

Injunctances: Labor Protests, Abortion-Clinic Picketing, and *McCullen v. Coakley*

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Introduction

In *McCullen v. Coakley*, the Supreme Court invalidated a Massachusetts law that established a 35-foot “speech free” buffer zone around abortion clinics.¹ Specifically, the law prohibited any person from “knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet.”²

The law was the latest iteration of abortion-clinic buffer zones to reach the Supreme Court. In 2000, in the highly controversial case *Hill v. Colorado*, the Court upheld a so-called “floating buffer zone” that established an 8-foot bubble around those within 100 feet of a medical facility.³ Whereas that law regulated only speech conduct within 100 feet of a medical facility—it is unlawful to “knowingly approach another person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling”⁴—the Massachusetts law made mere public presence in the 35-foot zone a criminal offense.

That sweeping prohibition was a little too much for the Supreme Court, which unanimously struck down the law as an unconstitutional violation of the First Amendment. There was, however, disagreement among the justices as to why the law was unconstitutional. Chief Justice John Roberts was joined in the five-justice majority by

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¹ 134 S. Ct. 2518 (2014).

² Mass. Gen. Laws, ch. 266, § 120E½(b)(2014).

³ *Hill v. Colorado*, 530 U.S. 703 (2000).

⁴ Colo. Rev. Stat. § 18-9-122(3).

the “liberal” wing of the Court: Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Roberts ruled that the law was neither content-based nor viewpoint-based and therefore need not be analyzed under strict scrutiny.⁵ Nevertheless, the breadth of the law’s restrictions meant that it “burden[s] substantially more speech than is necessary to further the government’s legitimate interests” and was thus unconstitutional.⁶

In a characteristically vehement concurrence—a dissent in all but name—Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, argued that the majority opinion’s “dicta” on content-neutrality was unnecessary to the “not narrowly tailored” holding and, moreover, that the law was in fact content-based and therefore deserved strict scrutiny.⁷ Scalia reiterated what he had said in previous abortion-clinic buffer zone cases: that the laws are clearly content-based ordinances that can’t survive the heightened scrutiny they deserve.⁸

In this article I will examine the history of laws and injunctions that prohibit picketing and protesting in public places. I will then look at the lessons we can learn from that history and the decision in *McCullen*.

Before abortion became a lively issue, the majority of legal actions that prohibited public picketing were injunctions or ordinances against labor unions. Abortion-clinic buffer zones and labor-picketing ordinances can be seen as “injordinances,” a combination of an ordinance and an injunction.⁹ An injordinance resembles a law in most regards—it is passed by the legislative body and is enforced through criminal sanctions against the general public—but it resembles an injunction in that it applies to specific places and proscribes specific conduct around that space. Moreover, like an injunction, the injordinance is justified by appeals to prior unlawful actions of a group of people.

⁵ *McCullen*, 134 S. Ct. at 2525–41 (opinion of Roberts, C.J.).

⁶ *Id.* at 2535 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

⁷ *Id.* at 2541–49 (Scalia, J., concurring in judgment).

⁸ See *Hill*, 530 U.S. at 741–64 (Scalia, J., dissenting).

⁹ Credit for this useful term goes to the amicus brief of the Life Legal Defense Foundation and Walter B. Hoye II. See, Brief for the Life Legal Defense Foundation and Walter B. Hoye II as Amici Curiae Supporting Petitioners at 4, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168).

Given that injordinances came out of injunctions, exploring the history of labor injunctions allows us to examine Justice Scalia's claim in his dissent in *Hill*, that he has "no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protesters, or union members seeking to 'educate' the public about the reasons for their strike."¹⁰

Is Justice Scalia's claim correct? The controversial issue of abortion and women's reproductive rights sits in the background of cases like *Hill* and *McCullen*. Does this lead more pro-abortion-rights justices to view abortion picketers as a unique type of threat to exercising an important right? Similarly, do anti-abortion-rights justices give abortion picketers more of a free pass when it comes to the state's role in protecting people from unwanted interference in a public place?

These counterfactuals are probably unanswerable, but a careful examination of past jurisprudence on labor injunctions might give us a better window into the questions. Perhaps, at bottom, what really animates views in this area is a background belief about how disruptive and violent either (or both) labor picketers and abortion picketers are likely to be. Did justices and judges in past labor-picketing cases, and do justices and judges in current abortion-picketing cases, adopt an unstated position of taking judicial notice that either labor union protesters or abortion protesters are uniquely prone to violent behavior? If either labor protesters or abortion protesters are viewed as a swirling, uncontrollable mob, then it seems far more likely that a judge will uphold laws and injunctions restricting their activities and speech. Otherwise, generally applicable laws such as trespass, assault, and obstruction should be sufficient to deal with the occasional bad apple whose First Amendment-protected speech act turns into unlawful action.

Knowing that such bad apples would be unsympathetic plaintiffs, both labor lawyers of the past and those fighting abortion-clinic buffer zone laws today have tried to choose peaceful clients to bring challenges. For example, septuagenarian grandmother Eleanor McCullen and her friends have moral and religious convictions that abortion is wrong. Like many people with deeply held beliefs, they would like to try to convince others that they are correct and hopefully to help others avoid making a decision that they view as deeply

¹⁰ *Hill*, 530 U.S. at 742 (emphasis in original).

immoral. To that end, McCullen and others sit outside Massachusetts abortion clinics and try to convince women not to have abortions with “close, kind, personal communication, with a calm voice, a caring demeanor, and eye contact.”¹¹

Given that *modus operandi*, Eleanor McCullen has never been arrested. Instead, over the years, she and her husband have spent over \$50,000 helping women choose options other than abortion. She has paid for “baby showers, living quarters, furniture, heating oil, electricity, water, gasoline, clothing, food, baby formula, diapers, strollers, or whatever else women needed.”¹²

The other petitioners in *McCullen v. Coakley* have similar stories.¹³ They style themselves as “counselors” not “protesters,” and Chief Justice Roberts accepted that characterization in his majority opinion, as did the four “liberal” justices who joined him. So perhaps *McCullen* is actually about the right to be a decent, lawful, unobtrusive person who counsels people in a time of need. After all, McCullen has good evidence that many women entering abortion clinics are ignorant of other options or have not been fully apprised of the risks. She convincingly argued that, in order to be a better counselor, communication with the women needs to be up close and personal.¹⁴

In the past, many who challenged labor injunctions were similarly peaceful. Accordingly, the running narrative through these cases is, essentially, how much do peaceful protesters have to suffer under regulations designed to curb non-peaceful protesters?

