ESCAPING A CATCH-22 BY MAKING EVERYONE LOSE: THE COURT LIMITS FREE SPEECH IN *HILL v. COLORADO*

William Backer*

"Is Orr crazy?"

"He sure is," Doc Daneeka said.

"Can you ground him?"

"I sure can. But first he has to ask me to. That's part of the rule."

"Then why doesn't he ask you to?"

"Because he's crazy," Doc Daneeka said. "He has to be crazy to keep flying combat missions after all the close calls he's had. Sure, I can ground Orr. But first he has to ask me to."

"That's all he has to do to be grounded?"

"That's all. Let him ask me."

"And then you can ground him?" Yossarian asked.

"No. Then I can't ground him."

"You mean there's a catch?"

"Sure there's a catch," Doc Daneeka replied. "Catch-22. Anyone who wants to get out of combat duty isn't really crazy."

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was

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 Stetson Law Review, Articles & Symposia Editor. B.A., Cumberland College, 1999; J.D., Stetson College of Law, forthcoming 2002.

I would like to dedicate this Note to all those who, over my protestations, have encouraged me to write. Special thanks to Professor Thomas C. Marks, Jr., without whom this Note would have been only an idea. I would also like to thank my parents for their love and continued support.

> *sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.*
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> *"That's some catch, that Catch-22," he observed.*
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> *"It's the best there is," Doc Daneeka agreed.*[1]

One of our greatest rights as Americans is the freedom of speech guaranteed by the First Amendment. One of our most divisive issues today concerns a woman's choice to have an abortion, though it, too, is a recognized right. Limiting the outbreaks of violence between supporters and protesters of abortion, while at the same time preserving the free-speech rights of these opposing sides, has become an increasing problem and places courts in a Catch-22.[2] The United States Supreme Court recently reexamined these issues and this problem in *Hill v. Colorado*.[3]

In *Hill*, the Court faced a challenge to a newly-developed solution adopted by a state for the first time.[4] Under a recent Colorado law, a buffer zone surrounded persons near a health clinic.[5] This buffer zone banned protesters from approaching other persons to speak to them without first obtaining their consent.[6] Faced with a constitutional challenge to this solution, the Court had to conduct a two-step inquiry.[7] First, "What standard of scrutiny or test should apply to the statute?"[8] To answer this, the Court had to decide whether the statute prohibits speech on the basis of content (and is therefore content based) or without reference to the content of the prohibited speech (and is therefore content neutral).[9] This determination is a crucial step in deciding whether the statute is a permissible regulation of free speech or should be invalidated as contrary to the First Amendment, because content-based statutes face a

1. Joseph Heller, *Catch-22* 45–46 (Simon & Schuster 1955).
2. *Merriam-Webster's Collegiate Dictionary* 180 (Frederick C. Mish ed., 10th ed., Merriam-Webster 2000) (defining Catch-22 as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule").
3. 530 U.S. 703 (2000).
4. *Id.* at 708.
5. *Id.* at 707–708.
6. *Id.* at 707.
7. Martin H. Redish, *Freedom of Expression: A Critical Analysis* 87 (Michie 1984).
8. *Id.*
9. *Id.*

much tougher test than content-neutral ones do.[10] Second, "Based on the answer to the first question, does this statute pass the test?"[11] If the answer to the first question is that the statute is content based, then the statute has to be such that there are no less drastic means to achieve its purpose.[12] If the answer to the first question is content neutral, then the statute has to be narrowly tailored so that the purpose would be achieved less effectively without the restriction, and the means chosen must not be "substantially broader than necessary to achieve" that purpose.[13] If the statute does not satisfy the appropriate test, the statute is unconstitutional.[14]

The Court's analysis on both of these questions, however, failed. To uphold the statute, the Court answered the first question by finding that the statute burdened the speech of all individuals and all subjects alike, and was therefore content neutral.[15] However, there was a catch — a Catch-22. To answer the second question affirmatively, the Court also needed to find that the statute was narrowly tailored.[16] The statute could be interpreted to cover all speech, but as soon as it was, the Court needed to concede that the statute was not narrowly tailored. The statute could burden the speech rights of all and thus not be narrowly tailored, or it could be narrowly tailored to burden only speech that obstructed access to clinics and thus be content based. Ignoring this inverted relationship, the Court seemingly escaped the lose-lose situation of the Catch-22.

The result, however, was not a win. For this result not only

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10. Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* vol. 2, § 3:1, 3-1 to 3-2 (West 1999). A content-based restriction faces the strict scrutiny of the compelling-governmental-interest test, Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Mallable Doctrine*, 29 McGeorge L. Rev. 69, 76 (1997), whereas a content-neutral restriction faces lesser, intermediate scrutiny of the time, place, and manner test, *Turner Broad. Sys., Inc. v. Fed. Commun. Commn.*, 512 U.S. 622, 642 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 790–791 (1989).

11. Redish, *supra* n. 7, at 87.

12. *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000).

13. *Ward*, 491 U.S. at 799–800. The Court upheld a noise control ordinance in Central Park as content neutral and narrowly tailored. *Id.* at 803.

14. *See e.g. Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating a content-based statute that failed the compelling-governmental-interest test).

15. *Hill*, 530 U.S. at 723. Therefore, the Court applied the intermediate-scrutiny test. *Id.* at 725–730.

16. *Supra* n. 13 and accompanying text.

added to the confusion surrounding the content distinction[17] of First Amendment jurisprudence, but also wrongfully eroded part of our greatly valued freedom of speech. Although certain dissenting justices alleged that the Court reached the wrong decision because it favored the right to abortion,[18] the larger problem with this decision is that this incorrect analysis may not be limited to just the abortion setting. The Court opened the door for potential government suppression of any unwanted view on any issue. This is abhorrent to the First Amendment's guarantees.[19]

Part I of this Note will examine the statute in question, provide background on the reason for its enactment, and give a history of the challenge to it. Part II of this Note will inform the reader of both sides' undisputed interests brought into conflict by the statute and focus on the only challenged provision of the statute. Part III will provide background for answering the first question, detail how the Court answered this question, and explain why that analysis fails. Part IV will assume, arguendo, that the Court answered the first question correctly, explain how the Court answered the second question, and detail why the "Catch-22" of the Court's answer to the first question dictates a different answer to the second question. Part V will examine the impact of the case. Part VI will summarize the prior parts.

PART I: BACKGROUND, HISTORY, AND CHALLENGE OF THE STATUTE

A. Both Courts and Legislatures Have Attempted to Control Violence at Abortion Clinics

Because of the emotional fervor attached to abortion, discussions about the subject sometimes become uncivil and violent. To avoid stirring up these emotions, this Note will not debate the legality of abortions or the flaws in the reasoning of each side's arguments. However, a general background of the volatile and

17. The phrase "content distinction" refers to the first question of whether the restriction of speech is content based or content neutral. Redish, *supra* n. 7, at 87.

18. *Hill*, 530 U.S. at 741 (Scalia & Thomas, JJ., dissenting) (stating that "[n]one of these remarkable conclusions should come as a surprise. What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice." (citation omitted)).

19. *See infra* nn. 76–83 and accompanying text (explaining that the purpose behind the First Amendment is to keep government from invading the free marketplace of ideas).

turbulent situation is necessary to better understand the purpose behind the Colorado statute at issue in *Hill*. Without question, violence surrounding abortion clinics is a national problem.[20] In fact, violent clashes lead to Congress's passing of the Federal Access to Clinics Act in 1994.[21]

State legislatures and courts have attempted other solutions to quell the violence. Legislatures opened doors to civil suits for damages[22] and also have changed criminal codes to prohibit physical interference with access to clinics.[23] "In the spring of 1989, Maryland passed the nation's first such law, prohibiting interference with entry or exit from a medical facility by 'physically detaining the individual or obstructing, impeding, or hindering the individual's passage.'"[24] Courts utilized stricter measures by issuing injunctions that enjoined protesters, based

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20. *See generally* Alan Guttmacher Inst., *Alan Guttmacher Inst.* <http://www.agiusa.org> (accessed Nov. 10, 2001) (showing statistics and providing some stories of attacks); Natl. Abortion & Reprod. Rights Action League, *NARAL Reproductive Freedom of Choice, Clinic Violence* <http://www.naral.org/issues/ issues_violence.html> (accessed Nov. 10, 2001) (showing statistics and providing some stories of attacks).

21. 18 U.S.C. § 248(a) (2000). This statute proscribes as unlawful the following:

> Whoever (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
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> (2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
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> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship.

22. Cal. Civ. Code § 3427.1 (West 2000); Student Author, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-abortion Violence*, 113 Harv. L. Rev. 1210, 1218 (2000).

23. Kan. Stat. Ann. § 21-3721 (1999); 5 Me. Rev. Stat. Ann. § 4684-B (1999); Md. Crimes & Punishments Code Ann. § 577B (1999); Mass. Gen. Laws ch. 266, § 120E (1993); Mich. Comp. Laws § 333.20198 (2000); Minn. Stat. § 609.7495 (1999); Nev. Rev. Stat. § 449.760 (2000); N.Y. Penal Laws § 240.70 (Consol. 1999); N.C. Gen. Stat. § 14-277.4 (1999); Or. Rev. Stat. § 164.365 (1999); Wash. Rev. Code § 9A.50.020 (2000); Wis. Stat. § 943.145 (1999); *see generally* Natl. Abortion & Reprod. Rights Action League, *Who Decides?: A State-by-State Review of Abortion and Reproductive Rights* vii, xiii (10th ed., Natl. Abortion & Reprod. Rights Action League 2001) (a yearly publication detailing a state-by-state analysis of all laws and recent trends affecting the right to abortion).

24. Student Author, *supra* n. 22, at 1218–1219 (quoting Robert Barnes, *Schaefer Signs Bill for Clinics; Law Prohibits Blocking Entries*, Wash. Post B1 (May 26, 1989)). Thirteen other states have followed this lead. *Supra* n 23.

on past conduct, from entering buffer zones that surrounded clinics.[25]

There are some key distinctions between these legislative and judicial restrictions. Statutes have a broad reach by protecting all clinics state-wide.[26] But these restrictions are less severe than injunctions are, because statutes prohibit only the current use of physical interference, allowing peaceful entry and protest.[27] Injunctions have a much narrower reach than statutes do, because they protect only the party seeking the injunction, typically just one clinic.[28] But these restrictions are more severe than statutes are, because no entrance is allowed in the buffer zone at all; even peaceful entry and protest is prohibited.[29]

The Colorado Legislature attempted to combine the broader reach of a statute with the more severe restriction that had been reserved for court injunctions. Before the *Hill* case, the constitutionality of statutorily-mandated buffer zones created in response to protesters' past conduct had not been decided. The Court had avoided "the question of whether 'some sort of zone of separation' [i.e., a buffer zone] between individuals entering the clinics and protesters would ever be constitutional," if passed by legislatures and affecting clinics state-wide.[30] But in *Hill*, the Court finally confronted such a state-wide creation of buffer zones. The outcome would affect the future use of buffer zones nation-wide.

B. The Statute Is Enacted and Challenged All the Way to the Supreme Court

In 1993, the Colorado Legislature enacted the clinic-access law in question.[31] The entire statute reads as follows:

(1) The general assembly recognizes that access to health care

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25. *See e.g. Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 381–382 (1997) (upholding an injunction enjoining protesters); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757 (1994) (partially upholding an injunction enjoining protesters).

26. *E.g.* Kan. Stat. Ann. § 21-3721 (applying statewide).

27. *E.g. id.* (prohibiting entering or remaining on public or private land only when doing so would interfere with patients' access to health care facilities).

28. *E.g. Madsen*, 512 U.S. at 757–758 (partially upholding an injunction protecting only one clinic).

29. *E.g. id.* at 759–760 (prohibiting all entry and protest within a buffer zone created by an injunction). Additionally, there exists the federal law, which, like the state statutes, prohibited physical interference. 18 U.S.C. § 248(a).

30. Smolla, *supra* n. 10, at § 13:38, 13-69 (quoting *Schenck*, 519 U.S. at 377).

31. *Hill*, 530 U.S. at 707.

> facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
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> (2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.
>
> (3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.
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> (4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.
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> (5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.
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> (6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C. R. S.[32]

A facial challenge to Subsection (3) was filed in a Colorado district court almost immediately after the statute's enactment.[33] The district court upheld the constitutionality of the statute, and a Colorado appellate court affirmed.[34] In 1996, the Colorado Sup-

32. Colo. Rev. Stat. § 18-9-122 (1999).

33. *Hill*, 530 U.S. at 708.

34. *Id.* at 710–711 (noting both courts found that the statute was content neutral and applied the intermediate-scrutiny test).

reme Court refused to review the case.[35] At the same time, the Court decided *Schenck v. Pro-Choice Network of Western New York*.[36] The Court then granted certiorari in the Colorado case, vacated the judgment of the appellate court, and remanded in light of the decision pronounced in *Schenck*.[37]

On remand, the Colorado appellate court upheld the statute, noting that, in *Schenck*, the Court "expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises, and protesters."[38] The appellate court also distinguished *Schenck* as an injunction case, which is subject to higher scrutiny than a statute such as Colorado's.[39] The Colorado Supreme Court affirmed the lower courts' opinions that the statute was content neutral and found that it was a valid restriction on time, place, and manner according to the intermediate test pronounced in *Ward v. Rock Against Racism*[40] for content-neutral statutes.[41] Recognizing the importance of the case, the Court then granted certiorari.[42]

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35. *Id.* at 712.

