*First Amendment — Freedom of Speech — Content Neutrality* — McCullen v. Coakley

For over forty years, the distinction between content-based and content-neutral restrictions on speech has been central to the Supreme Court's First Amendment jurisprudence. With few exceptions, the Court has struck down laws that make facial distinctions between different subject matters or viewpoints, while upholding those that do not. Last Term, in *McCullen v. Coakley*,[1] the Supreme Court held that a law establishing a fixed buffer zone outside of Massachusetts abortion clinics was a content-neutral "time, place, or manner" restriction on speech, but that it was unconstitutional because it was not narrowly tailored. The Court instead should have recognized that a restriction on speech that applies only at abortion clinics is content based, but that because it protects women's constitutional right to seek abortions, it could, with more adequate tailoring, survive strict scrutiny.

Massachusetts has long been a focal point in the dispute over abortion rights in the United States. During the 1990s, the state "experienced repeated incidents of violence and aggressive behavior outside" abortion clinics.[2] In response, the Massachusetts legislature in 2000 enacted a statute — modeled after a provision upheld by the Supreme Court in *Hill v. Colorado*[3] — that limited protest activities outside of abortion clinics.[4] But by 2007, some state officials, citing difficulties in enforcement, had "come to regard the 2000 statute as inadequate,"[5] and the legislature amended it in November of that year.[6] The amended statute provided that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet."[7] It made exceptions for four classes of individuals, including "employees or agents of such facility acting within the scope of their employment."[8]

Eleanor McCullen is a Massachusetts pro-life activist who regularly engages in advocacy outside of abortion clinics. Eschewing the confrontational tactics of some protesters, McCullen conducts "sidewalk counseling," in which she offers information about alternatives to abortion while

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[1] 134 S. Ct. 2518 (2014).

[2] McGuire v. Reilly, 260 F.3d 36, 39 (1st Cir. 2001).

[3] 530 U.S. 703 (2000).

[4] McCullen v. Coakley, 571 F.3d 167, 173 (1st Cir. 2009).

[5] *McCullen*, 134 S. Ct. at 2525.

[6] *McCullen*, 571 F.3d at 173.

[7] MASS. GEN. LAWS ch. 266, § 120E½(b) (2012), *invalidated by McCullen*, 134 S. Ct. 2518. The statute defined "reproductive health care facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." *Id.* § 120E½(a).

[8] *Id.* § 120E½(b)(2). The law also exempted certain municipal employees, as well as people entering or leaving or in transit past a facility. *Id.*

maintaining a "caring demeanor . . . [and] a calm tone of voice."[9] In 2008, McCullen and several coplaintiffs sued Massachusetts Attorney General Martha Coakley in her official capacity, arguing that the 2007 Act violated the First and Fourteenth Amendments both facially and as applied to them.[10] Following a bench trial, the district court rejected the plaintiffs' facial challenge, holding that the Act was content neutral and that it satisfied intermediate scrutiny.[11]

The First Circuit affirmed. The court unanimously held that the Act was content neutral because the record amply supported Massachusetts's position that the law was enacted for permissible purposes unrelated to the content of any speech.[12] The court also rejected plaintiffs' arguments that the Act's exemption for clinic employees and the fact that it applied only at abortion clinics rendered it content based, stressing that "the mere fact that a content-neutral law has a disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference."[13] Having determined the law was content neutral, the court found the Act sufficiently tailored to survive intermediate scrutiny.[14] On remand, the district court rejected the plaintiffs' as-applied challenges,[15] and the First Circuit affirmed once more.[16]

The Supreme Court reversed. Writing for the Court, Chief Justice Roberts[17] found that while the Act was content neutral, it was not narrowly tailored and thus could not satisfy intermediate scrutiny. The Chief Justice began his analysis by articulating the degree to which the government may permissibly regulate speech in a public forum.[18] These areas are among the most important "venues for the exchange of ideas,"[19] and as a result, "the government's ability to restrict speech in such locations is 'very limited.'"[20] But while, in such areas, the government may not restrict expression on the basis of its content, it has "somewhat wider leeway to regulate features of speech unrelated to its content."[21] Thus, the Court explained, a restriction on speech in a

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9 *McCullen*, 134 S. Ct. at 2527.

