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Preventing Conflict or Descending an Iron Curtain? Buffer-Zone Laws and Balancing Histories of Disruption with Free Speech

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— Note —

PREVENTING CONFLICT OR DESCENDING AN IRON CURTAIN? BUFFER-ZONE LAWS AND BALANCING HISTORIES OF DISRUPTION WITH FREE SPEECH

> *"From Stettin in the Baltic to Trieste in the Adriatic*, an iron curtain has descended *across the Continent. . . . I repulse the idea that a new war is inevitable; still more that it is imminent. It is because I am sure that our fortunes are still in our own hands and that we hold the power to save the future, that* I feel the duty to speak out now that I have the occasion and the opportunity *to do so."*[1]

CONTENTS

1. Winston Churchill, Sinews of Peace (Mar. 5, 1946) (emphasis added).

INTRODUCTION

Not unlike military buffer zones, free-speech buffer zones "create an area of separation"[2] to alleviate tension between conflicting rights. Many argue that buffer zones act as a sort of "Iron Curtain"[3] through which government interests wrongfully prevail over a constitutional command that is "the matrix, the indispensable condition" of United States democracy.[4] But because the Constitution also reflects the principles of privacy, human dignity, and public order, others argue that something has got to give.[5]

The Supreme Court had occasion to elaborate on this breaking point in *McCullen v. Coakley*.[6] For decades, Massachusetts has been a "battleground state"[7] in which antiabortion protestors have wielded obstruction, harassment, intimidation, and sometimes even violence to purposefully prevent women from obtaining access to medical care.[8] Massachusetts' battle began in the early 1980s when Problem Pregnancy, Inc., an antiabortion group, moved into the same building as Planned Parenthood, adopted the same logo, and attempted to lure clinic patients into their office.[9] Later that same decade, the fight picked up

2. *Buffer Zone*, MILITARYFACTORY.COM, http://www.militaryfactory.com/dictionary/military-terms-defined.asp?term_id=802 [http://perma.cc/3NSS-QU6F] (last updated July 17, 2015).

3. Charles Lugosi, *The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand*, 79 DENV. U. L. REV. 91, 93 (2001) ("A new form of Iron Curtain called a 'bubble zone,' has invaded the traditional public forum of city sidewalks . . . .").

4. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

5. *See* Justice William J. Brennan, Jr., Address at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html [http://perma.cc/D9L2-SERZ] ("For the Constitution is a sublime oration on the dignity of man . . . a sparkling vision of the supremacy of the human dignity of every individual.").

6. 134 S. Ct. 2518 (2014).

7. McCullen v. Coakley, 571 F.3d 167, 172 (1st Cir. 2009).

8. Joint App. at 84–89, McCullen v. Coakley, 134 S. Ct. 2518 (2014) (No. 12–1168) (referencing oral testimony of Gail Kaplan, Michael Baniukiewicz, and Liz McMahon).

9. Patricia Baird-Windle & Eleanor J. Bader, TARGETS OF HATRED 67 (2001) (explaining that Problem Pregnancy, Inc. would often scare clinic patients by surprising them with pictures of dismembered fetuses).

pace when "Operation Rescue"[10] first targeted Massachusetts clinics.[11] Its members threatened, intimidated, and coerced clinic patients and employees.[12] They obstructed access to clinics by standing or lying in front of entrances and often chained themselves to doors, one another, or, in at least one case, a toilet.[13] They even set up decoys to trick the police and clinic workers.[14] As a result, women frequently sacrificed medical treatment,[15] police were often overburdened,[16] and courts constantly imposed and enforced injunctions to prevent such disruption.[17] One incident, in particular, grabbed the nation's attention.[18] On December 30, 1994, a gunman "dressed in black" calmly walked into two abortion clinics in Greater Boston, asked each of the receptionists whether he was in the right place, pulled a rifle out of a duffel bag, and sprayed the clinics with gunfire, leaving two dead and five wounded.[19]

The problems confronting Massachusetts were part of a greater "history of violence around abortion clinics" nationwide.[20] To respond

10. This national organization holds "a deep commitment" to causing targeted clinics to "cease operations entirely." Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989).

11. Sara Rimer, *Brookline Shows Fervor in Keeping Clinics Open*, N.Y. TIMES (Jan. 3, 1995), http://www.nytimes.com/1995/01/03/us/brookline-shows-fervor-in-keeping-clinics-open.html [http://perma.cc/PRL7-NSBJ].

12. Planned Parenthood League of Mass., Inc. v. Blake, 631 N.E.2d 985, 989 (Mass. 1994).

13. *Id.* at 988; Planned Parenthood League of Mass., Inc. v. Operation Rescue, 550 N.E.2d 1361, 1363 (Mass. 1990).

14. *See, e.g.*, *Blake*, 631 N.E.2d at 988 (explaining that protestors acted like clinic patients in order to gain access to the clinic and allow fellow protestors to "rush[]" in and lock the doors); *Operation Rescue*, 550 N.E.2d at 1364 ("Sending about 75 rescuers as a decoy to [one clinic] . . . [the protesters] were able to draw the police away from the entrance to [another clinic].").

15. *Blake*, 631 N.E.2d at 990.

16. Rimer, *supra* note 11. Though their precincts had as few as twelve jail cells, officers often arrested more than 200 protestors in a day. *Id.*

17. *See, e.g.*, Commonwealth v. Filos, 649 N.E.2d 1085, 1086–87 n.1 (Mass. 1995) (holding a protestor in criminal contempt for violating an injunction).

18. *See* Christopher B. Daly, *Gunman Kills 2, Wounds 5 in Attack on Abortion Clinics*, WASH. POST (Dec. 31, 1994), https://www.washingtonpost.com/wp-srv/national/longterm/abortviolence/stories/salvi.htm [https://perma.cc/Q4ZV-LK4A] (stating that former President Bill Clinton, along with other politicians, denounced the acts as "domestic terrorism").

19. *Id.*

20. Megan Amundson, *Statement on the Anniversary of the Boston and Brookline Abortion Clinic Shootings in Light of McCullen v. Coakley*, NARAL PRO-CHOICE MASS. (Dec. 26, 2013), http://www.prochoicemass.org/media/press/20131226.shtml [http://perma.cc/E8LG-DXCE]; *see also* Jennifer Latson, *How an Abortion-Clinic Shooting Led to a 'Wrongful Life' Lawsuit*, TIME

to this problem, the Massachusetts legislature implemented and revised buffer zones around its reproductive health care facilities.[21] In November of 2007, the legislature determined that the Massachusetts Reproductive Health Care Facilities Act[22] struck the proper balance between ensuring public safety and protecting free speech.[23] The Act's buffer zone prohibited any person from "knowingly enter[ing] or remain[ing] on a public way or sidewalk" within a thirty-five-foot semicircle around entrances, exits, and driveways at reproductive health care facilities.[24] The legislature determined that this more stringent buffer zone was "necessary to address" the continuing disruption.[25] But this buffer was "truly exceptional," in that it was the only statutorily imposed fixed buffer zone around abortion clinics.[26]

Led by a five-foot tall, seventy-seven-year-old grandmother, a group of "sidewalk counselors" brought the fight to federal court.[27] Both the district court and the First Circuit held that the Act was not an unconstitutional infringement on free speech.[28] Regarding the history of

(Dec. 30, 2014), http://time.com/3648437/john-salvi-shootings/ [http://perma.cc/C6PF-5ZWU] (noting that "antiabortion violence had become disconcertingly common" by 1994).

21. Originally, the legislature proposed a twenty-five-foot buffer zone. S. 148, 181st Gen. Ct., Reg. Sess., § 2(b)(1). *See also In re* Op. of the Justices to the Senate, 723 N.E.2d 1, 2, 6 (Mass. 2000) (approving the bill's constitutionality). Before the bill's enactment, the legislature replaced the twenty-five-foot fixed buffer zone with a six-foot floating buffer zone within an eighteen-foot fixed buffer zone. MASS. GEN. LAWS ch. 266, § 120E 1/2(b) (2000); s*ee also* McGuire v. Reilly, 260 F.3d 36, 41–42 (1st Cir. 2001) (upholding the law's constitutionality).

22. MASS. GEN. LAWS ch. 266, § 120E1/2 (2008).

23. Joint App., *supra* note 8, at 75–76 (referencing oral testimony of Representative Michael Festa).

24. MASS. GEN. LAWS ch. 266, § 120E1/2(b) (2008). The statute exempted four classes of individuals from its blanket prohibition, including clinic employees "acting within the scope of their employment." *Id.*

25. McCullen v. Coakley, 573 F. Supp. 2d 382, 392 (D. Mass. 2008).

26. McCullen v. Coakley, 134 S. Ct. 2518, 2537 (2014).

27. Adam Liptak, *Where Free Speech Collides with Abortion Rights*, N.Y. TIMES (Jan. 12, 2014), http://www.nytimes.com/2014/01/13/us/where-free-speech-collides-with-abortion-rights.html?_r=0 [https://perma.cc/Z22Q-ADJ9]. Sidewalk counselors distinguish themselves from protestors because they are guided by sympathy for women seeking abortion and use calm, personal conversation. *Id.*

28. McCullen v. Coakley, 571 F.3d 167, 184 (1st Cir. 2009); McCullen v. Coakley, 573 F. Supp. 2d 382, 425 (D. Mass. 2008).

disruption[29] that prefaced the Act, the courts explained that Massachusetts "faced significant public safety problems" and that "a 35-foot fixed buffer zone was immediately necessary to protect public safety and ensure patient access to clinics."[30] The Supreme Court, however, unanimously reversed.[31] Applying intermediate scrutiny,[32] the Court held that the Act was not narrowly tailored,[33] emphasized the serious burden on the sidewalk counselor's speech,[34] and admonished the breadth of the buffer zone.[35] This conclusion was neither unsound nor surprising.[36]

What is unsettling, however, is the Court's analysis of the history of disruption that faced Massachusetts abortion clinics. The Court stated that "far from being 'widespread,' the problem appears from the record to be limited principally to the Boston clinic on Saturday mornings"; that the record supports Massachusetts' interest for only "one place at one time"; and that the broad statute failed to "focus[] on the precise individuals and the precise conduct causing a particular problem."[37] In doing so, the Court suggested that only history specific to the conduct, places, and persons restricted can inform legislative action. To state the inverse, broader problems that confront the nation as a whole cannot warrant restrictions on speech. This Note argues that the Court's subtle suggestion that a broader history of disruption cannot justify buffer zones contradicts precedent, departs from the concept of necessity, and misleads courts and legislators.

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29. I use "history" to refer only to legislative facts—facts that "can be accurately and readily determined" by the legislature, FED. R. EVID. 201(b), and those that are "most needed in thinking about difficult problems of law and policy." Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 69, 82 (Roscoe Pound, Erwin N. Griswold & Arthur E. Sutherland eds., 1964).

30. *McCullen*, 573 F. Supp. 2d at 410.