36. 519 U.S. 357, 361 (1997) (upholding some parts of an injunction, but invalidating a provision creating a speech-free "floating buffer zone" surrounding a clinic as violating the First Amendment).

37. *Hill*, 530 U.S. at 712 (explaining that the Colorado statute, like the New York statute at issue in *Schenck*, imposed a floating buffer zone). Floating buffer zones are zones the boundaries of which are determined by the location of a moving object, such as another person. *Schenck*, 519 U.S. at 367. Thus, the zone "floats" to wherever that person moves. *Id.* In *Schenck*, the floating zone required protesters to remain fifteen feet away from people seeking access to the clinic. *Id.* These are different than fixed zones, the boundaries of which are set by non-moving objects such as doorways or driveways. *Id.* The floating zone in *Hill* is established by Subsection (3). *Infra* nn. 53–59 and accompanying text.

38. *Hill v. Lakewood*, 949 P.2d 107, 109 (Colo. App. 5th Div. 1997), *aff'd, sub. nom. Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999), *aff'd, sub. nom. Hill v. Colorado*, 530 U.S. 703 (2000).

39. *Id.* Content-neutral injunctions face stricter scrutiny than content-neutral statutes, but this is still less scrutiny than the amount courts impose upon content-based restrictions (injunctions or statutes). *Madsen*, 512 U.S. at 757. Thus, the following is the descending order in which courts scrutinize speech restrictions: content-based (either injunctions or statutes), content-neutral injunctions in public fora (as in *Madsen* and *Schenck*), and content-neutral statutes in public fora (as in *Hill*).

40. 491 U.S. 781 (1989).

41. *Hill*, 530 U.S. at 712–713.

42. *Id.* at 714.

PART II: BALANCE OF INTERESTS

A. Only Challenge Is to the Statute's Restriction on Peaceful Speech

It is important to begin, as the majority opinion did, with an analysis of the interests involved in the statute.[43] First, the issue presented did not involve any form of violence.[44] The statute was challenged on the basis that it suppresses peaceful free speech protected by the First Amendment.[45] Violence is not protected by the First Amendment and should be condemned regardless of the purpose behind it.[46] Unfortunately, violence caused by some pro-life groups makes it

> easy to dismiss glibly the [peaceful] free speech claims of pro-life groups.... To be fair and present the First Amendment questions in their proper context, it is important to observe that many pro-life groups do not condone violence, and indeed have condemned attacks on clinics.[47]

In fact, as the Court found, although the record demonstrated that violence occurred at clinics in Colorado, "there was no evidence, however, that the 'sidewalk counseling' conducted by petitioners in this case was ever abusive or confrontational."[48] So, the challenge here was to the restrictions placed on peaceful abortion demonstrations, a form of expression protected by the First Amendment and heretofore not prohibited by statute.[49]

B. The Petitioners' Interests Are Undisputed

The specific challenge is to the constitutionality of Subsection (3).[50] No other provision was challenged,[51] including Subsection (2), which bans physical interference, as other state

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43. *Id.*

44. *Id.* at 714–715.

45. *Id.* at 715; *see* Smolla, *supra* n. 10, at § 13:31, 13-53 (noting that "peaceful protest by antiabortion demonstrators is a form of freedom of expression protected by the First Amendment").

46. *See Chaplinsky v. N.H.*, 315 U.S. 568, 571–572 (1942) (finding that "fighting words" are not protected by the First Amendment).

47. Smolla, *supra* n. 10, at § 13:32, 13-54.

48. *Hill*, 530 U.S. at 710. The Author interprets this finding of non-abusive, non-confrontational protest as meaning peaceful protest.

49. *Supra* nn. 44–46 and accompanying text.

50. *Hill*, 530 U.S. at 707–708.

51. *Id.*

legislatures have done.[52] Subsection (3) provides for the drawing of buffer zones, prohibiting even peaceful entry and protest.[53] These are the severe restrictions that previously were left to court injunctions surrounding specific clinics.[54] However, Subsection (3) is a state-wide ban.[55] Subsection (3) "creates a 100-foot radius around a health care facility, as a 'fixed buffer zone.'"[56] Inside this fixed zone, "no person may knowingly approach another within eight feet for the purpose of displaying a sign, engaging in oral protest, educating, counseling, or passing leaflets or handbills, unless the other person consents."[57] The petitioners challenged this eight-foot "limited floating buffer zone,"[58] which applies state-wide without any proof of physical interference or violence.[59]

These "limited" restrictions affect political speech in traditional public fora.[60] As the majority recognized, the restrictions affect speech on sidewalks surrounding clinics, which are traditional public fora.[61] Public fora are to be kept open and free from government censure.[62] Pro-life groups act within their First Amendment rights when they engage in peaceful protesting in public fora such as streets and sidewalks.[63] Thus, as the majority noted, "[t]he First Amendment interests of petitioners are clear

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52. Colo. Rev. Stat. § 18-9-122(2); *supra* n. 23 and accompanying text.

53. *Id.* § 18-9-122(3).

54. *See supra* nn. 25–29 and accompanying text (relating the differences between statutes and injunctions).

55. Colo. Rev. Stat. § 18-9-122(3).

56. *Hill v. Thomas*, 973 P.2d 1246, 1250 (Colo. 1999), *aff'd, sub. nom. Hill v. Colorado*, 530 U.S. 703 (2000).

57. *Id.* This is a floating zone because a moving object — another person — determines its boundaries. *See Schenck*, 519 U.S. at 367 (describing such a restriction as a floating buffer zone).

58. *Hill*, 973 P.2d at 1250 (characterizing the buffer zone as such).

59. *Hill*, 530 U.S. at 708–709.

60. *Id.* at 715.

61. *Id.*

62. Smolla, *supra* n. 10, at § 13:33, 13-57 (explaining that "streets and sidewalks are 'traditional public forums.' Peaceful protest activity is normally protected against government censure and regulation in traditional public forums." (citation and footnote omitted)). Of course, not all speech occurring in public fora is entitled to the highest level of First Amendment protection. *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of N.Y.*, 447 U.S. 557, 562–563 (1980). Specifically, courts grant commercial speech less protection than political speech. *Id.* However, the speech at issue in *Hill* is political speech because the protests did not relate to the economic interests of the protesters. *See id.* at 561 (describing such speech as political).

63. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 781–782 (1995) (noting that public fora traditionally have been used for assembly and discussion).

and undisputed."[64]

C. One of the State's Interests Is Undisputed

Balanced against these undisputed constitutional rights is Colorado's legitimate interest in protecting the health and safety of its citizens.[65] First Amendment rights are not absolute and, even in public fora, such rights can be restricted.[66] The Colorado Legislature wished to ensure, as the statute explains, that its citizens may "obtain medical counseling and treatment in an unobstructed manner."[67] The petitioners did not challenge this legitimate and important state interest.[68]

However, the Court also tried to justify the restriction upon another state interest: that of protecting citizens from unwanted communication[69] or, as the dissent labeled it, "the State's interest in protecting its citizens' rights to be left alone from unwanted speech."[70] The Court incorrectly labeled this an appropriate interest, to justify restrictions on the freedom of speech. In the *Schenck* decision, decided only three years before *Hill*, the Court doubted that a state's interest in protecting "'the right of the people approaching and entering the facilities to be left alone' — accurately reflects our First Amendment jurisprudence in this area."[71] Moreover, use of this interest was not appropriate because, as Justice Antonin Scalia properly noted in his dissent, Colorado denied this interest in its brief to the Court.[72] In fact, the Colorado Supreme Court stated that "the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was 'imperative,' a citizen's right of access to 'counseling and treatment' at Colorado medical facilities."[73] The right in question thus was not the "right"

64. *Hill*, 530 U.S. at 714.

65. *Id.* at 715.

66. *Ward*, 491 U.S. at 781.

67. Colo. Rev. Stat. § 18-9-122(1).

68. *Hill*, 530 U.S. at 715.

69. *Id.* at 716–717.

70. *Id.* at 750 (Scalia & Thomas, JJ., dissenting) (emphasis deleted).

71. *Schenck*, 519 U.S. at 383 (quoting *Pro-Choice Network of W. N.Y. v. Schenck*, 799 F. Supp. 1417, 1435 (W.D.N.Y. 1992)).

72. *Hill*, 530 U.S. at 750 (Scalia & Thomas, JJ., dissenting).

73. *Hill*, 973 P.2d at 1252–1253: Also noteworthy is the fact that the statute itself does not mention a purpose to protect citizens from unwanted communication, but instead refers to the right to unobstructed access. Colo. Rev. Stat. § 18-9-122(1). By adding this other interest, the majority ignored a general rule of statutory construction — when a

to be left alone from unwanted speech.

This Note will use the only State interest given in the statute itself, argued before the Court, and affirmed by the State's highest court, because that is a recognized, legitimate interest and was not challenged by the petitioners. The improper effect and reach of the Court's error in also using the improper interest is beyond the scope of this Note and is best left to the aptly worded dissent of Justice Scalia and the reader's additional research and thought.

D. Both Sides Have Undisputed Interests

The balancing of interests thus entails weighing an individual's First Amendment rights to demonstrate peacefully in a public forum against the state's interest in ensuring unobstructed access to medical facilities. Neither of these interests was at issue in the case. Instead, the means used by Subsection (3) in balancing these interests was challenged.[74]

A restriction of speech in a public forum is constitutional provided that "the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[75] The first question, then, is, "Are the restrictions tied to the content of the regulated speech?"

PART III: ANSWERING THE FIRST QUESTION OF WHICH TEST TO APPLY

A. Test Is Determined by the Content Distinction

Stifling speech because of its content contravenes the First Amendment at its heart.[76] The risk is that the government seeks to "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[77] The

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statute is unambiguous, courts should interpret the statute using only the statute's words. Norman J. Singer, *Sutherland Statutory Construction* vol. 2B, § 56A:01, 431–432 (6th ed. West 2000).

74. *Hill*, 530 U.S. at 714–715.

75. *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citation omitted)).

76. *Turner Broad. Sys., Inc.*, 512 U.S. at 661–662 (finding that must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 were content neutral and thus subject to intermediate scrutiny).

77. *Id.* at 641.

government is not to act as thought- or idea-police, but rather "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[78] For this reason, laws that restrict speech because of content are held to higher standards of scrutiny than other regulations of speech.[79] Thus, determining whether a law regulates on the basis of content is extremely important.[80] "Content-neutral laws are much less likely to be struck down than those that restrict speech based on content."[81] The latter face the strict scrutiny of the compelling-governmental-interest test,[82] whereas the former face a lower, intermediate standard that examines time, place, and manner restrictions.[83] But what does a content-neutral or content-based law look like?

B. Content-based or Content-neutral?

Put simply, content-based laws are those in which the government regulates on the basis of the content or message of the speech.[84] Because of concern regarding government invasion of the idea marketplace, "[t]he principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[85] Perhaps the clearest way to understand this inquiry is to discuss some examples. "Laws that merely control decibel levels are clearly content-neutral, for they regulate the loudness of speech, but not the content of its message."[86] Other examples of content-neutral laws are those "that prohibit noisy speeches near a hospital, ban billboards in residential communities, impose [uniform] license fees for parades and demonstrations, or forbid the distribution of [all] leaflets in public places."[87] In each of these situations, the

78. *Hill*, 973 P.2d at 1252 (citation omitted).

79. Smolla, *supra* n. 10, at § 3:2, 3-4 (noting that content-based laws are "aimed at the perceived offensiveness of the message").

80. *Id.* at § 3:1, 3-1 to 3-2 (noting that the standard of scrutiny or applicable test "often effectively determines the outcome").

81. J.W. Peltason, *Corwin and Peltason's Understanding the Constitution* 235 (14th ed., Harcourt Brace 1997).

82. *Playboy Ent. Group, Inc.*, 529 U.S. at 813.

83. *Ward*, 491 U.S. at 790–791.

84. *Playboy Ent. Group, Inc.*, 529 U.S. at 811–812.

85. *Ward*, 491 U.S. at 791 (citation omitted).

86. Smolla, *supra* n. 10, at § 3:3, 3-4.

87. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 189–190 (1983) (arguing that although the content distinction has some problems and is more complex than at first glance, this distinction has its merit and is

government's purpose is not to limit the content or idea of the speech, but rather to regulate conditions regardless of the message being conveyed.[88] These restrictions "do not target or single out a particular subject matter or topic for regulation. They are neutral in their regulation as to both the subject matter of the speech restricted and the viewpoint of that speech."[89]

In contrast, laws and restrictions that are not neutral, but instead are formulated to restrict a particular message, are content based.[90] Examples are "[l]aws that prohibit seditious libel, ban the publication of confidential information, forbid the hiring of teachers who advocate the violent overthrow of government, or outlaw the display of the swastika in certain neighborhoods."[91]

C. Two Types of Content-based Laws

There are essentially two types of content-based restrictions.[92] One type involves the prohibition of discussing a certain subject, thus called subject-matter restriction.[93] Banning publication of confidential information, for example, fits this category.[94] The second type prohibits the discussion of a particular viewpoint.[95] This is viewpoint discrimination.[96] "In cases of viewpoint discrimination, the government has 'taken sides' on an issue, regulating because it disagrees with a particular view on the ideological spectrum."[97] The ban on displaying swastikas, for

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consistent with core First Amendment values).

88. *Id.*

89. Calvert, *supra* n. 10, at 73–74 (footnotes omitted) (arguing that the original content distinction, which served the purpose of limiting government distortion in the marketplace of ideas, has been transformed into a method that judges use to decide cases by slight of hand).