Labor Law Injunctions

Compared to decades past, today we rarely hear about labor disputes and labor injunctions. But questions about the practices of labor unions were common in the courts from the 19th century through the first decades of the 20th. Prior to abortion controversy engendered by *Roe v. Wade*, the most common form of picketing was in the context of labor disputes. Union members and supporters would picket recalcitrant employers, retailers that sold products of

¹¹ Petition for Writ of Certiorari at 11, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168).

¹² Brief for Petitioners at 10, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168).

¹³ See *id.* at 10–11.

¹⁴ *Id.* at 11.

the business, and many other places where they felt their message should be heard. As a consequence, courts often entered injunctions against picketing.

The early labor movement was dogged by many types of antagonistic laws and officials. The first obstacle was simply the illegality of unions as conspiracies in restraint of trade. In 1806, in one of the first American cases arising from a labor strike, a group of Philadelphia cordwainers were prosecuted for striking for higher wages. The charge against them was conspiracy, and they lost.¹⁵ The legal status of labor unions was shaky until Massachusetts Chief Justice Lemuel Shaw ruled that

associations [unions] may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy.¹⁶

Shaw's reasoning—that unions were not per se illegal but that the means that they use could be illegal—would be applied to cases concerning unions picketing. Each picketing situation would be analyzed individually. Up until the 1930s, many times the unions lost.

Section 20 of the Clayton Act provided some protection for unions that wished to picket outside workplaces. It provides that “no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert . . . from recommending, advising, or persuading others by peaceful means.”¹⁷ One of the first cases to analyze Section 20, *American Steel Foundries v. Tri-City Cent. Trades Council*, arose out of a labor dispute in which the business charged “that [a] conspiracy was being executed by organized picketing, accompanied by threats, intimidation and violence toward persons employed or

¹⁵ Clarence E. Bonnett, *The Origin of the Labor Injunction*, 5 S. Cal. L. Rev. 105, 113 (1931).

¹⁶ *Commonwealth v. Hunt*, 45 Mass. 111 (1842).

¹⁷ 29 U.S.C § 52 (2012).

seeking employment there.”¹⁸ The case is notable not only for the way in which labor picketing is treated as nearly per se illegal, but also for how it nearly entirely ignores the crucial speech values at issue.

Chief Justice William Howard Taft wrote that Section 20 of the Clayton Act added “no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always.”¹⁹ Equitable injunctive relief against protesters and picketers had always been properly focused on enjoining truly unlawful acts, such as force and intimidation, while letting lawful persuasion run free. With Section 20, “Congress wished to forbid the use by the federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be.”²⁰ Section 20 merely underscored and clarified common-law practice.

As would become a common inquiry in cases involving labor injunctions, and also in future cases involving abortion-protesting injunctions, the Court asked the key question: “How far may men go in persuasion and communication and still not violate the right of those whom they would influence?”²¹

Taft’s answer to this question is relevant to the modern issue of abortion-clinic buffer zones:

In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other’s action are not regarded as aggression or a violation of that other’s rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this

¹⁸ 257 U.S. 184, 193 (1921).

¹⁹ *Id.* at 203.

²⁰ *Id.*

²¹ *Id.* at 204.

the person sought to be influenced has a right to be free and his employer has a right to have him free.²²

In the end, the Court held that the picketing was unlawful, describing the difficulty in finding a way through the picketers as “running a gauntlet.”²³ The Court continued: “It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name ‘picket’ indicated a militant purpose, inconsistent with peaceable persuasion.”²⁴

In fact, Chief Justice Taft came very close to saying that any picketing worthy of the name is nearly per se unlawful because of the nature of picketing. And if any act of violence or intimidation occurred, then the entire peaceful, communicative purpose of picketing is permanently undercut: “When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term.”²⁵

Interestingly, Taft took it upon himself to issue a fairly specific and limiting injunction in the case. The strikers “should be limited to one representative for each point of ingress and egress in the plant or place of business” who is authorized by the group to observe, communicate, and persuade in such a way that “shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps.”²⁶ The behavior Taft describes is not unlike that of Eleanor McCullen and her friends in front of abortion clinics.

Overall, in *American Steel* we see the Court dealing with the scope and purpose of injunctive relief in a relatively hostile and

²² *Id.*

²³ *Id.* at 205.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 206–07.

unforgiving manner. Picketing is seen as nearly presumptively wrong due to the “necessary element of intimidation in the presence of groups as pickets,” and the speech aspect of picketing is almost ignored completely.²⁷ This is, of course, understandable given the state of First Amendment jurisprudence at the time.