31. *McCullen*, 134 S. Ct. at 2518.

32. *Id.* at 2530. The Court held that the law was content neutral, *id.* at 2531–34, over Justice Scalia's "scathing concurrence . . . that read[s] more like a dissent." Michael Scott Leonard, *Supreme Court Invalidates Massachusetts Abortion Clinic 'Buffer Zone'* McCullen v. Coakley, 10 No. 4 WESTLAW J. MED. MALPRACTICE 1 (2014).

33. *McCullen*, 134 S. Ct. at 2539.

34. *Id.* at 2536 ("It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm.").

35. *Id.* at 2537.

36. *See* Alexandra Cabonor, *McCullen v. Coakley: History in the Making*, JURIST (Feb. 16, 2014, 11:44 AM), http://jurist.org/hotline/2014/02/catherine-short-abortion-clinic-buffer-zones.php [http://perma.cc/WSJ5-8SG9].

37. *McCullen*, 134 S. Ct. at 2538–39.

Part I poses a question that is not at all uncommon: precisely when can legislators restrict free speech in order to protect public safety and order? It explains that lawmakers and courts struggle to balance two values, each of which is cherished by the United States legal system. On the one hand, freedom of speech is "indispensable" to United States democracy.[38] On the other, it is the government's duty to provide safety, order, and security to its citizenry. Part II discusses the mechanism through which courts measure whether a law strikes the appropriate balance between these two competing values. That balancing instrument, heightened scrutiny,[39] asks whether the law has a sufficient means-end fit to the government's goal. It considers the legitimacy of the government's interest, the amount of speech burdened by the law, and how necessary the law is. At its best, heightened scrutiny prevents lawmakers from lowering an iron curtain that stifles the free flow of ideas while also giving them sufficient leeway to deal with the problems that confront them. This Note focuses exclusively on necessity because it allows courts to consider the history of disruption motivating a given buffer-zone law.

Part III defines "buffer zone," analyzes First Amendment challenges to buffer zones, and points out that results in buffer-zone cases often turn on a law's necessity. It argues that courts look to two factors when asking whether a given law is necessary: (1) the extent of the law's history of disruption; and (2) the degree to which the disruption impedes upon the government's interest. Although the Court has recently framed this issue as one of specificity, neither its cases nor the concept of necessity compels the notion that lawmakers cannot impose buffer zones as a way of combatting broader problems.

Part IV argues that the Court has unwittingly narrowed its inquiry. Precedent demonstrates that the Court often considers broader problems confronted by legislatures. Further, heightened scrutiny requires courts to consider all relevant factors to determine whether a law strikes the appropriate balance. By failing to factor in histories that confront other legislatures, the Court frustrates the goal of heightened scrutiny and its necessity element.

Echoing the factors discussed in Part III, Part V proposes that courts and lawmakers look to two factors to help determine whether a given law is necessary. First, they should evaluate the extent of the law's history of disruption. To do this, they should ask whether the history is pervasive, whether it is egregious, whether it calls for immediate action, and whether it is particular. Second, courts and lawmakers should examine the degree to which the disruption impedes upon the government's interest. If logic dictates that the government cannot advance its interest so long as the prohibited conduct persists, then the

38. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

39. I use "heightened scrutiny" to refer to both strict and intermediate scrutiny.

government does not need to show that its interests have historically been harmed.

I. THE CLASH BETWEEN PUBLIC NECESSITY AND FREE SPEECH

The clash between the value of free speech and importance of maintaining order—"a problem [that is] 'as persistent as it is perplexing'"—has long troubled the United States legal system.[40] On the one hand, the First Amendment provides that the government "shall make no law . . . abridging the freedom of speech."[41] Free speech is fundamental[42] not only to individual liberty but also to the preservation and flourishing of United States democracy.[43] Without it, the individual's "notion of self-respect" dwindles,[44] and society cannot evolve toward a "livelier impression of truth."[45] Even "offensive or disagreeable"[46] speech holds an important place in public discourse because people can and should simply "avert[] their eyes"[47] and because disagreeable speech often brings the most truth to light. This important constitutional principle remains the same, regardless of the dangers that confront it.[48] So the government must be acutely aware of the harm it can do to this principle when it acts under the guise of public need.[49]

40. William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 757 (1986) (quoting Niemotko v. Maryland, 340 U.S. 268, 275 (1950) (Frankfurter, J., concurring)).

41. U.S. CONST. amend. I.

42. Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

43. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .").

44. David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

45. JOHN STUART MILL, ON LIBERTY 20 (1863).

46. Texas v. Johnson, 491 U.S. 397, 414 (1989).

47. Cohen v. California, 430 U.S. 15, 21 (1971).

48. *See* Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same.").

49. *See* Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 398–99 (2005) (explaining that the Supreme Court is very hostile toward content-based restrictions of speech).

Yet, the First Amendment's command is not absolute.[50] Not all protected speech is "equally permissible in all places and at all times."[51] At the heart of the free-speech guarantee lies the power of reason, which "gain[s] access to the mind" through "peaceful means."[52] "[U]tterance in a context of violence," then, "can lose its significance" and its constitutional protection.[53] Moreover, the Court has stated that "the character of every act depends upon the circumstances in which it is done,"[54] that people often have the "right to be let alone,"[55] and that unwilling listeners need not "undertake Herculean efforts" to avoid protest.[56] For these reasons, the government has "both the right and duty" to protect the public and to preserve other individual rights.[57] Lawmakers and judges must balance the unchanging, fundamental right to "uninhibited, robust, and wide-open" public debate[58] against governmental interests to decide whether a law actually violates the First Amendment.[59]

Part II explains that heightened scrutiny is the mechanism through which the Court balances these interests in an attempt to best resolve this "perplexing"[60] clash. Part III argues that legislatures and courts often use buffer zones to strike this balance. This Note further argues,

50. Elrod v. Burns, 427 U.S. 347, 360 (1976). The government may regulate certain categories of unprotected or less protected speech based on their content. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *But see* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("[The First Amendment] provides, in simple words, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' I read 'no law . . . abridging' to mean *no law abridging*.").

51. Frisby v. Schultz, 487 U.S. 474, 479 (1988) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985)).

52. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

53. *Id.*

54. Schenck v. U.S., 249 U.S. 47, 52 (1919).

55. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

56. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994).

57. Jessica Wainwright, Note, *The Evolutionary War on First Amendment Rights and Abortion Clinic Demonstration*, 36 NEW ENG. L. REV. 231, 236 (2001); *see also Milk Wagon Drivers*, 312 U.S. at 299 (explaining that the Court must give due recognition of the powers belonging to the states and that states have "the power to deal with coercion due to extensive violence").

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

59. *See* Hill v. Colorado, 530 U.S. 703, 714 (2000) (explaining that when comparing the rights of speakers to the rights of listeners "it is appropriate to examine the competing interests at stake").

60. Lee, *supra* note 40, at 757 (quoting Niemotko v. Maryland, 340 U.S. 268, 275 (1950) (Frankfurter, J., concurring)).

along with Parts IV and V, that histories of disruption are an indispensable part of this balancing process.

II. HEIGHTENED SCRUTINY: STRIKING THE BALANCE

Though its exact origins are somewhat unclear,[61] the Court created heightened scrutiny to "selectively shift[]"[62] the burden of proof to the government when it enacted "undesirable legislation" restricting fundamental rights.[63] Before heightened scrutiny existed, almost all legislative and executive decisions received a "strong presumption of constitutionality" and "extreme deference."[64] This rationality review imposed an "insurmountable burden" on the party challenging the decision because "the existence of facts supporting the legislative judgment [was] to be presumed."[65] While this approach was consistent with constitutional

61. Heightened scrutiny appears nowhere in the Constitution, nowhere in the writings of our founding fathers, and nowhere in precedent prior to the mid-20th century. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268, 1284 (2007). *Compare* McLaughlin v. Florida, 379 U.S. 184, 197 (1964) (Harlan, J., concurring) ("The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment."), *with* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (noting that heightened scrutiny "derives from [the Court's] equal protection jurisprudence").

62. RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE 47 (1992).

63. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

64. Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 786, 788 (2007). *See also* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 78 (2001).

65. SHAMAN, *supra* note 64, at 79; *Carolene Prods.*, 304 U.S. at 152. *See also* O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 258 (1931) ("*It does not appear* upon the face of the statute, or from any facts . . . that in New Jersey *evils did not exist* . . . .") (emphasis added).

republicanism and the separation of powers,[66] it was tone deaf to nuanced constitutional rights, including the right to free speech.[67]

Thus, the Court began calling for a "more searching judicial inquiry"[68] in order to "flush out illicit motives and to invalidate actions infected with them" and to prevent the government from "distorting" the content and quality of public dialogue.[69] Because the government cannot "select which issues are worth discussing or debating,"[70] content- or viewpoint-based laws are subject to strict scrutiny.[71] If the government "adopt[s] a regulation of speech because of disagreement with the

66. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("If it were a question whether I agreed with that [economic] theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty . . . ."); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 131, 133 (1893) (explaining that the judicial power to strike down legislative action authorized by the Constitution is "by no means a necessary one" and was long considered "anti-Republican").

67. G. EDWARD WHITE, HISTORY AND THE CONSTITUTION: COLLECTED ESSAYS 150–76 (2007); GASKINS, *supra* note 63, at 52–53.

68. *Carolene Prods.*, 304 U.S. at 153 n.4. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 236, 239 (1944) (Murphy, J., dissenting) (arguing that the executive order relocated 112,000 persons based only upon the possible disloyalty of a few, "misinformation, half-truths, and insinuations," and "no reliable evidence"); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (shifting a near-impossible burden of proof to the schools when it stated that "[s]eparate educational facilities are inherently unequal," though not explicitly applying heightened scrutiny); Speiser v. Randall, 357 U.S. 513, 529 (1958) ("The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech."); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

69. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 85. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 215–20, 303–05 (2000) (detailing the Warren Court's motive to shift the burden of proof to the government).

70. Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

71. United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); NAACP v. Button, 371 U.S. 415, 438 (1963). *But see* Kagan, *supra* note 69 (arguing against scrutiny-based jurisprudence and for "purposivism"); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996) (arguing against scrutiny-based jurisprudence but arguing for "permissible tailoring").

message it conveys," then that regulation is content based and, therefore, subject to strict scrutiny.[72] This test makes three main demands: (1) the "burden falls on the government to defend challenged legislation"; (2) the government must "demonstrate[e] that [the law] serves a compelling interest"; (3) the law must be "narrowly tailored" to the asserted interest.[73] At times, strict scrutiny offers such "aggressive" protection for free speech and other fundamental rights that it has been nicknamed "'strict' in theory and fatal in fact."[74]

Content-neutral laws that regulate only the time, place, or manner (TPM) of the speech can overreach as well.[75] The Court looks especially skeptically at TPM regulations of the "quintessential public forum,"[76] places that "have immemorially been held in trust for the use of the public" for the purposes of expression.[77] To prevent the government from suppressing speech "for mere convenience"[78] and to avoid unnecessary, "incidental burdens" on speech,[79] the Court filters TPM regulations through a four-part intermediate-scrutiny test: (1) the law must be "justified without reference to the content of the regulated speech" (i.e., content neutral); (2) the government must have a "significant" or "substantial" interest; (3) the law must be "narrowly tailored" to meet that interest; and (4) the law must "leave open ample alternative channels for communication."[80]

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72. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

73. Fallon, *supra* note 61, at 1273–74.

74. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (stating that "[thirty] percent of all applications of strict scrutiny . . . result in the challenged law being upheld").