90. Stone, *supra* n. 87, at 190.

91. *Id.*

92. *Infra* nn. 93–98 and accompanying text.

93. Smolla, *supra* n. 10, at § 3:9, 3-9 to 3-10.

94. *Id.*

95. Calvert, *supra* n. 10, at 76–77.

96. *Id.*

97. Smolla, *supra* n. 10, at § 13:35, 13-60 (footnotes omitted). In some ways, viewpoint discrimination is a classic content-based restriction. Redish, *supra* n. 7, at 91. Some commentators have suggested that viewpoint discrimination may be even worse than subject-matter restrictions. Smolla, *supra* n. 10, at § 3:10, 3-14 to 3-15 (stating that "the rule against viewpoint discrimination is made of sterner stuff than the rule against content discrimination. We permit some content discrimination [*i.e.*, subject matter restrictions] because some content discrimination is necessary.... We do not normally permit viewpoint discrimination.").

example, fits this category.[98]

However, the two types of content-based restrictions are not mutually exclusive.[99] "Viewpoint discrimination is a subset of content discrimination; all viewpoint discrimination is . . . content discrimination, but not all content discrimination is viewpoint discrimination."[100] So, a content-based regulation may be subject-matter restriction, viewpoint discrimination, or both.[101]

In adhering to the subset description, a finding that the law is viewpoint neutral is not equivalent to a finding that the law is content neutral.[102] Some cases have indicated otherwise.[103] These applications are incorrect because the restriction could be viewpoint neutral and yet be content based.[104] In *Carey v. Brown*,[105] the Court stated that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic."[106] Thus, laws that do not discriminate based on viewpoint may still be content based if they restrict a specific subject.[107]

D. Why the Content Distinction Determines the Answer to the First Question of Which Test to Apply

Deciding whether a law fits into one of these subsets of content-based restrictions or instead is content neutral does not require a determination of how much speech is restricted.[108] Content-neutral laws are not "invariably a 'lesser offense' to free

98. *See* Calvert, *supra* n. 10, at 76–77 (defining viewpoint discrimination).

99. *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 829 (1995).

100. Smolla, *supra* n. 10, at § 3:9, 3-9 (footnote omitted).

101. *Supra* nn. 99–100.

102. *Id.*

103. *Op. of the Justices to the Senate*, 723 N.E.2d 1, 4 (Mass. 2000) (noting that the Massachusetts Supreme Court, in affirming the constitutionality of a proposed statute, reasoned that "[b]ecause the buffer zone applies regardless of political viewpoint, Senate No. 148 is a content-neutral statute"). The statute was later challenged, struck down by a district court, and then upheld by an appellate court. *McGuire v. Reilly*, 2000 U.S. Dist. LEXIS 17275 (D. Mass. Nov. 20, 2000), *rev'd*, 260 F.3d 36 (1st Cir. 2001).

104. *Supra* nn. 99–101.

105. 447 U.S. 455 (1980). The court found that a law that did "not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message" was still content based. *Id.* at 462 n. 6.

106. *Id.* (quoting *Consol. Edison Co. v. Pub. Serv. Commn.*, 447 U.S. 530, 537 (1980)).

107. *Id.*

108. Smolla, *supra* n. 10, at § 3:2, 3-3 to 3-4.

speech values" than content-based laws.[109] In fact, a content-neutral law may stifle more speech than a content-based law.[110] For example, a complete ban on the posting of all signs along the road would be content neutral.[111] But, a law that restricted the posting of all campaign signs or all signs advocating communism would be content based.[112] The campaign-sign ban would restrict a specific subject — campaigns — and therefore would fit the first content-based type.[113] The communism ban would restrict a particular viewpoint — advocating communism — and therefore would fit the second content-based type.[114] However, the complete ban on posting all signs, although content neutral, would prohibit a greater quantity of speech than either of the content-based restrictions.[115]

The reason why the content-neutral law would face less scrutiny than the two content-based ones is that the former would not run the risk of the government behaving as the thought-police, but the two latter laws would.[116] The content-based laws, although restricting less speech than the complete ban, "effectively excis[e] a specific message from public debate."[117] This "mutilates 'the thinking process of the community' and is thus incompatible with the central precepts of the [F]irst [A]mendment," which include safeguarding the free marketplace of ideas.[118] Thus, the quantitative measure of how much speech is banned has no bearing on the answer to the first question of which test is appropriate.[119]

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109. *Id.* at § 3.2, 3-3.

110. *Id.*

111. *Id.* This fact is true because the ban would not restrict a specific subject nor a particular viewpoint. *Id.* at § 3.2, 3-3 to 3-4.

112. *See id.* at 3-3 to 3-4 (explaining the difference between content-neutral and content-based laws).

113. *See id.* at § 3:9, 3-9 to 3-10 (discussing subject-matter restrictions).

114. *See id.* at § 3.9, 3-9 (discussing viewpoint restrictions). Notice that the inclusion of the word "all" does not make the restriction content neutral. Even though "all" campaign signs are banned or "all" signs advocating communism are banned, these are still content-based restrictions. They still cover only a specific subject or a particular viewpoint, respectively.

115. Smolla, *supra* n. 10, at § 3:2, 3-3.

116. *See supra* nn. 76–83 and accompanying text (discussing the risks that content-based laws pose to First Amendment liberties).

117. Stone, *supra* n. 87, at 198 (footnote omitted).

118. *Id.* (citation omitted).

119. Instead, the amount of speech that the government bans becomes relevant when answering the second question of this analysis: "Does the statute pass the test?" *Infra* pt.

Unfortunately, despite the distinctions above, the Court has freely admitted that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task."[120] The Court in *Hill* went to great pains to avoid finding the statute was a content-based restriction, thus answering the first question by finding that the lesser-scrutiny test applied.[121]

E. The Statute Is Content Based as a Subject-matter Restriction

The Court improperly determined that the Colorado statute was content neutral as applying to all subjects. In this area of inquiry, courts examine the government's purpose in enacting the statute.[122] Thus, the Court should look for an indication that the restriction was created because of a disagreement with the subject of the speech.[123] However, this disagreement need not rise to the level of "an invidious motive to discriminate against or censor certain types of speech."[124] A finding of intent to censor, like a finding of intent to discriminate in Equal Protection Clause cases, is not required.[125]

1. The Majority's Reasoning

Justice John Paul Stevens, in his majority opinion, found that the statute did not apply to a specific subject, by reading only a Subsection of the statute.[126] He focused solely upon Subsection (3)[127] and noted that there was no mention of limiting

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IV.

120. *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

121. *Hill*, 530 U.S. at 719–725.

122. *Ward*, 491 U.S. at 791 (stating that the principal inquiry is the government's purpose). "At bottom, the distinction between content-based and content-neutral regulation of speech may be distilled into an inquiry into the justifications advanced for the law. When the government's purpose is disagreement with the message, the regulation is obviously content-based." Smolla, *supra* n. 10, at § 3:5, 3-5.

123. *Ward*, 491 U.S. at 791.

124. Smolla, *supra* n. 10, at § 3:5, 3-5 to 3-6.

125. *Id.* at § 3:7, 3-8 to 3-8.1.

126. *Hill*, 530 U.S. at 721–725. Justice Stevens was joined in his majority opinion by Chief Justice William H. Rehnquist, Justice Sandra Day O'Connor, Justice David Hackett Souter, Justice Ruth Bader Ginsburg, and Justice Stephen G. Breyer. *Id.* at 705. Justice Souter filed a concurring opinion joined by Justices O'Connor, Ginsburg, and Breyer. *Id.* Justice Antonin Scalia, joined by Justice Clarence Thomas, dissented. *Id.* Justice Anthony M. Kennedy also filed a dissenting opinion. *Id.*

127. *Id.* at 721–725.

a subject or subjects of speech.[128] Instead, he concluded that "the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries."[129] He agreed with the Colorado Supreme Court's conclusion that the words "'protest, education, or counseling' . . . encompass 'all communication.'"[130] He further concluded that the statute is so neutral that it "applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion."[131]

2. Why the Majority Is Wrong

A regulation that appears neutral "may be content-based if its manifest purpose is to regulate speech because of the message it conveys."[132] A simple reading of the statute's first sentence undercuts the majority's position and reveals this statute's content-based manifest purpose. Subsection (1) states the concern of the Colorado Legislature "that the exercise of a person's right to protest or counsel *against certain medical procedures* must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner."[133] The concern was with protests or demonstrations against certain medical procedures.[134] The Colorado Legislature did not intend for this statute to apply to "used car salesmen, animal rights activists, fundraisers, environmentalists or missionaries,"[135] unless these people were protesting or counseling against "medical procedures."[136]

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128. *Id.* at 723.

129. *Id.*

130. *Id.* at 720–721, 725 (quoting Br. of Resp. at 21, *Hill v. Colo.*, 530 U.S. 703 (2000)).

131. *Id.* at 725 (quoting Colo. Rev. Stat. § 18-9-122(3)).

132. *Turner Broad. Sys., Inc.*, 512 U.S. at 645.

133. Colo. Rev. Stat. § 18-9-122(1) (emphasis added). Another general rule of statutory construction is that statutes should be "construed as a whole with reference to the system of which it is a part." Singer, *supra* n. 73, at vol. 2A, § 45:05, 30 (footnote omitted). Thus, Subsection (3) should not be considered alone, but instead should be read in the context of the other Subsections, including Subsection (1). *See id.* (providing the basis for this conclusion).

134. Colo. Rev. Stat. § 18-9-122(1).

135. *Hill*, 530 U.S. at 723.

136. Colo. Rev. Stat. § 18-9-122(1). The fact that this statute would prohibit "all" protests and demonstrations against medical procedures does not make the statute content neutral, just as the ban on "all" campaign speech would not be content neutral. *See supra* nn. 110–115 and accompanying text (discussing the attributes of content-based statutes).

Though the Colorado Legislature did not define "certain medical procedures," there is little doubt as to what it meant. As Justice Anthony M. Kennedy explained in his dissent, "[t]he testimony to the Colorado Legislature consisted, almost in its entirety, of debates and controversies with respect to abortion."[137] Even the majority recognized that the scope of the legislative history concerned abortion.[138] Additionally, the Colorado Supreme Court has noted that, "[w]hile the legislation was pending, the Colorado House and Senate Judiciary Committees heard testimony regarding abortion opponents' conduct at abortion clinics."[139] The term "abortion" cleverly was not used by the Colorado Legislature,[140] but its replacement does not hide the statute's true subject. If "abortion" had been used, this statute would have been content based as a prohibition on a specific subject.[141]

Still, "medical procedures," like campaign speech, constitute a specific subject. Thus, Subsection (3)'s restrictions on speech affect only individuals whose speech concerns a specific subject: medical procedures or abortion.[142] This statute does not apply to other subjects of speech, because no other subjects were recognized by the Colorado Legislature.[143] As Justice Scalia properly noted, "This Colorado law is no more targeted at used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries than French vagrancy law was targeted at

137. *Hill*, 530 U.S. at 769 (Kennedy, J., dissenting) (footnote omitted).

138. *Id.* at 715 (majority opinion) (noting that "the legislative history makes it clear that . . . [the statute's] enactment was *primarily motivated* by activities in the vicinity of abortion clinics" (emphasis added)).

139. *Hill*, 973 P.2d at 1250. Apparently, the only other subject considered was animal rights, asserted by activists protesting the transplant of animal organs. *Hill v. City of Lakewood*, 911 P.2d 670, 672 (Colo. App. 1995), *aff'd*, 530 U.S. 703 (2000). Interestingly, although the statute concerns only "certain medical procedures," the statute does not specify which ones. Colo. Rev. Stat. § 18-9-122(1).

140. Colo. Rev. Stat. § 18-9-122.

141. *See McGuire*, 2000 U.S. Dist. LEXIS 17275 at *12 (distinguishing a Massachusetts law from the statute in *Hill* by noting that the Massachusetts law applied only at "abortion clinics," whereas the Colorado law applied at "health care facilities"). In *Hill*, the statute's application to all "health care facilities" militates "against there being a discriminatory governmental motive," but the Massachusetts law limited speech outside of only "abortion" clinics, and thus restricted a specific subject. *Id.* at **13–14.

142. Colo. Rev. Stat. § 18-9-122(1).

143. *Id.* (indicating that the Legislature was concerned with limiting only "the exercise of a person's right to protest or counsel against certain medical procedures"). Indeed, the terms "medical counseling" and "medical procedures" are mentioned three times in Subsection (1), the purpose section of this law. *Id.*

the rich."[144]

If it is the "content of the speech that determines whether it is within or without the statute's blunt prohibition," then the statute is content based.[145] For example, in *Carey*, Illinois banned the picketing of residences, but provided an exception for peaceful labor picketing.[146] If picketing concerned a labor protest, it was allowed.[147] But, if the picketing concerned something other than a labor protest, it was prohibited.[148] The Court concluded that the restriction was content based and struck it down as not passing the requirements of the compelling-governmental-interest test.[149] The Court summarized that "information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. . . . [T]he Illinois statute is thus dependent solely on the nature of the message being conveyed."[150]

Likewise, a Chicago ban on all picketing around schools, except for labor picketing, was struck down in *Police Department of the City of Chicago v. Mosley*.[151] The concern in *Carey* and *Mosley* was that the government decided some subjects (labor protests) could be discussed, but others could not.[152] To enforce either of these bans on picketing, government officials were required to examine the content of the message to determine whether the speech was within the exception.[153]

Similarly, to enforce the Colorado statute, the content of the

144. *Hill*, 530 U.S. at 744 (Scalia & Thomas, JJ., dissenting). Rather, the target is activists whose speech may concern medical procedures. Colo. Rev. Stat. § 18-9-122(1). The Author wishes to note that the use of this quote in no way is intended to besmirch used car salesman, animal rights activists, fundraisers, environmentalists, or missionaries, and wishes to point out these persons may in fact also be activists of "medical procedures."