10 *Id.* at 2528.

11 *See* McCullen v. Coakley, 573 F. Supp. 2d 382, 416 (D. Mass. 2008).

12 McCullen v. Coakley, 571 F.3d 167, 176–78 (1st Cir. 2009).

13 *Id.* at 177.

14 *See id.* at 181.

15 *See* McCullen v. Coakley, 844 F. Supp. 2d 206, 225 (D. Mass. 2012); McCullen v. Coakley, 759 F. Supp. 2d 133, 144 (D. Mass. 2010).

16 *See* McCullen v. Coakley, 708 F.3d 1, 3 (1st Cir. 2013).

17 The Chief Justice was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

18 *McCullen*, 134 S. Ct. at 2528–29. The Chief Justice observed that the Act, "[b]y its very terms," restricted access to such areas. *Id.* at 2528.

19 *Id.* at 2529.

20 *Id.* (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).

21 *Id.*

public forum will be upheld if it satisfies the three-part test outlined in *Ward v. Rock Against Racism*[22]: it must (1) be "justified without reference to the content of the regulated speech," (2) be "narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of information."[23]

Having articulated the applicable legal standard, the Chief Justice went on to determine that the Act was content neutral.[24] First, he explained that the fact that the Act applied only at abortion clinics did not "render[] [it] content based."[25] The law did not regulate what petitioners may say, but rather simply "where they say it."[26] Thus, "the Act [did] not draw content-based distinctions on its face," and "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."[27] Under the *Ward* test, what matters is not the effect of a law, but how it is justified, and the asserted purposes of the Act were indisputably content neutral.[28] Moreover, because Massachusetts sought to address a problem that was "limited to abortion clinics," the fact that the Act applied only at those clinics was a virtue: it was "a limited solution" to a "limited . . . problem," "one that restricts less speech, not more."[29]

Second, the Chief Justice explained that the Act's exemption for clinic employees did not amount to impermissible viewpoint discrimination. Because the exception applied only to those employees acting within the scope of their employment, it made clear "that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers."[30] And since "[t]here [was] no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones,"[31] the exemption did not "facilitate speech on only one side of the abortion debate."[32]

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[22] 491 U.S. 781 (1989).

[23] *McCullen*, 134 S. Ct. at 2529 (quoting *Ward*, 491 U.S. at 791) (internal quotation mark omitted).

[24] *See id.* at 2530. Chief Justice Roberts also explained that, contrary to the position of Justice Scalia in dissent, it was appropriate for the Court to reach the question of the statute's content neutrality, because "[t]he content-neutrality prong of the *Ward* test is logically antecedent to the narrow-tailoring prong." *Id.*

[25] *Id.* at 2531.

[26] *Id.*

[27] *Id.*

[28] *Id.* The Act's asserted purposes were "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Respondents' Brief on the Merits at 27, *McCullen*, 134 S. Ct. 2518 (No. 12-1168).

[29] *McCullen*, 134 S. Ct. at 2532.

[30] *Id.* at 2533.

[31] *Id.*

[32] *Id.* at 2534. The Chief Justice also explained that "[i]t would be a very different question" if a clinic *had* authorized such speech, but that such authorization would still only "support an as-applied challenge." *Id.*

