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Disfavored Speech About Favored Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test

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ARTICLES

DISFAVORED SPEECH ABOUT FAVORED RIGHTS: *HILL v. COLORADO*, THE VANISHING PUBLIC FORUM AND THE NEED FOR AN OBJECTIVE SPEECH DISCRIMINATION TEST

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INTRODUCTION

Because the First Amendment first came alive in cases where the Supreme Court invalidated municipal efforts to criminalize political speech in public places,[1] the Court's "public forum" doctrine is historically and conceptually intertwined with the very idea of free speech in the United States. Before the organizing image of the "traditional public forum"[2] came to define and anchor the constitutional status of public property, political expression enjoyed almost no constitutional protection.[3] In practical terms, political expression was considered to be a limited privilege of private property ownership rather than the universal birthright of a sovereign democratic citizenry.[4]

Since the mid-20th century, the relative ubiquity and democratic character of the public forum have given free speech central instrumental and symbolic value in American life.[5] Open public spaces like parks, sidewalks, streets, and other accessible government-owned properties have served as the most effective and reliable arena

1. *See* Hague v. CIO, 307 U.S. 496, 516-18 (1939) (holding invalid ordinances prohibiting leafleting and "public assembly" in city streets and other public places without a permit); Schneider v. New Jersey, 308 U.S. 147, 163 (1939) (invalidating ordinances prohibiting or restricting leafleting in public places). Professor David Rabban has shown that there was considerable First Amendment litigation prior to the period between World War I and World War II, but that throughout "the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims . . . ." David M. Rabban, *Free Speech: The Lost Years*, 25 J. SUP. CT. HIST. 145, 147 (2000). *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 131 (1997) (noting that a widespread hostility existed toward free speech claims during this period regardless of the person or issue involved, and thus courts often simply ignored the existence of the claims).

2. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (defining "traditional public forums" as places that have been "devoted to assembly and debate" throughout history such as streets and parks); *see also infra* pp. 184-89 (discussing the development of the "traditional public forum" doctrine).

3. *See* Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895) (articulating the traditional position taken by the courts that legislatures have the power to regulate public use of public spaces, including the right to prohibit public speaking in such places); *see also infra* notes 35-38 and accompanying text.

4. *See generally* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 58 (1996) (advocating a return to a property-based vision of the First Amendment where free speech was considered a property right of the individual rather than a "means of self-governance").

5. *See infra* notes 23-34 and accompanying text (noting how the public forum has been accessible by all and allows the dissemination of ideas in areas of symbolic and political importance).

of communication for all citizens regardless of their political ideology, private wealth, property ownership, social status, or popularity.[6] This is why the traditional public forum has been called the "poor man's printing press."[7] Whether the speakers are labor organizers educating workers about the National Labor Relations Act and challenging a corrupt urban political machine,[8] an individual conducting a "solitary vigil" against racism in school,[9] a civil rights movement engaged in mass protest,[10] or religious proselytizers spreading their gospel,[11] the public forum empowers citizens to assemble, associate, agitate, persuade, and disseminate their views. The public forum, while almost always besieged by public officials, has become both an indispensable means of expression in the real world and the central metaphor for "uninhibited, robust, and wide-open" dialogue in society generally.[12]

In 1998, in a case deeply colored by the exclusionary politics of the "two-party system,"[13] the Supreme Court dangerously eroded the principle of political free expression in limited public and nonpublic

6. *See* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 30 (1965) ("[T]he parade, the picket, the leaflet, [and] the sound truck have been the media of communication exploited by those with little access to the more genteel means of communication."); *see also infra* pp. 185-87 (discussing the use of public fora for speech purposes by a variety of groups who could lack access to other modes of mass media).

7. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975) (quoting Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 30 (1965)). Apparently, Kalven derived this phrase from Justice Black's description of the door-to-door distribution of leaflets as an activity "essential to the poorly financed causes of little people." *See id.* at 130 n.101 (quoting Black's majority opinion in Martin v. Struthers, 319 U.S. 141, 146 (1943)).

8. *See* Hague v. CIO, 307 U.S. 496, 501-05 (1939) (explaining that respondent's sole objective was merely to explain to workingmen the purposes of the Act and to organize workers into unions lawfully and peacefully).

9. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (discussing how Mosley protested on the sidewalk near a school, and later sued to invalidate on First Amendment grounds, an ordinance permitting labor picketing in this area but prohibiting all other kinds).

10. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963) (reversing the criminal convictions of black students arrested for breach of the peace for peacefully walking down two city blocks in protest).

11. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444, 448, 450-53 (1938) (striking down an ordinance, challenged by religious proselytizers, which banned the distribution of literature in Griffin, Georgia without advance permission of the City Manager).

12. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Of course, *Sullivan* concerned constitutional standards governing state libel law in the context of alleged newspaper defamation, but the First Amendment has considerably more scope than merely protecting the rights of newspapers.

13. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (holding that Arkansas' state-owned public television network's decision to exclude a third-party congressional candidate from a televised debate between his Democratic and Republican rivals did not violate the First Amendment).

speech fora by upholding the exclusion of an Independent congressional candidate from a state-run television channel's candidate debate.[14] Now, the Court's alarming nonchalance about resurgent government manipulation of speech rights and the public's political consciousness has spread right down to the old-fashioned public forum: the street itself.[15]

The Court's decision last year in *Hill v. Colorado*,[16] a case deeply colored by abortion politics, has opened the door widely to a new era of restrictive speech regulation within traditional public fora.[17] The *Hill* majority upheld a remarkable ban on the core speech activity of:

> knowingly approach[ing] 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.[18]

The decision reflects a disoriented attitude by the Court's majority about aggressive legislative assaults on free speech rights in the most public spaces. Disturbingly, the Court made it substantially easier for government entities to discriminate against disfavored viewpoints in the public forum provided that their enactments maintain the thinnest façade of neutrality.[19] Indeed, with its *nouveau* validation of a countervailing interest in being left alone in the First Amendment context, *Hill* becomes a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places.[20] If left uncorrected, this precedent

14. *See id.* at 672, 683 (refusing to extend the "public forum doctrine" to the public television broadcasting context on grounds that the candidate was excluded not because his views were unpopular but rather because of a lack of public support and interest in his platform). *But see* Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1948 (1999) (arguing that the majority in *Forbes* "mislabeled what was clearly a designated public forum as a nonpublic forum and . . . denied the obvious presence of viewpoint discrimination by confusing this objective concept with subjective political animus, thus watering down a pivotal First Amendment doctrine.") (internal quotation marks and footnote omitted).

15. *See generally* Hill v. Colorado, 120 S. Ct. 2480 (2000) (upholding a statute which prohibited a person from coming within eight feet of someone who was within 100 feet of a health care facility with the objective of displaying signs, protesting, and passing leaflets); *see also infra* pp. 185-89 (describing contemporary governmental restraints on popular media).

16. 120 S. Ct. 2480 (2000).

17. *See id.* at 2519 (Kennedy, J., dissenting) ("In a further glaring departure from precedent we learn today that citizens have a right to avoid unpopular speech in a public forum.").

18. COLO. REV. STAT. § 18-9-122(3) (2000) (emphasis added).

19. *See Hill*, 120 S. Ct. at 2491-94 (holding that the statute was content-neutral despite its obvious effect of targeting anti-abortion protestors).

20. *See id.* at 2489-90 (maintaining that individuals have a right "to be let alone"

could proliferate facially neutral but functionally discriminatory speech regulations that will chill and diminish the free public discourse vital to popular democracy.

