court discussed the merits of the protestors' argument that it is incumbent upon the drivers and passersby to ignore or avert their attention from offensive materials.133 The majority believed the protestors' reliance on Cohen v. California134 was misplaced.135 In Cohen, the public could avoid offensive messages simply by turning their eyes away from the message.136 The Frye court continued by quoting Hill stating, ""[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings."

The court inferred that because the display of the offensive signs occurred by a heavily trafficked intersection and such a display was creating a potential hazard, Cohen was inapplicable.138 The majority argued that Cohen was distinguishable because no actual physical harm was threatened in that

129. Id.
130. Id.
131. Id. at 790-91 (quoting Hill v. Colorado, 530 U.S. 703, 734 (2000)).
132. Id. at 791 (quoting Hill, 530 U.S. at 721).
133. Id.
135. Frye, 375 F.3d at 791.
137. Frye, 375 F. 3d. at 790 (quoting Hill, 530 U.S. at 716).
138. Id. The court also noted here that ""[t]he motorists all complained that viewing the photographs impaired their ability to safely drive their vehicles."" Id. Also stated, the state need not wait for an actual accident to justify its safety measures. Id. (relying on ACORN v. St. Louis County, 930 F.2d 591, 596 (8th Cir. 1991)).
case, while here the speakers posed a very real threat of causing traffic accidents.\footnote{Id. The government may also have a compelling interest in protecting minor children from frightening images. \textit{Id.} at 791 n.2 (citing Olmer v. City of Lincoln, 192 F.3d 1176, 1180 (8th Cir. 1999)).}

Finally, the court concluded that while it is protestors' prerogative to choose which cause to advocate, their options regarding the means of their advocacy are not entirely unfettered.\footnote{Id. at 792.} The restriction of free speech, as in \textit{Foti},\footnote{Id. at 792.} was permissible as the city had a ""substantial interest in requiring drivers to devote greater attention to driving conditions and the road signs.""\footnote{Id. at 792.} The majority concluded that the KCPD acted appropriately in limiting demonstrators’ speech because it had a substantial interest in promoting safe driving conditions, and its means of achieving this interest were narrowly tailored.\footnote{Id. at 792 (Beam, J., dissenting).}

\textbf{B. Dissenting Opinion}

Judge Beam dissented, stating that the majority opinion impermissibly vests a heckler's veto in the public at large.\footnote{Id. (Beam, J., dissenting).} Judge Beam declared that ""[t]he First Amendment guards jealously a citizen's right to express even controversial and shocking messages.""\footnote{Id. at 792-93 (Beam, J., dissenting).} Relying on an imposing cache of Supreme Court and Eighth Circuit precedent, the dissent concluded that the First Amendment prohibits heckler's vetoes such as the one installed by the majority.\footnote{Id. at 792 (Beam, J., dissenting).}

A private citizen's reaction to offensive speech is a content-based reaction.\footnote{Id. (Beam, J., dissenting).} The state may make content-neutral restrictions or restrictions to combat the secondary effects of speech.\footnote{Id. at 792-93 (Beam, J., dissenting).} However, listeners' reactions to
speech are primary effects of that speech which may not be used as a justification to curtail the speech. 149

Judge Beam asserted that reducing the traffic hazard to a function of passersby’s emotions affords citizens averse to the speaker’s message the power to silence the message altogether. 150 The current situation, wrote Judge Beam, is tantamount to such an overt content-based statute which directed police, “upon the complaint of any citizen that a demonstrator’s photo is offensive and causes the citizen to become too emotional to operate a vehicle,” to remove the demonstrator. 151 While both this hypothetical and the facts from the current case could support a “secondary effects” justification, the secondary effects directly arise from reactions of a listener and are thus content-based. 152 The state cannot silence the speaker to protect against the expected unlawful reactions of the listener—this is the very essence of a heckler’s veto. 153 The courts have mandated that the state punish the criminal action of the listener, not the speaker who affronts the listener. 154