75. *See* Suplina, *supra* note 49, at 397–99 (arguing that legislators can manipulate and abuse the Court's distinction between content-neutral and content-based laws).

76. Burson v. Freeman, 504 U.S. 191, 196 (1992) (plurality).

77. Hague v. CIO, 307 U.S. 496, 515 (1939). The public forum includes only places traditionally recognized as public forums, such as streets, parks, and sidewalks; and places designated "by government fiat" to assembly and debate. Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

78. McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014).

79. Margaret Greco, Comment, *Take a Step Back: The Constitutionality of Stricter Funeral-Picketing Regulations After* Snyder v. Phelps, 23 B.U. PUB. INT. L.J. 151, 159 (2014).

80. Ward v. Rock Against Racism, 491 U.S. 781, 791, 797 (1989) (quoting Clark v. Comm. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). *See also* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) ("[T]he Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these

Although heightened scrutiny is often understood as and applied as a sort of "rigid," mathematical formula, it is essentially a system of "categorical balancing" through which the Court combines the "two unbridgeable worlds of form and substance."[81] The Court does make certain "a priori" determinations when it asks, as a threshold matter, which level of scrutiny it will apply.[82] But it does not predetermine results; it does not attribute set amounts of weight to the rights at stake; and it does not impose the exact same burden of proof in every case analyzed under a given level of scrutiny.[83] Instead, each level of scrutiny acts as a floor to ensure that individual rights and interests receive at least a certain amount of weight and predetermines a possible *range* of weight to the individual right or interest, not a built-in, precise weight.[84] In doing so, it "eliminate[s] the rigidity," "promote[s] more

terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government . . . .").

81. SHAMAN, *supra* note 64, at 104–05; GASKINS, *supra* note 63, at 53. *See* Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 CONN. L. REV. 101, 108 (2012) (discussing balancing free speech "within a broader framework of rights"); Fallon, *supra* note 61, at 1316 ("[C]ourts need to identify the rights that trigger [heightened scrutiny].").

82. SHAMAN, *supra* note 64, at 105. *But see* Fallon, *supra* note 61, at 1293–97, 1306–08 (explaining that the Court often "effectively applie[s] [heightened scrutiny] as if it were a balancing test" but that many justices oppose this approach and, instead, apply the test as a formula); Volokh, *supra* note 71, at 2438–39 (focusing on the fact that the Court does not explicitly discuss strict scrutiny in terms of balancing while "sympathiz[ing] with the normative theory behind this view").

83. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 740–41 (1996) ("[T]his Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application."); SHAMAN, *supra* note 64, at 102–05; Heyman, *supra* note 81, at 126 (explaining that the *Snyder v. Phelps* Court mistakenly relied on "abstract categories," as opposed to looking at the precise interests); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 58 (1987) (arguing that although the Court "does not speak explicitly" in terms of balancing in First Amendment cases, it uses an "implicit balancing approach"). Justice Marshall illustrates this point in a series of Social Security and welfare-benefit dissents, arguing that the majority's formulaic approach ignored constitutional differences between and concededly equated "state regulation [of business or industry]" with the "literally vital interests" of "powerless minorit[ies] [including] poor families without breadwinners," and "families of disabled persons," Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 91 (1971) (Marshall, J., dissenting).

84. *See* SHAMAN, *supra* note 64, at 105–09. *See, e.g.*, *Denver Area Educ.*, 518 U.S. at 741 ("[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through *close judicial scrutiny*,

accuracy,"[85] and prevents judges from "overstat[ing] governmental interests" to ensure protection for preferred rights.[86] The requisite burden of proof, then, depends upon the overall, "delicate and difficult" balance of all of the rights, interests, and considerations at stake.[87]

The "narrowly tailored" prong often acts as the balancing prong.[88] Though this prong "contains significant, unresolved ambiguities" and "has sparked little systematic investigation,"[89] it is the "touchstone" of the heightened scrutiny analysis.[90] At its essence, this prong ensures a sufficient "connection between challenged legislative means and the ends they are intended to promote."[91] "[E]merg[ing] from contrasts,"[92] this prong balances at least three things to determine whether a law has a sufficient means-end fit: (1) the amount of speech burdened by the law;[93] (2) the availability of "alternative means of pursuing the same

thereby enforcing the Constitution's constraints, *but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems*.") (emphasis added); Plyler v. Doe, 457 U.S. 202, 221–23 (1982) (explaining that although a school's policy does not cleanly fit into any heightened-scrutiny category, "more [was] involved" than an "abstract question" of categorization and that, at the very least, the "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause").

85. SHAMAN, *supra* note 64, 109.

86. Stone, *supra* note 83, at 73.

87. Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

88. *See* Fallon, *supra* note 61, at 1330 (explaining that narrow tailoring depends on "whether the damage or wrong attending an infringement on protected rights is constitutionally acceptable in light of the government's compelling aims").

89. *Id.* at 1326; Matthew D. Bunker & Emily Erikson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in the First Amendment Doctrine*, 6 COMM. L. & POL'Y 259, 277 (2001) ("[T]he jurisprudence of precision is anything but precise, and the Court has been quite haphazard in its narrow tailoring analyses.").

90. NAACP v. Button, 371 U.S. 415, 438 (1963); *see* POWE, *supra* note 69, at 320 (explaining that Justice Brennan, while developing this prong, often assumed arguendo the sufficiency of the government's interest then looked skeptically at the government's means of achieving that interest); Volokh, *supra* note 71, at 2421 ("Most cases striking down speech restrictions, however, rely primarily on the narrow tailoring prong . . . .").

91. Fallon, *supra* note 61, at 1274.

92. *Id.*

93. *Id.* at 1327–29.

goals";[94] and, most importantly here, (3) the "proof of necessity of infringement on a triggering right."[95] Courts must then assess these factors "in light of" the weight of the government's interest.[96]

The necessity factor involves "empirical judgments."[97] The government can meet its burden of proof if it can show that it enacted a given law to protect a pressing, "extremely weighty, possibly urgent" public need.[98] Because "the past informs the present,"[99] and because the government has "the power to deal with coercion,"[100] violence, and other problems that disrupt its interests,[101] history can demonstrate necessity if the prohibited activity imminently threatens the government's interests.[102]

For content-neutral TPM cases, the government may show a lesser degree of urgency to pass constitutional muster because TPM laws restrict less speech. To meet its burden, the government need not show that TPM restrictions are "the least restrictive or least intrusive means."[103] It must show only that a "substantial government interest" would be "achieved less effectively absent the regulation"[104] and that

94. *Id.* at 1330.

95. *Id.* at 1274. Focusing on heightened scrutiny in all contexts, Fallon discusses the "overinclusiveness" and "underinclusiveness" of the law in place of the first factor listed here. *Id.* at 1327–29. In the First Amendment context, however, the breadth of a restriction plays into the Court's assessment of the burden on free speech. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) ("[TPM regulations may not] burden substantially more speech than is necessary to further the government's legitimate interests.").

96. Fallon, *supra* note 61, at 1330 (referring to this consideration as "proportionality"). *See, e.g.*, Zachary J. Phillipps, Note, *The Unavoidable Implication of* McCullen v. Coakley*: Protection Against Unwelcome Speech Is Not a Sufficient Justification for Restricting Speech in a Traditional Public Fora*, 47 CONN. L. REV. 937, 944, 946 (2015) (arguing that the Court did not adequately address precedent requiring that the Court "must balance" the "unwilling listener's right to be let alone" with "the speaker's right to communicate").

97. Volokh, *supra* note 71, at 2424.

98. Fallon, *supra* note 61, at 1273.

99. McCullen v. Coakley, 571 F.3d 167, 172 (1st Cir. 2009).

100. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 299 (1941).

101. *See* Hill v. Colorado, 530 U.S 703, 725–30 (2000) (explaining that an eight-foot floating buffer zone was narrowly tailored).

102. *See Milk Wagon Drivers*, 312 U.S. at 297–99 (explaining that an injunction was narrowly tailored because of its imminent relationship to the evil the government sought to address).

103. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

104. United States v. Albertini, 472 U.S. 675, 689 (1985).

the law does not "burden substantially more speech than is necessary to further the government's legitimate interests."[105] The government often meets this burden of proof through the "necessity" element by showing merely that the prohibited activity impedes the government's interest[106] and that the law serves the interest in a "direct and effective way."[107] In *Grayned v. Rockford*,[108] for example, the Court upheld an ordinance that prohibited "the making of any noise or diversion" (manner) on sidewalks near schools (place) while school is in session (time).[109] Mindful of the "nature of the place," the Court explained that the law regulated "boisterous demonstrators"[110] who "materially disrupt[] classwork," the substantial government interest, but the law allowed for peaceful, nondisruptive demonstrations.[111]

Part III highlights that when the government can show a history of disruptive activities, courts more readily find that the government restricted speech out of necessity. Parts III, IV, and V further explain that the Court does not just assess histories specific to the precise restrictions to evaluate necessity; it also considers the broader histories that inform the government's decision. These Parts also illustrate that when confronted with histories of disruption, both general and specific, the government often implements buffer zones to strike the balance between advancing its substantial interests and protecting free speech.

III. BUFFER ZONES: IMPLEMENTING THE BALANCE BY FACTORING IN HISTORY

A "buffer zone" is a type of TPM regulation that focuses on the "place" in which the speech occurs.[112] Buffer zones specify, often by

105. *Ward*, 491 U.S. at 799.

106. *See* Volokh, *supra* note 71, at 2421–24 ("When the Court says . . . that a law must be 'necessary to serve a compelling state interest,' it seems to be referring to [advancement of the interest, no overinclusiveness, and least restrictive alternative]." (quoting Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality))).

107. *Ward*, 491 U.S. at 800.

108. 408 U.S. 104 (1972).

109. *Id.* at 108.

110. *Id.* at 119.