The constitutionality of the Colorado statute at issue in *Hill* was tested on various grounds, but this Article focuses on the Court's most corrosive holding that the challenged provision was neither content-based nor viewpoint-based. Part I explains the emergence of the public forum doctrine and its central importance to free speech in American democracy. Part II describes the Colorado statute, litigation of the case, and the majority's decision. Part II analyzes the *Hill* Court's ruling affirming the statute's content and viewpoint neutrality, and contends that the Court deployed a pinched and disingenuous interpretation of the doctrine of content and viewpoint discrimination. Part II also reviews a variety of evidence, dismissed or ignored by the Court, which suggested that, putting aside its purported interest in neutral health and safety regulation, Colorado targeted its statute directly at anti-abortion protesters and selected their disfavored speech activities for discriminatory treatment.

To rescue indispensable First Amendment values and protections, Part III recommends that for Free Speech Clause review purposes the Court adopt what we call an "objective purpose and function-based discrimination analysis" analogous to that which has evolved in the religion and equal protection contexts. This analytical tool will help courts properly distinguish between speech-respectful statutes governing conduct that do not impede social discourse and those speech-discriminatory laws for which facial neutrality is most plausibly seen as camouflage and subterfuge. Part IV strips away the doctrinal pretenses of both the majority and dissenting opinions and examines what was truly at issue in *Hill*: the social value and constitutional status of aggressive anti-abortion speech outside abortion clinics. This Part attempts to reunify a libertarian jurisprudence of reproductive rights with a libertarian jurisprudence of speech. Part IV insists that the constitutional value of democratic expression is too important for games of judicial make-believe, and liberal justices should not allow the complicated street theater of anti-abortion politics to distort fundamental First Amendment principles and commitments.

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which encompasses a right to "avoid unwanted communication" and this right may outweigh another individual's First Amendment right of free speech).

I. THE EMERGENCE OF THE TRADITIONAL PUBLIC FORUM AS A SANCTUARY FOR FREE SPEECH AND INCUBATOR OF DEMOCRATIC CHANGE

Uninhibited and impassioned public discourse is the essential condition of political democracy.[21] Writing for the Court in *Terminiello v. Chicago*, Justice Douglas captured this relationship:

> [t]he vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly[,] a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[22]

As democracy depends on free speech, free speech depends on the wide-open availability of the traditional public forum to citizens for speech purposes.[23] It may be tempting to think that the public forum is an obsolescent concept in the new age of information, but today many, perhaps most, Americans still face highly restricted access to mass media.[24] Newspapers, magazines, and book publishing houses are privately owned and their content is dictated by rigid space constraints, profit considerations, and ideologically-slanted editorial control.[25] Access to television and radio is likewise constrained by the

21. *See* Terminiello v. Chicago, 337 U.S. 1, 4-5 (noting the great importance of free speech to a democratic society and invalidating an ordinance which prohibited any speech that "stirred people to anger, invite public dispute, or brought about a condition of unrest").

22. *Id.*

23. *See* Kalven, Jr., *supra* note 6, at 11-12 ("In an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process.").

24. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (2d ed. 1988) (noting how "indispensable communication in [public fora] is to people who lack access to more elaborate (and more costly) channels" of communication).

25. *See* ROBERT MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 37-63, 77 (Univ. of Ill. Press 1999) (discussing the negative

reality of private corporate control over the channels of broadcast.[26] A citizen-speaker may seek paid advertising in these media, but that option assumes the speaker has sufficient economic resources and, in any event, he or she will still have to survive the inevitable editorial pressures if the message is controversial.[27] Although the Internet offers a more open medium, Internet access is substantially controlled by private service providers and requires the purchase of—and ability to use—computer hardware and software.[28] Moreover, the speaker may still have to rely on the editorial friendliness of website editors unless the speaker has the financial and technological resources necessary to create the speaker's own website.[29] Thus, for those without money, computers, and the eloquence or politically correct message required to attract the favor of corporate mass media, the traditional public forum remains the only medium that many people can feasibly "commandeer."[30]

Even if citizen-speakers have access to the Internet or other media, the physical public forum often remains the indispensable locale for message dissemination.[31] The "essential feature" of protests and other speech activities in public places is their direct and dramatic

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impact that conglomeration and "hypercommercialization" have had on the media industry).

26. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 36-39 (arguing that media owners and managers have control over which individuals' views and stories will be heard by the public).

27. *See id.* at 39-40.

> [T]hose facts, ideas and perspectives most likely to gain media access . . . are those appealing to the self-interest of those individuals who own and manage the media . . . Because these groups tend to embrace established and traditional perspectives, media managers are unlikely to disseminate frequently those ideas most challenging to conventional wisdom and the established power structure.

Id.

28. According to the U.S. Department of Commerce, fewer than half of all American households—only forty-two percent—had Internet access in August 2000, despite a fifty-eight percent increase from 1998 to 2000. *See* NAT'L TELECOMM. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION, Exec. Summary (2000), http://www.ntia.doc.gov/ntiahome/fttn00/contents00.html (last visited Dec. 2, 2001). The share of individuals using the Internet in August 2000 was forty-four percent. *Id.* In addition, "noticeable divides still exist between those with different levels of income and education, different racial and ethnic groups, old and young, single and dual-parent families, and those with and without disabilities." *Id.* For example, black and Hispanic Americans have the lowest rates of household Internet access at 23.5% and 23.6%, respectively. *Id.*

29. *See* Greg Taylor, *Your On-Ramp to the Internet: Is Your Dealership Born to Ride the Worldwide Web?*, DEALERNEWS, Sept. 1, 2000, at 32 (estimating that the cost of building a website ranges from $500 to $20,000 depending on the design).

30. *See* Kalven, Jr., *supra* note 6, at 12 (discussing how the streets, parks, and other public places are a "public forum that the citizen can commandeer").

31. *See* Ingber, *supra* note 26, at 41 (discussing the powerful nature of the public forum as opposed to other forms of communication).

"appeal to public opinion."[32] Use of the public forum not only allows the speaker to interact directly with other citizens, but also improves the broader dissemination of the message. By bringing the clash of ideas to a site of relevant symbolic importance like the sidewalk near a military recruitment office, a business paying low wages, an abortion clinic, an anti-abortion church, or the headquarters of a large multinational corporation, the speaker delivers the message to a larger audience.[33] The spectacle of vivid speech encounters at nerve centers of social controversy often attracts the attention of other media, such as newspapers or television stations, thereby multiplying exponentially the reach of the message.

The protected status of traditional public fora has been enshrined in our jurisprudence since the American labor movement, desperate to organize but repressed in the workplace, fought for the right to campaign and agitate on public property in the 1930s.[34] The traditional position of the courts, as expounded by Oliver Wendell Holmes in the oft-cited *Commonwealth v. Davis*,[35] had been that municipal corporations had the same power to forbid and censor speech on their property as did private homeowners or corporations.[36] But Justice Roberts articulated the new public forum doctrine in 1939 in *Hague v. CIO*,[37] in this now-classic statement:

> [the] use of the streets and public places [for speech] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . is not absolute . . . but it must not, in the guise of regulation, be abridged or denied.[38]

Whatever its historical accuracy, the *Hague* Court's emphatic pronouncement that the right to speak and assemble peacefully in public was part of the ancient rights of democratic citizenship made

32. *See* Kalven, Jr., *supra* note 6, at 11 (noting that the purpose of mass protest in public places such as civil rights demonstrations is not to violate the law but rather to attract public opinion).

33. *See* Ingber, *supra* note 26, at 44-46 (noting that people who lack direct access to the mass media may use public fora to gain media attention).

34. *See* Hague v. CIO, 307 U.S. 496, 515-16 (1939) (Roberts, J., concurring) (articulating for the first time the public forum doctrine and holding that labor organizers could not be prevented from distributing leaflets and assembling in public places).

35. 39 N.E. 113 (Mass. 1895).

36. *See id.* at 113 ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

37. 307 U.S. 496 (1939).

