



**LESLIE  
KENDRICK**

## A FRESH LOOK AT THE FIRST AMENDMENT

**LESLIE KENDRICK** joined the faculty in 2008. She teaches and writes about torts, property, and constitutional law. Kendrick's scholarship is marked by both creativity and care, and it has received wide recognition for its nuanced assessments. She is particularly adept at choosing topics ripe for consideration within First Amendment law. Indeed, most of her scholarly work examines the freedom of speech, revealing the oddities of First Amendment doctrine and the problem of singling out free speech from the backdrop of all other activities. Her articles often reconsider the justifications for widely accepted rules in a way that provides insight for specific questions while also opening new avenues for the consideration of even broader questions of free speech law. The work consistently displays a powerful, penetrating intelligence and makes important and original contributions to the fast-developing and often murky topic of free speech.

Kendrick's path to this set of legal questions began long before she joined the faculty in 2008, even before she attended UVA as a law student.

Born in the mountains of Eastern Kentucky, Kendrick grew up around her father's law practice. William Kendrick had attended law school on the GI Bill at the University of Louisville and returned to his hometown, where he developed a specialty in mineral and property law. Kendrick remembers tagging along to depositions from the age of 5 and later summarizing depositions and looking up cases along with her two younger sisters.

Kendrick's mother, Leatha Kendrick, was a poet and creative writing instructor. Leatha and Will met while studying English literature at the University of Kentucky, and later Leatha received an MFA in poetry from Vermont College. Through her mother, Kendrick was exposed to writers and to writing as a craft and occupation.

Kendrick says that being the daughter "of a poet and a property lawyer" primed her interest in both speech rights and property rights.

More broadly, she wants to explore how rights like these are defined and how we distinguish them from each other.

Kendrick's educational path followed that of both her parents. She studied classics and English as a Morehead Scholar at the University of North Carolina at Chapel Hill. She then completed a master's and Ph.D. in English literature at the University of Oxford on a Rhodes Scholarship. She applied to law school while completing her dissertation and, after visiting Charlottesville on a fine April weekend, chose to come to UVA on a Hardy Cross Dillard Scholarship.

Kendrick came to UVA for the well-balanced and rigorous legal education it offers. As it happened, she also found a bridge between her literary background and the law. Vincent Blasi, a First Amendment scholar and then a member of the UVA faculty, was researching John Milton's *Areopagitica*, the first modern defense of freedom of speech. Kendrick had written her dissertation on Milton and had spent some time studying *Areopagitica* and its political and religious context. Kendrick signed up for Blasi's class, "Ideas of the First Amendment."

In class, Kendrick encountered a host of arguments about why speech was (or was not) important enough to be protected by its own special right. One set of arguments held that only speech directly related to the political process was protected, and that art and literature were not.

"I remember having a very strong reaction to that line of argument," Kendrick recalls. "I had just spent all this time studying literature, and I thought, how could that not be protected? I also thought that the line between political and non-political speech was very hard to draw. *Paradise Lost* was literature and religion and politics all rolled up into one."

At the same time, however, this coursework exposed Kendrick to the problems of defining rights and distinguishing activities that fall within a right from activities that do not. She received more exposure to these and similar questions in classes on rights with John Simmons, on tort theory with Blasi and Ken Abraham, and on property rights with Lillian BeVier and Julia Mahoney. Kendrick also benefited from the arrival of Fred Schauer at UVA in the same year she joined the faculty. One of the world's preeminent scholars of freedom of speech and jurisprudence, Schauer has criticized as unreflective many typical paeans to free speech and has expressed skepticism about whether speech is justifiably distinguishable from other activities.

Drawing on these influences, Kendrick questions the structure of

free speech law at every level, from particular doctrines to underlying premises. In one set of papers, she considers a central doctrinal feature of free speech law: the distinction between content-based and content-neutral regulation. As a first approximation, content-based regulation regulates on the basis of what a speaker says; content-neutral regulation regulates without regard to what the speaker says. The Supreme Court subjects content-based regulations to strict scrutiny, while it gives content-neutral regulations only cursory review. Thus, much depends on whether a law is classified as content-based or content-neutral. Some scholars have criticized the Supreme Court for applying these labels inconsistently.