111. *Id.* at 118 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

112. *See* Amy E. Miller, *The Collapse and Fall of Floating Buffer Zones: The Court Clarifies Analysis for Reviewing Speech-Restrictive Injunctions in Schenck v. Pro-Choice Network*, 32 U. RICH. L. REV. 275, 290 (1998).

measurements, an area in which at least some manner of speech is prohibited.[113] Like the phrase suggests, lawmakers and courts impose buffer zones to "separat[e] conflicting forces"[114] as a "prophylactic"[115] means of protecting a governmental interest or a conflicting constitutional right.[116] While the Massachusetts buffer zone in *McCullen* may have been "truly exceptional,"[117] legislatures and courts frequently use buffer zones to combat disruption in a variety of contexts, ranging from churches to ATMs.[118]

The outcome of a challenge to a given buffer-zone turns on the particular circumstances surrounding the buffer zone.[119] Like in other free speech cases, courts take a serious look at the amount of speech burdened by the size or breadth of the buffer zone.[120] Court-imposed injunctions, though facially more narrowly drawn,[121] "carry greater risks

113. *Id.*

114. *Buffer Zone*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/buffer%20zone [http://perma.cc/XG8Z-NSY5] (last visited Mar. 7, 2016).

115. McCullen v. Coakley, 134 S. Ct. 2518, 2538 (2014).

116. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 715–16 (2000) (protecting public health, safety, and constitutional right to privacy); Burson v. Freeman, 504 U.S. 191, 197 (1992) (protecting constitutional right to vote).

117. *McCullen*, 134 S. Ct. at 2537.

118. *See* ROCKFORD, ILL., CODE OF ORDINANCES § 19-13(21) (2013) (prohibiting demonstrations within 150 feet of any place of worship); KANSAS CITY, MO. MUN. CODE § 50-8-5(c)(2) (2007) (prohibiting panhandling within twenty feet of any ATM). Additionally, the Texas State Legislature proposed a bill that imposed a buffer zone limiting the distance at which people can film police officers. MaryAnn Martinez, *Texas Lawmaker Wants Filming Police to be Illegal*, KENS 5 (Mar. 13, 2015, 11:05 PM), http://www.kens5.com/story/news/2015/03/13/texas-lawmaker-wants-filming-police-to-be-illegal/70317008/ [http://perma.cc/2E3B-BVL6]. Due to public backlash, the legislature quickly dropped the bill. Allison Wisk, *Bill to Limit Filming of Police Activity is Dropped*, THE DALLAS MORNING NEWS (Sept. 28, 2015, 10:35 PM), http://www.dallasnews.com/news/politics/state-politics/20150410-bill-to-limit-filming-of-police-activity-is-dropped.ece [http://perma.cc/8HC9-QTSA].

119. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994); Heyman, *supra* note 81, at 169.

120. Heyman, *supra* note 81, at 168–71. Often times, courts preoccupy themselves with the exact size of the buffer zone. *See, e.g.*, Clift v. City of Burlington, 925 F. Supp. 2d 614, 638 (D. Vt. 2013) ("While there is 'no outer limit' on the size of a buffer zone, the 36 and 15-foot dimension upheld in *Madsen* and *Schenck* serve as benchmarks for what is permissible.") (citations omitted).

121. *See McCullen*, 134 S. Ct. at 2538 ("[G]iven the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary.").

of censorship and discriminatory application"[122] and are subject to something in between intermediate and strict scrutiny.[123] "Floating" buffer zones, which move to protect a given listener, are also more likely unconstitutional because they tend to overburden speakers.[124]

But buffer zones live and die by the necessity element. A law's history often reveals that the government had few other choices in order to advance its interest.[125] The cases that follow demonstrate that the Court looks at two factors to assess the necessity motivating a given buffer zone: (1) the extent of the histories of disruption; and (2) the degree to which the disruption impedes upon the government's weighty interest.[126]

A. Labor-Protest Laws

Buffer zones are sometimes used to regulate labor protests "because of the excessive violence associated with [them]."[127] The Court has never dealt with a statutorily imposed buffer zone restricting labor protests, but "several states have enacted regulations on the right to picket and the time, place, or manner of such picketing."[128]

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122. *Madsen*, 512 U.S. at 764.

123. *See* Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997) (partly invalidating an injunction because it "burden[s] more speech than is necessary to serve the relevant governmental interests").

124. *See* Miller, *supra* note 112, at 294–95 (contrasting the Court's treatment of floating buffer zones with its treatment of fixed buffer zones).

125. *See, e.g.*, *Schenck*, 519 U.S. at 380–85; *Madsen*, 512 U.S. at 772–75 (detailing protestors' offensive actions as a basis for upholding parts of buffer zones).

126. For discussion on these factors, see *infra* Part V. Because the necessity element, like heightened scrutiny as a whole, involves categorical balancing, the weight of the government's interest often affects how necessary a given law is. *See infra* Part V. Captive audience cases provide an obvious example of this. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) ("[In the home,] the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."). The weight of the government's interest is often a factor in buffer zone cases as well. *See, e.g.*, Hill v. Colorado, 703, 717, 727–28 (upholding a buffer zone in part because it protects medical privacy). However, this is outside the scope of this Note.

127. Rachel Entman, Note, *Picket Fences: Analyzing the Court's Treatment of Restrictions on Polling, Abortion, and Labor Picketers*, 90 GEO. L.J. 2581, 2588 (2002).

128. *Id.* at 2591. *See, e.g.*, NEB. REV. STAT. §§ 28-1317 to -1318 (2000) (prohibiting "unlawful picketing" and "mass picketing," each of which can be committed by just one person in a number of ways, and including engaging in "any form of picketing in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises" as an example of "mass picketing").

Additionally, the Court addressed the constitutionality of court-imposed buffer zones in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*.[129] There, the Court upheld a state-court order permanently enjoining employees of dairy companies from all picketing near stores where the companies' products were sold.[130] Importantly, the Court emphasized that the protests involved "violence on a considerable scale."[131] The employees smashed store windows, set-off "explosive bombs" as well as "stench bombs," destroyed a number of vendor vehicles, burned down one dairy store, and severely beat and threatened other nonunion employees.[132] Although the government cannot deny free-speech rights "by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force," the violence in this case was "neither episodic nor isolated."[133] The Court explained that the state has the power and perhaps even the duty to "protect its storekeepers" from violence and coercion.[134]

B. Polling-Place Buffer Zones

All states use buffer-zone statutes to protect voting booths and polling places.[135] The Court upheld such a statute in *Burson v. Freeman*.[136] There, a Tennessee statute prohibited the "display" or "distribution" of "campaign materials" and the "solicitation of votes" within 100 feet of any polling place.[137] The Court subjected the content-based law to strict scrutiny and noted that "the First Amendment 'has its fullest . . . application'" in cases involving campaign speech.[138] But

129. 312 U.S. 287 (1941).

130. *Id.* at 291, 299.

131. *Id.* at 291.

132. *Id.* at 291–92.

133. *Id.* at 293, 295.

134. *Id.* at 294. The Court further noted that the injunction, though it was broad and prevented some peaceful picketing, was specific enough. *Id.* at 298 ("The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it."). *See also* Trevor Burrus, *Injordinances: Labor Protests, Abortion-Clinic Picketing, and* McCullen v. Coakley, 2014 CATO SUP. CT. REV. 167, 182 (2014) (explaining that the "history and possibility of violence justif[ied] the broad prohibition on even peaceful picketing").

135. Robert Brett Dunham, Note, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 GEO. L.J. 2137, 2143 (1989).

136. 504 U.S. 191 (1992).

137. TENN. CODE ANN. § 2–7–111(a), (b)(2) (Supp. 1991).

138. *Burson*, 504 U.S. at 196 (quoting Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

the Court also stated that the government "interests in preventing voter intimidation and election fraud" and "preserving the integrity of [the] election process" are especially strong because the "right to vote freely for the candidate of one's choice is of the essence of a democratic society."[139]

The Court concluded that the buffer zone was narrowly tailored because "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter."[140] In other words, the restriction was necessary. To "reconcile" the competing interests, the Court looked to two main factors.[141] First, the Court laid out extensive histories during the United States colonial period, in Australia, and in some European countries.[142] These histories "reveal[ed] a persistent battle against two evils: voter intimidation and election fraud."[143] Second, it explained that voter intimidation and election fraud likened the countries' voting processes to "entering an open auction place" and had proven "difficult to detect," threatening the democratic process.[144]

Thus, the broad, widespread history of disruption at polling places showed necessity and played an integral role in the Court's balancing process, along with the threat that the right to vote, a right central to our government, could be compromised.

C. Political Protest and Security Measures Buffer Zones

Not surprisingly, the government often imposes buffer zones as a security measure where political protests might be especially obtrusive.[145] Courts hold that both general and specific histories of disruption can justify the use of buffer zones as security measures, as long as the measures are "tied to identifiable risks and harms against which they

139. *Id.* at 199, 206 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989)). The Court separated voter fraud and the importance of the right to vote into two compelling government interests. *Id.* at 198–99.

140. *Id.* at 207–08.

141. *Id.* at 198.

142. *Id.* at 200–06.

143. *Id.* at 206.

144. *Id.* at 202, 208.

145. Currently, Cleveland is struggling with the placement of a "free-speech zone" for protestors during the Republican National Convention in July 2016. Andrew J. Tobias, *Cleveland Plans 'Free-Speech Zone' for Republican National Convention, but May Struggle to Find a Location*, CLEVELAND.COM (August 26, 2015, 9:42 AM), http://www.cleveland.com/rnc-2016/index.ssf/2015/08/cleveland_plans_free-speech_zo.html [http://perma.cc/3VEZ-NRD4].

are designed to protect."[146] Courts have reminded that "[s]ecurity is not a talisman that the government may invoke to justify *any* burden on speech," but that past experiences across the nation could justify a buffer zone.[147]

As an extreme example of a specific history of disruption, the district court in *Menotti v. City of Seattle*[148] upheld an emergency order prohibiting access to large portions of downtown Seattle during the 1999 World Trade Organization conference.[149] There, protestors grew violent before the conference had even begun by vandalizing and looting stores, attempting to take over one store, throwing Molotov cocktails, and hurling rocks at police officers.[150] When the conference opened, "things got worse" until the city "bordered on chaos"[151] and the streets turned into "seeming war zones."[152] Protestors wielded weapons, "lock[ed] down intersections by forming human chains," continued vandalizing and looting stores, assaulted police officers, and even assaulted conference delegates.[153] As things "spiral[led] out of control," some officers began fighting fire with fire, which put the general public at risk.[154] Though the number of violent protestors was small in comparison to the number of peaceful protestors, the court held that the emergency order was necessary to protect residents of Seattle and world leaders against such severe violence and "clear and present risks."[155] The court further stated that "once multiple instances of violence erupt, with a

146. ACLU of Colo. v. City & Cty. of Denver, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008) (citing Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1221 (10th Cir. 2007)).

147. Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 13 (1st Cir. 2004). *See also* Watchtower Bible and Tract Society of N.Y., Inc. v. Sagardia De Jesus, 634 F.3d 3, 6, 12 (1st Cir. 2011) (upholding a statute prompted by "endemic violent crime" that allows cities to control access to their streets); Tetaz v. District of Columbia, 976 A. 2d 907, 915–17 (D.C. Cir. 2009) (upholding a one-hundred-yard police line around the Capitol Building); Citizens for Peace in Space, 477 F.3d at 1221, 1223 (upholding a broad "security zone" based only on hypothetical threats).