38. *Hague*, 307 U.S. at 515-16 (Roberts, J., concurring).

clear that those with political power, such as Jersey City Mayor Hague, could not use their offices to stifle political expression by citizens in public places.

Shortly after the *Hague* decision, the full Court embraced the doctrine. In *Schneider v. New Jersey*,[39] the Court struck down municipal ordinances restricting the distribution of leaflets and other literature in the streets, sidewalks, and other public places, recognizing "the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature."[40] The Court explained that the public forum right did not permit an individual to stand in the street and block traffic or obstruct the passage of pedestrians on a sidewalk,[41] but ruled that any such regulations of speech activity must be subjected to close judicial scrutiny.[42] Because speech rights are so critical,[43] they deserve strong protection against legislative invasion. For example, a public forum speech restriction cannot be excused by the fact that a speaker repressed by it remains free to disseminate his message through other media.[44] Nor can a regulation be justified on the ground that, without it, the state's attempts to address legitimate non-speech social problems such as littering or fraud might be made somewhat less effective.[45] Here, one sees the emergence of modern strict scrutiny.[46]

The early Supreme Court cases also recognized the speech value of citizen-to-citizen leafleting. In *Lovell v. City of Griffin*,[47] the Court voided an ordinance banning distribution of literature in public places without a permit, holding that the freedom of the press

39. 308 U.S. 147, 160 (1939).

40. *Id.* at 160.

41. *See id.* at 160-61 (noting that legislation may regulate some aspects of the conduct of individuals using the street to disseminate information as long as it does not "abridge [their] constitutional liberty").

42. *See id.* at 161 (ruling that courts, whenever considering a regulation abridging speech rights in a public forum, "should be astute to examine the effect of the challenged legislation").

43. *See id.* at 160-64 (emphasizing the importance of public forum free speech rights).

44. *See id.* at 163 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

45. Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (noting that considerations such as efficiency and convenience for law enforcement officials do not justify diminishing freedom of speech).

46. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2432 (2001) (Thomas, J., concurring) (noting that the court applies strict scrutiny to content-based regulations of speech); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

47. 303 U.S. 444 (1938).

embraces the distribution of leaflets: "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."[48] The *Schneider* court described pamphlets and leaflets as "historical weapons in the defense of liberty" which have "proved most effective instruments in the dissemination of opinion."[49]

The Court's solicitude towards public forum speech rights at the dawn of the free speech era reflected its understanding that democracy requires freedom of political communication in public spaces. Justice Roberts noted in *Hague* that "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss [public policy] and the benefits, advantages, and opportunities to accrue to citizens therefrom."[50] The Court in *Schneider* declared public forum speech rights to be among those "vital to the maintenance of democratic institutions."[51] These rights, it said, lie "at the foundation of free government by free men" because the "streets are natural and proper places for the dissemination of information and opinion."[52] Private employers might own the factories in Jersey City, but Mayor Hague does not own the street.

In the following decades, the Court reaffirmed its embrace of the public forum as a safe haven for free expression and a germinator of democratic change.[53] While recognizing that the state may have a valid interest in regulating harmful non-speech conduct in public fora, such as obstruction of passage on sidewalks, the Court has made clear that, as a general rule, "[f]reedom of press [and] freedom of speech . . . are in a preferred position."[54] The decisions establish that, in democracy, speech is primary and logically prior to other state interests. An incumbent majority cannot restrain political debate

48. *Id.* at 452 (internal quotation marks omitted) (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1877)).

49. *Schneider*, 308 U.S. at 162, 164.

50. Hague v. CIO, 307 U.S. 496, 513 (1939).

51. *Schneider*, 308 U.S. at 161.

52. *Id.* at 161, 163.

53. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321-29 (1988) (overturning a federal law restricting the display of signs near foreign embassies); United States v. Grace, 461 U.S. 171, 183 (1983) (invalidating a law prohibiting leafleting and the display of signs on sidewalks near the U.S. Supreme Court); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (overturning breach of peace convictions of protesters who were demonstrating on state house grounds); Saia v. New York, 334 U.S. 558, 559-60 (1948) (invalidating a law banning use of sound amplification devices in public places without a city permit); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (holding unconstitutional an ordinance prohibiting the door-to-door distribution of literature); Jamison v. Texas, 318 U.S. 413, 416 (1943) (invalidating an ordinance prohibiting leafleting on city streets).

54. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

under the guise of protecting the values of consensus, civility, or social peace. As the Court in *Martin v. City of Struthers* stated, the "authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance."[55] Elaborating further in a case overturning the conviction of civil rights protesters for breach of the peace, the Court in *Edwards v. South Carolina* declared that the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[56]

Unfortunately, the *Hill* decision marks a dramatic downward departure from this core First Amendment tradition defining democracy as rooted in a boundless speech ethic in public fora. In *Hill*, the majority cavalierly dethroned free political speech from its preeminent constitutional position in the public forum and subordinated it to newly conjured and ill-defined values of listener privacy and solitude. It can only be hoped that this sudden erosion of public forum speech rights will be remembered as a flash-in-the-pan aberration based on the liberal justices' passing irritation with the aggressive tactics of the anti-abortion movement rather than a doctrinal turning point that sends the First Amendment back to its strong property ownership roots in the common law.[57]

II. HILL V. COLORADO

A. The Colorado Statute

In 1993, the Colorado legislature enacted a law[58] expressly intended to prevent the "willful obstruction of a person's access to medical counseling and treatment."[59] To achieve this objective, Section 2 of the statute made it a criminal offense to "knowingly

55. Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

56. Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)) (internal quotation marks omitted).

57. *See* McGinnis, *supra* note 4, at 57 (taking an optimistic view of a return to a property-based vision of the First Amendment).

58. COLO. REV. STAT. § 18-9-122 (2000) (prohibiting certain types of communication within eight feet of an unconsenting individual who is within 100 feet of a health care facility).

59. *Id.* § 18-9-122(1).

obstruct[], detain[], hinder[], impede[], or block[] another person's entry to or exit from a health care facility."[60] Section 3, however, went far beyond this ban on actually blocking entry and exit, and made it a crime for any person:

> [to] 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.[61]

The statute effectively banned handbilling in this zone because of the impossibility of handing another person a leaflet at a distance of eight feet.[62] The statute also eliminated or severely hindered much conversational speech because it is very difficult to speak to someone in a conversational tone at eight feet with ambient street noise and other nearby distractions.[63] The purpose of the statute was to build a kind of bubble around people walking to and from health facilities and a corresponding straitjacket around those who would think of approaching and talking to them.

While Section 2 of the statute directly addressed conduct—physical obstruction of access to health care facilities—Section 3 criminalized pure speech activities.[64] The state justified Section 3 as a "prophylactic" regulation which prevented unruly demonstrators from engaging in unlawful, non-speech conduct by discouraging them from knowingly getting close enough to patients and staff to commit such conduct.[65] In its brief, the state contended that recent demonstrations outside health care facilities involved kicking, punching, blocking, intimidating, threatening, and "crowding"

60. *Id.* § 18-9-122(2); *see also id.* § 18-9-122(4) (defining a "health care facility" as any entity authorized "to administer medical treatment in" Colorado). According to the Colorado Attorney General, the statute did not apply, however, to the offices of dentists, chiropractors, or optometrists. *See* Brief for Respondents at *11 n.9, Hill v. Colorado, 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Dec. 10, 1999) (citing COLO. REV. STAT. ANN. § 12-36-106 (West 1999)).

61. COLO. REV. STAT. § 18-9-122(3); *see also* COLO. REV. STAT. § 18-9-122(6) (subjecting any person violating the act to civil liability).

62. *See id.* § 18-9-122(3) (prohibiting a person from coming within eight feet of an individual who is within 100 feet of the entrance of a health care facility to engage in leafleting, oral communication, or the exhibition of signs).