145. *Carey*, 447 U.S. at 462 (footnote omitted).

146. *Id.* at 457.

147. *Id.*

148. *Id.*

149. *Id.* at 460, 461–462.

150. *Id.* at 461 (footnote omitted).

151. 408 U.S. 92 (1972). As in *Carey*, 447 U.S. 455, the exception of allowing labor picketing made this a subject-matter content-based restriction. *Mosley*, 408 U.S. at 95–96.

152. *Carey*, 447 U.S. at 462 (stating that "under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home"); *Mosley*, 408 U.S. at 95 (stating that "[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (citations omitted)).

153. *Carey*, 447 U.S. at 457; *Mosley*, 408 U.S. at 92–93.

message must be examined.[154] Instead of providing an exception for one subject, such as labor pickets, and restricting all others, the Colorado statute restricts one subject (abortion) and all other subjects are outside its scope.[155] Colorado, then, decided some subjects could be discussed within the buffer zone, but others could not.[156] A proper reading of the whole statute reveals that information about the weather, the time, the economy, or any other subject may be freely discussed, but discussion of abortion[157] is restricted. The concern is the same as in *Carey* and *Mosley*: the government singled out what could and could not be discussed.

In this way, the Colorado law is also similar to the singling out of speech in *Simon and Schuster, Incorporated v. Members of the New York State Crime Victims Board.*[158] In that case, New York's "Son of Sam" law was challenged.[159] The law gave money to victims that criminals made from selling their stories about the crime.[160] When New York's Crime Victims Board sought royalties from the publisher of a story based on a criminal's account of the crime,[161] the law was struck down as being content based and failing the compelling-governmental-interest test.[162] The Court determined that the law "singles out income derived from expressive activity for a burden the State places on no other income, and . . . is directed only at works with a specified content."[163] The law affected only those works based upon a criminal's story; all other works were unaffected.[164]

Similarly, a restriction prohibiting the carrying of signs critical of foreign governments outside the governments' embassies was struck down in *Boos v. Barry*.[165] In *Boos*, the

154. Colo. Rev. Stat. § 18-9-122(3).

155. *Id.*

156. *Id.*

157. For a discussion of what is meant by "certain medical procedures" in the statutory language, review *supra* notes 132–144 and accompanying text. Throughout the rest of this Note, the Author will use "abortion" when the statute indicates "certain medical procedures." Additionally, a proper reading of the statute requires reading Subsection (3) in the context of Subsection (1). *See supra* n. 133 (discussing general rules of statutory construction).

158. 502 U.S. 105 (1991).

159. *Simon & Schuster, Inc.*, 502 U.S. at 115.

160. *Id.* at 108.

161. *Id.* at 114–115.

162. *Id.* at 116, 120–121, 123.

163. *Id.* at 116.

164. *Id.*

165. 485 U.S. 312 (1988). The District of Columbia enacted this law, which fits both

determination of

> [w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. [Although] [o]ne category of speech has been completely prohibited [near the embassies,] . . . [o]ther categories of speech . . . are permitted.[166]

Like the statutes in the aforementioned cases, this Colorado statute singles out expressive activity relating to abortion and places a burden on abortion-related speech that the state places on no other subject. The restriction is directed at speech with a specified content. Properly read, the law affects only speech concerning abortion; all other speech is unaffected. The determination of whether individuals may speak within the buffer zone depends entirely upon whether their speech is about abortions. One category of speech has been completely prohibited in the buffer zone, while other categories have not.

Thus, the result is the same whether a subject is singled out as being restricted or as an exception to the restriction. In either instance, the application of the statute depends solely on the "nature" or subject of the message being conveyed, and as such is a content-based restriction.

3. The Concurrence's Reasoning

Looking for a distinguishing factor other than the majority's narrow, incomplete, and incorrect reading that the statute applies to any subject, the concurrence asserted that it is not the content of the message that is singled out, but rather the approach of the protester within eight feet of another person.[167] The concurrence concluded that the purpose of the law is to control not the content of a message, but rather the conduct of the speakers.[168] The concurrence found that the statute forbids only "approaching another person closer than eight feet (absent permission) to deliver the message."[169] Thus, a stationary protester is

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subcategories of content-based restrictions. *Id.* at 319. The law affected signs concerning foreign governments (a subject-matter restriction) that were critical of those governments (a viewpoint restriction). *Id.* at 316.

166. *Id.* at 318–319 (citation omitted).

167. *Hill*, 530 U.S. at 737–738 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring).

168. *Id.* at 738.

169. *Id.*

not affected.[170] This observation caused the concurrence to conclude that

> the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching.... Hence the implausibility of any claim that an anti-abortion message, not the behavior of protestors, is what is being singled out.[171]

4. Why the Concurrence Is Wrong

"[T]he mere assertion of a content-neutral purpose [such as controlling conduct or "approaches"] . . . [is not] enough to save a law which, on its face, discriminates based on content."[172] The concurrence is correct in observing that Subsection (3) states, "[N]o person shall knowingly approach another person within eight feet of such person, unless such other person consents."[173] But, like the majority, the concurrence failed to read the whole statute.[174] Even worse than the majority, the concurrence failed to finish the very sentence upon which it relied.[175] As the rest of Subsection (3) states, an approach is limited only if it is "for the purpose of passing a leaflet . . . or engaging in oral protest, education, or counseling."[176] Thus, speakers approaching without consent are singled out only if their message is one of protest, educating, or counseling.[177] Not all "approachers" are affected. A person who does not intend to deliver a message of protest, education, or counseling is not affected by the statute, regardless of whether that person remains stationary or approaches a clinic patient. As the *Hill* dissent noted, the government can regulate peaceful approaches, "but not, on the basis of content, without satisfying the requirements of our strict-scrutiny First Amendment jurisprudence."[178]

Perhaps the following example will illustrate better the flaw

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170. *Id.*

171. *Id.*

172. *Turner Broad. Sys., Inc.*, 512 U.S. at 642–643.

173. Colo. Rev. Stat. § 18-9-122(3); *Hill*, 530 U.S. at 737–738 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring).

174. *See Hill*, 530 U.S. at 735–741 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring) (considering only whether Subsection (3) restricts speech based on content).

175. *Id.*

176. Colo. Rev. Stat. § 18-9-122(3).

177. *Id.*

178. *Hill*, 530 U.S. at 745 (Scalia & Thomas, JJ., dissenting).

in the concurrence's reasoning: even within the "fixed" buffer zone, a stationary person is free to shout a statement against abortion to a nearby patient entering the clinic.[179] In the same situation, if the stationary protester takes a step toward the patient while whispering, "Abortion is wrong," the whisperer violates the statute.[180] Using this reasoning, the concurrence concluded that the statute restricts only approaches.[181] However, a complete reading of Subsection (3) leads to a different conclusion. For example, if a person approaches a patient and asks for the time, the statute does not apply because this approach is not for the purpose of passing a leaflet "or engaging in oral protest, education, or counseling."[182] Thus, only persons who approach with the intent of delivering a certain message are subject to criminal prosecution.[183] It is the content of the message, then, that determines whether a person has broken this law; this determination is not based on whether he or she approached another person. As Justice Kennedy wrote in his dissent,

> When a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer's judgment, the speaker's words stray too far toward "protest, education, or counseling" . . . the speech has moved from the permissible to the criminal.[184]

Not all approaching people are restricted from speaking, but rather only those who approach to deliver a message the government does not want expressed (i.e., a message to protest, educate, or counsel). So, while Colorado claimed its purpose was to "prohibit[ ] a person from knowingly obstructing another person's

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179. *See supra* nn. 167–171 and accompanying text (explaining the concurrence's conclusion that the statute forbids only protesters who approach).

180. *Id.*

181. *Hill*, 530 U.S. at 737–738 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring).

182. Colo. Rev. Stat. § 18-9-122(3); *supra* nn. 172–178 and accompanying text (explaining that the statute restricts approaching persons only if their message is one of protest, education, or counseling). The Author believes asking for the time is not protest, education, or counseling.

183. *Supra* n. 182.

184. *Hill*, 530 U.S. at 766–767 (Kennedy, J., dissenting). As a court recently noted, "Logic and experience dictate that in order to determine whether a particular speech constitutes oral protest, education or counseling, rather than random conversation, it is necessary to examine the content of the exact words which were actually spoken in the conversation between the speaker and the listener." *McGuire*, 2000 U.S. Dist. LEXIS 17275 at *14 n. 8.

entry to or exit from a health care facility,"[185] a content-neutral purpose, the method used in Subsection (3) is based upon the approaching speaker's words, a discrimination based on content.

5. A Case On-point Not Considered?

The majority and concurrence in *Hill* could have gained insight from one of the rare cases in which a statute passed the compelling-governmental-interest test. In *Burson v. Freeman*,[186] Tennessee prohibited the display of campaign signs, distribution of campaign materials, and solicitation of votes for or against any political person, party, or position within one hundred feet of the entrance to a polling place.[187] Even though the language "for or against" made the law viewpoint neutral, the law was still content based because it restricted speech related only to political campaigns.[188] The statute implicated "three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech."[189] In concluding that the statute was content based, the Court found that,

> [w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display.[190]

Even the *Burson* dissent, written by Justice Stevens, found that the statute "targets only a specific subject matter (campaign speech) and a defined class of speakers (campaign workers) and thus regulates expression based on its content."[191]

The Colorado statute restricts displaying signs, distributing handbills, and orally protesting for the purpose of educating or

185. Colo. Rev. Stat. § 18-9-122(1).

186. 504 U.S. 191 (1992).

187. *Burson*, 504 U.S. at 193–194 (plurality).

188. *Id.* at 197. In contrast, the Colorado statute is also content based because it is directed only at those protesting "against certain medical procedures," making it viewpoint discrimination. *See infra* pt. III(F) (explaining that the statute's application to one viewpoint makes it content based).

189. *Id.* at 196 (plurality).

190. *Id.* at 197.

191. *Id.* at 217 (Stevens, J., dissenting) (agreeing that the statute was content based, but dissenting because he concluded the statute failed the compelling-governmental-interest test). Justice Stevens's dissent in *Burson* will be explored more in part V.

counseling within eight feet of another person who is within one hundred feet of the entrance to a health clinic.[192] Even if the Court broadly construed the statute to read "for or against" certain medical procedures, making the statute viewpoint neutral,[193] the Court should not have ignored the fact that the statute limits speech based on content. The same three concerns raised in *Burson* were also implicated in *Hill*. Speaking on the subject of abortion is political speech, and sidewalks outside of clinics are public fora.[194] As in *Burson* with campaign speech, whether individuals can exercise their free speech rights near health clinics depends on whether their speech is related to abortion.[195] To refute the concurrence, this determination rests on whether the individual who approaches can be said to be protesting, educating, or counseling. Despite what the majority claimed, the statute does not reach other categories of speech. The Colorado statute, just as the statute in *Burson*, targets a specific subject (abortion) and a defined class of speakers (abortion protesters, educators, and counselors), and thus regulates based on content.[196]

F. The Statute Is Content Based Because It Discriminates Based on Viewpoint

1. The Concurrence Joins the Majority's Reasoning

The Court should have found that the statute discriminates based on viewpoint and therefore is content based. The Court, however, did not do so.[197] Instead, the Court found that the statute was viewpoint neutral by, again, confining a reading of the statute to Subsection (3).[198] This Subsection places no restrictions on a particular viewpoint.[199] According to the Court, the statute therefore "was not adopted 'because of disagreement

192. Colo. Rev. Stat. § 18-9-122(3).

193. Apparently, the Court improperly did so. *See infra* pt. III(F) (explaining the Court's reasoning for concluding that the statute is viewpoint neutral).

194. *See supra* nn. 189–191 and accompanying text (noting that regulations on campaign speech outside of polling places implicates the First Amendment).

195. *See supra* n. 182 (providing the basis for this conclusion).

196. *See supra* nn. 132–196 and accompanying text (detailing why the statute is content based).

197. *Hill*, 530 U.S. at 725.

198. *Id.* at 719–725.

199. *Id.* at 719.

with the message.'"[200] As the majority appropriately found, this Subsection, read alone, prohibits the approach of a person for the purpose of, inter alia, "engaging in 'oral protest, education, or counseling'" without a mention of a viewpoint.[201] The majority again stated that this provision "is not limited to those who oppose abortion. It applies . . . whether they oppose or support the woman who has made an abortion decision."[202] Thus, a speaker who approaches to chant "in praise of the Supreme Court and its abortion decisions" would be in violation of the statute.[203] The Court then properly concluded that this "is the level of neutrality that the Constitution demands."[204] Unfortunately, although this is the level of neutrality needed, it is not present in this statute.

2. Why This Reasoning Is Flawed

As a general principle, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[205] For example, in *Thomason v. Jernigan*,[206] the United States District Court for the Eastern District of Michigan confronted a situation in which a city vacated public access to an abortion clinic and transformed it into private property belonging to the clinic.[207] Individuals had been protesting on a public cul-de-sac near the clinic.[208] The request to vacate the cul-de-sac was prompted by the owners of the clinic, and the City Planning Commission stated that the objective "was to allow 'better control of protestors who block access to the . . . clinic.'"[209] Making the cul-de-sac private would prohibit the protesters from using it (assuming the clinic would not grant permission for them to continue protesting on clinic

200. *Id.* (quoting *Ward*, 491 U.S. at 791).