148. 409 F.3d 1113 (9th Cir. 2005).

149. *Id.* at 1117–18.

150. *Id.* at 1120–21.

151. *Id.* at 1121.

152. *Id.* at 1123 (quoting SEATTLE CITY COUNCIL, REPORT OF THE WTO ACCOUNTABILITY REVIEW COMMITTEE 4 (2000)).

153. *Id.* at 1121–23 ("Some violent protestors stopped one delegate's car and punctured its tires. Reflecting the extreme dangers to delegates, protestors, and the public, at least one WTO delegate drew a gun in response to the protestors' attempts to detain him, requiring immediate police intervention.").

154. *Id.* at 1122.

155. *Id.* at 1123, 1136.

breakdown in social order, a city must act vigorously, and more extensively."[156]

Explicitly rejecting the notion that buffer zones need to be based only on "specific, known threats,"[157] the district court in *ACLU v. City & County of Denver*[158] exemplifies that broader histories of disruption can justify restrictions on speech. At issue in that case was a security measure that prohibited "all public expressive activity by non-credentialed individuals" on portions of several Denver streets during the 2008 Democratic National Convention.[159] "[W]ith little specificity," the Secret Service based its security concerns on bombings that took place in New York City, Oklahoma City, and various "bomb attacks around the world."[160] Nevertheless, the court held that this history provided the buffer zone with a "sufficient fit" and showed that "closure of the streets [was] necessary."[161]

Likewise, the First Circuit in *Bl(a)ck Tea Society v. City of Boston*[162] upheld buffer zones surrounding the 2004 Democratic National Convention, despite the fact that there was no "event-specific threat evidence."[163] The court reasoned that a "recent past experience with large demonstrations," the 2000 Democratic National Convention in Los Angeles, met "the quantum of 'threat' evidence" and proved that the city's "extreme" measures were narrowly tailored.[164] Further, the Tenth Circuit in *Citizens for Peace in Space v. City of Colorado Springs*[165] upheld a "security zone" across several blocks that was "completely closed to all persons" based only upon the "hypothetical," unproven "threat of a terrorist attack utilizing explosives."[166] The court

156. *Id.* at 1137.

157. ACLU of Colo. v. City & Cty. of Denver, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008).

158. 569 F. Supp. 2d 1142 (D. Colo. 2008).

159. *Id.* at 1176.

160. *Id.* at 1176–77 (referring to the court's analysis of a Secret Service member's testimony).

161. *Id.* at 1177, 1178.

162. 378 F.3d 8 (1st Cir. 2004).

163. *Id.* at 13–14.

164. *Id.* Boston imposed a "hard" buffer zone, a "highly secure" area to which only "specially authorized classes of persons" could gain access, and "soft" buffer zones, to which access was "generally unrestricted." *Id.* at 10. The court explained that, in cases like this, "the public interest cuts both ways." *Id.* at 15. Though "[a] burden on protected speech always causes some degree of irreparable harm," the "concerns voiced by the City were real." *Id.*

165. 477 F.3d 1212 (10th Cir. 2007).

166. *Id.* at 1217, 1223.

reasoned that the restriction was necessary to prevent delegates at a NATO conference from being harmed by any potential detonations.[167]

In contrast, the Supreme Court has invalidated federal buffer-zone statutes concerning political protests in both *Boos v. Barry*[168] and *U.S. v. Grace*[169] because the government failed to show any proof of necessity.[170] At issue in *Boos* was a 500-foot statutorily imposed buffer zone that prohibited the display of any sign outside of foreign embassies "designed or adapted to intimidate, coerce, or bring into public odium any foreign government."[171] Although there was some evidence that foreign government officials had been successfully harassed, other federal statutes already prevented harassment.[172] But the government presented no proof that "more extensive measures [were] necessary," so the extremely broad, content-based restriction could not withstand strict scrutiny.[173]

The *Grace* Court invalidated a federal statute prohibiting any person from standing or moving or displaying "any flag, banner, or device designed . . . to bring into public notice any party, organization, or movement" on the sidewalks surrounding the Supreme Court for lack of proof.[174] No history suggested that these sidewalks were "in any way different from other public sidewalks" or that "a lone picketer" could frustrate the Government's interest in maintaining "proper order and decorum."[175] Rather, the history revealed only that "[c]ourts are not subject to lobbying . . . and they do not and should not respond to parades, picketing, or pressure groups."[176]

D. Buffer Zones Targeting an "Evil" that Necessarily Impedes Governmental Interests

The Court also upholds buffer zones by emphasizing the second necessity factor, the degree to which the disruption impedes upon the government's weighty interest, when the prohibited conduct and the governmental interest fundamentally oppose one another. Here, the

167. *Id.* at 1221. The court also explained that it would "give deference to a reasonable judgment by the City as to the best means of providing security at the NATO conference." *Id.*

168. 485 U.S. 312 (1988).

169. 461 U.S. 171 (1983).

170. *Boos*, 485 U.S. at 327.

171. *Id.* at 316 (quoting D.C. CODE § 22-1315 (1938)).

172. *Id.* at 324–27.

173. *Id.* at 327.

174. *Grace*, 461 U.S. at 172–73, 183 (quoting 40 U.S.C. § 6135 (1982)).

175. *Id.* at 182–83.

176. *Id.* at 183.

focus is not on the law's history but instead on the logical connection between the prohibited conduct and the government's interest. This analysis comes up most often when the government's goal is to protect a right to privacy.[177] In these cases, the protests are often aimed at preventing the exercise of a privacy right.

In *Frisby v. Schultz*,[178] the Court upheld an ordinance that prohibited any picketing "before or about" any residence.[179] The majority construed the statute as "a limited one" that prohibits only "focused picketing taking place solely in front of a particular residence."[180] The city showed that protestors consistently picketed outside the home of a doctor performing abortions, which held the doctor "captive" and "figuratively, and perhaps literally, trapped [him] within [his] home"—actions that conflicted with the government's interest in protecting the privacy of the home.[181] Though this disruption may have had some influence on the case's outcome, the Court did not explicitly rely on it. Instead, the Court explained that the law is constitutional because picketing at the home "inherently and offensively intrudes on residential privacy" and because the statute "targeted" only this "evil."[182] In some situations, then, the second necessity factor provides enough urgency to satisfy the necessity test without a showing of history.

E. Funeral-Protest Buffer Zones

Lawmakers and courts use both the logical-connection analysis and the history-of-disruption analysis to justify buffer zones in the funeral-picketing context. At least forty-four states have imposed buffer zones around funeral processions.[183] The buffer zones range from 100 to 1,000 feet, and nineteen of those states settle on a 500-ft buffer zone.[184]

The federal government, too, deems funeral-protest buffer zones necessary. In 2012, the Honoring America's Veterans and Caring for Camp Lejeune Families Act[185] revised the Respect for America's Fallen

177. *See infra* Parts III.E and III.F.

178. 487 U.S. 474 (1988).

179. *Id.* at 476.

180. *Id.* at 483. The dissent argued that this ordinance looked like a "total ban." *Id.* at 497 (Stevens, J., dissenting).

181. *Id.* at 484, 487.

182. *Id.* at 485.

183. Snyder v. Phelps, 562 U.S. 443, 456 (2011); Greco, *supra* note 79, at 155.

184. Nathan Eilert, Comment, *Counting the Cost of Free Speech: Evaluating a Nation's Attempts to Protect the Honor of Its Troops*, 23 KAN. J.L. & PUB. POL'Y 262, 265 (2014).

185. Pub. L. No. 112-154, tit. VI, § 601, 126 Stat. 1165, 1195–99 (2012).

Heroes Act[186] by beefing up the buffer zones surrounding funerals.[187] This Act prohibits picketing from two hours before a funeral until two hours after and rather stringently imposes 300- and 500-foot buffer zones, which increased the previous buffer zones by 150 and 200 feet.[188]

"[T]he great majority" of these statutes, with Ohio's as the only known exception, were motivated by the Westboro Baptist Church's (WBC) extensive funeral picketing.[189] Though WBC has only about seventy members, it is dedicated to picketing around the country to spread its message: God punishes the United States by killing its soldiers for tolerating homosexuality, an abominable sin.[190] To that end, WBC has picketed "an estimated 51,358 events" since 1991 and garners national media attention as often as possible.[191] Moreover, WBC has picketed in every state and in almost 1,000 cities.[192] The picketers carry signs reading "God Hates Fags," "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."[193]

186. Pub. L. No. 109-228, § 2, 120 Stat. 387 (2006).

187. Press Release, Office of Press Sec'y, Statement by the Press Sec'y on H.R. 1627 (Aug. 6, 2012), https://www.whitehouse.gov/the-press-office/2012/08/06/statement-press-secretary-hr-1627 [https://perma.cc/GD9C-2XA2].

188. Eilert, *supra* note 184, at 269.

189. Heyman, *supra* note 81, at 166 & n.368. *See* Greco, *supra* note 79, at 155 ("Seemingly as a direct result of Westboro's activities, at least forty-four states and the federal government have passed laws regulating funeral protests.").

190. Greco, *supra* note 79, at 152–53; Eilert, *supra* note 184, at 264.

191. Eilert, *supra* note 184, at 263–64. However, WBC's official website states that it has picketed at 55,979 events. *Westboro Baptist Church Picket Schedule*, GODHATESFAGS.COM (Nov. 9, 2015), http://www.godhatesfags.com/schedule.html?COLLCC=952175322& [http://perma.cc/TW7U-ZJZ7].

192. Kendra Suesz, *America versus Westboro Baptist Church: The Legal Battle to Preserve Peace at the Funerals of Fallen Soldiers*, 27 NEB. ANTHROPOLOGIST 160, 167 (2012); *Westboro Baptist Church Picket Schedule*, *supra* note 191. The website lists its official "numbers," or statistics, for categories such as "soldiers that God has killed in Iraq and Afghanistan," an ever-increasing "people whom God has cast into hell since you loaded this page," and "nanoseconds of sleep that WBC members lose over your opinions and feeeeellllliiiiiings," a number that remains at "0." *Id.*

193. Snyder v. Phelps, 562 U.S. 443, 448 (2011); Phelps-Roper v. City of Manchester, 697 F.3d 678, 683 (8th Cir. 2012) (en banc); Phelps-Roper v. Strickland, 539 F.3d 356, 359 (6th Cir. 2008).