In "Content Discrimination Revisited," 98 *Va. L. Rev.* 231 (2012), Kendrick counters this common conception of the Court's First Amendment jurisprudence. Kendrick suggests that the real confusion stems from the fact that "content-based regulation" could mean many things—regulation based on viewpoint, subject matter, message, form of communication, and still other possibilities. The Supreme Court has never been very clear about what forms of "content-based" regulation are suspect, which has led to confusion. Nevertheless, Kendrick argues, an exhaustive analysis of the case law shows that the Court's jurisprudence on content discrimination is actually quite orderly, though that order is latent rather than patent.

In "Nonsense on Sidewalks: Content Discrimination in *McCullen v. Coakley*," 2014 *Sup. Ct. Rev.* 215, Kendrick examines the application of content discrimination rules in a case involving regulation of abortion clinic protests. She argues that the highly charged context of abortion was a stress test for the Supreme Court's rules about content discrimination, one which they largely survived. But the case highlights that different judges will find different forms of regulation suspect. Doctrinal rules are an imperfect, though possibly necessary, proxy for those gut intuitions about discrimination.

Kendrick has also written repeatedly on the role of intent in free speech cases. When examining whether speech can constitutionally be penalized, it is common for courts to inquire into the state of mind, or intent, of the speaker being punished. For instance, a speaker can only be held liable for defamation of a so-called "public figure" if the speaker had "actual malice": The speaker either knew, or recklessly disregarded the possibility, that the statement made was false. First Amend-

ment law is rife with such intent rules, but what purpose do these rules serve?

The standard explanation is that the use of intent standards can mitigate chilling-effect problems that might arise when speakers refrain from protected speech out of concern that it will erroneously be punished as unprotected speech. In other words, intent rules serve to avoid chill by factoring in the speaker's state of mind. We may be more willing to speak our minds if we know that the intent in doing so is taken into consideration.

In "Speech, Intent and the Chilling Effect," 54 *Wm. & Mary L. Rev.* 1633 (2013), Kendrick questioned whether chilling effects could really serve as a sound justification for intent rules. She did this by examining the role that intent plays in constitutional law more generally—not just in defamation. By looking at how intent is used throughout the full range of First Amendment cases, the article found very little empirical support (in either the case law or the empirical literature) to justify reliance on the chilling effect. Indeed, Kendrick showed that a chilling effect is both under- and over-inclusive as a justification for the treatment of intent in First Amendment law because intent is not treated identically in all First Amendment cases: Defamation standards are different from incitement standards. By looking carefully at the different ways that intent is used in this area, Kendrick demonstrated that justification of an intent standard was a much more complex endeavor.

She continued this work in "Free Speech and Guilty Minds," 114 *Colum. L. Rev.* (2014), which offered a general theory about how intent rules in speech regulation could and should be justified. By breaking down the various harms that potentially flowed from speech—and describing how those harms connect to a speaker's intent in different contexts—Kendrick argued that an autonomy-based theory of speech (referring to the basic sense of individuals' capacities, rational and otherwise, to form thoughts and beliefs for themselves) served as a better justification for how and why intent should be used in the law. For example, First Amendment law forbids punishment of incendiary statements without considering the intent of the speaker. Kendrick argues that this is likely not because of a concern about chilling valuable discourse—after all, the speech at issue is objectively incendiary. If the speaker's state of mind deserves attention, it is likely because it seems unjust to punish someone who does not mean to stir up illegality or violence but instead is pursuing a legitimate communicative endeavor.

More recently, Kendrick has examined the increasingly disparate array of legal claims that are often brought under the mantle of free speech. Today's courts encounter free speech claims from a motley array of litigants, including meat producers, tobacco companies, mining companies, Internet service providers, tattoo parlors, search engines, and pornographic actors. In an information economy, more and more activities can be described as speech, and the line becomes even harder to demarcate.

"A big tension that used to exist and has flared up again is the tension between speech rights, which get a lot of protection, and economic rights, which today do not," said Kendrick. In the *Lochner* era of the early twentieth century, the same tension existed in the opposite direction. "There is Justice Brandeis in the 1920s saying to his colleagues, 'This speech claim that you're rejecting from a newspaper publisher could be reframed as an economic rights claim and you'd be all for it.' Speech rights and economic rights, speech and property—these concepts overlap, but our constitutional system treats them differently."

This set of problems has led Kendrick to think about how rights are defined and what structure they have. One solution to the tension between speech and other activities is to conclude that speech is no different from other activities and therefore deserves no higher protection. Taking any other route—trying to distinguish speech from economic activity, or activity generally—involves defining the criteria for just how distinct speech must be and then considering whether it meets those criteria.