201. *Id.* at 720 (quoting Colo. Rev. Stat. § 18-9-122(3)).

202. *Id.* at 725.

203. *Id.* (quoting *Hill*, 530 U.S. at 769 (Kennedy, J., dissenting)).

204. *Id.*

205. *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (citations omitted) (reversing and remanding a Ninth Circuit ruling that an ordinance was unconstitutional. The Court concluded that the ordinance complied with this general principle, because the statute could be enforced without favoring any speaker's point of view.).

206. 770 F. Supp. 1195 (E.D. Mich. 1991).

207. *Id.* at 1196.

208. *Id.* at 1196–1197.

209. *Id.* at 1198 (quoting an Ann Arbor, Mich., City Planning Dept. staff report).

property).[210] This same objective — controlling abortion protesters — was repeated in a staff report, an official memorandum from the City Attorney, and at a public hearing.[211] The court concluded that this vacating of public property was invalid because it was clearly aimed only at the protesters.[212] As the court found, the city "never attempted to justify its action without reference to the protests" against the clinic.[213]

One has to read only the first sentence of the Colorado statute to see that this statute does not have the neutrality the Court attributed to it. Rather, the statute clearly refers only to those protesting against abortions. The first section states that "[t]he general assembly recognizes . . . that the exercise of a person's right to *protest or counsel against* certain medical procedures must be balanced."[214] As Justice Scalia noted in his dissent, this statement sets out the Colorado Legislature's objective as being clearly aimed only at those protesting against abortions.[215]

As a court recently concluded in striking down a similar statute, "[t]here can be no discrimination between the viewpoints advocated, between those who advocate that the life of the unborn child should be preserved and those who advocate that the viability of the unborn child can by legal right be terminated."[216] This fact stems from the free-marketplace ideal of the First Amendment.[217]

The majority in *Hill* found that a person supporting abortion could be convicted of the crime this statute created.[218] This conclusion is baffling in two ways. First, the statute is directed only at those protesting "against" abortions.[219] Missing is the

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210. *Id.*

211. *Id.* at 1198.

212. *Id.* at 1201.

213. *Id.*; *but see Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1326 (D. Minn. 1995) (declining to follow *Thomason* and classifying these restrictions as being only incidental to speech rights).

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

215. *Hill*, 530 U.S. at 744 (Scalia & Thomas, JJ., dissenting) (stating that "[w]e know what the Colorado legislators . . . were taking aim at, for they set it forth in the statute itself: the 'right to protest or counsel *against* certain medical procedures' on the sidewalks and streets surrounding health care facilities" (emphasis in original, citation omitted)).

216. *McGuire*, 2000 U.S. Dist. LEXIS 17275 at **15–16.

217. *See supra* nn. 76–83 and accompanying text (noting that the First Amendment is designed to prevent the government from acting as the thought- or idea-police).

218. *Hill*, 530 U.S. at 725.

219. Colo. Rev. Stat. § 18-9-122(1); *see supra* nn. 132–144 and accompanying text

language "for or against," which would have rendered the statute viewpoint neutral.[220] Second, abortion supporters would not be obstructing access to abortion clinics.[221]

The General Assembly of Colorado, then, did not direct the statute at those expressing support for these procedures, but only at those protesting against the procedures.[222] This conclusion is inferred not only from the fact that abortion protesters are the only logical group who would be blocking access, but, more importantly, from the choice of wording in the statute itself. Earlier, it was demonstrated that the Legislature cleverly attempted to hide its intent to restrict a subject by using the phrase "certain medical procedures" instead of "abortion."[223] However, the Legislature did not completely disguise its intent to restrict a viewpoint. Notably, Subsection (3) prohibits engaging in oral protest, education, or counseling;[224] however, only anti-abortion protesters are likely to be engaged in such activities. Thus, this Subsection clearly reveals the statute's target.[225] The Court failed to find viewpoint discrimination simply by ignoring the target of the statute. The Court also failed adequately to perform an original analysis of this issue, relying instead upon the Colorado Supreme Court's faulty reading of the statute.[226]

(discussing the statute's true purpose).

220. *See supra* nn. 92–98 and accompanying text (discussing the differences between viewpoint discrimination and viewpoint neutrality). Tennessee's statute in *Burson* was viewpoint neutral because it was directed at both those soliciting votes "for or against" a candidate. 504 U.S. at 193–194.

221. The Author reminds the reader that removing obstruction to access is the purpose of the statute. Does the Court truly believe that a person actively supporting the right to abortion would knowingly obstruct a patient from entering a clinic?

222. *See* Colo. Rev. Stat. § 18-9-122(1) (indicating that the statute was directed toward those protesting "against certain medical procedures"). Notably absent is any reference to those expressing support for the procedures.

223. *See supra* nn. 137–141 and accompanying text (explaining that the Legislature made this attempt to prevent the statute from appearing to be content based).

224. Colo. Rev. Stat. § 18-9-122(3).

225. The *in pari materia* rule of statutory construction states that a provision should be read in the context of surrounding provisions. *Supra* n. 133. The target of the whole statute is to limit those protesting "against certain medical procedures." *See supra* nn. 137–141 and accompanying text (discussing the statute's true purpose); *but see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (stating that the Court is bound by state court constructions of state law except in extreme circumstances). In *Mullaney*, the Court did not find an "extreme circumstance" because Maine's interpretation of state law did not frustrate consideration of the due process issue the Court was examining. *Id.*

226. *Hill*, 530 U.S. at 719–725.

G. The Proper Conclusion

Thus, the statute should have been found to be a content-based restriction of speech either as a subject-matter restriction or as viewpoint discrimination. More accurately, it should have been found to be both. As such, the Court should have applied the compelling-governmental-interest test.[227] Although applying this test typically results in invalidating the statute, *Burson* demonstrates that a statute occasionally will survive strict scrutiny.[228] Reluctantly assuming, as we must for purposes of further discussion, that the statute is content neutral, we must move to the second question: "Does the statute pass the test applicable to content-neutral statutes?" As Justice Scalia properly concluded in his dissent, the statute does not pass even this lesser-scrutiny test of time, place, and manner.[229]

PART IV: ANSWERING THE SECOND QUESTION: "DOES THIS STATUTE PASS THE TEST?"

A. Requirement That the Statute Be Narrowly Tailored

In concluding that the statute was content neutral, the majority found that the restrictions on speech applied to expressions from all sides of the abortion issue, to expressions unrelated to abortion, and to expressions in any form (not just educating, protesting, or counseling).[230] Although this conclusion allowed the Court to deem the statute content neutral, this conclusion posed problems when the Court deemed the statute narrowly tailored. The Court reasoned that, because the statute restricts all speech equally, the statute is content neutral and therefore constitutional.[231] But "[i]t is axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum."[232] The

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227. *See supra* n. 10 and accompanying text (explaining that courts apply the compelling-governmental-interest test to content-based statutes).

228. 504 U.S. 191.

229. *Hill*, 530 U.S. at 749 (Scalia & Thomas, JJ., dissenting). This conclusion that the statute would not pass the lesser-scrutiny test of time, place, and manner means that the statute would also fail the strict scrutiny applied to content-based restrictions. Therefore, a discussion of the outcome under the strict-scrutiny test is unnecessary and not included in this Note.

230. *Hill*, 530 U.S. at 725.

231. *Id.*

232. *Edwards v. City of Santa Barbara*, 883 F. Supp. 1379, 1389 (C.D. Cal. 1995), *vacated*, 70 F.3d 1277 (9th Cir. 1995) (citations omitted). After remand, the case reached

statute, as the Court read it, should fail the narrowly-tailored requirement.

Assuming content neutrality, the statute must be narrowly tailored to first, promote "a substantial government interest that would be achieved less effectively absent" the restriction, and second, the means chosen must not be "substantially broader than necessary to achieve" that interest.[233] Whether this statute meets the first requirement is debatable, but, with regard to the second, the majority's broad reading of the statute as covering all subjects precludes the possibility of the statute being narrowly tailored.

B. The Majority's Reasoning

The majority correctly pointed out that a content-neutral regulation need not be the least restrictive means for the government to achieve its purpose to qualify as being narrowly tailored.[234] The majority then examined each restriction and concluded that the statute is narrowly tailored, but failed to apply properly the two-part test set out in *Ward*.[235] Instead, the majority concluded that the restrictions, rather than limiting the protesters, might help them.[236] With respect to the restrictions on protesting, educating, and counseling, the majority found that the

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the Ninth Circuit again. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998). In a restriction similar to this challenged Colorado statute, the Ninth Circuit upheld fixed buffer-zone provisions, but struck down an eight-foot floating buffer zone relying on *Schenck* and *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). *Edwards*, 150 F.3d at 1215.

By way of review, before *Hill*, courts generally invalidated floating buffer zones. For example, the Court in *Schenck* struck down a fifteen-foot floating zone. 519 U.S. at 361. Then, the Ninth Circuit in *Sabelko* struck down an eight-foot floating zone. 120 F.3d at 162–163. Additionally, the Ninth Circuit in *Edwards* struck down an eight-foot floating zone. 150 F.3d at 1215. However, the Court in *Hill* upheld an eight-foot floating buffer zone. 530 U.S. at 726–728. The majority in *Hill* distinguished the prior floating zone decisions by noting that the zones in those cases were larger (fifteen feet as compared to eight feet) and that in the prior cases, a stationary protester was required to move to create the zone. *Id.* at 726–727. In *Hill*, however, the stationary protester was not affected. *Id.* at 727. Left unanswered is the question of whether the Court would have upheld the zone in *Hill* had the zone been larger than eight feet.

233. *Ward*, 491 U.S. at 799 (citations omitted); *Fischer*, 894 F. Supp. at 1326, 1329 (finding that the imposition of a fixed buffer zone as a pre-emptive measure was content neutral because the area was closed to the entire public, and concluding that the zone was narrowly tailored to ensure the right to access to the clinic).

234. *Hill*, 530 U.S. at 726.

235. *Id.* at 725–730.

236. *Id.* at 726.

required eight-foot separation between the approaching protester and the other person "allows the speaker to communicate at a 'normal conversational distance.'"[237] Further, the Court found that "[t]he statute might encourage the most aggressive and vociferous protesters to moderate their confrontational and harassing conduct, and thereby make it easier for thoughtful and law-abiding sidewalk counselors like petitioners to make themselves heard."[238] The Court also deferred to the Colorado Legislature's conclusion that "the 8-foot interval is the best possible accommodation of the competing interests at stake."[239] Finally, the Court took account of the fact that the restrictions were imposed on speech surrounding health-care facilities, suggesting that states have a greater interest in protecting such facilities than in protecting other areas.[240]

C. The Concurrence's Reasoning

The concurrence also failed to conduct the required two-part inquiry. This opinion asserted that, although Subsection (3) was not designed to protect all the people the statute reaches, such as dental patients, this overreach is not a flaw.[241] Instead, the concurrence asserted that the needless protection this law provides is not substantial enough to invalidate the statute.[242] This

237. *Id.* at 726–727 (citation omitted) (distinguishing the eight-foot zone in *Hill* from the fifteen-foot zone in *Schenck*); *but see Sabelko*, 120 F.3d at 165 (ruling that an eight-foot buffer zone would prevent normal communication). The *Hill* majority failed to define the length of a "normal conversational distance," but by implication, this distance falls somewhere between eight and fifteen feet. Comparing the outcome in *Hill* with the outcome in *Schenck*, a difference of seven feet separates a constitutional restriction of speech from an unconstitutional one.

238. *Hill*, 530 U.S. at 727. The Author wishes to re-emphasize that, contrary to the majority's opinion, the statute actually prohibits the peaceful, "thoughtful and [formerly] law-abiding" protests by the petitioners. *Id.*

239. *Id.* (citation omitted). But in *Schenck*, the Court apparently did not consider the fifteen-foot interval to be the best possible accommodation, nor did it defer to the New York Legislature. 519 U.S. 357.

240. *Hill*, 530 U.S. at 728–729.

241. *Id.* at 738–739 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring) (stating that "[w]hile it is true that subsection (3) was not enacted to protect dental patients, . . . I fail to see danger of the substantial overbreadth required to be shown before a statute is struck down. . . .").

242. *Id.* at 739. The concurrence also acknowledged, but failed to follow, the precedent of *Schenck*:

> Although petitioners have not argued that the "floating bubble" feature of the 8-foot zone around a pedestrian is itself a failure of narrow tailoring, I would note the contrast between the operation of subsection (3) and that of the comparable

Note will conduct the inquiry that both the majority and concurring opinions failed to undertake.

D. The Statute Would Not Achieve Its Purpose as Effectively Absent Subsection (3)'s Restriction

Applying the first part of the *Ward* test to the present case, the question to be answered is, "Will the statute achieve its purpose less effectively absent Subsection (3)?"[243] The statute's purpose is to "prohibit[ ] a person from knowingly obstructing another person's entry to or exit from a health care facility."[244] In other words, the intent is to remove the evil of blocking access to clinics.[245] Thus, the first part of *Ward* questions whether the statute could just as effectively ensure unobstructed access to clinics without the speech restrictions of Subsection (3). One could argue that the answer to this question is "yes," because Subsection (2) can accomplish this purpose without restricting speech.[246] Additionally, a similar federal law also accomplishes this goal without restricting speech.[247] Subsection (2) was not challenged,[248] and that Subsection does not implicate any First Amendment free-speech concerns.[249] Thus, one could argue that the statute would be as effective in meeting its purpose of ensuring access to clinics with just Subsection (2) and absent Subsection (3).