Having thus determined that the Act was content neutral, the Court nevertheless found that the Act did not satisfy *Ward*'s narrow tailoring prong, because "[t]he buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests."[33] The Chief Justice explained that by forcing the petitioners to move away from the clinic entrances, the Act prevented them from distributing literature and engaging in personal conversations — "[i]n short . . . depriv[ing] petitioners of their two primary methods of communicating with patients."[34] The fact that petitioners remained free to "chant[] slogans and display[] signs . . . outside the buffer zones . . . misses the point."[35] Their message was bound up in their mode of delivering it; as a result, if patients entering the clinic could only "see and hear . . . vociferous opponents of abortion, then the buffer zones [had] effectively stifled petitioners' message."[36] Moreover, while the Commonwealth provided evidence of pro-life advocates obstructing access at only a single clinic, the Act applied at every clinic across the state.[37] The Chief Justice concluded by rejecting Massachusetts's claim that other approaches were unworkable, writing that the evidence in the record was insufficient to support this position.[38] It is not enough that a restriction on speech is easier for a state to administer: "the prime objective of the First Amendment is not efficiency."[39]

Justice Scalia concurred in the judgment,[40] criticizing the majority for erroneously finding the Act to be content neutral, and in so finding, "do[ing] violence to a great swath of [the Court's] First Amendment jurisprudence."[41] He first chastised the majority for its overreach with respect to the content-neutrality question: because the Court's holding that the Act was not narrowly tailored was enough to dispose of the case under the lesser scrutiny appropriate for content-neutral regulations, "there [was] no principled reason for the majority to decide whether the statute [was] subject to strict scrutiny."[42]

In any case, Justice Scalia contended, "the Court provide[d] the wrong answer" to "the level-of-scrutiny question."[43] The fact that the Act applied only at abortion clinics — and thus, as a practical matter, only to abortion-related speech — was enough to indicate that it was

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[33] *Id.* at 2537.
[34] *Id.* at 2536.
[35] *Id.*
[36] *Id.* at 2537.
[37] *Id.* at 2539. The Court observed that this was "hardly a narrowly tailored solution." *Id.*
[38] *Id.* at 2539–40.
[39] *Id.* at 2540.
[40] Justice Scalia was joined by Justices Kennedy and Thomas.
[41] *McCullen*, 134 S. Ct. at 2542 n.2 (Scalia, J., concurring in the judgment).
[42] *Id.* at 2541–42.
[43] *Id.* at 2543.

content based. Justice Scalia agreed that the controlling question was whether the statute was "justified without reference to the content of the regulated speech,"[44] but rejected the idea that the Commonwealth could meet this burden merely by asserting a neutral justification. In fact, "[e]very objective indication show[ed] that the [Act's] primary purpose [was] to restrict speech that opposes abortion."[45] Justice Scalia emphasized that the Act applied to all abortion clinics in the state, despite the fact that "only one is known to have been beset by the problems that the statute supposedly addresses."[46] Whereas the majority found that this fact demonstrated the Act's insufficient tailoring, Justice Scalia insisted that "it [was] also relevant — powerfully relevant — to whether the law [was] really directed to safety and access concerns or rather to the suppression of a particular type of speech."[47]

Justice Scalia also would have found the Act to be content based because of its exemption for clinic employees acting within the scope of their employment. Because "'scope of employment' is a well-known common law concept that includes '[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business,'"[48] the exemption necessarily included employee "speech favorable to abortion rights" since "[t]here is not a shadow of a doubt" that such speech is part of the foreseeable conduct of a clinic employee.[49] Because the statute therefore permitted pro-abortion speech while "excluding antiabortion speech, it discriminate[d] on the basis of viewpoint."[50] Having thus concluded that the Act was a content-based restriction on speech subject to strict scrutiny, Justice Scalia declined to address the narrow tailoring question, "prefer[ring] not to take part in the assembling of an apparent but specious unanimity."[51]

Justice Scalia's incredulity in the face of the majority's finding that the Act was content neutral reflects a commonsense intuition: when a law disproportionately — or indeed exclusively — burdens speech on a single topic, that law is in an important sense "based" on that topic. Abortion clinic buffer zones place specific and targeted burdens on antiabortion speech like that of Eleanor McCullen and her coplaintiffs. Such laws should be subject to the highest scrutiny. But this is not to

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[44] *Id.* (quoting *id.* at 2531 (majority opinion) (internal quotation marks omitted)) (internal quotation marks omitted).