Next Judge Beam outlined the majority’s three primary mistakes. First, Cohen was applicable because the passersby are not members of a captive audience. 155 The majority’s reliance on Hill is misplaced because Hill only allowed a listener to turn away from a truly captive audience. 156 Here, the audience was by no means captive as they had every opportunity to look away from the signs. 157 Secondly, the majority truncated the facts to come to an incorrect conclusion. The majority stated “police officers placed reason-

150. Frye, 375 F.3d at 795 (Beam, J., dissenting).
151. Id. (Beam, J., dissenting).
152. Id. (Beam, J., dissenting); see supra note 146 and accompanying text.
153. Frye, 375 F.3d at 795 (Beam, J., dissenting) (citing Lewis v. Wilson, 253 F.3d 1077, 1081-82 (8th Cir. 2001) (holding that a state must issue a license plate with a white supremacist message, despite risk of other drivers seeing it and experiencing road rage); Robb v. Hungerbeeler, 370 F.3d 735, 743 (8th Cir. 2004) (holding that a state must allow the Ku Klux Klan to adopt a highway despite the risk drivers may be outraged and lose control of their cars); Schneider v. Town of Irvington, 308 U.S. 147, 160 (1939) (holding that a state cannot prohibit the distribution of pamphlets despite the risk recipients will unlawfully discard them); Cohen v. California, 403 U.S. 15, 23 (1971) (holding that despite risk some citizens will react violently, the state must allow a speaker to wear a jacket reading “Fuck the Draft”)).
154. Frye, 375 F.3d at 795 (Beam, J., dissenting).
155. Id. at 796 (Beam, J., dissenting).
156. Id. (Beam, J., dissenting). The audience in Hill was women attempting to enter an abortion clinic. The statute restricted protesters from coming within eight feet of a patron thus giving those patrons entering and exiting an opportunity to ignore the protestors. Hill v. Colorado, 530 U.S. 703, 707 & n.1 (2000).
157. Frye, 375 F.3d at 796 (Beam, J., dissenting).
able restrictions on the location of the signs." 158 But they should have instead stated that "police officers placed reasonable restrictions on the location of the signs that the passersby described as offensive and disgusting." 159 This is a heckler's veto—a content-based restriction on protected speech. 160 Finally, the dissent matter-of-factly stated and provided extensive authority for the proposition that the public's reactions to speech are always content-based. 161 The majority simply misstated and misapplied existing law.

V. COMMENT

In Frye, the Eighth Circuit speciously interpreted case law and set dangerous precedent by installing a heckler's veto. Even though in at least one instance there are dicta stating that the state's attempt to limit "congestion" 162 is a content-neutral restriction, overwhelming authority dictates that the state's attempt to restrict speech in response to public reaction to that speech is content-based. 163 Frye's dangerous precedent imperils many types of protected speech in places traditionally afforded the highest degree of protection and may even induce recklessness and intentional violence as a means of silencing speakers.

Largely, Frye turns on the question of content-neutrality. The record is fairly clear that the demonstration could be silenced under intermediate scrutiny, the standard required by content-neutral restrictions, but would be protected under strict scrutiny, the more demanding standard content-based restrictions command. 164

The content-neutrality requirement does not operate as a matter ofblind adhesion to arcane legal principles; rather, it has a distinct and readily identifiable purpose. The ultimate end behind the content-neutral/content-based distinction is to ensure that "government may not grant the use of a forum to

158. Id. at 790.
159. Id. at 797 (Beam, J., dissenting).
160. Id. (Beam, J., dissenting).
161. Id. at 793 (Beam, J., dissenting).
162. Boos v. Barry, 485 U.S. 312, 321 (1988). The reference to "congestion" is unclear and dicta. It may refer to both pedestrian and automobile congestion or it may refer to either pedestrian or automobile congestion.
163. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (holding a fee system for demonstrations based on the amount of expected counterprotestors is a content-based restriction); R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992) (stating "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in Renton") (citations omitted); Boos, 485 U.S. at 321 (holding "[t]he emotive impact of speech on its audience is not a 'secondary effect' ");terminiello v. Chicago, 337 U.S. 1, 5 (1949) (holding speech cannot be burdened by an unintentionally caused mob's violent reaction to speech).
164. "[T]here is no dispute that appellants had a First Amendment right to express their views about abortion in a public forum." Frye, 375 F.3d at 789.
people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." In this way the First Amendment protects minority viewpoints from both an overreaching government and a disgruntled majority. Its protection is most essential to antinomian viewpoints and controversial topics.