However, Justice Scalia, in his dissent, properly recognized otherwise.[250] Justice Scalia found that there is a possibility that

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> portion of the injunction struck down in *Schenck v. Pro-Choice Network of Western N.Y.*, . . . where we observed that the difficulty of administering a floating bubble zone threatened to burden more speech than necessary. In *Schenck*, the floating bubble was larger (15 feet) and was associated with near-absolute prohibitions on speech. Since subsection (3) prohibits only 8-foot approaches, however, with the stationary speaker free to speak, the risk is less. Whether floating bubble zones are so inherently difficult to administer that only fixed, no-speech zones . . . should pass muster is an issue neither before us nor well suited to consideration on a facial challenge.

Id. at 740 (citations omitted).

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

244. Colo. Rev. Stat. § 18-9-122(1).

245. *Id.*

246. Colo. Rev. Stat. § 18-9-122(2) (prohibiting a person from knowingly obstructing, detaining, hindering, impeding, or blocking another person's entry to or exit from a clinic).

247. 18 U.S.C. § 248.

248. *Hill*, 530 U.S. at 707.

249. Colo. Rev. Stat. § 18-9-122(2).

250. *Hill*, 530 U.S. at 755 (Scalia & Thomas, JJ., dissenting).

some of the evil of blocking access would not be removed by Subsection (2)'s restrictions alone.[251] A protester may engage in expressive activity that may be sufficiently harassing so as to have the effect of blocking access, while not committing any of the prohibited acts listed in Subsection (2).[252] That was the likely goal of drafting Subsection (3): to remove the evil of any expressive activity that would block access to clinics.[253] Subsection (2) does not limit any expressive activity, so the statute would not ensure access as effectively without Subsection (3). Thus, this Note concedes that the statute satisfies the first prong of the narrowly-tailored test. However, this Note argues that the statute fails the test's second prong.

E. Subsection (3)'s Restrictions Are Substantially Broader Than Necessary to Achieve Its Purpose

The second component of narrowly tailored from *Ward* questions whether the government's means are substantially broader than necessary to achieve its purpose.[254] This requirement exists to ensure that the restriction focuses on the governmental interest in removing the "evil," while not removing a substantial amount of free speech that does not create that evil.[255] Yet, the majority concluded that the bright-line prophylactic approach of removing all speech regardless of whether it creates the evil of obstructing access is one of the statute's strengths.[256] It concluded

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251. *Id.*

252. *Id.*; Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests* (pt. 2), 29 U.C. Davis L. Rev. 1163, 1192–1211 (1996) (focusing on the constitutionality of regulations designed to protect clinic patients and staff from expression that may or may not constitute harassment).

253. Subsection (3) is not concerned with any physical interference. Colo. Rev. Stat. § 18-9-122(3). Any such physical interference is clearly prohibitable and should be prevented. The concern here is with speech that may have the same effect of blocking access. *Id.* at § 18-9-122(1). Because Subsection (3) deals with limiting expressive activity, the First Amendment is implicated.

254. *Ward*, 491 U.S. at 799–800.

255. *Id.*

256. *Hill*, 530 U.S. at 729 (stating that "the statute takes a prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet. We recognize that by doing so, it will sometimes inhibit a demonstrator whose approach in fact would have proved harmless. But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from *physical harassment* with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement

that this approach removes the great difficulty the state would face in enforcing a harassing law.[257] To this end, the Court stated that the "bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."[258] Although removing more speech rights certainly better "protects" the unwilling listener, it is unclear how this removal better "protects" speech itself. Perhaps, by removing more speech rights, the government is given a better chance of proving illegal conduct, and the protesters are more alert. But, helping the government in prosecutions and giving the public notice of what is prohibited is not the focus of narrow tailoring.

Contrary to the majority's analysis, "[b]road prophylactic rules in the area of free expression are suspect."[259] As Justice Kennedy aptly described in dissent,

> The saving feature the Court tries to grasp [restrictions applying to all speech making those restrictions content neutral] simply creates additional free speech infirmity. Our precedents do not permit content censoring to be cured by taking even more protected speech within a statute's reach. The statute before us, as construed by the majority, would do just that. If it indeed proscribes "oral protest, education, or counseling" on all subjects across the board, it by definition becomes "substantially broader than necessary to achieve the government's interest."[260]

This is the Catch-22 to the Court's finding of content

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within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately." (emphasis added)). In sum, the Court seems to conclude that because it is too difficult to tell who would be "physically harassing," all speech rights are removed. *Id.* However, Subsection (3) has nothing to do with any "physical" harassment, and therefore, cannot be justified as protecting against such harassment.

257. *Id.*

258. *Id.*

259. *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted) (invalidating a law that sought to include the NAACP's activities of aiding parties in litigation within a ban of improper solicitation of legal business). *Id.* at 424–425, 428–429. The Court found the NAACP's aid in such matters was a protected form of expression and refused to extend professional rules on improper solicitation to include a simple referral, recommendation, or any other cooperative activity. *Id.* at 428–429, 433. Extending the ban this far would have limited First Amendment freedoms beyond the evil of improper solicitation, and thus nothing justified the law's breadth. *Id.* at 444 (implying essentially that the law was not narrowly tailored).

260. *Hill*, 530 U.S. at 776 (Kennedy, J., dissenting) (citation omitted).

neutrality.

A complete ban on speech in an area "can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[261] For example, in *Frisby v. Schultz*,[262] a city ordinance banned all picketing of private residences.[263] Abortion protesters who picketed around the house of a doctor who performed abortions challenged the ordinance.[264] The Court concluded that the ordinance was narrowly tailored.[265] In this instance, the purpose of the ordinance was not to allow any picketing of residences.[266] The means used did exactly that.[267] Although there was a complete ban, the ban eliminated the evil the city sought to proscribe.[268] The ordinance's purpose was to completely remove residential picketing, and the ordinance was narrowly tailored to remove that evil completely and nothing more.[269]

In *Hill*, the majority interpreted the statute as banning the expression of all communication made by approaching persons within the zone.[270] But banning all communication was not the evil Colorado sought to proscribe.[271] Instead, the purpose of Subsection (3) is to ensure complete access to clinics by removing any expressive activity that blocks such access.[272] Unlike the ordinance in *Frisby*, Subsection (3)'s restrictions remove more than the evil. As the concurrence found, this restriction provided needless protection.[273] Unfortunately, the majority and concurrence focused on the wrong side of this coin. Instead of viewing the statute as providing needless protection, the proper inquiry into narrow tailoring is to determine whether the statute

261. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).
262. 487 U.S. 474 (1988).
263. *Id.* at 476.
264. *Id.*
265. *Id.* at 487–488.
266. *Id.* at 477.
267. *Id.*
268. *Id.*
269. *Id.* at 477, 487–488.
270. *Hill*, 530 U.S. at 719–725.
271. Colo. Rev. Stat. § 18-9-122(1).
272. *See id.* at § 18-9-122(1), (3) (indicating that only speech that would obstruct or block access was the evil sought to be removed). Not all communication would obstruct or block access. For example, saying "Good morning" would not obstruct someone from entering a clinic.
273. *Hill*, 530 U.S. at 738–739 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring).

needlessly infringes upon speech rights.[274] In fact, concluding that some people are protected needlessly acknowledges that this law is broader than necessary. The question becomes whether this overbreadth is substantial.[275]

In *Simon and Schuster*, the Court examined a complete ban that was substantially broader than necessary. In that case, New York's Son of Sam law prohibited criminals from receiving royalties from published accounts of their crimes.[276] The law was intended to compensate the criminals' victims.[277] The Court found that the law, rather than being narrowly tailored, was "significantly overinclusive."[278] The statute applied to works that expressed the criminals' recollections of the crime,[279] and the Court noted that under this law, various classic literature, such as St. Augustine's *Confessions*, would have been found to be within its scope.[280] However, not all of these works could be said to enable a criminal to profit from the crime while the victim remained uncompensated.[281] Thus, the law banned works that did not fit within the targeted evil.[282]

In the same way, the Colorado statute bans speech that does not fit within the targeted evil. The targeted evil here is speech that obstructs access to clinics.[283] The petitioners' expressions can be said to be an example of banned speech that does not fit within this targeted evil. The majority acknowledged that there was no evidence that the sidewalk counseling conducted by the petitioners was abusive or confrontational.[284] It is hard to imagine blocking access with only words that are not abusive or confrontational. Moreover, the statute restricts even peaceful protests.[285]

In his dissent, Justice Scalia provided a scenario demonstra-

274. *Ward*, 491 U.S. at 799.
275. *Id.*
276. *Simon & Schuster, Inc.*, 502 U.S. at 108.
277. *Id.*
278. *Id.* at 121. The Author interprets "significantly overinclusive" as being reasonably analogous to "substantially broader than necessary."
279. *Id.* at 109.
280. *Id.* at 121–122.
281. *Id.* at 122.
282. *Id.*
283. Colo. Rev. Stat. § 18-9-122(1).
284. *Hill*, 530 U.S. at 710.
285. Colo. Rev. Stat. § 18-9-122(3).

ting that the statute is significantly overinclusive.[286] Consider a counselor walking alongside a person attempting to enter a clinic.[287] The counselor sympathetically and softly says, "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you?"[288] At the same time a group of individuals follows the person entering the clinic, keeping nine feet away from her, and shouts through a bullhorn, "You are a baby killer! You are going to burn in hell, murderer!" and anything else the reader can imagine. The gentle, sympathetic counselor would risk prosecution under Subsection (3), but the accusatory, shouting group would not.[289] But can the former be said to be obstructing access to the clinic and not the latter?

Worse yet is the scenario the majority used to support its conclusion that the statute is viewpoint neutral. The majority stated that a person chanting in praise of the Court's abortion decisions within the buffer zone would be in violation of the statute.[290] This statement results from the absurd reasoning that the majority used to avoid finding the statute content based. Thus, this hypothetical person, actively supporting the right for women to have access to abortion clinics, would be arrested for blocking access.[291] As this scenario demonstrates, the statute, which provides a basis for arresting persons who in no way could be said to be obstructing access, is substantially broader than necessary to remove the evil of speech that obstructs access to clinics.

Recent precedent also calls into question the Court's finding that the statute is narrowly tailored. In fact, only three years prior to this decision, the Court in *Schenck* struck down a similar restriction.[292] In that case, a fifteen-foot floating buffer zone surrounding people entering clinics was struck down as burdening more speech than was necessary to serve the governmental interest.[293] The restriction was designed for the

286. *Hill*, 530 U.S. at 757 (Scalia & Thomas, JJ., dissenting).
287. *Id.*
288. *Id.* (quoting a hypothetical counselor).
289. Colo. Rev. Stat. § 18-9-122(3); *Hill*, 530 U.S. at 757 (Scalia & Thomas, JJ., dissenting).
290. *Hill*, 530 U.S. at 725.
291. *Id.*
292. *Schenck*, 519 U.S. at 377.
293. *Id.*

same interest as the one in *Hill*, that of prohibiting obstruction of access to clinics, or, phrased more positively, ensuring unobstructed access to clinics.[294] The restriction was struck down because it was too broad and prohibited "commenting on matters of public concern," a form of speech at the heart of the First Amendment.[295] But the Court did leave open the possibility that, "[i]n some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."[296]

Apparently, patients outside of Colorado clinics have this necessary record of being subjected to abusive conduct. However, the Court did not cite the record to support this contention. Perhaps the Court was giving the proper deference to the Legislature. But, if that were the case, the Court at least should have upheld its role in judicial review and cited the findings made by the Legislature in support of this abusive conduct.[297] Indeed, as stated earlier, the Court defined the petitioners' conduct as non-abusive.[298] Taking this absence in the record further, the dissenters properly acknowledged a conclusion the Court reached in another recent, analogous case.[299]

In *Madsen v. Women's Health Center, Incorporated*,[300] the Court concluded,

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand.[301]

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294. *Id.* at 366–367 n. 3.

295. *Id.* at 377.

296. *Id.* (citations omitted).

297. *See U.S. v. Lopez*, 514 U.S. 549, 562–563 (1995) (noting the lack of congressional findings in striking down a firearm possession law as outside of Congress's commerce power). Of course, legislative findings will not guarantee a statute's constitutionality. *U.S. v. Morrison*, 529 U.S. 598, 614 (2000).

298. *Hill*, 530 U.S. at 710.

299. *Id.* at 761–762 (Scalia & Thomas, JJ., dissenting).

300. 512 U.S. 753.

301. 512 U.S. at 774 (emphasis deleted, citation omitted).

Despite the "difficulty," Justice Stevens in *Hill*, in almost direct contradiction to the *Madsen* Court's conclusion, wrote a decision for the majority upholding such a complete ban.[302] Subsection (3) of the statute places a ban on all[303] uninvited approaches,[304] regardless of them being peaceful,[305] and without a requirement that they be fighting words or threats.[306] According to *Madsen*, Justice Stevens should have found that the statute in *Hill* "burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic."[307] Instead, he found the exact opposite.[308]

F. A Proposed Solution

In his dissent, Justice Kennedy suggested a more proper means with which to combat the targeted evil.[309] The majority noted that the restriction in Subsection (3) is designed to protect those who are entering

> a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face to face.[310]

Following Justice Kennedy's suggestion, "[i]f these are punishable acts, they should be prohibited in those terms."[311] Doing so would remove the targeted evil without creating the problems that the present restriction does of prohibiting substantially more speech outside of the targeted evil. Other states, such as North Carolina, just remove physical

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302. *Hill*, 530 U.S. at 707–735.