Ultimately, Kendrick argues, our practice of singling out speech is defensible. But it requires much more reflection and precision than it often receives. Concepts such as speech rights and property rights are complex and may inevitably overlap to some degree. But careful thinking about these rights is necessary for their appropriate recognition.

## EXCERPTS

## FIRST AMENDMENT EXPANSIONISM

56 *Wm. & Mary L. Rev.* 1199 (2015) (symposium)

When it comes to the scope of the First Amendment, there are only two clear rules: either no speech is covered, or all speech is covered. Every other position is somewhere in the mushy middle. The first clear rule—no speech is covered—suggests that speech is not distinguishable from other activities, or that “the freedom of speech” is not distinguishable from some other freedom that covers a broader range of activities. This position, while it garners some support in the theoretical literature, seems unlikely to be adopted as a tenet of constitutional law.

The second clear rule is that all speech is covered, sometimes called the “all-inclusive approach.” This may seem equally unpalatable. After all, everyone has intuitive examples of speech that simply cannot receive First Amendment protection. Any rule that all speech is covered is going to have to involve a heavy amount of defining out, presumably by employing some sort of test to conclude that, while all speech is nominally within the scope of the First Amendment, some of it ultimately receives little to no protection.

But this option must be compared with the alternatives. Any theory of free speech between “no coverage” and “all coverage” will be nuanced and complex. This is certainly true of any pluralistic theory, which identifies multiple purposes which freedom of speech serves. It is also true of any unified theory, which assigns importance only to one value, such as the search for truth or democratic participation. Even if only one value is involved, a theory must take account of all of the different activities in the world that serve that value and how they relate to “the freedom of speech.” Such a theory should probably also explain how various activities that involve “speech” in the everyday sense either do or do not further the chosen value and thus how they do—or do not—relate to “the freedom of speech.” Certainly courts are going to want to know the answer to this question when faced with applying “the freedom of speech” to particular activities.

Even at their best, such theories will involve complexity, they

will involve nuance, and they will go on for pages. At their worst, given all the innumerable things that speech does, and all the ways that particular values either are or are not furthered by speech activities, listening to somebody else’s First Amendment theory is like listening to somebody else’s dream—an obscure, convoluted trek that is at its most satisfying when it is avoided. As Henry James said, “Tell a dream, lose a reader.”

Any actual First Amendment theory, then, will function as more of a standard than a rule. Even the hardest and clearest of theories will require much explication in order to bring it down to the level of particular activities in particular disputes. Rather than deal with these complexities, some courts and some scholars opt for the “all-inclusive approach.” They prefer defining out to defining in. The all-inclusive approach cannot avoid the difficult questions: some activities will have to be defined out, and some set of values will have to govern that process. But it feels clearer and easier to start with the presumption that everything is in and work from there. And along the way one may conclude that the easiest course of all is just to leave the NLRB Notice, the tattoos, and the food labels in after all.

Of course, it need not be thus. European courts, for example, seem quite happy with standards, as do some American judges. But for many American courts, rules seem to exert a magnetic pull. Theorists who are working to develop a comprehensive First Amendment theory not only have their work cut out for them generally, but they are fighting against this magnetic pull. Even the world’s best First Amendment theory would still have to contend with judges’ desire for what Learned Hand described, in the context of subversive speech, as “a qualitative formula, hard, conventional, difficult to evade.” And if this pull exerts itself in the First Amendment context, it is likely, at least at this point, to pull toward “all coverage” rather than “no coverage.”

First Amendment expansionism is likely a product of many factors. It does, however, highlight challenges intrinsic in formulating and propagating a workable understanding of “the freedom of speech.” The pull of both everyday language and clear rules undercuts the best efforts to bring a full conception of the First Amendment to legal decisionmaking. Such a conception—one which can comprehensively explain the relationship between “speech” and “the freedom of speech”—is precisely what courts need to address

the diverse and often novel claims that First Amendment opportunism brings their way. It is a paradox that a complex understanding of the First Amendment is exactly what legal decisionmaking requires and exactly what it shuns.

## NONSENSE ON SIDEWALKS: CONTENT DISCRIMINATION IN *McCULLEN V. COAKLEY*

2014 *Sup. Ct. Rev.* 215

What does it mean to say that the government may not “restrict expression because of its message, its ideas, its subject matter, or its content?” Whatever it means, how would one determine when it has occurred? First Amendment law has wrestled with these questions for more than forty years, and if *McCullen v. Coakley* is a reliable indicator, the debates have only become more fractious.