The Eighth Circuit’s majority opinion in Frye correctly cited the broad content-neutral/content-based Ward test; however, it incorrectly applied this test to the facts of the case. The majority’s primary mistake was in arguing that the protestors simply intended to display an “anti-abortion message” and the police’s interruption of the demonstration operated independently of that “anti-abortion message.” Any restriction on the demonstration was only made in response to the offensive means of conveying the message, while leaving the inoffensive means of conveying the identical “anti-abortion” mes-

165. Police Dep’t of Chicago v. Mosely, 408 U.S. 92, 96 (1972). See also R.A.V., 505 U.S. at 387 (stating “[t]he rationale of the general prohibition, after all, is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”) (internal quotations omitted).

166. See David F. McGowan & Ragesh K. Tangri, Comment, A Libertarian Critique of University Restrictions of Offensive Speech, 79 CAL. L. REV. 825, 834-45 (1991). McGowan and Tangri describe four justifications for freedom of speech. First, the Millian concept of marketplace of ideas focuses upon arriving at some objective form of truth through open, unrestricted dialogue. Unpopular ideas are necessary both to test prevailing ideas and to replace those prevailing ideas if they become untenable. See generally JOHN STUART MILL, OF THE LIBERTY OF THOUGHT AND DISCUSSION, in ON LIBERTY 19, 19-67 (Currin V. Shields ed., Prentice-Hall 1997) (1859). Second, the democratic self-governance rationale, like the Millian model, uses a marketplace of ideas. But, the marketplace’s primary purpose is in arriving at democratically achieved, sound public policy decisions, not finding an objective truth. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971). See also ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 89 (1965). Third, free speech engenders tolerance in all areas by forcing individuals to acknowledge rights of minority speakers. If people are forced to passively listen to difficult ideas, society’s ability to tolerate all manner of antinomian activities is increased. See Kent Greenawalt, Free Speech Justifications, 89 COLUM. L. REV. 119, 146-47 (1989). Finally, several theorists have stated that freedom of speech is a good in and of itself as it is a primary vehicle of self-realization; unpopular ideas are just as or more important for individual self-fulfillment. See Martin H. Redish, The Value of Free Speech, 130 U. PA. L. REV. 591-93 (1982). See also FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50-56 (1982) (describing free speech not only in terms of communication but in terms of expression for its own sake). Each of these theories, in varying degrees, affords legal protection to unpopular, offensive, and even antisocial speech.

167. Frye, 375 F.3d at 789-91 (stating “[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”) (quoting Hill v. Colorado, 530 U.S. 703, 719 (2000)).

168. Id. at 790.
sage intact.\(^{169}\) Therefore, the majority incorrectly held that the restrictions on the graphic pictures were made without reference to the content of the speech because other speech, with identical anti-abortion messages, was not censored.\(^{170}\) By reducing the message of the protestors' speech to its logical skeleton, the majority unjustly gave free rein to censor any emotative or extra-verbal component of that speech.

The majority glossed over the protestors' message and deemed it simply "anti-abortion"\(^{171}\) as opposed to "feticide is violent, inhumane, and disgusting."\(^{172}\) The majority condensed no less than two messages into a single "anti-abortion" message. The message abridged by the police was not simply that abortion is wrong but that abortion is wrong because it is nasty, brutal, and shocking. Several of the protestors' signs exemplified this message with pictures of mangled aborted fetuses. They also displayed other, entirely verbal, non-offensive messages.\(^{173}\) Regardless of the rhetorical efficacy of their methods and the ultimate value of their message, the plaintiff protestors wished to convey an idea far more descriptive than simply that "abortion is wrong." Plaintiffs believe, quite legitimately, that one of the most effective means of conveying their own thoughts about the brutality of abortion is to display these violent images. The emotive impact of the speech may be a far more important component of protected speech than the topical message.\(^{174}\) The offensive means of conveying the speech may be, and in this case are, bound to the message.\(^{175}\) Any attempt to silence the demonstrators' graphic display directly infringes on their ability to convey their chosen message and thus strikes at the core of First Amendment rights.