We also see how the violence associated with labor disputes helped undercut any claim that picketing could remain peaceful. It was “clear from the evidence” that “violent methods were pursued from time to time in such a way as to characterize the attitude of the picketers as continuously threatening,” and that the situation was bad enough that “[a] number of employees, sometimes fifteen or more, slept in the plant for a week during the trouble, because they could not safely go to their homes.”²⁸ Again, the situation is quite similar to the violence that surrounds abortion protests, including actual murders of abortion doctors.²⁹

In the first decades of the 20th century, state courts often heard cases involving labor-picketing injunctions. Sometimes, injunctions would be upheld against small pickets and nonviolent protests. In Texas, in *Webb v. Cooks’, Waiters’, and Waitresses’ Union*, the court of civil appeals upheld an injunction against those picketing a cafe that refused unionization.³⁰ The picketing consisted of two or more members at a time, but usually two, “walking back and forward in front of plaintiff’s restaurant and handing out to passers-by cards upon which were printed the words: ‘This cafe is unfair to organized labor.’”³¹ Picketers were also heard to have said, “Please don’t go into that café!,” “We are working for organized labor!,” and “We will win!”³²

Despite these innocuous pleas, the court railed against the conduct of the picketers, even while conceding that violence was not at issue. “We at least cannot hide nor obscure the truth with the specious contention urged herein that *no open threats or violence was*

²⁷ *Id.* at 207.

²⁸ *Id.* at 200.

²⁹ William Booth, Doctor Killed During Abortion Protest, *Wash. Post.*, Mar. 10, 1993, at A1.

³⁰ 205 S.W. 465 (Tex. 1918).

³¹ *Id.* at 466.

³² *Id.*

proven. We must know what has frequently been declared in adjudicated cases, that restraint of the mind is just as potent as a threat of physical violence."³³

In a 1902 New Jersey case, the court was asked whether "one person has a right to *persuade* another to work or not to work."³⁴ Only "if the other person is willing to listen and be persuaded," said the court, because "no person has a right to speak to another after he knows that his endeavor is unwelcome."³⁵

In general, by the 1930s, labor unions were more often on the losing side of challenges to labor injunctions. In the words of one early-'30s commentator, Jerome Hellerstein, "courts have tended without analysis to conclude that everything beyond the stationing of a few pickets who carry banners or in calm terms speak to customers or employees is beyond the lawful ambit permitted the worker."³⁶ Hellerstein went on to passionately explain how the important message of labor unions depended upon the use of language that the courts had classified as "intimidating":

Certainly when a picket yells "scab" or curses a strike breaker or a customer, he is unmistakably expressing his contempt for the employee or the customer, and is voicing his vehement disapproval of the latter's conduct. . . . It is exceedingly important to recognize that there is a strong emotional force which can be here exerted, which has no relation to a threat of physical injury or violence, a moral force which labor has every right to exert in industrial struggles, and that it greatly handicaps the worker to deprive him of the use of this weapon.³⁷

The *American Steel* decision "dealt a death blow to the legality of mass picketing in this country."³⁸ Yet labor picketing was resuscitated by the Norris-LaGuardia Act, which limited equity jurisdiction of federal courts to situations where "such action is imperatively

³³ *Id.* at 467 (emphasis added).

³⁴ *Frank v. Herold*, 63 N.J. Eq. 443 (N.J. Ch. 1902) (emphasis added).

³⁵ *Id.* at 449–50.

³⁶ Jerome R. Hellerstein, *Picketing Legislation and the Courts*, 10 No. Car. L. Rev. 158, 177 (1931).

³⁷ *Id.* at 178.

³⁸ *Id.* at 182.

demanded.”³⁹ Specifically, nine activities were insulated from injunction, including work stoppages, union membership, peaceful assembly to promote their “interests in a labor dispute,” and, importantly, “[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.”⁴⁰

Norris-LaGuardia gave labor a statutory carve-out, but injunctions were still granted against union picketing when “imperatively demanded.” Most important, the First Amendment had not yet made a significant appearance in the discussion. In the early 1940s, however, the First Amendment would be applied to picketing that, thereafter, the law around public picketing would change dramatically.

The First Amendment and Labor Injunctions

In his dissent in *Hill*, Justice Scalia rightly admonishes the majority for partially relying on the decision in *American Steel* to support Colorado’s anti-abortion picketing statute. In *American Steel*, Scalia writes, “the First Amendment was not at issue, and was not so much as mentioned in the opinion.”⁴¹

In 1921, First Amendment jurisprudence barely existed. Nevertheless, the majority in *Hill* approvingly cited *American Steel* as if subsequent First Amendment decisions did not fundamentally alter the case, and thus did not alter the precedential value of *American Steel*. As the *Hill* majority wrote, while quoting *American Steel*, “None of our decisions has minimized the enduring importance of ‘the right to be free’ from persistent ‘importunity, following and dogging’ after an offer to communicate has been declined.”⁴²

It is shocking to think that a case about labor picketing would fail to even mention the most known and prominent part of the Bill of Rights, but it says something about the state of the First Amendment at the time that it wasn’t brought up. Granted, the First Amendment wasn’t incorporated against the states until *Gitlow v. New York* in 1925,

³⁹ S. Rep. No. 163, 72d Cong., 1st Sess. 11 (1932).

⁴⁰ 29 U.S.C. § 104(e) (2012). For a general discussion of Norris-LaGuardia’s affect on labor injunctions, see, Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 Hofstra Lab. L. J. 97 (1993).

⁴¹ *Hill*, 530 U.S. at 753 (Scalia, J., dissenting).