63. *Id.*

64. *See* Hill v. Colorado, 120 S. Ct. 2480, 2488 (2000) (stating that it is "clear and undisputed" that the plaintiffs' leafleting, oral communications, and sign displays, which are prohibited by Section 3, are speech activities "protected by the First Amendment").

65. *See* Brief for Respondents at *1-*3, *Hill* (No. 98-1856) (noting that without the statute, demonstrators were likely to "continue to crowd and surround patients" making intimidation "inevitable" and access to the facility problematic).

patients and staff, as well as spitting and "intrusive" or "in-your-face" approaches and protesting.[66] This kind of activity not only physically prevented or discouraged some patients from entering facilities, thereby delaying their health care, the state said, but substantially increased their stress levels, which could complicate medical treatment and increase the risks associated with surgical procedures.[67] Without much elaboration, the state argued that simply relying on Section 2 or other general laws against harassment and assault would be ineffectual, primarily because these laws would be "more difficult to enforce" in crowd situations.[68]

Colorado acknowledged that the substance of the protestors' speech was often perceived by legislators as "offensive,"[69] but contended that Section 3 was not targeted at the content of the speech. Rather, the state said, the provision was a constitutionally valid, content and viewpoint-neutral regulation of the place and manner of this speech that complied with the Supreme Court specifications in *Ward v. Rock Against Racism*.[70] Under *Ward*, a government may impose reasonable regulations on the time, place, and manner of speech, provided the restrictions are "justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[71] Colorado argued that, in addition to meeting the

66. *Id.* at *1-*4, *12-*13. According to the brief, the term "in your face" protesting referred to things like protesters coming "inches away from people's faces," *id.* at *13, messages delivered at "extremely close range," *id.* at *19, and "thrusting signs and leaflets into faces" or cars, *id.* at *1, *13.

67. *Id.* at *10 (emphasizing the state's interest in "protecting [the] health" of its citizens).

68. *Id.* at *3-*4. It is not clear why it would be harder for police to determine whether protestors were obstructing or harassing people in a crowd situation than it would be to determine if a demonstrator crossed the eight foot threshold without consent in a crowd situation. The statute does not prohibit "crowding" as long as demonstrators do not block ingress and egress, and they remain at least eight feet from another person without consent. Interestingly, the state said that the legislature had considered a revision to its general harassment law to address the problem, but that it declined this alternative because it was more difficult to enforce and "possibly impermissibly content-based." *Id.* at *4. The state did not explain how such a legislative approach would be content-based, especially if it applied generally.

69. *See* Brief for Respondents at *19, *Hill* (No. 98-1856) (noting that the Colorado legislature discussed the "extremely offensive terms," such as "murderer," used by demonstrators); *see also id.* at *24 ("[T]he legislature heard descriptions of demonstrations that were highly offensive in . . . their content . . . .").

70. 491 U.S. 781, 802-03 (1989) (finding that the city's desire to control noise in order to return the sedate character of the park has nothing to do with content, and therefore, the challenged guideline was content neutral, narrowly tailored to serve legitimate governmental interests, and left open alternative channels of communication).

71. *Id.* at 791.

other elements of the *Ward* test, the statute was aimed at obstruction, crowding, and threatening conduct; it did not reference the content of any speech; and it applied generally to any "health care facility" and to any group, including "pro-choice, animal rights, or anti-Medicaid demonstrators."[72]

B. Litigation and the High Court's Ruling

Shortly after enactment, a group of anti-abortion demonstrators filed suit in state court contending that Section 3 of the statute was facially invalid and requesting declaratory and injunctive relief.[73] The plaintiffs were citizens who believed that "many women who abort their children do so because no one has offered them information about alternatives to abortion."[74] They described themselves as "sidewalk counselors" who offered information about alternatives to abortion to women near abortion clinics.[75] They stated that their counseling and education efforts involved the use of leaflets, signs,[76] conversation, and a model of an unborn child at ten weeks gestation, and that in some cases these efforts succeeded in converting pregnant women to their point of view.[77] The plaintiffs' activities occurred within eight feet of other persons, and they alleged that, based on their experience, it would be difficult to accomplish the feat of simultaneously remaining on the sidewalks or public ways, staying eight feet from any person not granting consent to their approach, and conducting their conversational and political leafleting activities.[78] They further stated that they did not engage in dangerous or harassing conduct as part of their speech activities.[79] After the statute was enacted, the plaintiffs, out of fear of criminal prosecution, either suspended their activities or curbed them in a way that

72. Brief for Respondents at *18-*19, *Hill* (No. 98-1856).

73. *See Hill*, 120 S. Ct. at 2485 (describing that the complaint alleged violations of the right to free speech protected by the First Amendment and the right to a free press by impairing the right to distribute written materials).

74. Brief for Petitioners at *2, Hill v. Colorado, 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Nov. 10, 1999).

75. *See id.* (describing "sidewalk counseling" as a means for petitions to educate others about abortion alternatives).

76. Signs used by the plaintiffs included messages like "Abortion Kills Children" or photographs of aborted fetuses. *See id.* at *3.

77. *See id.* at *2-*4 (describing how, through petitioner's various efforts, women headed to abortion clinics allegedly changed their minds after speaking with petitioners).

78. *See id.* at *3 (drawing conclusion based on the petitioner's experiences as sidewalk counselors).

79. *See id.* ("The Colorado Supreme Court assumed for the purposes of deciding the case below, 'that petitioners have not engaged in, and do not intend to engage in, such dangerous and harassing conduct.'").

undermined their effectiveness.[80]

The plaintiffs lost in both the Colorado Court of Appeals[81] and the Supreme Court of Colorado.[82] In their appeal to the U.S. Supreme Court, the plaintiffs, now petitioners, challenged Section 3 of the statute on the following grounds: content and viewpoint discrimination; insufficiently narrow tailoring; failure to leave open ample alternative channels of communication; imposition of a prior restraint;[83] overbreadth; and vagueness.[84] With regard to content and viewpoint discrimination, the petitioners claimed first that Section 3 was content-based because protest, education, and counseling are categories of speech.[85] They argued that liability under the statute turned on an examination of whether their speech fell into one of these categories as opposed to an unrestricted and permissible category like a salutation or greeting.[86] The petitioners also contended that the statute was discriminatory because it effectively gave listeners unbridled discretion to grant or deny a speaker permission to approach for speech purposes based on their dislike of the content or viewpoint of their speech.[87]

The Court rejected the petitioners' claims, including those involving content and viewpoint discrimination.[88] The Court framed its analysis by discussing the interests it perceived to be at stake in the case: the petitioners' interest in free speech, the state's interest in protecting the health and safety of its citizens, and, most curiously of

80. *See* Brief for Petitioners at *4, *Hill* (No. 98-1856) (noting that the statute's enactment directly prohibits conduct that interferes with access to facilities, which hinders or prevents petitioners from conducting their activities).

81. *See* Hill v. City of Lakewood, 949 P.2d 107, 109-10 (Colo. Ct. App. 1997) (holding that the Colorado statute complied with all elements of the *Ward* test for time, place, and manner restrictions).

82. *See* Hill v. Thomas, 973 P.2d 1246, 1259 (Colo. 1999) (affirming the decision of the Colorado Court of Appeals in *Hill v. City of Lakewood*).

83. The rather powerful prior restraint argument was that the statute delegated to listeners in the public forum the unbridled authority and discretion to restrict in advance the speech of anyone beginning to approach them within eight feet. *See* Brief for Petitioners at *10-*11, *Hill* (No. 98-1856).

84. *See id.* (articulating each of the plaintiffs' grounds of appeal).

85. *See id.* at *10 (stating that distributing leaflets displaying signs, and orally educating, counseling, or protesting are protected forms of expression—and by enacting such a statute, petitioners claim that Colorado is attempting to regulate their exercise of core constitutional rights of expression).