The jacket needing First Amendment protection in *Cohen* did not say, "An all-volunteer army is far superior to an army of conscripts." Rather, it was the jacket's blunt message of "Fuck the Draft" that commanded the high-

\(^{169}\) *Id.* "[T]he police officers did not forbid appellants from expressing their anti-abortion message. Indeed, the police officers did not forbid appellants from expressing their message by the use of the large photographs displaying mutilated fetuses." *Id.*

\(^{170}\) *Id.*

\(^{171}\) *Id.* at 789-91.

\(^{172}\) See *id.* at 790.

\(^{173}\) *Id.* at 794 (Beam, J., dissenting).

\(^{174}\) See *Cohen* v. California, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."). See also Bonny E. Sweeney, Note, Bering v. Share: *Accommodating Abortion and the First Amendment*, 38 CASE. W. RES. L. REV. 698, 725-26 (1988).

\(^{175}\) Describing Frye's message as such seems to be obvious, nevertheless, this message may be a question of fact which would demand remand for further determination.
est degree of protection. While a speaker may not have every available means of conveying his thoughts to the public, the emotional, irrational impact of his chosen message can be a central, protected component of his speech. Requiring the plaintiffs in Frye to alter their message of brutally mangled aborted fetuses to “abortion is wrong,” or even to reduce what plaintiffs see as the inhumane violence of abortion to prose, would be analogous to allowing Cohen to display a jacket politely admiring the benefits of an all-volunteer army while prohibiting his “absurd and immature antic.” Doing so, according to the Supreme Court, violates the First Amendment.

Next, the majority incorrectly applied the rule announced in Foti v. City of Menlo Park, failing to come to terms with the most basic distinctions between content-neutral and content-based restrictions. The Foti court correctly held that a limitation of offensive signs based on their size and number is content-neutral. The government’s legitimate purpose was to limit the secondary effects of the signs, namely the obstruction of drivers’ view of the road. Such a restriction is equally applicable to either a highly offensive photograph of an aborted fetus or, say, an inoffensive painting of Washington crossing the Delaware. Unlike Foti, the proscription of signs in Frye only reaches those signs which passersby find offensive. Under the Frye regime, the painting of Washington crossing the Delaware would presumably not be censored; therefore, reference to the message is required to determine if censorship is prudent. The purpose in limiting the signs here, as opposed to in Foti, is to limit that offense, and any further effects springing from such offense.

Citing Erznoznik, the Frye majority insisted that “‘deliberate verbal or visual assaults’" were subject to proscription without providing reliable precedent for that holding. The majority’s reliance on Erznoznik amounts to reliance on dictum which itself relies on a dissenting opinion. While the majority cited Erznoznik for the proposition that restricting a “deliberate verbal or visual assault” may be considered content-neutral, Erznoznik plainly stated

176. Cohen, 403 U.S. at 17.
177. Id. at 19 (holding “the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses”).
178. See Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (stating “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation”).
179. Cohen, 403 U.S. at 27 (Blackmun, J., dissenting).
180. Id. at 26.
181. 146 F.3d 629 (9th Cir. 1998).
182. Id. at 641-42.
183. Id. at 637.
184. Frye, 375 F.3d at 790 (quoting Erznoznik v. City of Jacksonville 422 U.S. 205, 210-11 n.6 (1975)).
that "the constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."185 In Erznoznik, a manager of a drive-in movie theater was charged with violating a statute prohibiting public nudity after showing an R-rated film.186 In dicta, the Erznoznik Court delineated several exceptions, outlined in Justice Powell's dissenting opinion in Rosenfeld v. New Jersey,187 to the general rule that it is an unwilling listener's duty to avoid offensive speech.188 However, the Erznoznik Court ultimately noted that such exceptions were irrelevant to its holding as the speaker, a drive-in movie theater, was not intentionally trying to convey a message to an unwilling listener or viewer.189 Thus, the Frye court's reliance on Erznoznik was not only improper but inapposite. If this was the strongest authority the Eighth Circuit could find to institute a heckler's veto, Frye is dubious precedent at best.