⁴² *Id.* at 718 (citing *American Steel Foundries*, 257 U.S. at 204).

but, even before incorporation, it was not uncommon for a right to be mentioned in order to highlight it as an important value of a free society. Yet in *American Steel*, speech seems to be hardly valued at all.⁴³ The first question at hand, therefore, is to examine how evolved First Amendment jurisprudence affected the law around labor picketing as well as picketing in general. Second, we must examine how the First Amendment affects, if it does, “common law freedoms in ordinary disputes between private parties.”⁴⁴

In *Lovell v. City of Griffin* (1938), the Court overturned a city ordinance that prevented the distribution of “circulars, handbooks, advertising, or literature of any kind . . . without first obtaining written permission from the City Manager.”⁴⁵ The Court found that “[w]hatsoever the motive which induced [the ordinance’s] adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship.”⁴⁶

In *Lovell*, the Court also performed an early version of a “fit” analysis—that is, analyzing whether a law sweeps in too much lawful conduct in the name of prohibiting unlawful conduct. “The ordinance is not limited to ‘literature,’” wrote Chief Justice Charles Evans Hughes, “that is obscene or offensive to public morals or that advocates unlawful conduct.”⁴⁷ Because the ordinance wasn’t limited to literature that was feasibly proscribable as “involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets,” then the ordinance had to fall.⁴⁸

Analyzing how a statute “fits” with a legitimate government goal is central to any First Amendment question. In both *Hill* and *McCullen*, the Court examined whether, in attempting to limit unlawful intimidation and molestation, the statutes prohibited the lawful exercise of First Amendment rights. In upholding a First Amendment protection of the right to distribute literature, the *Lovell* Court began to insert the First Amendment into the debate about communications

⁴³ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴⁴ Richard A. Epstein, *Wrong on Abortion Picketing, Defining Ideas* (June 30, 2014), <http://www.hoover.org/research/scotus-gets-abortion-picketing-wrong>.

⁴⁵ *Lovell v. City of Griffin*, 303 U.S. 444, 447 (1938).

⁴⁶ *Id.* at 451.

⁴⁷ *Id.*

⁴⁸ *Id.*

on public streets. Recall that in *American Steel*, such First Amendment analysis is absent. There is some discussion of how many permissible peaceful activities were being enjoined, but there is more focus on the rights of *listeners* to be free from annoying and intimidating speech than there is on the abridgment of a fundamental right of the speaker (freedom of speech). In the words of Chief Justice Taft: “the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other’s action are *not regarded as aggression or a violation of that other’s rights.*”⁴⁹

Taft’s focus on the listener is understandable given the state of First Amendment jurisprudence at the time. Now, because the freedom of speech has ascended to such a cherished position in our constitutional hierarchy, such language is strange. Freedom of speech, the ability to speak one’s mind, is now seen as an essential human right for the *speaker*. Listeners are still important, especially in many campaign finance cases, but freedom from annoyance for the listener is certainly not at the same level in our constitutional hierarchy.

After *Lovell*, the law around handbilling and leafleting continued to evolve. In 1939, the Supreme Court decided *Schneider v. State*, a challenge to four municipal ordinances prohibiting the distribution of handbills on public sidewalks.⁵⁰ The Court, in an opinion by Justice Owen Roberts, held that “[a]lthough a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.”⁵¹

In holding this, however, Justice Roberts was quick to point out that the First Amendment did not provide absolute protection to those who were communicating their message by being willfully obstreperous, noisome, and intimidating:

So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using

⁴⁹ *American Steel Foundries*, 257 U.S. at 204 (emphasis added).

⁵⁰ 308 U.S. 147 (1939).

⁵¹ *Id.* at 160.

the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.⁵²

Here, we see further elucidation of the crucial distinction between proscribable, coercive conduct and protected speech. Justice Roberts describes the freedom to pass out literature as a “constitutional liberty” held by the individual, and therefore he focuses less on whether that liberty might annoy others. Stopping traffic and littering are proper objects of state action, but limiting the freedom of speech is not. In *Schneider*, we also see the Court beginning to wrestle with the concept of public forums. “[T]he streets,” wrote Justice Roberts, “are natural and proper places for the dissemination of information and opinion.”⁵³

After *Lovell* and *Schneider*, the stage was set for a constitutional challenge to a pair of labor injordinances. Like the abortion injunctions that would eventually give rise to injordinances, labor injunctions saw the same evolution. In two cases decided the same day, the Supreme Court invalidated labor injordinances designed to curtail labor union speech in specific locations.

In *Thornhill v. Alabama*, the Court overturned the conviction of Byron Thornhill for violating a state law prohibiting people from going “near or loiter[ing] about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business” with the intent to induce “other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons.”⁵⁴ Testimonial evidence showed that

⁵² *Id.* at 160–61.

⁵³ *Id.* at 163.

⁵⁴ *Thornhill v. Alabama*, 310 U.S. 88, 91 (1940).

Mr. Thornhill had been peacefully picketing. According to one witness, a non-union member who showed up for work, “[n]either Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad.”⁵⁵ The Court, in an opinion by Justice Frank Murphy, held that the ordinance violated the First Amendment.

Given that the statute—the injunctive—in *Thornhill* greatly resembled labor injunctions like those in *American Steel*, it is interesting how differently the *Thornhill* Court analyzed the scope of the statute than did the Court in *American Steel*. The *Thornhill* Court was concerned that the statute prohibited too much peaceful speech and thus it would inhibit public debate. As Justice Murphy wrote:

The range of activities proscribed by § 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. . . . Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in § 3448.⁵⁶

In *American Steel*, the Court showed almost no concern that the injunction was too broad.

In *Carlson v. California*, decided the same day as *Thornhill*, the Court overturned the conviction of a man engaged in picketing in front of a tunnel construction work site.⁵⁷ The men walked on the edge of the highway for “a distance of 50 to 100 feet” then turned around to retrace their steps.⁵⁸ Some held signs, including one that said “This job is unfair to CIO.”⁵⁹

⁵⁵ *Id.* at 94.

⁵⁶ *Id.* at 104-05.

⁵⁷ *Carlson v. California*, 310 U.S. 106 (1940).

⁵⁸ *Id.* at 110.