[45] *Id.* at 2544 (Scalia, J., concurring in the judgment).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 2547 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1465 (9th ed. 2009)).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 2548. Justice Alito also wrote a brief opinion concurring in the judgment. He argued that the exemption for clinic employees meant that "[i]t [wa]s clear on the face of the . . . law that it discriminate[d] based on viewpoint." *Id.* at 2549 (Alito, J., concurring in the judgment).

say that they should always be struck down, because they do more than ensure public safety and unobstructed sidewalks. Rather, they protect women in the exercise of what the Court has held to be an important constitutional right,[52] and thus further what is plainly a compelling state interest. Advocates on both sides of the abortion debate would be better served by a more forthright approach.[53]

Perhaps no branch of the Supreme Court's constitutional jurisprudence has been so roundly and routinely criticized as that concerning content neutrality. One recent commentator, surveying the scholarly criticism, notes that the standard critique — that the Court's "application of [content neutrality doctrine] has been unprincipled, unpredictable and deeply incoherent"[54] — has become "such a truism that citation does not entirely do it justice."[55] The Court itself has struggled to articulate its standards cogently, explaining that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task."[56] Moreover, the problem is not simply a failure of clarity or coherence on the part of the Court; rather, the very "concept of content discrimination . . . is rife with ambiguity."[57]

Against the backdrop of this apparent confusion, two stable principles emerge. First, a law is content based if it facially discriminates between different subject matters or different viewpoints, even if the government articulates a plausible neutral justification.[58] Second, a law that does not make such distinctions on its face is content neutral "so long as it is supported by a *sufficient neutral justification*."[59] In making the latter determination, the Court nearly always accepts those justifications proffered by the government.[60]

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[52] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (explaining that the right to seek an abortion is part of a broader liberty interest in making "choices central to personal dignity and autonomy").

[53] As, indeed, would the Court itself, which could bolster its credibility by refuting the suggestion that it has created "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion." *McCullen*, 134 S. Ct. at 2541 (Scalia, J., concurring in the judgment).

[54] Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 233 (2012). Professor Kendrick herself, it should be noted, is a dissenting voice, arguing that "these claims of incoherence are greatly overstated." *Id.*

[55] *Id.* at 233 n.3.

[56] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 642 (1994).

[57] Kendrick, *supra* note 54, at 241–42; *see also id.* at 241–47 (observing that "content" may be understood as inhering in viewpoint, subject matter, or even a mode of communication, among other possibilities).

[58] *See id.* at 260–61. For cases in which the Court found facially discriminatory laws to be content based despite strong neutral justifications, see *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010); and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993).

[59] Kendrick, *supra* note 54, at 286.

[60] *See id.* at 281, 285. Thus, the *McCullen* Court was faithfully applying its content neutrality doctrine. This comment argues that the fault lies not with the Court's application, but with the doctrine itself.

The Court's content inquiry is thus heavily dependent on the face of the law. But this approach seems out of step with the Court's own emphasis on the motives underlying restrictions on speech. In *Police Department v. Mosley*,[61] the Court, in its most famous articulation of the content standard, emphasized that "above all else, the First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter, or its content."[62] And in *Ward*, the case that supplied the test applied by the *McCullen* majority, the Court explained 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."[63] Scholars, led by then-Professor Elena Kagan, have similarly emphasized that the best justification for the content distinction is as one of "a series of tools to flush out illicit motives and to invalidate actions infected with them."[64]

The Court's approach in *McCullen* illustrates the disconnect between the goals of the content neutrality doctrine and its applications. In rejecting petitioners' argument that the Act was content based because it applied only at abortion clinics, the Court declared that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."[65] But as Justice Scalia recognized, laws that carry such disproportionate burdens because they are limited to a specific location carry a high risk of concealing improper motives.[66] It makes little sense simply to take the government's word for it that its purposes are benign.[67] Thus, even Justice Kagan — a member of the *McCullen* majority — previously argued that "a facially general law that operates to restrict only speech of a particular kind ought to confront the strictest review."[68] Laws like the Act that limit speech at specific, politically salient locations are particularly likely to impose this sort of disparate burden.[69] When a

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[61] 408 U.S. 92 (1972).