Though the Supreme Court has never ruled on the constitutionality of these buffer zones,[194] the Court stated in *Snyder v. Phelps*[195] that funeral-protest picketing is "not beyond the government's regulatory reach" and is "subject to reasonable time, place, or manner restrictions."[196] Furthermore, the U.S. Courts of Appeals for both the Sixth and the Eighth Circuits have upheld somewhat broad funeral–picketing buffer zones.[197] In *Phelps-Roper v. Strickland*,[198] the Sixth circuit upheld the constitutionality of a 300-foot Ohio buffer-zone statute prohibiting picketing and "other protest activities" at funeral or burial services from one hour before the service until one hour after the service.[199] The Eighth Circuit upheld an identical Missouri buffer zone in *Phelps-Roper v. City of Manchester*.[200] Although each court discussed the extensive general history of the disruption caused by the Westboro Baptist Church, the courts focused on the logical connection between the significant privacy right in "the character and memory of the deceased" and protests.[201] Despite the sizes of the buffer zones, the statutes were limited in time and targeted only protesting directed at funerals.[202] Thus, the courts concluded that the statutes were necessary.

As in *Frisby*, the second necessity factor plays a strong role in funeral protest cases. The government's interest and the prohibited conduct inherently oppose one another. It is also likely that courts weigh rights to privacy heavily enough that an urgent need to protect that right arises from the mere possibility that the right could be impeded upon.

F. Abortion-Clinic Buffer Zones

Similarly, courts have emphasized both the first and the second necessity factors in cases involving abortion-clinic buffer zones. Unlike *Frisby*, however, lawmakers implementing abortion-clinic buffer zones were confronted with much more pervasive histories of disruption. Anti-abortion protestors have wielded violence, harassment, intimidation,

194. Greco, *supra* note 79, at 155.

195. 562 U.S. 443, 458 (2011) (holding that the Westboro Baptist Church's picketing, however "outrageous," is constitutionally protected speech and must be shielded from tort liability).

196. *Id.* at 456 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

197. *Manchester*, 697 F.3d 678; *Strickland*, 539 F.3d 356.

198. 539 F.3d 356 (6th Cir. 2008).

199. *Id.* at 358 (quoting OHIO REV. CODE ANN. § 3767.30 (West 2006)).

200. 697 F.3d 678 (8th Cir. 2012).

201. *Manchester*, 697 F.3d at 693; *Strickland*, 539 F.3d at 365–66 (quoting Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 169 (2004)).

202. *Manchester*, 697 F.3d at 693–95; *Strickland*, 539 F.3d at 368–69.

and obstruction as weapons for inspiring change ever since the Court decided *Roe v. Wade*.[203] Indeed, "clinic-front activism" became an "identifying hallmark[]" of the antiabortion movement for the next several decades.[204] As a result, buffer zones have played an especially prominent role in curbing the history of disruption outside of abortion clinics and protecting women seeking abortions, health-care providers, and abortion-clinic employees.[205]

On several occasions, the lower federal courts have decided abortion-clinic buffer-zone cases based, at least in part, on histories of disruption.[206] Further, the Supreme Court relied on histories of disruption to uphold at least portions of abortion-clinic buffer zones in three cases. In each of these cases, the Court recognized substantial governmental interests in ensuring public safety and order, preserving women's rights to seek lawful medical counseling, and protecting medical privacy.[207]

In *Madsen v. Women's Health Ctr., Inc.*,[208] protestors congregated around a Florida abortion clinic in numbers varying "from a handful to 400."[209] They obstructed access to the clinic, distributed literature, sang and chanted, sometimes used loudspeakers or bullhorns, and even harassed doctors and clinic employees at their homes.[210] Initially, the trial

203. 410 U.S. 113 (1973). *See* DALLAS A. BLANCHARD & TERRY J. PREWITT, RELIGIOUS VIOLENCE AND ABORTION: THE GIDEON PROJECT 36–40 (1993) (analyzing the sociological and anthropological backdrop of the violent antiabortion movement).

204. JOSHUA C. WILSON, THE STREET POLITICS OF ABORTION: SPEECH, VIOLENCE, AND AMERICA'S CULTURE WARS 1–2 (2013).

205. Allison Lange, Note, *First Amendment – Freedom of Speech and the Press – Statute Regulating Speech and Speech-Related Conduct Within 100-Feet of an Entrance to a Health Care Facility is a Narrowly Tailored Content-Neutral Time, Place, and Manner Regulation* – Hill v. Colorado*, 120 S. Ct. 2480 (2000)*, 11 SETON HALL CONST. L.J. 429, 430 (2001).

206. *See, e.g.*, Brown v. City of Pittsburgh, 586 F.3d 263, 279, 281 (3d Cir. 2009) (upholding an ordinance's fifteen-foot buffer zone because it "promises to accomplish the City's objectives" but striking down its one-hundred-foot buffer zone because the ordinance lacked "support, either in the record or in case law"); New York *ex rel.* Spitzer v. Operation Rescue Nat'l, 273 F. 3d 184, 204–205 (2d Cir. 2001) (holding that a sixty-foot buffer zone is "unnecessary" because "the evidence indicates that clinic access . . . is preserved by application of the [previous] buffer zones").

207. Hill v. Colorado, 530 U.S. 703, 715–17 (2000); Schenck v. Pro-Choice Network, Inc., 519 U.S. 357, 376 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767–68 (1994).

208. 512 U.S. 753 (1994).

209. *Id.* at 758.

210. *Id.* at 758–59. These protests frustrated the government's interests because they increased health risks in patients. *Id.*

court issued a non-speech-related injunction with no buffer zones. But when that order proved ineffective, the trial court imposed a much broader, multifaceted injunction.[211]

The Court upheld two parts of this injunction, using the history-of-disruption analysis for the first and the logical-connection analysis for the second. First, the Court held that a thirty-six-foot buffer zone prohibiting protesting and congregating in front of clinic entrances and places of ingress and egress "burden[ed] no more speech than necessary."[212] Though the buffer zone looked like a total ban and applied at all times, history revealed that the protestors obstructed access to the clinic and that the "state court seem[ed] to have had few other options."[213] Second, the Court upheld a provision prohibiting noise "within earshot" of the clinic during a specific set of hours.[214] After noting the importance of noise control around medical facilities, the Court explained, again, that the trial court did what was necessary to protect the government's interests.[215]

But history could not show that the injunction's most broad provisions satisfied either factor of the necessity element. The Court struck down a thirty-six-foot buffer zone on the clinic's sides and on private property near the clinic because "nothing in the record" indicated that protestors obstructed access to the clinic or even protested in these areas.[216] Further, the Court held that a provision prohibiting any "images observable" from the clinic was unconstitutional because it ignored obvious alternatives—the clinic could simply "pull its curtains."[217] Then, the Court struck down a prohibition on "*all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be," within 300 feet of the clinic.[218] Lastly, a fourth provision that prohibited "picketing, demonstrating, or using sound amplification equipment" in a 300-foot buffer zone around the residences of clinic employees was ruled unconstitutional because more limited intrusions on speech "could have accomplished the desired result."[219]

211. *Id.* at 769–70.

212. *Id.* at 770.

213. *Id.* at 769.

214. *Id.* at 772.

215. *Id.*

216. *Id.* at 771.

217. *Id.* at 773.

218. *Id.* at 774.

219. *Id.* at 774–75.

Similarly, the Court in *Schenck v. Pro-Choice Network*[220] relied almost entirely upon "extraordinary"[221] histories of disruption to uphold provisions of a court-imposed buffer zone, but it struck down more extensive restraints on speech because the government could prove neither historical nor logical necessity. There, protestors at several abortion clinics in Upstate New York engaged in "large-scale blockades," "consistently attempted to stop or disrupt clinic operations," often grabbed and pushed clinic patients and employees, and sometimes harassed law-enforcement officers.[222] After the protestors ignored a temporary restraining order,[223] the trial court issued a more stringent preliminary injunction with three main components: (1) a fifteen-foot floating buffer zone; (2) a fifteen-foot fixed buffer zone around clinic and parking lot entrances; and (3) a requirement that sidewalk counselors retreat from the fixed buffer zone once a person "indicates a desire not to be counseled."[224]

The Court struck down the floating buffer zone but upheld the latter two restrictions.[225] It asserted that "a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."[226] Thus, the Court upheld the fifteen-foot fixed buffer zone because "the record show[ed] that protestors purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots."[227] The Court countered the argument that the fixed buffer zone was a "ban on peaceful, nonobstructive demonstrations" by explaining that "the District Court was entitled" to rely on the history of disruptive demonstrations to ban all demonstrations.[228] While the district court did not first issue a "non-

220. 519 U.S. 357 (1997).

221. *Id.* at 383.

222. *Id.* at 362–65.

223. The trial court temporarily restrained harassment, blockades, and "'demonstrating within [fifteen] feet of any person' entering or leaving the clinics" but allowed sidewalk counselors to engage in "conversation[s] of a nonthreatening nature." *Id.* at 364. The Court noted that the protestors "[a]t first, . . . complied with" the order but eventually continued demonstrating and harassing clinic patients and employees. *Id.* at 361.

224. *Id.* at 371.

225. *Id.* at 377, 380, 383–85. The floating buffer zone was deemed unconstitutional because it "burden[ed] more speech than is necessary to serve the relevant governmental interests." *Id.* at 377.

226. *Id.* at 377.

227. *Id.* at 380.

228. *Id.* at 381–82

speech-restrictive" injunction, as in *Madsen*, the Court stated the previous injunction was merely a "consideration" in *Madsen* and was not at all dispositive.[229] Further, the requirement that sidewalk counselors retreat from that zone was constitutional because the history indicated that they, too, often harassed clinic patients and employees.[230]

The Court confronted another floating buffer zone in *Hill v. Colorado*[231] but upheld the law because it "reflect[ed] an acceptable balance" between the "right to persuade" and the "right to be let alone."[232] At issue in Hill was a Colorado statute that made it unlawful to "knowingly approach" within eight feet of another person without that person's consent.[233] The Court's narrow tailoring analysis turned on the "modest[y]" of the restriction, the weight of the states' right, and the need for legislative action.[234] The Court explained, firstly, that although the statute prevented peaceful leafletting; it did not limit the number of speakers, the noise level, the use of signs at a distance, or the speakers' ability to approach those who consent.[235]

Next, the Court indicated that state legislatures have the power to protect the "unique concerns that surround health care facilities."[236] Not unlike *Frisby v. Schultz*, the Court reasoned that the protestors who fall within the buffer zone can impair patients' access to health care.[237] The "modest restriction," then, really only regulates speech that prevents the state from protecting patients.[238]

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229. *Id.* at 382–83.

230. *Id.* at 384–85.

231. 530 U.S. 703 (2000). For a discussion on *Hill's* "complicated procedural history," see Wainwright, *supra* note 57, at 257–58.

232. *Hill*, 530 U.S. at 714, 716–17.

233. *Id.* at 703 (citing COLO. REV. STAT. § 18–9–122(3) (1999)). The buffer zone in *Hill* differed from the buffer zone in *Schenck* in two important ways: (1) the "scienter requirement" alleviated the uncertainty inherent in floating buffer zones and, in doing so, reduced the burden on the speaker; (2) the legislature enacted the buffer zone through statute, as opposed to the court-ordered injunctions in *Madsen* and *Schenck*. *Id.* at 732–33; Wainwright, *supra* note 57, at 259. *See supra* notes 73–83 and accompanying text. Thus, the floating buffer zone in *Hill* burdened far less speech than the floating buffer zone in *Schenck*.