⁵⁹ *Id.*

Again, Justice Frank Murphy wrote the opinion for the Court. “The sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence,” he wrote.⁶⁰ He also added a comment about the legitimate role of the state in maintaining public safety:

The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control.⁶¹

Just one year after *Thornhill* and *Carlson* struck down labor-picketing injordinances, the Court had a chance to revisit the question of traditional labor injunctions in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*.⁶² In *Milk Wagon*, unlike *American Steel*, the Court treated the issue as primarily one of the First Amendment. Just like *American Steel*, however, the Court, in an opinion by Justice Felix Frankfurter, upheld the broad injunction. This time, however, there were vehement and prescient dissents from Justices Hugo Black and Stanley Reed.

During a labor dispute between a dairy and its drivers, an injunction was issued to restrain all union conduct “violent and peaceful.”⁶³ Widespread violence had been associated with the strikes, including “more than fifty instances of window-smashing,” bombs, stench bombs, shootings, and beatings.⁶⁴ Given the scope of the injunction, the question before the Court was whether “a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed.”⁶⁵

⁶⁰ *Id.* at 113.

⁶¹ *Id.*

⁶² 312 U.S. 287 (1941).

⁶³ *Id.* at 291.

⁶⁴ *Id.* at 292.

⁶⁵ *Id.*

While upholding the broad injunction, Justice Frankfurter reaffirmed *Thornhill*, *Carlson*, and the importance of peaceful picketing, “the workingman’s means of communication.”⁶⁶ Frankfurter also underscores the importance of properly scrutinizing infringements on constitutional freedoms so that they are not “defeated by insubstantial findings of fact screening reality.”⁶⁷

Nevertheless, scrutinizing the injunction, Frankfurter concludes that the history and possibility of violence justify the broad prohibition on even peaceful picketing. Yet Frankfurter is quick to point out that *Thornhill* and *Carlson* are not being qualified; they are being reaffirmed because “[t]hey involved statutes baldly forbidding all picketing near an employer’s place of business.”⁶⁸ A history of violence was expressly not a factor in those cases, which, because they were statutes, had to be dealt with facially.⁶⁹

Frankfurter also makes a crucial comparison between an injunction and ordinance that will be relevant to the question of abortion-picketing injunctances. Specifically, he comments that “just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts.”⁷⁰ But injunctions and ordinances are also importantly distinct because “[i]t distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.”⁷¹

In his dissent, Justice Hugo Black has little patience for the distinctions drawn by Frankfurter. “The injunction,” writes Black, “like a statute, stands as an overhanging threat of future punishment. The law of Illinois has been declared by its highest court in such manner as to infringe upon constitutional guaranties. . . . It surely cannot be

⁶⁶ *Id.* at 293.

⁶⁷ *Id.*

⁶⁸ *Id.* at 297.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 298.

doubted that an act of the Illinois legislature, couched in this sweeping language, would be held invalid on its face.”⁷²

In *Milk Wagon*, we see many concepts that will be crucial to cases dealing with both abortion-picketing injunctions and abortion-picketing injordinances. Although Justice Frankfurter upheld the injunction, his decision seems to predominantly rest on the history of violence in that specific dispute. A similar injunction issued in a dispute that didn’t have the same history of violence would likely have been struck down or greatly narrowed to only enjoin violent and disruptive behavior. Unlike Chief Justice Taft in *American Steel*, Frankfurter seems genuinely concerned that picketing injunctions impinge on major First Amendment values and thus deserve some level of scrutiny.

In Justice Black’s dissent, we also see a proto-version of many arguments that would later be raised by Justice Scalia in abortion-picketing cases. Justice Black believes that injunctions and statutes should be seen as essentially identical for First Amendment purposes. He considers there to be an element of viewpoint discrimination in labor-picketing injunctions and believes that something resembling strict scrutiny—although that term was not yet available to him—should govern labor-picketing cases.⁷³ Because of Justice Black’s belief in strictly scrutinizing injunctions, we also see him carefully assessing the facts for a better understanding of the proper scope of injunctions. All of these are similar to Justice Scalia’s approach to the abortion-picketing cases, as we will see.

Abortion Injunctions and Abortion Injordinances

After the “heyday” of labor disputes and the early cases on labor picketing discussed above, there wasn’t a significant public-picketing problem until the pro-life abortion movement galvanized after *Roe v. Wade*. Like labor-union picketing, what started off as injunctions soon became ordinances—or, again, injordinances.

⁷² *Id.* at 308 (Black, J., dissenting).

⁷³ *Id.* at 305 (“[I]t is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy.”); *id.* at 316 (“But it is going a long way to say that because of the acts of these few men, six thousand other members of their union can be denied the right to express their opinion to the extent accomplished by the sweeping injunction here sustained.”).

In *Madsen v. Women's Health Center*, the Court upheld part of a sweeping injunction against abortion protesters. The petitioners challenged a second, broader injunction issued by a Florida state court. The first injunction, issued in 1992, prohibited petitioners from "blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic."⁷⁴

Yet the protesters were largely undeterred. They blocked access to the clinic by congregating on the street and made noise that "varied from singing and chanting to the use of loudspeakers and bullhorns."⁷⁵ As a result, the patients "manifested a higher level of anxiety and hypertension," according to the testimony of one doctor.⁷⁶ The clinic sought and was granted a second injunction that prohibited, inter alia, "congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [36] feet of the property line of the Clinic" and "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic."⁷⁷

In an opinion by Chief Justice William Rehnquist, the Court upheld the 36-foot buffer zone around the clinic and certain noise restrictions.⁷⁸ The Court struck down, however, broader parts of the injunction, such as a 300-foot buffer zone where the petitioners were forbidden from "physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate.'"⁷⁹

The Court also ruled that injunctions would receive a different level of scrutiny because "there are obvious differences . . . between an injunction and a generally applicable ordinance."⁸⁰ "Ordinances," wrote Rehnquist, "represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a leg-

⁷⁴ *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 758 (1994).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 759–60.

⁷⁸ 512 U.S. 753 (1994).

⁷⁹ *Id.* at 773.