86. *See id.* at *31-*32 (urging that the statute be subject to strict scrutiny because it is the content of the speech that determines whether it is within the statute's prohibition) (citing Carey v. Brown, 447 U.S. 455, 462 (1980)) (internal quotation marks omitted).

87. *See id.* at *33 (providing examples of how the Colorado statute discriminates based upon content or viewpoint).

88. *See Hill*, 120 S. Ct. at 2483 (finding that the Colorado statute passes the *Ward* test and also noting that the statute is a regulation of places where speech may occur, as opposed to being a regulation of speech).

all, a listener's interest in avoiding unwanted communication.[89] The Court claimed that this last interest derived from the "right to be let alone" discussed by Justice Brandeis in *Olmstead v. United States*,[90] from the privacy interest recognized in speech cases involving private residences,[91] and from a most surprising eighty-year-old labor case which held that if an offer to communicate is declined by a speaker, "persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction . . . ."[92] However, the Court denied that it was recognizing a new listener's "right" to avoid unwanted speech in a public forum.[93] Rather, it was "merely" recognizing an "interest" in "situations where the degree of captivity makes it impractical for the unwilling viewer . . . to avoid exposure."[94] The majority presumably concluded that medical facility patients and staff walking down the sidewalk experienced some degree of "captivity."[95]

C. The Court's Content and Viewpoint Analysis

In First Amendment jurisprudence, "content is a spacious concept that embraces whole subjects of discourse regardless of the 'viewpoint' expressed."[96] It has been defined variously as the "subject matter,"[97] a "topic,"[98] or a "category"[99] of speech. The term

89. *See id.* at 2488-89 (mentioning that when conducting this interest analysis, it is necessary to recognize the great difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication).

90. *See id.* at 2489-90 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

91. *See id.* at 2490 (adding that this right to avoid unwelcome speech derives special force from cases that involve the privacy of the home and its immediate surroundings) (citing Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970)).

92. *Id.* (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)).

93. *See id.* (clarifying that past Supreme Court cases have recognized the rights of unwilling listeners in certain situations).

94. *See Hill*, 120 S. Ct. at 2490 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)).

95. *See id.* (recognizing that freedom to communicate is a substantial right, but that the right of every individual "to be let alone" must be placed alongside the right of others to communicate; because there are situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure," courts have recognized the need to protect the interests of the unwilling listeners).

96. Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 101 (1996).

97. *See Hill*, 120 S. Ct. at 2493 (noting that in an earlier case, the court found content discrimination where a regulation gave preferential treatment to only "one particular subject matter"); Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (contrasting discrimination based on the "subject matter" of speech with that based on the viewpoint of the speech); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV.

"viewpoint" refers to "one's opinion, judgment, or position" within the subject matter, topic, or category.[100] As these definitions indicate, "[v]iewpoint discrimination is . . . an egregious form of content discrimination" and thus, logically, a subset of content discrimination.[101] Although "the distinction is not a precise one"[102] and the two concepts often merge and intersect, the distinction is one that the Court continues to apply, albeit with varying degrees of consistency and difficulty.[103]

As noted above, the threshold question for application of the *Ward* test is whether the time, place, and manner regulation at issue is content-neutral (and therefore, by extension, viewpoint-neutral).[104] For if a regulation of speech is deemed content-based, strict scrutiny is triggered, and the state must demonstrate that the regulation serves a compelling government interest and is narrowly tailored to promote that interest.[105] The strict scrutiny standard also requires the state to use the regulatory alternative that is least restrictive of speech.[106] If, however, the regulation is content-neutral, then it will be considered under the *Ward* test, which involves a substantially less

199, 202-03 (1994) (differentiating viewpoint neutral from subject matter neutral government regulation; subject matter neutral means that government cannot regulate speech based on the topic of speech).

98. *See* Burson v. Freeman, 504 U.S. 191, 197 (1992) (describing content as a category that includes not only viewpoints but "discussion of an entire topic"); Boos v. Barry, 485 U.S. 312, 319 (1988) (stating that content-based regulation, and hostility toward such regulation, extends to prohibition of public discussion of an entire topic).

99. *See* Boos v. Barry, 485 U.S. 312, 319 (1988) (referring to content as "an entire category of speech").

100. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.02(2)(c)(i), at 3-20 (1994) (quoting Amato v. Wilentz, 753 F. Supp. 543, 553 (D.N.J. 1990)) (internal quotation marks omitted); *see also* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (describing "viewpoint" as the "particular views taken by speakers on a subject").

101. *Rosenberger*, 515 U.S. at 829; *see also* SMOLLA, *supra* note 100, § 3.02(2)(c)(i), at 3-18 ("Viewpoint discrimination is a subset of content discrimination; all viewpoint discrimination is first content discrimination . . .").

102. *Rosenberger*, 515 U.S. at 831.

103. *See* Heins, *supra* note 96, at 101 (pointing out that the court has sometimes confused the matter by using the terms "content" and "viewpoint" interchangeably).

104. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (setting forth the three-part test for judging the constitutionality of a government's regulation of time, place, and manner of protected speech).

105. *See* United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1886 (2000) (finding that the distinction between laws burdening and laws banning speech is a matter of degree, and thus, the government's content-based burdens must satisfy the same rigorous scrutiny as content-based bans); Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that a content-based restriction on speech in a public forum must be subjected to the "most exacting scrutiny").

106. *See Playboy Entm't Group*, 120 S. Ct. at 1886 (stating that if a less restrictive alternative to regulating speech based on content exists, and it serves the government's purpose, the legislature must use that alternative).

rigorous form of scrutiny.[107] Under *Ward*, the government need only show a significant government interest, not a compelling one.[108] And while *Ward* also contains a narrow tailoring requirement, it does not require that the government deploy the least restrictive regulatory alternative.[109] Rather, the state can satisfy the narrow tailoring requirement "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[110] This weaker standard means that the state can select a regulation that burdens more speech than other available regulatory alternatives, provided the selected regulation is not "*substantially* broader than necessary to achieve the government's interest . . . ."[111] Thus, the content neutrality analysis will be the critical doctrinal crossroads when a plaintiff challenges a speech restriction that the government claims to be only a time, place, and manner restriction.[112]

In *Hill*, the Court found that Section 3 was content-neutral and governed by the more relaxed *Ward* test, making it much easier for the statute to survive the petitioners' challenges on narrow tailoring and perhaps the separate but related overbreadth issue.[113] The Court began its content neutrality analysis by stating that the "principal inquiry" was "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[114] The Court answered the question with three general points.[115] First, the Court declared that Section 3 was not a regulation of speech, but only a "regulation of the places where some speech may occur."[116] Second, it concluded that Section 3 was not adopted because of any disagreement by the Colorado legislature with any messages conveyed

107. *See Ward*, 491 U.S. at 791 (noting that government regulation is content neutral provided that it is "justified without reference to the content of regulated speech").

108. *See id.* (allowing for the government to impose reasonable restrictions so long as such restrictions do not reference the content of the speech) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

109. *See id.* at 798 (stating that a time, place, and manner restriction must be narrowly tailored to serve the government's interest, but "it need not be the least restrictive or least intrusive means of doing so").

110. *Id.* at 799 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)) (internal quotation marks omitted).

111. *Id.* at 800 (emphasis added).

112. *See id.* at 797 (noting that the less-restrictive-alternative analysis has never been part of the time, place, and manner inquiry).

113. In its discussion of overbreadth, the Court makes repeated references to its analysis of the scope of the statute under the *Ward* test. *See* Hill v. Colorado, 120 S. Ct. 2480, 2497 (2000).

114. *Id.* at 2491 (quoting *Ward*, 491 U.S. at 791).

115. *See id.* (noting how the Colorado statute passes the *Ward* test).