303. At least, the majority found that the statute bans all communication in order to conclude it was a content-neutral law. *Supra* nn. 230–231 and accompanying text.

304. Colo. Rev. Stat § 18-9-122(3) (stating that "[n]o person shall knowingly approach another person within eight feet of such person, unless such other person consents").

305. *Id.*; *Hill*, 530 U.S. at 710 (admitting that petitioners' protests were peaceful).

306. Colo. Rev. Stat. § 18-9-122. The Court cited no evidence of petitioners using fighting words or threats, but instead found that they were non-abusive and non-confrontational. *Supra* n. 48 and accompanying text.

307. 512 U.S. at 774 (footnote omitted).

308. *Hill*, 530 U.S. at 730.

309. *Id.* at 777 (Kennedy, J., dissenting).

310. *Id.* at 723–724 (majority opinion).

311. *Id.* at 777 (Kennedy, J., dissenting).

interference,[312] but, if a more severe restriction is needed, perhaps Colorado could simply prohibit the blocking of access in any manner (which would include physical interference and speech) that deprives or delays a person from getting to the clinic. In other words, the Colorado Legislature should ban speech connected only to the impediment or delay of the person entering the clinic.

G. The Location of the Restrictions

Lastly, the majority justified its reasoning based upon the location of the restrictions, finding that the uniqueness of the clinics justifies a greater need for restrictions.[313] In doing so, the majority failed to appreciate the location of the restrictions. The restrictions are imposed on sidewalks and driveways, which are traditional public fora.[314] As Justice Scalia concluded in his dissent, this fact should make it more difficult to justify the restrictions, not provide an additional reason for them.[315]

The majority, though, emphasized that the restrictions are imposed outside of health-care facilities.[316] The majority correctly noted that the government has special interests in controlling the areas surrounding "schools, courthouses, polling places, and private homes."[317] Missing from this list, though, are health-care facilities. The Court cited *National Labor Relations Board v. Baptist Hospital, Incorporated*[318] for the proposition that it has previously recognized unique concerns surrounding health-care facilities.[319] However, in *NLRB*, the restrictions on speech were prohibitions of solicitation within the lobby, café, and gift shop — areas *inside* the hospital — not on sidewalks surrounding the

312. *Supra* n. 23 and accompanying text.

313. *Hill*, 530 U.S. at 728 (noting that states and municipalities plainly have a substantial interest in controlling the activity around certain public and private places. The Court explained, "[W]e have recognized the special governmental interests surrounding schools, courthouses, polling places, and private homes. Additionally, we previously have noted the unique concerns that surround health care facilities: 'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry. . . .'" (citation and footnotes omitted)).

314. *Id.* at 715.

315. *Hill*, 530 U.S. at 763 (Scalia & Thomas, JJ., dissenting).

316. *Id.* at 728–729 (majority opinion).

317. *Id.* (footnotes omitted).

318. 442 U.S. 773 (1979).

319. *Hill*, 530 U.S. at 728–729.

hospital.[320] Thus, *NLRB* does not support the majority's conclusion at all, and no other support was cited.[321]

In fact, the Eighth Circuit, in *Olmer v. City of Lincoln*,[322] specifically rejected this extension of special governmental interests.[323] In that case, a city enacted an ordinance restricting demonstrations in areas outside of churches.[324] The city argued that the special protection applied in *Frisby* should be used to uphold the ban.[325] The circuit court disagreed, noting, as the Court did in *Frisby*, that "the home is different."[326] The circuit court reasoned that "[a]llowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication."[327]

Private houses, then, are afforded even more privacy than churches, which possess privacy rights stemming from the freedom of religion.[328] Similar to churches, health-care facilities possess privacy rights, in this case stemming from the right to abortion.[329] But, like churches, this level of privacy probably does not rise to the level afforded to private houses; at least the Court has never before ruled that health-care facilities are entitled to such protection.[330]

Additionally, the circuit court in *Olmer* found that the ordinance covered areas beyond the church building and property out to the public sidewalks,[331] just like the Colorado statute covers areas beyond the health-care facilities out to the public sidewalks.[332] These sidewalks are public fora, worthy of more scrutiny, not less.[333]

Further, the Colorado statute is substantially broader than

320. *NLRB*, 442 U.S. at 775–776.

321. *Hill*, 530 U.S. at 728–729.

322. 192 F.3d 1176 (8th Cir. 1999).

323. *Id.* at 1182.

324. *Id.* at 1178.

325. *Id.* at 1181–1182. *Frisby* recognized increased privacy in a person's home. 487 U.S. at 484–485.

326. *Olmer*, 192 F.3d at 1182 (quoting *Frisby*, 487 U.S. at 484).

327. *Id.*

328. *Id.* at 1181–1182.

329. *Hill*, 530 U.S. at 728–729.

330. If the *Hill* Court wished to place health-care facilities within this special list of entities afforded higher protection, it should have so stated instead of misapplying *NLRB*.

331. 192 F.3d at 1180–1181.

332. Colo. Rev. Stat. § 18-9-122(3).

333. *Hill*, 530 U.S. at 779–780 (Kennedy, J., dissenting).

necessary because of the variety of places it affects. The restrictions apply within a one-hundred-foot radius of "health care facilities."[334] As the concurrence conceded, the restrictions apply to dentist offices.[335] The concurrence asserted that, although the restriction was not enacted to protect dental patients, this inclusion is not beyond the state's interest.[336] This Note concedes that protecting dental patients is certainly within the state's interest, and observes that the statute's broad applicability lends some support to the Court's finding that the statute is content neutral, because the statute applies to places not concerned with abortions.[337] As the Colorado Supreme Court stated, "the applicability of the statute to situations other than anti-abortion protesting is one reason we conclude that the statute is content-neutral. And we decline any invitation on this record to conclude that a facet of a statute that renders it content neutral necessarily renders it overly broad."[338]

That court was correct in stating that the statute is not overbroad simply because it applies to a wide range of facilities, such as dentist offices. However, there is no record of any obstruction of access to dentist offices. Thus, free speech is banned from sidewalks surrounding places that have not been troubled by the evil that was targeted. In fact, dentist offices are unlikely ever to experience that evil. The majority was silent on this subject, but the concurrence concluded that this free speech is properly removed despite the Legislature not needing to protect dentist offices from the evil against which the statute guards.[339] Again, this means that the statute needlessly removes rights of free speech. This fact alone may not make the statute so broad as to invalidate it, but when combined with the other needless removals of free speech, one can see that the statute is substantially broader than is necessary.

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334. Colo. Rev. Stat. § 18-9-122(3).

335. *Hill*, 530 U.S. at 739 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring).

336. *Id.*

337. *See supra* nn. 84–91 and accompanying text (discussing the attributes of content-neutral laws). If the statute had applied to only "abortion clinics," that would lead to a finding of the statute being content based. *Id.*

338. *Hill*, 973 P.2d at 1258.

339. *Hill*, 530 U.S. at 739 (Souter, O'Connor, Ginsburg & Breyer, JJ., concurring).

H. The Court's Answer and the Catch-22

The concurrence admitted that the statute is broader than necessary.[340] The concurrence asserted, however, that this "needless protection" is not substantial enough to find that the statute is not narrowly tailored.[341] However, as the above discussion demonstrates in several ways, the restrictions are significantly over-inclusive. One need only compare the Court's recent decisions in *Madsen* and *Schenck* with the *Hill* majority's reasoning that the statute was content neutral to see that Subsection (3) is not narrowly tailored.

Therefore, in upholding the statute, the Court ruled that the restrictions apply to all subjects and thus are content neutral.[342] Doing so, however, contradicted the Court's finding that the statute is narrowly tailored. This paradox brings us to a final question.

PART V: "WHAT IS THE IMPACT OF THIS CASE?"

A. Incorrect Analysis

First, this decision can be added to the common criticism of the Court in this area, that there is inconsistent analysis of legislative purpose in determining whether a restriction is content neutral or content based.[343] Undertaking the proper analysis is crucial in determining whether the restriction will be upheld.[344] The statute here fits both types of content-based laws, because it applies to a specific subject and also singles out a particular viewpoint.[345] The Court's failure to acknowledge this fact adds to confusion in this complex area.

B. Relaxes the Test Required to Limit Speech Based on Content

Second, the Court failed to consider the true impact of the restriction. A similar charge in clinic-protesting cases has been

340. *Id.* at 738–739.

341. *Id.*

342. *Id.* at 725 (majority opinion).

343. Calvert, *supra* n. 10, at 71.

344. *See supra* pt. III(A) (noting that the answer to this question determines what test to apply, which can be outcome determinative).

345. *See supra* pt. III(E)–(F) (explaining in detail how the statute discriminates based on subject matter and viewpoint).

leveled on the Court previously.[346] As in both *Madsen* and *Schenck*, the restrictions limited only one particular viewpoint, that of abortion protesters.[347] Despite this, the Court failed to consider this disparate impact. Thus, a restriction that fits both categories of content-based laws was upheld by applying a lower standard of scrutiny. This is the evil against which the First Amendment was designed to protect: government's limiting the discussion of a political or social topic and giving official support to one view.[348]

C. Removes a Check on the Legislature

In addition, the *Hill* decision magnified the problems created by the Colorado Legislature. As Justice Stevens pointed out in his concurring and dissenting opinion in *Madsen*, "legislation is imposed on an entire community, regardless of individual culpability."[349] In upholding the Colorado statute, the majority deferred to the Legislature.[350] However, one could argue that the Court's role in judicial review includes requiring the legislature to support its findings with evidence of why such measures are needed.[351] When the government restricts speech, it has the burden of proving the restriction is constitutional.[352] The majority, however, did not make the government meet this burden and did not support its decision with any legislative findings. To the contrary, it upheld the restrictions upon petitioners who were

346. Calvert, *supra* n. 10, at 71.

347. *Id.* at 100 (noting that "[i]n each case, the impact of the law in question clearly was not only content-based, singling out speech on abortion, but also viewpoint based, restricting speech of anti-abortion activists"). The majority concluded that the restriction also applies to those praising the Court's abortion opinions. *Hill*, 530 U.S. at 725. However, the Author finds it hard to foresee a patient leveling a complaint against such persons as blocking their access.

348. Stone, *supra* n. 87, at 214–215.

349. 512 U.S. at 778 (Stevens, J., concurring in part and dissenting in part) (citation omitted). Justice Stevens dissented in part because the majority in *Madsen* applied stricter scrutiny to content-neutral injunctions in a public forum than the level of scrutiny it applied to content-neutral statutes in a public forum. *Id.* Justice Stevens concluded that this application should be reversed. *Id.*

350. *Hill*, 530 U.S. at 727.

351. *See supra* n. 297 and accompanying text (discussing the interaction of legislative findings and judicial review).

352. *Playboy Ent. Group, Inc.*, 529 U.S. at 816 (striking down a content-based law that required cable companies to fully scramble sexually-oriented programming because the government failed to meet its burden and thus did not pass the compelling-governmental-interest test).

peacefully exercising their free-speech rights.[353]

D. May Lead to Increase in Violence

Removing peaceful approaches and offers may, in fact, thwart the purpose of ensuring access to the clinics. This removal forces peaceful abortion protesters to voice their message by other means. As one commentator stated, "abortion clinic protesters, without an opportunity to approach and offer, are restricted to picketing and chanting in hope that passersby will take the affirmative step of asking them for more information."[354] However, the area outside of clinics is the one place that those opposing abortions can reach their intended audience.[355] "To remove personal access to all patients — a group which can realistically be identified only by their presence at the clinic or, more precisely, by their presence on the public sidewalk outside the clinic — is to effectively block access to the audience in toto."[356] It is not only the last place where the message to change a person's mind can be personally communicated; it is likely the only place.[357] "It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it."[358] So, what exactly will the former sidewalk counselors do to voice their message, assuming that a patient does not give consent for them to approach?

As one commentator pointed out in discussing the petitioners in *Schenck*, "'The sidewalk counselor seeks not so much to broadcast a message to the world as to touch the mind, heart and conscience of particular individuals.'"[359] These protesters seek to reason with the clinic patients and offer them counsel.[360] Now, these counselors are left standing still, shouting through

353. *Hill*, 530 U.S. at 735.

354. Darrin A. Hostetler, Student Author, *Face-to-face with the First Amendment: Schenck v. Pro-choice Network and the Right to "Approach and Offer" in Abortion Clinic Protests*, 50 Stan. L. Rev. 179, 199 (1997). The author argues that the Court has minimized the right "to approach and offer" in reaching a compromise in the clinic protesting cases of *Madsen* and *Schenck*. *Id.* at 200–201.

355. *Id.* at 201.

356. *Id.* at 201–202 (footnote omitted).

357. *Hill*, 530 U.S. at 789 (Kennedy, J., dissenting); Hostetler, *supra* n. 354, at 203–204.

358. *Hill*, 530 U.S. at 789 (Kennedy, J., dissenting).

359. Hostetler, *supra* n. 354, at 203 (quoting Br. of Pet. at 20, *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (footnote omitted)).