⁸⁰ *Id.* at 764.

islative or judicial decree.”⁸¹ Injunctions thus carry a greater risk of “censorship and discriminatory application” and therefore should be judged under a stricter standard than mere time, place, and manner analysis.⁸² When reviewing injunctions, therefore, courts should ask “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”⁸³

Justice Scalia’s *Madsen* dissent can be said to be the first in a quadrilogy of cases dealing with abortion-picketing injunctions and injordinances. Like Justice Black in *Milk Wagon*, who extensively examined the incidents of violence and how they corresponded to the injunction, Scalia begins by carefully describing a video of the protesters because “[a]nyone who is seriously interested in what this case was about must view that tape.”⁸⁴ To Scalia, “[w]hat the videotape, the rest of the record, and the trial court’s findings do not contain is any suggestion of violence near the clinic, nor do they establish any attempt to prevent entry or exit.”⁸⁵

That he spends nearly four pages of his dissent describing a video scene-by-scene illustrates something about Justice Scalia’s approach in these cases. He seems to believe that those in the majority are presuming a level of violence, or possibility of violence, that is not supported by the record. Similarly, in *Milk Wagon*, Justice Black included a chart of the incidents of violence in order to argue that the injunction overly burdened peaceful speech. Both justices seem to be trying to get their respective majorities to carefully scrutinize the record for actual incidents of violence rather than presume it to exist.

Scalia argues that the *Madsen* majority constructed an unworkable and illegitimate test to apply to injunctions that burden speech. “[A] restriction upon speech imposed by injunction . . . is at least as deserving of strict scrutiny as a statutory, content-based restriction,” writes Scalia.⁸⁶ Injunctions are issued by individual judges, and “[t]he

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 765.

⁸⁴ *Id.* at 786 (Scalia, J., dissenting).

⁸⁵ *Id.* at 790.

⁸⁶ *Id.* at 792.

right to free speech should not be lightly placed within the control of a single man or woman.”⁸⁷

At the end of his dissent, Scalia accuses the majority of leaving a “powerful loaded weapon lying about” that is ““ready for the hand of any authority that can bring forward a plausible claim of an urgent need.””⁸⁸ By applying intermediate scrutiny on injunctions, the majority created a situation where “injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy,” and trial-court conclusions permitting injunctions will be accepted “without considering whether those conclusions are supported by any findings of fact.”⁸⁹

Justice Scalia got another chance to vent his spleen at an abortion-picketing injunction three years later in *Schenck v. Pro-Choice Network of Western New York*. The majority, in a decision again by Rehnquist, overturned part of an injunction against abortion protesters.⁹⁰ Chief Justice Rehnquist upheld a fixed 15-foot buffer zone around clinics’ doorways, entrances, and parking lot entrances. The Court overturned, however, a 15-foot floating buffer zone around persons or vehicles seeking access to the clinic because it burdened more speech than was necessary to serve the government’s interest.

Schenck is the last abortion-picketing injunction case before the Court dealt with the injunctances in *Hill v. Colorado*—and then in *McCullen v. Coakley*. Many concepts present in *Hill* and *McCullen* can be found in *Schenck*, in particular the heavily debated “right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics,” which, according to Scalia, is “tucked away” in the majority’s opinion and is at odds with First Amendment jurisprudence.⁹¹

Content Neutrality?

As mentioned, the First Amendment makes only the occasional appearance in early labor-injunction cases—and, if it appears at all, the justices don’t use the language familiar to modern First Amendment

⁸⁷ *Id.* at 793.

⁸⁸ *Id.* at 815 (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944)).

⁸⁹ *Id.*

⁹⁰ *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997).

⁹¹ *Id.* at 386 (Scalia, J., concurring in part and dissenting in part).

jurisprudence. Indeed, early free-speech cases seem often to be ad hoc and based mostly on the justices' senses of propriety. Concepts like "content neutrality" or "secondary effects" are not articulated.

One of the first cases to focus on content-based or subject-matter restrictions was *Police Department of Chicago v. Mosley*, which dealt with a restriction on picketing within 150 feet of schools.⁹² Picketing for labor disputes, however, was expressly exempted from the ordinance. The Court struck down the law as a violation of the Equal Protection Clause more than of the First Amendment, with Justice Thurgood Marshall writing that the "Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."⁹³

Although the *Mosley* Court used the Equal Protection Clause, it was actually employing an early version of the test for content neutrality. An ordinance that discriminates on its face between types of picketing through reference to the speech-content of the picketing is clearly not content-neutral. The Court affirmed that public streets are traditionally open to the public for gathering and that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."⁹⁴

Interestingly, in light of the history of labor violence, Chicago argued that exempting labor picketing was justified because "nonlabor picketing is more prone to produce violence than labor picketing."⁹⁵ The Court said this determination could not be made on such a broad level because "[p]redictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."⁹⁶ In other words, injunctions might be better for handling specifically violent groups than ordinances.

Three years later, in *Erznoznik v. City of Jacksonville*, the Court added a bit more clarity and predictability to its First Amendment jurisprudence.⁹⁷ *Erznoznik* dealt with a challenge to an ordinance preventing

⁹² 408 U.S. 92 (1972).

⁹³ *Id.* at 101.

⁹⁴ *Id.* at 96.

⁹⁵ *Id.* at 100.

⁹⁶ *Id.* at 100–01.