116. *Id.*

by affected speech.[117] The Court rested this conclusion on the fact that the Colorado courts reviewing the statute and its legislative history determined that the "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."[118] And finally, it said that a regulation is content-neutral if it is "justified without reference to the content of regulated speech."[119] Here, it found that the state's expressed interests underlying the statute—protecting health and safety by securing access—were unrelated to the content of the demonstrators' speech.[120]

The Court dismissed the petitioners' argument that the statute's selective application to oral protest, education, and counseling made it content-based. This argument, based on *Carey v. Brown*,[121] pointed out that the content of the speech would have to be examined by a court in order to determine whether it came within the statute's categorical restrictions. The statute, from this vantage point, was *all* about content. But the majority held that courts often review, without constitutional problems, the content of certain speech, such as possible threats, blackmail, or an agreement to fix prices, in order to determine whether a law applies to a course of conduct.[122] The Court conceded that, in the context of Section 3, it may be necessary to review the content of speech to ensure that punishment is not imposed for greetings and other innocuous social communications.[123] The Court, however, cited several precedents which purportedly upheld the regulation of broad categories of speech comparable to protest, education, and counseling speech.[124] Moreover, the Court

117. *See id.* (finding that the statute applies equally to all demonstrators, and the statutory language makes no reference to the content of speech).

118. *Hill*, 120 S. Ct. at 2491 (citing Hill v. Thomas, 973 P.2d 1246, 1256 (Colo. 1999)).

119. *Id.*

120. *See id.* at 2493 (restating that the Colorado statute places no restrictions on either viewpoint or subject matter; rather it represents a minor place restriction on a broad category of communications).

121. 447 U.S. 455, 462 (1980) (holding that because "it is the content of speech that determines whether [the regulation] is within or without the statute's blunt prohibition[,]" the statute is content-based).

122. *See Hill*, 120 S. Ct. at 2492 (speculating that under the Colorado statute, one would rarely need to know the exact words spoken in order to determine whether speech constitutes protest or purely social conversation).

123. *See id.* (stating that regulation of activities such as demonstrating and picketing does not include social, random, or other ordinary conversation).

124. *See id.* at 2492 n.30 (citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 753 (1994) (upholding an injunction that prohibited demonstrating); Frisby v. Schultz, 487 U.S. 474, 474 (1988) (upholding a ban on residential picketing); United States v. Grace, 461 U.S. 171, 181 n.10 (1983) (upholding as content-neutral a statute that prohibited picketing and leafleting but not other expressive conduct); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98 (1972) (stating that picketing may be

said that *Carey* dealt with a statute that banned all picketing except labor picketing at places of employment, and therefore the regulation in *Carey* was clearly content-based.[125] By contrast, Section 3 applied to any form of protest, education, and counseling, whether spoken by anti-abortion, pro-choice, or animal rights protestors; and it only established, the Court held, a "minor place restriction"[126] on the speech of any demonstrators, and only for the purpose of preventing harassment and protecting access.[127]

Justice Kennedy argued in dissent that Section 3 was content-based because it applied only to areas around "health care facilities," which was a euphemism for abortion clinics, the principal target area of protest, education, and counseling by anti-abortion activists.[128] The majority attempted to rebut this point by invoking the example of *International Society for Krishna Consciousness, Inc. v. Lee*,[129] where the Court upheld a regulation banning solicitation in airports, an area frequently used for solicitation by the Hare-Krishnas. Justice Kennedy also raised the more general concern that the whole purpose and design of the statute was to target the speech of anti-abortion protestors.[130] The majority, however, replied that the fact that an "enactment [i]s motivated by the conduct of the partisans on one side of a debate" does not make it content or viewpoint-based.[131] Finally, the Court concluded its content neutrality analysis by arguing that just as anti-abortion protesters would have to seek permission for an approach to hand someone a leaflet or speak to them about abortion, so too would a pro-choice activist.[132]

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regulated)).

125. *See Hill*, 120 S. Ct. at 2492-93 (maintaining that although subject matter regulation was not as obnoxious as viewpoint regulation, it was still objectionable).

126. *Id.* at 2493.

127. *See id.* (arguing that the purpose of the statute is to protect people who enter health care facilities from harassment arising from an unwelcome approach by someone who may want to engage in confrontational dialogue).

128. *See id.* at 2517 (Kennedy, J., dissenting) (asserting that the statute is unmistakably content-based because it only restricts speech around health care facilities which in practice will target a narrow range of topics).

129. 505 U.S. 672, 672 (1992) (emphasizing that regulations pertaining to expressive activity conducted on government property that is not a traditional or designated public forum must only be reasonable in order to survive constitutional scrutiny).

130. *See Hill*, 120 S. Ct. at 2517 (Kennedy, J., dissenting) (arguing that the majority's refusal to view the targeting of speech outside of medical facilities is cloaked content regulation).

131. *Id.* at 2494. The Court cited *Frisby v. Schultz* for this proposition, a case involving a ban on residential picketing that was prompted by anti-abortion protests outside a doctor's home. *See Frisby*, 487 U.S. 474, 482 (1988) (examining the wording of the statute and not the motive behind the legislation in order to determine whether the statute is content neutral).

132. *See Hill*, 120 S. Ct. at 2494 (emphasizing a close scrutiny of the statute's text,

III. INVITING DISCRIMINATION

Given the more relaxed standard of review for a content-neutral regulation under *Ward*, the threshold content neutrality determination is obviously the linchpin of a time, place, and manner case like *Hill*.[133] If a court is too easily seduced by the facially neutral aspects of a statute, the likelihood of that statute surviving judicial scrutiny will increase markedly, and speech will be less free for the politically weak, the controversial, the marginal, and all those who depend on public fora to communicate.[134] In *Hill*, the majority fell head over heels for the seductive Colorado statute. The majority's analysis, however, fails to stand on its own terms. The majority suppressed essential free speech principles that would have ensured far more rigorous scrutiny of new limitations on expression in the public forum. It also ignored or dismissed abundant evidence of the content and viewpoint-based character of Section 3. As a result, governments now have a legislative blueprint for restricting the kinds of speech they want to suppress in public spaces.

A. The Interest of the "Unwilling Listener" as a Potential Viewpoint-Neutral Government Motivation

Although the majority insisted that it was recognizing only a constitutional interest, not a constitutional right, that the unwilling listener has to avoid unwelcome speech in a public forum, the Court accorded this novel "interest" sufficient weight to justify balancing it against the constitutional bedrock of free speech rights in the public forum.[135] Consequently, the state's interest in protecting the unwilling listener becomes an effective tool for government to reduce the speech rights of disfavored groups or individuals.[136]

The majority's newly minted "interest of the unwilling listener"

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which does not call for restriction of speech on a specific topic but rather only restricts the broad category of oral protest, education, and counseling).

133. *See id.* (emphasizing that while time, place, or manner restrictions must be narrowly tailored to serve government interests that are legitimate and content neutral, they do not need to be the least restrictive means of doing so) (citing Ward v. Rock Against Racism, 491 U.S. 783, 789 (1989)).

134. *See infra* Part IV (discussing the need for an objective approach to viewpoint and content-based analysis).

135. *See Hill*, 120 S. Ct. at 2488-90 (maintaining that while the right to free speech offers protection for offensive speech, that protection does not condone such offensive speech when it is so intrusive that the unwilling listener is unable to avoid it).