360. *Hill*, 530 U.S. at 788 (Kennedy, J., dissenting); Hostetler, *supra* n. 354, at 203.

bullhorns, or holding up signs.[361] This, though, appears to lend itself to more confrontational types of speech, "with a far greater chance of being perceived as intrusive, inflammatory, and insulting."[362] Such a result seems contrary to the purpose of ensuring access to the clinics, as well as contrary to the majority's contrived "right" to be left alone. Further, one commentator, in tracing the history of access laws, has noted that such laws actually seem to contribute to an increase in violence.[363] So, enacting more restrictions upon the voice of abortion protesters seems actually to be counterproductive to the purpose of ensuring peaceful access to clinics.

E. Uses the Removal of More Speech as a Justification

But the reach of this statute is not confined just to the purpose of ensuring access. Rather, the Court upheld a restriction of speech that is substantially broader than needed to reach its goal.[364] In fact, the breadth of the restrictions was used as a justification for applying the lesser, intermediate content-neutral test.[365] The majority missed the enormous "leak" that this places in its rescue ship, the catch that springs open from the majority's own interpretation of the statute. The breadth is actually an additional problem with the statute, not a saving feature.[366]

F. Plots a Path for Clever Drafters to Remove Other Unwanted Messages

Beyond the abortion-clinic setting, this holding presents the serious danger that the government can more easily "regulate in a superficially content-neutral manner with the motive of

361. The majority believed this helped the protesters' cause. *Hill*, 530 U.S. at 726 (majority opinion).

362. Hostetler, *supra* n. 354, at 203.

363. Student Author, *supra* n. 22, at 1226 (stating that "[t]he patterns of anti-abortion violence, however, suggest that further limiting nonviolent protests — either by increasing penalties for interfering with access or by establishing buffer zones within which activists cannot demonstrate or distribute literature — is counterproductive; such limits appear to have contributed to the increase in violence").

364. *See supra* pt. IV (explaining why the statute is unnecessarily broad).

365. *Hill*, 530 U.S. at 719–725.

366. *See supra* pt. IV(E) (explaining that the statute's restrictions are substantially broader than necessary to achieve its purpose). Justice Kennedy said it best: if the statute proscribes speaking "on all subjects across the board, it by definition becomes 'substantially broader than necessary to achieve the government's interest.'" *Hill*, 530 U.S. at 776 (Kennedy, J., dissenting) (quoting *Ward*, 491 U.S. at 800).

penalizing particular viewpoints."[367] The Colorado Legislature was concerned with limiting the voice of groups who advocate "against certain medical procedures."[368] The Court strained to find that, despite this admission, the law was content neutral. Perhaps, though, the Legislature, although recognizing the effect of the restriction on abortion protesters, actually intended to regulate only the protesters' conduct and not the content of their speech.[369]

> But the danger also exists that, because of the often unclear line between regulation of the manner of expression and regulation of its content, government may both purport and intend to regulate what it considers to be "manner" while in reality having a significant indirect impact on interests meant to be protected by close scrutiny of content regulation.[370]

Here is an example of such a dangerous restriction. The effect could be like a crack in a ship's hull. As Justice Kennedy eloquently stated, the Court has licensed legislatures "to adopt 'bright-line prophylactic rules . . . to provide protection' to unwilling listeners in a quintessential public forum."[371] But "[t]he Court has long maintained that the First Amendment does not permit government to prohibit the public expression of views merely because they are offensive or unpopular."[372] If government can single out and restrict abortion protests in this fashion and yet avoid facing the strict-scrutiny standard of the compelling-interest test, what protects other unfavorable groups from similar governmental treatment?

Suppose, for example, "that during the 1950's, protesters urged patients not to patronize a privately-owned, segregated clinic or health care facility" and the restriction here was passed, prohibiting the exercise of a person's right to protest or counsel against certain employment or admittance procedures.[373] Or to

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367. Redish, *supra* n. 7, at 115 (footnote omitted) (pointing out pragmatic difficulties with the content distinction).

368. Colo. Rev. Stat. § 18-9-122(1).

369. *See supra* nn. 167–171 and accompanying text (explaining the concurrence claimed that only approaches are restricted and not speech).

370. Redish, *supra* n. 7, at 114–115. Redish's concerns with the content distinction seem to foreshadow the blurred lines later created by the *Madsen*, *Schenck*, and now *Hill* decisions.

371. *Hill*, 530 U.S. at 778 (Kennedy, J., dissenting) (citation omitted).

372. Stone, *supra* n. 87, at 214–215.

373. Ronald D. Rotunda, *2000 Supplement to Modern Constitutional Law: Cases and*

modernize, consider the hypothetical with the clinic or facility discriminating based on gender or sexual orientation. Could, in this manner, those protesting against the discrimination be limited from approaching people unless they consented?

G. Fails to Recognize or Follow Precedent

Does *Hill* differ from these hypotheticals only in the sense that the *Hill* majority sought to protect constitutional (abortion) rights? The Court has already considered a situation involving a restriction of speech in which the restriction was designed to protect a constitutional right.[374] However, as one commentator has noted, in this area of content distinctions, the Court rarely uses its own controlling precedents.[375] The present case can be added to this list, as the Court failed to consider a case close to being on point, *Burson v. Freeman*.[376]

As already mentioned, *Burson* dealt with the balance between the right to free speech and the right to vote.[377] Because the restriction on campaign speech was content based, the compelling-governmental-interest test was applied.[378] Protecting the right to vote freely and ensuring the integrity and reliability of the vote are compelling interests,[379] and the restriction banning campaign speech within one hundred feet of the polling place is not over-inclusive because it affects only the targeted evil (campaign speech near a polling place).[380] Thus, the statute was upheld.[381]

Why should this Author, arguing in favor of invalidating a restriction on speech, make such use of a case that upheld a somewhat similar ban? First, because the case is so analogous. The statute in *Burson* restricted speech to protect the access of a recognized right — voting.[382] The present statute also restricts

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Notes 64 (6th ed., West 2000).

374. *Burson*, 504 U.S. at 191 (plurality opinion).

375. Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. Chi. L. Rev. 81, 99 (1978).

376. Brownstein, *supra* n. 252, at 1213 (indicating that *Burson* is applicable to cases in which courts balance free speech rights against competing interests).

377. 504 U.S. at 198 (plurality opinion).

378. *Id.* at 198.

379. *Id.* at 198–199.

380. *Id.* at 208–211.

381. *Id.* at 211.

382. *Id.* at 193–194.

speech to protect the access to a recognized right — abortion.[383] The second reason is that *Burson* demonstrates the proper analysis for determining which test to apply.[384] The third reason is to contradict Justice Stevens with his own words.

Justice Stevens dissented in *Burson*.[385] He was concerned that Tennessee's restriction was "particularly problematic because such a regulation will inevitably favor certain groups of candidates. As the testimony in this case illustrates, several groups of candidates rely heavily on last-minute campaigning."[386]

Here, Colorado's statute inevitably will favor a certain group, namely those in favor of abortion.[387] In practice, the statute will not remove speech rights from those supporting abortion, but rather from only those protesting against abortion.[388] Additionally, those protesting against abortion heavily rely on last-minute counseling (or campaigning) on public sidewalks outside the clinics, and the restriction removes what is in all probability the only place for this counseling to be done.[389]

Justice Stevens, in his dissent in *Burson*, further noted that

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383. Colo. Rev. Stat. § 18-9-122(1).

384. *See supra* nn. 374–381 and accompanying text (explaining that courts should apply the compelling-governmental-interest test when a content-based restriction affects a constitutional right).

385. *Burson*, 504 U.S. at 217–228 (Stevens, O'Connor & Souter, JJ., dissenting).

386. *Id.* at 224 (Stevens, O'Connor & Souter, JJ., dissenting) (citation omitted).

387. Despite what the majority asserted, the Author doubts that an abortion supporter would be prosecuted for blocking access to an abortion clinic. *See generally Madsen*, 512 U.S. at 793 (Scalia, Kennedy & Thomas, JJ., concurring in part and dissenting in part) (stating that "[w]hen a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he knows he is enjoining) the expression of pro-union views." (emphasis deleted)). The same is true when legislation is enacted that prohibits protesting at the site of a health-care clinic; legislators limit (and they know they are limiting) the expression of one side's views. Justice Scalia furthered his point in *Madsen* by citing part of the record from the trial court. *Id.* at 796 (observing that a person charged with violating the injunction asked the judge "'[w]hen you issued the Injunction did you determine that it would only apply to — that it would only apply to people that were demonstrating pro-life?' The Court: 'In effect, yes.'" (emphasis deleted, citation omitted)); *see* Calvert, *supra* n. 10, at 97 (explaining the *Madsen* dissents). Now, imagine the hypothetical in the context of a police officer attempting to enforce the Colorado law:

"When you arrested Mr. Doe, did you determine that the law against obstructing entrance to a clinic applied only to those demonstrating pro-life?"

Officer: "Well, they would be the only ones wanting to obstruct entry, wouldn't they?"

Does this restriction apply only to persons protesting against abortion? In effect, as well in the words of the restriction itself, yes.

388. *Supra* n. 132–144 and accompanying text.

389. *Hill*, 530 U.S. at 756–758 (Scalia & Thomas, JJ., dissenting).

> the Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the simple "display of campaign posters, signs, or other campaign materials." . . . [L]apel buttons on pedestrians are taboo. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.[390]

Yet, in *Hill*, the statute does not merely regulate conduct that might inhibit access but also bars the simple "passing [of] a leaflet or handbill," as well as the "displaying [of] a sign," if the person doing so approaches within eight feet of another person.[391] A small leaflet being held by a pedestrian or a simple greeting, "Hello" by a pedestrian approaching this eight-foot zone is taboo. Justice Stevens failed to find this to be a sweeping restriction,[392] and rejected as absurd the notion that this restriction is not needed to maintain the freedom to an abortion and ensure access to clinics.[393]

What can be said of this discrepancy? The dissent vigorously maintained that the Court reached its conclusion because the case deals with the right to abortion, and this "stacks the deck."[394] According to the dissent, the Court then utilized an "ad hoc nullification machine" to push aside First Amendment doctrines standing in the way of this right, but not with other rights.[395] First Amendment analysis is then determined by the content of the political speech being removed. By doing so, the Court has arguably engaged in the very evil that the First Amendment protects against: government acting as thought-police, deciding what speech can and cannot be restricted based on the content of the message.

PART VI: CONCLUSION

The Colorado statute was upheld as passing the content-neutral test. However, the Court's answers to both questions were wrong. First, the Court should have applied the compelling-

390. *Burson*, 504 U.S. at 218–219 (Stevens, O'Connor & Souter, JJ., dissenting) (citation omitted).

391. Colo. Rev. Stat. § 18-9-122(3).

392. *Hill*, 530 U.S. at 725–726, 728–732 (majority opinion).

393. *See id.* (noting the harassment that some protesters inflict upon patients attempting to gain access to health-care facilities).

394. *Id.* at 764 (Scalia & Thomas, JJ., dissenting).

395. *Id.* at 741–742.

governmental-interest test. The statute restricts speech only on the topic of certain medical procedures outside of health clinics.[396] Despite the attempt at clever drafting, the legislative history and common sense indicate the subject or topic that is being removed from the marketplace of ideas: abortion.[397] The decision of who is in violation of the prohibition is made, not based on whether a protester is approaching, as the concurrence suggests, but rather on the basis of what is said.[398] Further, the drafting was either too clever or not clever enough, because the statute itself decrees that only individuals protesting *against* this subject are affected.[399] The Legislature, then, has chosen sides in the public debate by restricting only one viewpoint.[400] Thus, the statute actually fits both categories of content-based restrictions. As a result, the compelling-governmental-interest test should have been applied.[401]

But even assuming the Court is correct in finding that the statute is content neutral, the proper application of the lesser-scrutiny test that goes with that finding[402] would have invalidated the statute. Under the Court's interpretation, the statute bans all communication, not just speech that would be so intimidating as to obstruct access to the clinic.[403] Thus, individuals singing the praises of the Court's abortion decisions, educating persons on how lower interest rates may allow them to buy another car, or conceivably saying, "Hello," all are in danger of being prosecuted if they enter the eight-foot no-speech zone.[404] Compounded upon these overbreadth concerns is the location of these restrictions.

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396. Colo. Rev. Stat. § 18-9-122(1).

397. Even if some other subjects are imagined to be a target here, such as the use of animals in medical testing or euthanasia, such targets are still being removed because of their content, making the statute a content-based law which regulates speech according to subject matter. Further, even in those situations the statute would still be affecting only one viewpoint. *See supra* n. 92–98 and accompanying text (defining viewpoint discrimination).

398. This is because even persons "approaching" will not be found in violation of this statute if their speech does not relate to "certain medical procedures." Colo. Rev. Stat. § 18-9-122(3).

399. *Id.* at § 18-9-122(1).

400. This fact makes the statute a content-based law that discriminates based on viewpoint. *See* Calvert, *supra* n. 10, at 76–77 (defining viewpoint discrimination).

401. *See supra* n. 10 and accompanying text (noting that courts apply the compelling-governmental-interest test to content-based statutes).

402. The proper application comes from *Ward*, 491 U.S. at 790–791.

403. *Hill*, 530 U.S. at 725.

404. *Id.*

Public sidewalks, well-recognized traditional public fora where the highest amount of free speech should be preserved, were instead one of the reasons the Court asserted in support of its conclusion that the restriction is narrowly tailored.[405] Too much speech is removed by this statute that has no connection to its stated purpose of ensuring access to clinics.

In reaching the wrong answers on these two questions, the Court, instead of escaping the Catch-22 with a win, created a loss, not only for abortion protesters,[406] but also for all Americans who wish to be protected from government restricting their speech based on its message.

405. *Id.* at 725–730.

406. For even abortion supporters can be prosecuted. *Hill*, 530 U.S. at 725.