The Massachusetts Reproductive Health Care Facilities Act prohibited knowingly standing on a “public way or sidewalk” within 35 feet of the entrances or driveways of facilities, other than hospitals, where abortions were performed. The law exempted people entering or leaving a facility; facility employees “acting within the scope of their employment;” municipal agents, such as police officers, firefighters, and so forth, in the scope of their duties; and people crossing the sidewalk solely to reach a destination.

The question for the Supreme Court was whether this law impermissibly discriminated against anti-abortion speakers or merely maintained public safety and preserved access to health care facilities. In this regard, the Court inquired into the purpose behind the law. A subsidiary question was, if the law served the latter goals, did it do so without treading too heavily on the expressive opportunities of anti-abortion speakers. In this regard, the Court inquired into the effects of the law. These inquiries, into purpose and effects, are aspects of the standard First Amendment jurisprudence of “content discrimination,” a term that describes both the principle that targeting speech for its content is highly suspicious and the various doctrinal tools used to determine when that is happening. Ultimately, the Court, with the Chief Justice writing for a five-person majority,

determined that the law had no discriminatory purpose but its burdensome effects on speakers were not justified. In two concurrences in the judgment, Justice Scalia and Justice Alito also concluded that the law was unconstitutional but did so on the ground that it discriminated against anti-abortion speech.

In their several approaches to content discrimination, the Justices’ opinions demonstrated that the question of *how* to approach the issue is somewhat of a chameleon: it is likely to match the contentiousness of the factual context that surrounds it. Given that the context in *McCullen* was abortion, matters became controversial indeed. At several points, both jurists and advocates viewed a single phenomenon in strikingly different terms, beginning with the facts, continuing through both the mechanics and the results of the purpose inquiry, and ending with the assessment of the law’s effects. These conflicts demonstrate both the potential benefits of clear rules in the content discrimination context and their lurking futility.

...

Although the majority managed to hold, consistently with precedent, that the 2007 Act was content-neutral, it then made a departure of its own, one whose ramifications have yet to be determined. After having concluded that the 2007 Act was content-neutral, it went on to invalidate it under the standard for content-neutral laws, which the Court has sometimes called “intermediate” scrutiny. This standard has historically required that the law be “narrowly tailored to serve a significant governmental interest” and that it leave open “ample alternative channels of communication.” The Court has never rejected a proffered government interest as not “significant,” and it has specified that “narrowly tailored” in this context need not be a least restrictive means and may be underinclusive, though not substantially overinclusive. The vast majority of laws subjected to this standard by the Supreme Court have passed, to the point that it has been likened to rational basis review.

The majority in *McCullen* departed from this past practice and applied the tailoring requirement with a newfound stringency. The Court took quite seriously the challengers’ assertions that the 2007 Act reduced their ability to reach patients for quiet conversations and to hand them literature. The majority quoted extensively from the challengers’ testimony on these matters and admonished that “[t]he Court of Appeals and respondents are wrong to downplay these bur-

dens on petitioners speech.” At the same time, the majority was skeptical of the Commonwealth’s arguments that the law was important for advancing its interests. The Court listed a number of alternative approaches that other jurisdictions had taken and was unimpressed with the Commonwealth’s imagined reply of, “We have tried other approaches, but they do not work.”

Although no members of the Court dissented from this tailoring analysis, one could imagine a dissent that accused the majority’s tailoring analysis of inconsistency with the same vitriol that the concurrences reserved for its content-neutral analysis. Content-neutral scrutiny has historically been enormously deferential. This is why so few laws have failed it. Any hard look would have turned up questions about whether Congress really needed to ban draft card burning for administrative reasons; whether the Postal Service had to ban solicitation of alms and contributions on postal premises to preserve its patrons from “the potentially unpleasant situation created by solicitation”; or whether the city of Los Angeles had to ban all written communication on all sidewalks, light posts, and myriad other public properties in order to advance its “substantial” government interest in “esthetic values.” In past cases, the Court has shown great deference to the government’s understanding of its own agenda; suddenly, it is anything but deferential.

While the government received less credit than usual, the speakers received more. All content-neutral laws affect speech opportunities. All the content-neutral laws previously upheld by the Supreme Court were challenged precisely because they interfered with a particular speaker or speakers’ ability to communicate in their desired way. For O’Brien and many others, burning a draft card expressed their message in a way that nothing else could. For advocates for the homeless, being unable to stage a sleep-in demonstration in Lafayette Park, across the street from the White House, removed an irreplaceable method of expressing their message. For Hare Krishnas, being unable to solicit passersby at the airport or a state fair was a frustration to their expressive, indeed their religious, mission. For countless speakers, being denied the ability to express themselves at a particular place or in a particular method fundamentally alters the power of what they are saying, the substance of what they are saying, or both. If it is wrong to downplay these effects in one case, it is wrong to downplay them in others.