234. *Hill*, 520 U.S. at 727–30.

235. *Id.* at 726–27. The Court explained that the buffer zone's limitations could encourage more effective political discourse by discouraging "aggressive and vociferous protest[ing]." *Id.* at 727.

236. *Id.* at 728.

237. *Id.* at 729.

238. *Id.* at 729–30.

Regarding the statute's history, the Court deferred to the legislature because it imposed a restriction "where the restriction [was] most needed."[239] The Colorado legislature based its determinations on testimony "regarding abortion opponents' conduct at abortion clinics,"[240] and on the outbreaks of violence at abortion clinics across the nation, including 1994 shootings at Massachusetts clinics.[241] Citing testimony from several witnesses, the Supreme Court of Colorado explained that the testimony revealed incidents of obstruction, intimidation, and harassment.[242] The Court did not discuss this history in much detail, but it noted that the demonstrations "impeded access," that they "were often confrontational," and that "confrontations *may* adversely affect a patient's medical care."[243]

G. In Summary

In each of these buffer-zone cases, courts essentially asked one question upon which all other questions hinged: did the government need to act in the way that it did? To answer this question, the Court looked to the history of disruption and the potential harm to the governmental interest. The legislatures in *Burson*, *Hill*, some of the political protest cases, and the funeral-protest cases each considered problems on a national level, as a whole. The legislatures allowed broader histories of disruption to inform their judgment, and they used those histories to craft their buffer zones. Additionally, none of the cases considered above preclude the possibility that a more general history could inform the necessity inquiry.

The Court bucked this trend in *McCullen v. Coakley*.[244] Massachusetts had long been a battleground state in which antiabortion groups such as Problem Pregnancy, Inc. and Operation Rescue targeted abortion clinics, patients, and employees.[245] The struggles in Massachusetts were, and in many ways still are, merely a part of a larger, nationwide effort to disrupt access to a constitutionally protected right.[246] Yet, the Court scoffed at this history by suggesting that only histories specific

239. *Id.* at 730.

240. Hill v. Thomas, 973 P.2d 1246, 1250 (Sup. Ct. Colo. 1999) (en banc).

241. David G. Pettinari, Hill v. Colorado – *The United States Supreme Court Squares Off with Colorado Over the First Amendment Rights of Abortion Protestors*, 77 U. DET. MERCY L. REV. 803, 803 (2000). For discussion on the 1994 shooting at Massachusetts abortion clinics, see *infra* Part IV.A.

242. *Thomas*, 973 P.2d at 1250.

243. *Hill*, 530 U.S. at 709–10 (emphasis added).

244. 134 S. Ct. 2518 (2014).

245. *See supra* notes 6–19 and accompanying text.

246. *See supra* notes 20–26 and accompanying text; *supra* notes 204–246 and accompanying text.

to the persons, places, and conduct regulated may inform a lawmaker's judgment.[247] Part IV explains why limiting the necessity inquiry in this way is problematic. Part V argues that the necessity element of heightened scrutiny ought to be broken down into flexible factors that allow legislatures and courts to adjust to a variety of circumstances. It then proposes that these factors reflect the two factors that guided the judgment in each of the cases discussed above: the extent of the history of disruption and the degree to which disruption impairs the government's objective.

IV. Why "Generality vs. Specificity" Does Not Quite Cut It

The Supreme Court recently reduced the necessity inquiry to one consideration: general history versus specific history. The Court stated that the legislature's interest was limited to "one place at one time" and suggested that the legislature must "focus[] on the *precise* individuals and the *precise* conduct causing a *particular* problem" when it regulates speech.[248] But this formulation "refus[es] to take . . . seriously"[249] the broader problems confronting many legislatures. Neither prior buffer-zone cases nor the purpose of heightened scrutiny supports such a confining understanding of necessity. Contrarily, each demonstrates that courts must consider a variety of things in order to accurately weigh histories of disruption.

A. The Court Contradicts Precedential Emphasis on Histories of Disruption

At first glance, the Court's formulation might appear to follow precedent. The Court has explained that free speech "cannot be denied by drawing from a trivial rough incident" or from "dissociated acts of past violence," that acts of violence should not be "episodic" or "isolated," and that a "legislature may deal with specific circumstances menacing the peace" and with "concrete situation[s]."[250] Further, almost all of the Supreme Court's buffer-zone cases involved injunctions, which typically address only specific conduct, precise places, and particular persons.[251]

247. *See supra* note 37 and accompanying text.

248. McCullen v. Coakley, 134 S. Ct. 2518, 2538–39 (emphasis added).

249. Phillipps, *supra* note 96, at 962.

250. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293, 295–97 (1941).

251. *McCullen*, 134 S. Ct. at 2539–40. *See* Schenck v. Pro-choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (upholding injunctions against protestors around abortion clinics).

However, a more broad history is not inherently "dissociated," "trivial," "isolated," or abstract.[252] And nothing in any of the previous buffer-zone cases forecloses the possibility that a general history can at least inform a legislature's decision to restrict speech.

Quite the opposite. The Court has explained that "the momentum of fear generated by past violence" may still call lawmakers to action.[253] Indeed, the Court held in *Burson v. Freeman*[254] that a general history of disruption can show a sufficiently urgent need on its own. It explicitly stated that its analysis was based upon "the history of election regulation in this *country*," the fraud and intimidation that occurred "[d]uring the *colonial period*," and the problems faced and solutions posed by *other* states and "*other countries*."[255] None of the targeted "evils"[256] actually occurred in Tennessee, whose buffer-zone statute was at issue. And the Court did not discuss whether Tennessee had actually tried any of the possible solutions. Contrarily, each part of the *Burson* Court's analysis relied only upon harms that occurred in other places, at other times, and, presumably, to other persons.

The Court distinguishes *McCullen* from *Burson* by explaining that "voter intimidation and election fraud are . . . difficult to detect," whereas obstruction and harassment at abortion clinics "are anything but subtle."[257] Similar to the analysis in *Frisby v. Schultz*,[258] the *McCullen* Court reasoned that the prohibited conduct in *Burson*, campaigning at polling places, and the government's interests, preventing voter fraud and intimidation, were inherently opposed to one another. As in *Frisby*, then, the *Burson* buffer zone "targeted" only the "evil" it sought to prevent.[259]

The Court's reasoning misses the point. While the *Burson* Court did say that "the link between ballot secrecy and some restricted zone surrounding the voting area is . . . common sense," it provided this "link" by observing the "ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud."[260] Thus, *Burson*'s first premise was that there is a general but

252. *Milk Wagon Drivers*, 312 U.S. at 293, 295–96.

253. *Id.* at 294.

254. 504 U.S. 191 (1992).

255. *Id.* at 200, 202, 206 (emphasis added).

256. Frisby v. Schultz, 487 U.S. 474, 485–86 (1988).

257. *McCullen*, 134 S. Ct. at 2540 (citing Burson v. Freeman, 504 U.S. 191, 208 (1992)).

258. 487 U.S. 474 (1988).

259. *Id.* at 485–86.

260. *Burson*, 504 U.S. at 207.

extensive history of "a persistent battle against two evils."[261] And the *Burson* Court's "common sense"[262] link does not exist without this history. The Court "fanciful[ly]"[263] eluded this point in *McCullen* and, in doing so, ignored the possibility that another history like *Burson*'s could exist.

Further, the Court has suggested that a general history can play at least some role in the Court's balance on several occasions. The statute upheld in *Hill* was motivated, in part, by the 1994 Massachusetts abortion-clinic shootings[264]—history that is not at all focused on the specific conduct, precise place, or particular persons restricted. Though the Court did not discuss this broader history, it quickly referred to the transcript of the statute's legislative hearings.[265] It explained that "there was . . . evidence" of obstruction, "confrontation[]," "abusive language," and "that emotional confrontations may adversely affect a patient's medical care."[266] The *Hill* Court's willingness to accept that the legislature acted where it "most needed" to act[267] implies that a general history combined with a more specific history can satisfy the necessity inquiry.

The Court also explained in *Snyder v. Phelps*[268] that states may regulate picketing at funeral speeches.[269] The Court even acknowledged that forty-four states, along with the federal government, already have funeral-picketing buffer zones in place.[270] Forty-three of those states base their restrictions on WBC's picketing, as does the federal government.[271] While WBC has picketed at a tremendous number of funerals across the country,[272] the small church does not present a constant,

261. *Id.* at 206.

262. *Id.* at 207.

263. *McCullen*, 134 S. Ct. at 2541, 2545 (Scalia, J., dissenting) (arguing that the majority "fanciful[ly]" defended the Act by wrongfully and "unnecessarily" deciding the content-neutrality issue).

264. Pettinari, *supra* note 241, at 803.

265. Hill v. Colorado, 530 U.S. 703, 709–10 (2000).

266. *Id.*

267. *Id.* at 730.

268. 562 U.S. 443 (2011).

269. *Id.* at 456–57. The Court also qualified this statement by saying that the funeral-picketing buffer zones are "'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents." *Id.* at 456 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

270. *Id.* at 456.

271. *See supra* Part III.E.

272. *See Westboro Baptist Church Picket Schedule*, *supra* note 191.

"imminent" threat in every city or even every state. Moreover, WBC has hardly made a dent in the total number of United States cities.[273] The Court's formulation in *McCullen*—that the legislature must tailor its restrictions to precise places—would require the Court to strike down many of the funeral-picketing buffer zones for lack of specificity. In doing so, the Court would frustrate legislative efforts to protect privacy rights that people hold dear and to deal with broader problems through comprehensive legislation.

B. The Specificity Requirement Undercuts the Necessity Inquiry

The Court's formulation misses the forest for the tree. The necessity inquiry is part of a larger framework that categorically balances the government's interests alongside the individual's right to free speech. This framework, heightened scrutiny, filters out restrictions that overburden speech and that, thereby, dilute public discourse or stifle individual autonomy. But because this freedom can conflict with other rights, heightened scrutiny also allows the government to pursue its sufficiently important interests.[274] Courts can adequately balance these two things only when they weigh the entirety of each interest, as opposed to giving either interest a rigid, a priori value.[275] As an important part of heightened scrutiny, the necessity inquiry requires "empirical judgments" based on all of the relevant factors.[276] Therefore, courts must ask whether any relevant aspect of a history of disruption could have contributed to the urgency of the government's interest. But the Court prevented itself from doing so in *McCullen*. By imposing a specificity requirement, the Court slashed the necessity inquiry down to a single consideration.