136. This is an especially ironic result given that the State of Colorado explicitly repudiated the unwilling listener interest in the case. *See id.* at 2507-08 (Scalia, J., dissenting) (pointing out that the state not only explicitly disclaimed the unwilling listener interest in its brief but characterized it as a "'straw interest' petitioners served up in the hope of discrediting the State's case.") (emphasis omitted).

rests on a wobbly precedential foundation, as the dissenters in *Hill* perceived.[137] To begin with, the majority refers to *Olmstead* as an example of the Court's recognition of a right to be let alone, but cites to Justice Brandeis' dissenting opinion, which involved Fourth, not First, Amendment interests.[138] Justice Brandeis was focused on "unjustifiable intrusion *by the Government* upon the privacy of the individual,"[139] not the problem of citizens bothering one another with speech in public places. Likewise, the First Amendment was not even at issue in *American Steel Foundries v. Tri-City Central Trades Council*,[140] the dubious old labor case about the Clayton Act that cavalierly elevated, in dicta, the harms of union supporters "following and dogging" other citizens.[141] Amazingly, the *Hill* Court goes even further than the 1921 *American Steel Foundries* Court, which only allowed for injunctions against picketers *after* the first face-to-face approach:

> We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, *the offer is declined*, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.[142]

Thus, even this 1901 Supreme Court, exhibiting pre-modern First Amendment consciousness, perceived that the law cannot obstruct

137. *See id.* at 2508 (Scalia, J., dissenting) (describing one authority relied on by the majority as a "slim reed" which "contradicts rather than supports the Court's position"); *see also id.* at 2519 (Kennedy, J., dissenting) ("In a further glaring departure from precedent we learn today that citizens have a right to avoid unpopular speech in a public forum.").

138. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("To protect [the right to be let alone], every unjustifiable intrusion by the Government upon the privacy of the individual . . . must be deemed a violation of the *Fourth* Amendment.") (emphasis added). The case involved the constitutional propriety of government wiretapping of private telephones. *See id.* at 456-57, 466.

139. *Id.* at 478 (emphasis added).

140. 257 U.S. 184 (1921).

141. *Id.* at 204. Even if *American Steel Foundries* had involved the First Amendment and established a valid limitation on free speech activity, its relevance in *Hill* would be questionable at best. The Colorado statute's proscription went well beyond "following and dogging." Under the statute, a wholly peaceful and respectful protester, who neither followed nor said anything after another person declined to accept a leaflet or conversation, would be just as liable as a protester who "followed and dogged" the unresponsive subject of an approach. *Id.* at 203. The sole trigger of liability under the statute is the mere act of approaching another person within eight feet without consent for the purpose of exercising long-recognized free speech rights. *See Hill*, 120 S. Ct. at 2484.

142. *Am. Steel Foundries*, 257 U.S. at 204 (emphasis added).

speech encounters among citizens in the first instance but can interfere only when the engagement begins to move down the road to stalking, which is a far cry from the encounters banned by Section 3 of the statute in the *Hill* case.

In any event, both *Olmstead* and *American Steel Foundries* date from the 1920s, a period before the development of the public forum doctrine when the Supreme Court's modern First Amendment jurisprudence came into being.[143] Nor do the later precedents cited by the majority provide much, if any, additional support for the proposition. The "degree of captivity" reference,[144] for instance, was pulled from *Erznoznik v. City of Jacksonville*,[145] but was based on the language of an earlier case which did not involve a public forum[146] and in which the Court was making the point that passengers on a city bus face a much higher "degree of captivity" than "a person on the street."[147] In fact, the *Erznoznik* Court struck down an ordinance prohibiting the showing of nudity on drive-in movie screens visible from a public street, and held that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener."[148] Other cases relied on by the *Hill* majority concerned the unique privacy interests of the home or its immediate surroundings, an area categorically distinguishable from public parks and sidewalks in commercial districts.[149]

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143. *See supra* pp. 185-89 and accompanying notes (providing an historical timeline detailing the development of the public forum doctrine).

144. The Court contended that it was merely recognizing the interest of the unwilling listener in situations where the "degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Hill*, 120 S. Ct. at 2490 (internal quotation marks omitted) (quoting Erznoznik v. City of Jacksonville, 422 U.S 205, 209 (1975)).

145. 422 U.S. 205, 209-10 (1975) (indicating that government restrictions intended to shield the public from certain speech can only be upheld upon showing an invasion of substantial privacy interests).

146. The earlier case discussed by the *Erznoznik* court was *Lehman v. City of Shaker Heights*, in which the plurality stated that "[n]o First Amendment forum is here to be found." Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

147. *Erznoznik*, 422 U.S. at 210 n.5.

148. *Id.* at 210.

149. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("One important aspect of *residential* privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different.") (emphasis added); *see also* Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere."). *Rowan* and *Frisby* were key cases relied on by the majority in *Hill* to support its "unwilling listener" theory. Whatever the intrinsic merits of these decisions, they at least have some plausible constitutional basis in the Third and Fourth Amendments' sanctification of privacy in the home. The *Hill* decision takes the residential privacy idea and runs all the way downtown with it.

The Court's surprising identification of the unwilling listener interest as a strong potential counterweight to traditional public forum free speech rights is a most troubling development,[150] but also puzzling in its doctrinal ramifications. It is unclear whether the unwilling listener balancing test is independent and supplemental to, or fully integrated in, the established First Amendment tests like that of *Ward*.[151] In *Hill*, the "unwilling listener" paradigm seemed to change the overall analysis and outcome of the case, and it likely influenced the Court's views as it applied the significant governmental interest prong of the *Ward* test.[152] But the exact logical connection is not self-evident from the text of the case. One possibility is that the majority views the new interest in being left alone as a content and viewpoint-neutral motivation for government speech regulations. If so, this interest is a little dagger aimed at the very heart of the First Amendment because it is hard to see how the right to speak freely in public places can coexist with an equally weighty interest in being left alone in public places.

In this sense, *Hill* does for abortion-related speech in public places what *Arkansas Educational Television Commission v. Forbes*[153] did for political discourse during election campaigns: it allows political forces with state power to tilt the market in speech to favor reproduction of their hegemony in ideas and beliefs.[154] In *Forbes*, the majority upheld as non-viewpoint discriminatory the exclusion of an Independent candidate for Congress from a state-run and taxpayer-

150. An unwilling listener balancing test, in which the unwilling listener's interest in avoiding unwanted speech is balanced against the First Amendment rights of public forum speakers, could have broad and severe consequences for free speech in the public forum. For example, the typical worker faces at least as high a "degree of captivity" on the sidewalks and streets near his place of employment as a patient seeking medical care. Thus, the unwilling listener interest might be used in a future case to justify restrictions on labor unions or other demonstrations near the entrances of plants and office buildings.

151. *See* Hill v. Colorado, 120 S. Ct. 2480, 2489-90 (2000) (discussing the line of precedent that has recognized the interests of unwilling listeners); *see also* Ward v. Rock Against Racism, 491 U.S. 783, 792 (1989) (recognizing as legitimate the restraints imposed on musical performance for the purposes of avoiding "undue intrusion" into the area).

152. *See id.* (finding that the statute was advancing the state's interest in protecting unwilling listeners and protecting the health and safety of citizens); *see also Ward*, 491 U.S. at 791 (stating that a government's interest is justified as long as it is unrelated to the content of the speech that the government is attempting to regulate).

153. 523 U.S. 666 (1998).