⁹⁷ 422 U.S. 205 (1975).

the display of nudity at drive-in movie theaters. In striking down the ordinance as eliminating more speech than necessary—it made no distinction between types of nudity “however innocent or even educational”⁹⁸—the Court sketched out “some general principles” that had emerged from previous cases:

A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.⁹⁹

While it is relatively easy to identify a content-based regulation if the statute explicitly refers to the content of speech, the test has proved difficult to apply in many situations. In *Minneapolis Star*, a case striking down sales taxes that applied only to some publications, the Court said that “[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”¹⁰⁰ Yet even if there is no censorial motive, a law can be content-based if it applies to only certain speakers and if it requires officials to “examine the content of the message that is conveyed.”¹⁰¹ When officials scrutinize the content of “publications as the basis for imposing a tax,” it is “entirely incompatible with the First Amendment’s guarantee of freedom of the press.”¹⁰²

The question of whether a regulation is content-based became less clear, however, when the Court began deciding cases based on the “secondary effects” test. That test first emerged when the Court began reviewing challenges to zoning ordinances that regulated adult theaters and strip clubs. The secondary effects test claims not to regulate the speech itself but only the side effects of that speech. So, for example, in *Young v. American Mini Theaters, Inc.*, a four-justice plurality held that the purpose of a zoning ordinance applied to

⁹⁸ *Id.* at 212.

⁹⁹ *Id.* at 209 (citations omitted).

¹⁰⁰ *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592 (1983).

¹⁰¹ *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

¹⁰² *Id.* at 230.

adult theaters was “justified by the city’s interest in preserving the character of its neighborhoods.”¹⁰³ A decade later, in *City of Renton v. Playtime Theaters, Inc.*, the Court fully embraced the secondary effects doctrine in another case dealing with regulating adult-oriented businesses.¹⁰⁴ Then-Justice Rehnquist held that the “resolution of this case is largely dictated by our decision in *Young*.”¹⁰⁵

The secondary effects doctrine creates problems for the traditional inquiry into whether a law is content-based or content-neutral. When governments can claim that courts should look at the purpose behind regulating speech—that is, that courts should focus on what secondary effects the government was seeking to regulate, then whether a law is deemed content-based becomes a more difficult and less clear inquiry. Cases like *Mosley* looked at the terms of the statute and thus gave clear guidance to the content-based inquiry. Looking at the secondary effects and government purpose, however, is vague enough to fundamentally transform the content-based inquiry into one that is less protective of speech. In fact, that is precisely what happened after *Ward v. Rock Against Racism*, which has become the key case in analyzing whether a law is content-based.

In *Ward*, the Court looked at a content-neutral rule requiring musicians to use city-provided sound equipment while performing in Central Park.¹⁰⁶ In upholding the regulation, the Court focused on the legislative purpose rather than the terms of the regulation. “The principal inquiry in determining content neutrality . . . 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.”¹⁰⁷ Citing *Renton*, the Court held that 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.”¹⁰⁸

As a result of this new inquiry into government purpose, laws that may be explicitly content-based can be turned into “content-neutral”

¹⁰³ 427 U.S. 50, 71 (1976).

¹⁰⁴ 475 U.S. 41 (1986).

¹⁰⁵ *Id.* at 46.

¹⁰⁶ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹⁰⁷ *Id.* at 791.

¹⁰⁸ *Id.*

regulations of secondary effects if judged on the government-purpose test. Moreover, they can be changed almost at a judge's or justice's whim, depending on whether she wants to uphold or strike down a law.¹⁰⁹ After all, almost any speech can be said to have secondary effects that were the actual purpose of the government's regulation.

This is precisely what happened in *Hill v. Colorado*. Ward's "government purpose" test was perfectly adaptable to turning an obviously content-based law into a "content-neutral" one if some justices felt that abortion-protesting was a big enough evil to proscribe. Even though the statute at issue in *Hill* explicitly referred to a type of speech—"The general assembly recognizes that . . . the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner"¹¹⁰—the majority decided to overlook it in favor of applying Ward's "government purpose" test.

A truly content-neutral law would apply equally to all types of speech. Ward's rule about using certain sound equipment, for example, applied whether the band was punk or country. But a rule that required the government to examine the music to determine whether and if the sound regulations applied would certainly be content-based.

This was precisely what the supposedly content-neutral law in *Hill* required the government to do: examine the content of the speech. Recall the rule in *Mosley*: "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."¹¹¹ Paying attention to the content of the speech is precisely what enforcing the law required. The statute prohibited approaching within eight feet "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," not asking the time or talking about the weather.¹¹² As Justice Kennedy points out in his dissent,

¹⁰⁹ For further discussion see, John Fee, *Speech Discrimination*, 85 B.U. L. Rev. 1103 (2005).

¹¹⁰ Colo. Rev. Stat. § 18-9-122(1) (2013) (emphasis added).

¹¹¹ *Mosley*, 408 U.S. at 96.

¹¹² Colo. Rev. Stat. § 18-9-122(1) (2013).

When a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer's judgment, the speaker's words stray too far toward 'protest, education, or counseling'—the boundaries of which are far from clear—the officer may decide the speech has moved from the permissible to the criminal.¹¹³

This fact by itself should have kept the law in *Hill* from being upheld. In the words of one critic of the *Hill* decision, "if that is not content based, I just do not know what 'content-based' could possibly mean."¹¹⁴

In *McCullen*, although the Court rightly struck down the law, it did so without properly ruling that the law was content-based. More important, it did so without clarifying that the *Ward* government-purpose test is not broad enough or effective enough to properly suss out invidious content-based laws. "Government purpose" is one important inquiry, but it is equally important not to abandon an inquiry into a statute's plain terms, as well as the effect it has on protected speech.

In other contexts, the Court has been very good at realizing that a statute can be content-based without being passed for censorial reasons. In *Holder v. Humanitarian Law Project*, for example, the Court ruled that a law prohibiting providing "material support or resources to a foreign terrorist organization" . . . regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say."¹¹⁵ And in *United States v. Stevens*, the Court had no difficulty saying that a statute prohibiting depictions of animal cruelty "explicitly regulates expression based on content: The statute restricts 'visual [and] auditory depiction[s],' such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is 'presumptively invalid,' and the Government bears the burden to rebut that presumption."¹¹⁶

So if the Court is easily convinced that a statute is content-based on its face, then why does it have so much trouble with abortion-clinic

¹¹³ *Hill*, 530 U.S. at 766–67 (Kennedy, J., dissenting).