It is true that, in some sense, the Court's specificity requirement serves a purpose of heightened scrutiny because it ensures greater protection for free speech and prevents unnecessary government intrusion.[277] It is also true that the Court must prevent the government from "overstating its purpose" to infringe upon those rights. Further, it is true that some support the conclusion that "buffer zones need to be tailored to fix *specific* . . . problems."[278]

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273. There are almost 20,000 cities in the United States. *2002 Census of Governments*, UNITED STATES CENSUS BUREAU (May 21, 2015), https://www.census.gov/govs/www/02PubUsedoc_GovOrg.html [https://perma.cc/4BWH-YAYX].

274. Shaman, *supra* note 64, at 102–105. *See supra* notes 81–87 and accompanying text.

275. *See supra* notes 81–87 and accompanying text.

276. Volokh, *supra* note 71, at 2424. *See* Schneider v. New Jersey, 308 U.S. 147, 151, 160-61 (1939); *supra* notes 97–102 and accompanying text.

277. *See supra* notes 68–74 and accompanying text.

278. Burrus, *supra* note 134, at 194 (emphasis added).

But heightened scrutiny does not automatically give the win to free speech when rights conflict with one another. Instead, it acts as a mechanism through which courts can decide which interest should prevail. It requires a full and honest assessment of the rights and interests at stake in order to arrive at the best conclusion. Moreover, legislatures ought to be able to minimize the negative effects of a problem that occurs nationwide before that problem becomes widespread in their states. To serve these purposes, the necessity inquiry ought to be flexible enough to embrace a variety of problems, circumstances, and conflicting rights, while also remaining stringent enough to protect free speech.

V. Assessing Necessity by Weighing Histories of Disruption

This Part proposes that courts take a flexible, factor-based approach to remain consistent with the goals of heightened scrutiny and necessity. A law is narrowly tailored when "the means chosen are not substantially broader than necessary to achieve the government's interest."[279] Because necessity can override substantial burdens on speech—a fundamental right and a cornerstone of democracy—the government satisfies the necessity inquiry only when it can demonstrate a sufficient level of urgency, which varies according to the level of scrutiny applied.[280] The government can meet these requisite levels of urgency by focusing on the factors that subtly guide the Court's analysis in other buffer-zone cases: (1) the extent of the law's history; and (2) the degree to which that history impedes on the government's interest.

A. The Extent of the Law's History

Courts analyze this factor in a variety of ways. They look to the disruption's (a) pervasiveness, (b) its egregiousness, (c) its timing, and (d) its specificity. To do so, they must approach buffer-zone cases in a flexible, balanced manner that is consistent with heightened scrutiny. The cases discussed in Part III do not suggest that any particular combination of these things represents either a sufficient or a necessary condition. They suggest only that "the past informs the present"[281] and that courts weigh all relevant aspect of the problems that confront legislatures to achieve the most accurate, just result.

First, courts look to the disruption's pervasiveness, or how often the disruption occurs. If the disruption occurs repeatedly, then lawmakers likely have fewer options. But if the disruption is more isolated, then

279. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

280. *See* Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 298 (1941) ("[A]n injunction [on picketing] must be read in the context of its circumstances.").

281. McCullen v. Coakley, 571 F.3d 167, 172 (1st Cir. 2009).

the buffer zone appears less necessary. In both *Schenck v. Pro-Choice Network, Inc.*[282] and *Madsen v. Women's Health Ctr., Inc.*,[283] the obstruction and harassment was continuous[284] And in *Madsen*, the disruption even persisted after the initial injunction failed.[285] But even if the disruption does not repeatedly occur in the restricted location, a court might still determine that the disruption is sufficiently pervasive if it occurs in a multitude of other locations over a long period of time. In *Burson v. Freeman*,[286] for example, the government did not show that voter intimidation or election fraud had ever taken place in Tennessee. But these problems had occurred during the United States colonial period, in "other Western democracies," and in Australia.[287]

Second, courts look to the egregiousness of the disruptive activity. In *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*,[288] a series of assaults, destruction of property, and bombings made it difficult for the trial court to disentangle labor picketing from violence.[289] The Court stated that "the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."[290] And in *Menotti v. City of Seattle*,[291] Seattle's mayor imposed an emergency-order buffer zone when the city was faced with "chaos" and borderline-riots.[292] Acts of violence, then, are given an especially large amount of weight and can justify a buffer zone that is not pervasive, timely, or specific. A threat of violence, too, can be sufficiently egregious. The security concerns in *ACLU v. City & County of Denver*[293] were based on a few, unrelated bombings that occurred in different parts of the country.[294] But because of the devastation such a bombing could cause, the government showed that the history of disruption was sufficiently egregious. Moreover, serious harms to important rights could satisfy the necessity inquiry. The Court in *Burson* was

282. 519 U.S. 357, 362 (1997).

283. 512 U.S. 753, 758–59 (1994).

284. *Schenck*, 519 at 362; *Madsen*, 512 U.S. at 758–59.

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

286. 504 U.S. 191 (1992).

287. *Id.* at 206.

288. 312 U.S. 287, 294 (1941).

289. *Id.* at 294.

290. *Id.*

291. 409 F.3d 1113 (9th Cir. 2005).

292. *Id.* at 1121.

293. 569 F. Supp. 2d 1142 (D. Colo. 2008).

294. *Id.* at 1176–77.

willing to defer to legislatures where the right to vote and the integrity of the voting process were added to the scales.[295]

Third, the timing of the disruption can help to show that legislative action is especially necessary. In *Menotti*, Seattle needed to act as quickly as it could because the World Trade Organization conference was taking place as the disruption was occurring.[296] Every moment wasted was a moment that could have resulted in further harm to people or property.

Fourth, although the Court in *McCullen* overstates the role that specificity should play in evaluating history, histories specific to the conduct, places, or persons restricted help to demonstrate that the law is burdening no more than it needs to in order to accomplish its goal. The Court confronted such specific histories in at least three cases. In each case, the buffer zone was imposed by an injunction, which almost always "afford[s] more precise relief."[297] In both *Schenck* and *Madsen*, the Court upheld buffer zone injunctions because the government demonstrated that the obstruction and harassment took place at only the exact places in which speech was restricted, at the Upstate New York and Florida clinics near the clinics' doorways, parking lot entrances, and driveways.[298] Further, the buffer zone in *Madsen* was limited only to the defendants who had caused the disruption, Operation Rescue and its members.[299] Similarly, the Court in *Milk Wagon Drivers* upheld a buffer zone that applied only to the persons committing the violent acts (dairy company employees) and to the places at which the violent acts were committed (stores at which the companies' products were sold).[300] Circuit courts, too, are more likely to uphold a buffer-zone law when its restrictions are tightly tied to its history. In *Menotti*, the Court upheld an injunction prohibiting access to only the portions of the city at which violence and disruption had taken place.[301] Although none of these cases involve buffer zones that were specific in every respect, the greater a buffer zone's specificity, the more necessary it appears.

295. *Burson*, 504 U.S. at 199.

296. *Menotti*, 409 F.3d at 1121–23.

297. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citing United States v. Paradise, 480 U.S. 149 (1987)).

298. *See* Schenck v. Pro-Choice Network, Inc., 519 U.S. 357, 361–65 (1997); *Madsen*, 512 U.S. at 757–59 (discussing at length the specific disruption that occurred at specific locations).

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

300. *See* Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941).

301. *Menotti*, 409 F. 3d. at 1117–18.

In *United States v. Grace*[302] and *Boos v. Barry*,[303] the government failed to show that any of these factors were present.[304] It is not exactly clear what combination of these factors satisfies the necessity inquiry. But the cases do demonstrate that lawmakers give themselves a lot of room to prevail if they can plausibly show one or more of the factors.

B. The Degree to Which the Disruption Impedes upon a Right or Interest

If the government can show that, as a matter of logic, the restricted activity impedes upon the government's interest, then it can much more easily show that its buffer zone is necessary to serve that interest. Here, the protestors' goals often involve eroding privacy rights or preventing people from effectuating a given right. In *Hill*, for example, the protestors who fell within the buffer zone typically wanted to prevent clinic patients from seeking medical care at the clinic.[305] Without the buffer zone, then, protestors can more readily infringe upon clinic patients' right to be left alone and prevent them from accessing medical care at the clinic.

The greater the impediment, the less extensive the government's history has to be. In *Frisby v. Schultz*,[306] the Court indicated that someone cannot enjoy the privacy of his home so long as protestors engage in the targeted residential picketing that home.[307] There, the restricted activity wholly prevented the government from advancing its interest. Although the government could show some history of disruption, that history made little difference to the Court's analysis. If the government can show that it cannot advance its interests without the buffer zone, then its history of disruption can be purely hypothetical.

The Court has upheld buffer zones based on a combination of the two necessity factors. In *Hill*, the Court relied on history of harassment outside of the abortion clinics that was general and not-so-pervasive because that harassment made it more likely that the government could not protect the "unique concerns that surround health care facilities."[308] Similarly, the courts in *Phelps-Roper v. Strickland*[309] and *Phelps-Roper v. City of Manchester*[310] relied on a combination of an extensive history

302. 461 U.S. 171 (1983).

303. 485 U.S. 312 (1988).

304. *Grace*, 461 U.S. at 182; *Boos*, 485 U.S. at 326–27.

305. Hill v. Colorado, 530 U.S. 703, 728–30 (2000).

306. 487 U.S. 474 (1988).

307. *Id.* at 484–85, 487.

308. *Hill*, 530 U.S. at 728–29.

309. 539 F.3d 356 (6th Cir. 2008).

310. 697 F.3d 678 (8th Cir. 2012).

and a direct conflict between funeral protests and the right to privacy at funerals.[311]

Though the particulars of the necessity inquiry have yet to be teased out, the Court has long used this element of heightened scrutiny to flexibly consider these two factors and to reconcile free speech with other governmental interests. Thus, the Court should embrace these factors, reject *McCullen's* rigid reasoning, and allow histories of disruption to play a more consistent role.

CONCLUSION

Disagreement often sets truth-finding in motion. It can push people to confront their points of view and to either challenge themselves or strengthen their own arguments. For many, this principle lies at the core of the First Amendment's free speech guarantee. By closing that discussion off, the government may do irreparable damage to societal progress that could have been or to individual moments that are forever lost. Perhaps, then, the physical separation that buffer zones impose muffle truth-finding and bind self-determination. Perhaps, this physical separation acts as an "Iron Curtain" behind which those who fear opposing ideas and differing viewpoints cower.

But violence, harassment, and physical obstruction rarely add much to the polis; and those who employ these tools of disruption likely are not interested in truth. Furthermore, society must protect and preserve a variety of interests and rights, even when those rights conflict with free speech. By hamstringing the government from restricting speech in these situations, courts could give way to irreparable damage and could prevent other rights from ever being fully realized. A factor-based approach to the necessity inquiry gives both lawmakers and courts the flexibility they need to weigh all relevant factors and best reconcile all competing interests. Lawmakers cannot divide the market-place of ideas with an iron curtain, but they should not be powerless to address broader problems.

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311. *See supra* Part III.E.

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