The majority also failed to discuss the only circumstance when the reaction of listeners can justify the suppression of speech—when such speech is intended by the speaker to cause violence. While it is certainly true that the traffic hazard created by plaintiffs was a secondary effect of their speech, proscriptions of speech due to the public's noxious reaction to that speech are almost always content-based restrictions.190 Most likely, the plaintiffs in Frye had no intention to cause violence; they did not seek to physically impede traffic, harm bystanders, or intimidate. More probably, they intended to shock the public to raise awareness about an important public policy issue.191 Because the record did not demonstrate that plaintiffs intended to cause violence, it was inappropriate to impute listeners' reactions to the content-based/content-neutral equation under existing precedent.

185. Erznoznik, 422 U.S. at 210 (citing Cohen v. California, 463 U.S. 15, 21 (1971)).
186. Id. at 206.
188. Erznoznik, 422 U.S at 210 n.6. If it were the law, this exception to the broad protection for merely offensive speech, would allow proscriptions of speech willfully used and "calculated" to offend. Rosenfeld, 408 U.S. at 905. This type of reasoning seems to fall in the Feiner line of cases. Not merely offensive speech can be proscribed, but offensive speech intended to cause violence. Chief Justice Burger's dissent would censor Rosenfeld's speech because of the likelihood of a vigilante-style violent retaliation from an angry crowd. Id. at 902 (Burger, C.J., dissenting). Burger's dissent is silent as to whether he would apply this test equally to speech that both intentionally and unintentionally causes violence. See id. at 902-03 (Burger, C.J., dissenting).
189. Erznoznik, 422 U.S. at 211. Actually the speaker in Erznoznik had every intention of withholding speech from the non-paying viewers.
190. See Frye, 375 F.3d at 793.
191. As the district court granted summary judgment, we cannot conclusively determine the intent of Frye and his fellow demonstrators.
After claiming that the restriction was authorized for "deliberate verbal or visual assaults," the Frye court also claimed that the restriction was authorized because the protestors had a captive audience.192 In so holding, the Court misapplied Cohen. The majority in Frye stated that "the Supreme Court tolerated a protestor's right to wear a jacket expressing his view in vulgar language in the corridors of a courthouse because viewers could 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"193 But while the Eighth Circuit correctly noted that the pedestrians in Cohen could readily turn away from any offensive material, it imported an element of causation not found in Cohen. In reality, Cohen only allowed an extra measure speech-silencing "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."194 In Cohen, the simple ability for an unwilling listener to avert her attention was by itself insufficient to proscribe speech.195

The Frye majority did not discuss the "substantial privacy interest" required by Cohen either. Rather, the court offhandedly noted that "the recognizable privacy interest in avoiding unwanted communication varies widely in different settings," concluding, without support, that because the signs created a traffic hazard, this privacy interest was intolerably invaded.196 Quite correctly, the opinion noted that privacy interests vary widely depending on the time and place; unfortunately, the opinion failed to grasp that the setting involved in Frye was a traditional public forum where the individual's privacy interest is at its lowest. In Hill and Frisby, the listener had substantial privacy interests in access to a medical clinic and his home, respectively. No such interest was present here.197 The Eighth Circuit gave no guidance as to the precedent or rationale it relied on to find this privacy interest.

192. Frye, 375 F.3d at 791.
195. Id.
196. Frye, 375 F.3d at 791 (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000)). Hill found a substantial privacy interest in a health clinic and eight-foot buffers zone around those entering and exiting a clinic. Hill, 530 U.S. at 717-18. See Cohen, 403 U.S. at 21-22 (holding "one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home"). A public street is, as far as privacy interests are concerned, much closer to Central Park than to one's own home.