¹¹⁴ Michael W. McConnell, Response, 28 Pepp. L. Rev. 747, 748 (2000).

¹¹⁵ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (citation omitted).

¹¹⁶ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted).

buffer zone injunctances? It is easy to be cynical about this question and to simply say that some of the justices want to silence abortion critics and some don't. Perhaps, however, if we are being properly respectful and charitable, we again should look to whether the laws are properly regulating a secondary effect of the picketing, such as violence and obstruction of entrances.

In trying to achieve some of those valid purposes, the statute in *McCullen* can be said to have been less content-based than the one in *Hill*. Yet, as Justice Scalia points out, the fact that it applies only to abortion clinics, and that it explicitly allows abortion-clinic employees to escort women into the facility, makes the law clearly content-based. As Scalia properly observes, "Is there any serious doubt that *abortion-clinic employees or agents* 'acting within the scope of their employment' near clinic entrances may—indeed, often will—speak in favor of abortion ('You are doing the right thing')? Or speak in opposition to the message of abortion opponents—saying, for example, that 'this is a safe facility' to rebut the statement that it is not?"¹¹⁷ Of course not.

A proper application of the content-based test would look at both the realistic effects of the statute, *Ward's* government purpose test, and the terms of the statute. In *McCullen*, the exemption explicitly offered to clinic employees puts the statute clearly into the content-based category. The effect of that exemption, in the memorable words of Justice Scalia, is that it "license[s] one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensberry rules."¹¹⁸

Perhaps most surprising, however, is that rather than looking at the employee exemption on its face, the majority opinion decides to look to the record for evidence that employees had spoken in favor of abortion. This is a shocking affront to common sense in the area of our most cherished freedoms. Again, in the memorable words of Justice Scalia: "Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed."¹¹⁹

¹¹⁷ *McCullen*, 134 S. Ct. at 2546 (Scalia, J., dissenting) (emphasis in original).

¹¹⁸ *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

¹¹⁹ *McCullen*, 134 S. Ct. at 2548 (Scalia, J., dissenting).

Although it is good that the *McCullen* majority struck down the statute, it is unfortunate that it did further harm to First Amendment jurisprudence on content-based regulations of speech. *Ward's* government-purpose test is clearly inadequate for finding all content-based regulations, and the majority should simply have applied the lessons of *Humanitarian Law Project* and *Stevens* and looked at the terms of the statute. That the Court seemingly makes such errors exclusively in abortion-picketing cases makes it difficult to ignore as evidence of Justice Scalia's "ad hoc nullification machine" for laws touching the issue of abortion.¹²⁰

Hill, McCullen, and the Future of Injordinances

In this article, I have examined the history of the jurisprudence around labor-picketing injunctions, labor-picketing injordinances, abortion-picketing injunctions, and, now, abortion-picketing injordinances. It is interesting that two disparate sets of actors that are often at partisan loggerheads—pro-life activists and pro-union protesters—would find themselves to be precedential bedfellows in the matter of picketing injunctions and injordinances. Yet those who prefer to take their cause to the streets are likely to run afoul of the same legal rules, no matter what their ideology.

This is why the AFL-CIO has been a consistent supporter of pro-life protesters in cases before the Supreme Court.¹²¹ What was once labor's fight has now become the pro-life movement's cross to bear, as it were.

What lessons can we learn from reviewing these cases? I began this article by asking whether and how much the First Amendment adds to common-law principles prohibiting obstruction, intimidation, and interference with business. The answer seems to be "not a lot." Despite developing a more protective and defined First Amendment jurisprudence since the days of *American Steel*, the Supreme Court continued and continues to generally uphold broad labor injunctions (*Milk Wagon*), abortion-picketing injunctions (*Madsen* and *Schenck*), and abortion injordinances (*Hill*).

¹²⁰ *Madsen*, 512 U.S. at 785 (Scalia, J., dissenting).

¹²¹ See, e.g., Brief for the Am. Fed. of Labor and Cong. of Indus. Orgs. as Amicus Curiae Supporting Petitioners, *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856).

McCullen is partially an aberration in this line of cases, but not entirely so. A careful reading of the majority opinion in *McCullen*, paired with the majority opinion in *Hill*, leads to a conclusion that abortion-clinic buffer zones need to be tailored to fix specific, non-speech-related problems—namely, obstruction of entrances and potential violence. Future litigants will have to focus on those specific harms. Eight-foot buffer zones, such as what was upheld in *Hill*, can arguably help diminish the possibility of violence, and the obstruction of entrances can also be alleviated by narrower means than a 35-foot no-go area.

One of the most interesting parts of *McCullen* is the discussion of alternative means to alleviate the obstruction of entrances. Those alternate means include pre-existing statutes—“No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon”—as well as “generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.”¹²² By invoking these specific rules, it is clear that the Court is taking seriously the necessity for narrow tailoring. Future courts will have to do the same, and more injunctives will likely fall.

Although there are many similarities between labor protesters and abortion protesters, one is perhaps the most important to their shared legal history: a reputation for violence. Labor protesters did their cause no favors by using violence to help make their point, and abortion protesters are in a similar situation. Violence breeds judicial skepticism about purity of motive to the point that even elderly women like Eleanor McCullen can carry its stain. Nevertheless, *McCullen* won her case and the Court—like it did in *Thornhill* and *Carlson*—struck down an injunctive that was inimical to free speech. Perhaps, in the end, it was just a victory for “counselors” over “protesters.”

¹²² *McCullen*, 134 S. Ct. at 2538 (quoting Worcester, Mass., Rev. Ordinances of 2008, ch. 12, § 25(b)(2008)).