[62] *Id.* at 95 (emphasis added).

[63] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[64] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

[65] *McCullen*, 134 S. Ct. at 2531.

[66] *See id.* at 2543 (Scalia, J., concurring in the judgment); *see also* Hill v. Colorado, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) ("By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content.").

[67] *See McCullen*, 134 S. Ct. at 2544 (Scalia, J., concurring in the judgment).

[68] Kagan, *supra* note 64, at 501 n.238.

[69] *See, e.g.*, *McCullen*, 134 S. Ct. at 2543 (Scalia, J., concurring in the judgment) (arguing that a "blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur — and where that speech can most effectively be communicated"

facially neutral restriction foreseeably places a substantial burden on speech concerning a single topic, the Court should acknowledge that this restriction is content based and subject it to strict scrutiny.[70]

Buffer laws like that in *McCullen* should thus be subject to strict scrutiny, but that does not mean they can never survive such scrutiny. Although "First Amendment standards are rigorous" and "at their strictest make it difficult for the Government to prevail," they "do not make it impossible for the Government to prevail."[71] Indeed, the Court has at times upheld content-based restrictions after subjecting them to strict scrutiny.[72]

The case for doing so is particularly strong when the restriction on speech serves to advance another constitutional interest. Professor Steven Heyman has argued that while "free speech rights may not be subordinated to social welfare in general, . . . individuals may also have other fundamental rights, the protection of which may justify regulation of speech."[73] In many cases, the government seeks to regulate speech in order to advance some general social interest, such as noise reduction. In such cases, speech should nearly always be protected. But, "[t]he proposition that one's rights may not be restricted for the sake of social welfare does not entail that they may not be limited to protect other rights."[74] When a restriction on speech is intended to protect some other fundamental or constitutional right, recognizing that the free speech right is counterposed against a right of equal stature "allows us to express the competing values in more commensurable

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is clearly content based); Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2588 (2007).

[70] The Court has previously recognized that a law's disproportionately discriminatory effects may inform the analysis of whether it is content based. In *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), the Court held that "in its practical operation, [the statute in question] imposes a burden based on the content of speech and the identity of the speaker." *Id.* at 2665. And in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court explained that "the inevitable effect of a statute on its face may render it unconstitutional." *Id.* at 384.

Kendrick has argued that the Court's content neutrality jurisprudence is broadly analogous to its equal protection jurisprudence. *See* Kendrick, *supra* note 54, at 286. This analogy extends to a common "lack of concern with facially neutral laws having disparate effects." *Id.* at 289. The approach articulated in this comment amounts to the recognition of a "disparate impact" standard in First Amendment doctrine. The Court has, of course, rejected such an approach in the equal protection context. *See* Washington v. Davis, 426 U.S. 229, 239–45 (1976). But that rejection has itself been subject to substantial scholarly criticism. *See, e.g.*, Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

[71] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 846 (2000) (Breyer, J., dissenting).

[72] *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010); Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion).

[73] Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1308 (1998).

[74] *Id.*

terms, and to assess the strength of each value within a comprehensive framework based on the idea of rights."[75]

The Supreme Court has, itself, taken a similar approach. In *Burson v. Freeman*,[76] the Court upheld a content-based restriction on electioneering within a certain distance of polling places, observing that this was "the rare case in which . . . a law survives strict scrutiny."[77] In finding that the State had satisfied its burden under that standard, the Court placed particular emphasis on the fact that in that case, "the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud."[78] The fact that another constitutionally protected right was at stake made the Court more willing to take the unusual step of upholding a statute under strict scrutiny.