197. Also an argument based on the vulnerability of the drivers as seen in Hill would seem to be inapplicable to Frye as the drivers are not especially psychologically or physically vulnerable, as the intended audience was the public at large. Nor was the regulation on speech mild as was the case in Hill—it was a total proscription of an entire message.
Most disturbing about this opinion is that it was not expressly limited to unintentional disruptions of the peace by honestly distracted drivers. One might very reasonably interpret *Frye* to extend to any and all disturbances of the peace proximately caused by speech. The holding in *Frye* grants any sizable group with access to automobiles the power to limit roadside demonstrations.198 Simply by stopping short, honking, heckling, or in any other way, intentionally or unintentionally, posing a threat to the safe flow of traffic, the heckler can silence the speaker. Such a holding encourages all manner of intentionally criminal and reckless action. If a group of drivers, in sufficient numbers, passes a roadside protest with which they disagree, they now fully have the means to silence that protest.

The First Amendment demands a certain risk of car accidents and upset children. Free speech necessarily poses costs on society. While considering the cost of fender-benders may be relatively new to the First Amendment jurisprudence, other costs have long since been known. For example, all speech, correct or incorrect, presents an opportunity that the listener will be convinced by the speech. If a listener is convinced by a speaker of some principle or tenant which is incorrect or dangerous, that poses some cost on society. The convinced listener may harm himself, his family, or his community.199 Also, some forms of political speech may corrupt the democratic process.200 Furthermore, the actual cost of speech in lost labor and resources spent is in some ways shifted to society. Even if the speaker is blatantly wrong, unconvincing, and by all external measurements a waste of resources, we still allow such speech.201 The Supreme Court has even acknowledged the

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198. Even more invidiously, the rule created in *Frye* does not apply to truly offensive messages with which an overwhelming majority of the community agrees. If we assume the community in which the *Frye* demonstration took place is largely pro-choice, the pictures of fetuses were offensive and the attendant danger ensued because the community disagreed with the speaker's message. However, if the facts were reversed and the protestors displayed extremely graphic and offensive pro-choice signs, the speech may not be silenced because an insufficient number of pro-life drivers would be distracted by the demonstration. Thus, the *Frye* holding both operates in silencing an offensive minority view while sanctioning an offensive majority view.

199. *See* MILL, supra note 166, at 23 (discussing the danger of, and state's common overreaction to, the "propagation of error").


201. *See* JOHN STUART MILL, Of the Limits to the Authority of Society Over the Individual, in MILL, supra note 166, at 100 (in discussing costs to society from individual's irrational, unproductive, or morally reprehensible conduct "[b]ut with regard to the merely contingent or, as it may be called, constructive injury which a person causes to society by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom").
genuine emotional harm certain forms of protected speech cause. 202 If we follow the majority’s line of thinking to its ultimate conclusion, we are left with the bleak and dangerous prospect of governmental prohibition of all speech which may proximately cause physical or psychological harm, regardless of the extent or likelihood, and despite the American tradition of protecting such activity.

This is not to say that if we reject the holding in Frye, the state is without recourse. The state certainly has an interest in preventing traffic accidents, and all demonstrations on roadsides pose some risk of accident. The state may increase the penalty for inattentive or careless driving. 203 It may increase the amount of training necessary to get a driver’s license and increase the penalty for driving without a license. The state may restrict the size and number of signs so that they do not blind the driver. 204 The state may impose stricter safety requirements on vehicles to minimize the risk of injury. The state may place shrubbery and a higher curb between the sidewalk and the street to provide a buffer zone. None of these restrictions speak to the content of the roadside expression.

VI. Conclusion

Frye v. Kansas City Missouri Police Department 205 drastically enlarged disgruntled groups’ ability to silence unpopular speakers, granting the driving majority a heckler’s veto heretofore prohibited in First Amendment jurisprudence. Rather than punish the potentially criminal acts of inattentive drivers, the court chose to silence the unpopular speaker. By placing the power to silence in the hands of the crowd, we do a great injustice to all of us. The Frye court simultaneously gives incentive for violent and reckless behavior, disrespects our most cherished legal traditions, and limits any public and individual benefits of free speech. The Eighth Circuit has unfortunately exchanged constitutionally protected, fundamental rights for temporary freedom from fender-benders and crying children.

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202. See Boos v. Barry, 485 U.S. 312, 322 (1988) (holding “[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’”) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).


204. See Foti v. City of Menlo Park, 146 F.3d 629, 640 (9th Cir. 1998).

205. 375 F.3d 785 (8th Cir. 2004), cert. denied, 125 S. Ct. 1639 (2005).