It remains to be seen whether *McCullen*’s new approach will take hold for all content-neutral laws or whether instead it will become an abortion-specific standard. ... If the decision signals a new interest in the effects of content-neutral laws generally, this development would be, in some respects, praiseworthy. These effects on speaking opportunities are real enough, and past jurisprudence has undoubtedly given them short shrift. But this is just to say that these effects have been a casualty of the Court’s past preference for a rule—one in which the government’s interests and choice of remedy are given heavy presumptive weight. Once again, there are costs to revoking this rule. One is the fact, noted above, that all content-neutral laws have effects on speech opportunities; indeed, all laws affect speech opportunities. And such effects are difficult, if not impossible, to measure. If the Court intends to make it its business to police laws for their speech effects, it has its work cut out for it.

A related drawback is the fact that, given their unquantifiability, any assessments of speech effects are bound to be approximate, intuitive, and ultimately subjective. They are likely to be fraught in the same way as the parties’ debates about the facts, or the Justices’ debates about content neutrality. It will be extremely difficult to cabin these inquiries with rules, and in their rulelessness they will appear wholly subjective. In *McCullen*, five Justices thought the toll of the 2007 Act was too great. What this means for the myriad buffer zones that governments use in other contexts, from political conventions, to funerals, to the regulation of panhandling—or for content-neutral laws generally—is anyone’s guess. One might worry that the Court would perceive the trade-offs differently when it comes to certain laws. The statute prohibiting demonstrations on the Supreme Court grounds essentially insulates the Court’s building and members in their own buffer zone. When eminent personages, such as Supreme Court Justices, make public appearances on campuses and elsewhere, demonstrators and gawkers are often kept far from their path, whether through permanent so-called “free speech zones” or through specialized security measures. It would be interesting to know how the Justices would balance access and safety in such contexts against speakers’ interests in their preferred methods of speech.

## V. CONCLUSION

The notion of content discrimination is ultimately about identifying suspicious governmental action. This task is complicated by the facts that (1) the “real” objects behind governmental regulation are, on many levels, unknowable, and (2) everyone is suspicious of different things. To meet these problems, content discrimination doctrine has developed a series of rule-like proxies that attempt to triangulate legislative purpose in a somewhat predictable way. *McCullen*, like some cases before it, subjects this framework to the stress test of the abortion context, and unsurprisingly, it shows some strain. With regard to both content-discrimination analysis and content-neutral scrutiny, the opinions in *McCullen* show some Justices ready to jettison rule-like frameworks and rely upon their own sense of what the Massachusetts legislature did, or what effects it had. In this, the case demonstrates both the need for rules and their potential futility in highly polarized contexts. In the end, the Court seems no more able than the litigants to rise above the level of the sidewalks and their confusing, cacophonous din.

## BIBLIOGRAPHY

- “How Much Does Speech Matter?” 129 *Harv. L. Rev.* 997 (2016) (reviewing Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (2014)).
- “First Amendment Expansionism,” 56 *Wm. & Mary L. Rev.* 1199 (2015).
- “Free Speech and Guilty Minds,” 114 *Colum. L. Rev.* 1255 (2014).
- “Nonsense on Sidewalks: Content Discrimination in *McCullen v. Coakley*,” 2014 *Sup. Ct. Rev.* 215.
- “Speech, Intent, and the Chilling Effect,” 54 *Wm. & Mary L. Rev.* 1633 (2013).
- “Disclosure and Its Discontents,” 27 *J.L. & Pol.* 575 (2012).
- “Content Discrimination Revisited,” 98 *Va. L. Rev.* 231 (2012).
- “Content Neutrality and Compelling Interests: The October 2010 Term,” 98 *Va. L. Rev. in Brief* 14 (2012).
- “The Lockean Rights of Bequest and Inheritance,” 17 *Legal Theory* 145 (2011).
- “FDA’s Regulation of Prescription Drug Labeling: A Role for Implied Preemption,” 62 *Food & Drug L.J.* 227 (2007).
- Note, “A Test for Criminally Instructional Speech,” 91 *Va. L. Rev.* 1973 (2005).