*Burson* thus stands for the proposition that a state has a compelling interest in protecting the free exercise of constitutional rights. But this interest extends only as far as ensuring that citizens are able to make autonomous and uncoerced choices about whether and how to exercise those rights. Because of this, restrictions on speech designed to protect another constitutional right must not target the persuasive effects of speech.[79] One is not prevented from freely exercising a right when one is merely *persuaded* not to do so; rather, in such cases speech promotes autonomous decisionmaking. On the other hand, when speech influences action through intimidation or deception, it impedes the hearer in the exercise of his or her deliberative faculties.[80] As in *Burson*, the nonpersuasive aspects of speech may sufficiently burden the exercise of a constitutional right to justify regulation.[81]

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[75] Steven J. Heyman, Symposium, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 571 (2003). On rights-versus-rights balancing more generally, see Aharon Barak, *The Supreme Court, 2001 Term — Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 96 (2002).

[76] 504 U.S. 191 (1992).

[77] *Id.* at 211 (plurality opinion). Like that at issue in *McCullen*, the statute in *Burson* established a fixed buffer zone within which certain speech activities were prohibited. *Id.* at 193.

[78] *Id.* at 211; *see also id.* at 209 n.12 (characterizing the case as one "in which there was conflict between two constitutional rights").

[79] *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) ("The government may not suppress speech on the ground that it is too persuasive."); *see also* Hill v. Colorado, 530 U.S. 703, 717 (2000) (recognizing a "right to persuade" under the First Amendment (citing Thornhill v. Alabama, 310 U.S. 88 (1940) (internal quotation marks omitted))).

[80] *See* Strauss, *supra* note 79, at 335–36 (distinguishing between persuasive speech, which appeals to reason, and "speech that seeks to precipitate an ill-considered reaction," *id.* at 335, for example through intimidation, and arguing that the latter constitutes "a violation of autonomy, akin to coercion," *id.* at 366).

[81] *See Burson*, 504 U.S. at 199 (plurality opinion) (recognizing a state's "compelling interest in protecting voters from confusion and undue influence").

*McCullen* presents a similar set of circumstances. Just as in *Burson*, a state restriction on speech was enacted for the purpose of protecting citizens' capacity to freely exercise another constitutionally protected right. Admittedly, that is not how the Commonwealth of Massachusetts presented the issue. In an attempt to stress the law's content neutrality, the Commonwealth focused not on the protection of women seeking abortions, but on the general social interests of public safety and access to health care. But just as it defies common sense to hold that a law restricting speech only at abortion clinics is not based on the abortion-related content of that speech, so too does it defy common sense to fail to recognize that such a law aims to protect women in the exercise of their constitutional right to seek an abortion. *Burson*, therefore, provides the appropriate framework.[82]

Still, the constitutionality of content-based restrictions on speech that are designed to protect another constitutional right depends on whether they are narrowly tailored, and the *McCullen* Court ultimately reached the correct result precisely because Massachusetts failed to make any such showing. In *McCullen*, the Court's finding that the Act was not narrowly tailored turned in large part on Massachusetts's failure to develop a sufficient factual record.[83] It is likely the case that the presence of protesters often dissuades women from seeking abortions through intimidation. But where only one clinic in the state regularly faced such problems, the Act's sweeping restriction on *all* speech at *all* clinics was not reasonably necessary. Even so, the Court's reasoning leaves open the possibility that narrow tailoring could be satisfied by a more limited law, or by a more substantial factual showing of necessity. When the Court next faces a similar question, it should acknowledge both the gravity of the government's restriction, and the seriousness of the right it is meant to protect. A more honest approach would both lend credibility to the Court's content neutrality jurisprudence and better advance the purposes of the doctrine by more effectively rooting out improper government motive.

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[82] One might argue that because the First Amendment facilitates democratic self-governance, it is reasonable to limit it in the service of advancing democracy by protecting voting, but it would not be reasonable to limit it in the service of other rights. There are two answers to that argument. The first is that the First Amendment not only protects democracy, but also individual autonomy. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) ("The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being."). And as the Court made clear in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a woman's right to control her own reproductive choices is a key component of individual liberty. *Id.* at 852. Second, the right to seek an abortion is not irrelevant to the political process. After all, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856.

[83] *See McCullen*, 134 S. Ct. at 2539–40.