154. *See id.* (holding that a state-owned public television broadcaster's decision to exclude an electoral candidate from participation in debate, which thereby perpetuated the traditional two-party electoral system, did not violate the candidate's First Amendment rights because the debate was a non-public forum and the decision was well within the journalist's discretion).

subsidized cable network's televised candidate debate.[155] The Court found that keeping the Independent out of the debate was reasonable and viewpoint-neutral because the state television network's staff determined that he was not "viable."[156] Yet the viability screen for participation in government-run debates is simply a statement that certain candidates and their platforms are not sufficiently popular and, therefore, in the unscientific view of the government, *the majority of people do not want to hear them*.[157] Similarly, the Court's constitutionalization of an interest in being left alone against unwanted speech in public places is a statement by the Court that if certain political or moral views are unpopular and *the majority of people do not want to hear them*, speeech may then be censored or regulated by the government in affected areas.[158] Both of these holdings are at odds with the notion that the First Amendment protects unpopular speech.[159]

B. Dismissive and Insubstantial Responses to Petitioners' Arguments

The petitioners claimed that Section 3 was impermissibly content-based because protest, education, and counseling are all types of protected speech content.[160] As the Court noted, the petitioners modeled this claim largely on *Carey v. Brown*'s[161] statement that if the content of the speech is what determines whether liability is imposed, the regulation is content-based.[162] The petitioners reasoned that a fact finder applying Section 3 would have to evaluate the speech in

155. *See id.* at 674 (arguing that a broadcaster is charged with the task of choosing amongst viewpoints in order to serve a public interest and that such a choice is not considered viewpoint discrimination in the constitutional sense).

156. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (holding that a government-owned television station could exclude a legally qualified candidate from the debate simply because he was not deemed to be a "viable" candidate).

157. *See id.* at 682 (upholding candidate's exclusion based on the stated reason for exclusion being his inability to generate adequate public support).

158. *See* Hill v. Colorado, 120 S. Ct. 2480, 2517-18 (2000) (Kennedy, J., dissenting) (stating that the majority's decision gives citizens the right to avoid unpopular speech and sanctions the government's categorical restriction on certain speech in a public forum).

159. *See* Texas v. Johnson, 491 U.S. 397, 413 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

160. *See id.* at 2483 (discussing petitioners' position that the statute required examination of content and that their freedom of speech, press, and peaceable assembly were violated).

161. 447 U.S. 455 (1980).

162. *See id.* at 462 (reiterating the Court's previous holding that an ordinance regulating free speech cannot prohibit an activity only because it involves specific subject matter).

order to screen out pleasantries, greetings, requests for directions, or other unrestricted speech from restricted speech like protests or counseling, thereby triggering the *Carey* rule.[163] Interestingly, the majority, at least initially, admitted that this kind of content review would have to take place under Section 3.[164] But then the Court moved to negate the force of its admission by arguing that protest, education, and counseling do not fit under the definition of content.[165] The majority's analogy to the judicial review of speech content in blackmail or price fixing cases[166] is ultimately unpersuasive because the speech constituting these unlawful schemes does not receive First Amendment protection.[167] However, oral protest, education, and counseling are clearly types of protected speech, as the Court acknowledged.[168] They are, indeed, core forms of protected speech activity. Thus, in *Hill*, it is the content of otherwise protected speech which suddenly deprives it of constitutional standing.

Next, the Court analogized protest, education, and counseling to picketing and demonstrating, and cited cases upholding statutes that regulated picketing and demonstrating but not other forms of speech activity. But whatever the merits of those rather shaky decisions, picketing and demonstrations are a "mixture of conduct and communication,"[169] as Justice Scalia pointed out in his dissent, whereas Section 3 applies to strictly *verbal* protest, education, and counseling.[170] A more illuminating analogy for the majority could have been found in *Burson v. Freeman*,[171] which dealt with a law

163. *See Hill*, 120 S. Ct. at 2483 (responding to the Court's assertion that the Court has never held it improper to look at content in order to assess whether it falls under a statute).

164. *See id.* at 2492 (stating that "cases may arise in which it is necessary to review the content of the statements made by a person approaching within eight feet").

165. *See id.* at 2493 (arguing that the statute does not qualify as content-based regulation).

166. *See supra* text accompanying notes 122123 (discussing the comparison between speech conducted in furtherance of criminal activity and advocacy).

167. *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697 (1978) ("The First Amendment does not make it . . . impossible ever to enforce laws against agreements in restraint of trade . . .) (citation and internal quotation marks omitted); Giboney v. Empire Storage Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

168. *See Hill*, 120 S. Ct. at 2488 ("[Petitioners] correctly state that their leafleting, sign displays, and oral communications are protected by the First Amendment.").

169. *See id.* at 2504-05 (Scalia, J., dissenting) (citation and internal quotation marks omitted).

170. *See id.* at 2504 n.1 (quoting the statutory language of "oral protest, education, or counseling").

171. 504 U.S. 191 (1992). Although the Court in *Burson* upheld the speech

banning speech in a public place. There, the Court held that a Tennessee law prohibiting any campaign activities within 100 feet of the entrance of a polling place was a content-based restriction on the category of "political speech."[172] In the context of Section 3, oral protest is inherently political speech as well. However much one may dislike and want to refute anti-abortion activists, these activists are attempting to dissuade women from exercising their constitutional rights in a particular way and perhaps to persuade them to support a change in public policy on abortion, both of which are constitutionally protected speech activities.

The Court also argued that oral protest, education, and counseling constitute neither a "subject matter," unlike the law in *Carey* distinguishing labor speech from non-labor speech, nor a particular viewpoint, thereby reasoning that these forms of speech did not fit within the definition of speech content.[173] However, as Justice Scalia said, the Court has "never held that the universe of content-based regulations is limited to [subject matter and viewpoint] . . . ."[174] The Court's own decisions have defined content more broadly. *Burson* and *Boos v. Barry* explicitly state that "content" includes expansive categories of speech[175] such as political speech and commercial speech.[176] Oral protest, education, and counseling are *types* or *forms* of speech defined by the attitudes and purposes of the speakers.[177]

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restrictions within 100 feet of a polling place, *Burson* does not support the Court's reasoning in *Hill* or contradict our argument. *Id.* at 191-92. *Burson* held that the state law was content-based and strict scrutiny applied. *Id.* at 191. The Court then found that the statute survived strict scrutiny. *Id.* In *Hill*, the Court held that a comparable state law was not content-based and therefore not subject to strict scrutiny. 120 S. Ct. at 2494. We argue that the *Hill* Court's fundamental error was its failure to recognize the content and viewpoint-based nature of the Colorado statute, which resulted in application of the lesser standard of scrutiny for content-neutral statutes under *Ward*. *Id.* While we do not believe that the Colorado statute should pass muster under strict scrutiny, our key concern is that statutes such as Colorado's should be examined under the most stringent standard of review.

172. *Burson*, 504 U.S. at 198.

173. *See Hill*, 120 S. Ct. at 2493-94 (dismissing Justice Kennedy's theory that restrictions on speech become content-based when they are applied to specific locations where such speech takes place).

174. *Id.* at 2503-04 (Scalia, J., dissenting).

175. *See Burson*, 504 U.S. at 197 (describing speech content as including "categories of speech" or "an entire topic" of speech); Boos v. Barry, 485 U.S. 312, 318-19 (1988) (holding that the anti-picketing statute at issue was content-based because it prohibited "[o]ne category of speech" while permitting "[o]ther categories of speech").

176. *See Burson*, 504 U.S. at 197-98 (holding that the statute at issue was content-based because it restricted "political" speech but did not "reach other categories of speech, such as commercial solicitation, distribution, and display").

177. *See Hill*, 120 S. Ct. at 2505 (Scalia, J., dissenting) (asserting that when the government regulates demonstrators and picketing, it is proscribing a manner of expression).

Surely a First Amendment that protects expressive conduct like flag desecration must also protect the numerous types of verbal expression, from protest, education, and counseling to heckling, parody, commiseration, sarcasm, literary criticism, whispering, irony, exhortation, advice-giving, prayer, diatribe, and so on.[178]

The majority's rejoinders to some of the key points made by Justice Kennedy also lack substance and persuasive force. Justice Kennedy pointed out that Section 3's application only to the specific locations favored by one group of protesters might be a sign that the statute was effectively content and viewpoint-based.[179] In response, the Court alluded to *International Society for Krishna Consciousness, Inc. v. Lee*:[180] "[a] statute prohibiting solicitation in airports that was motivated by aggressive approaches of Hari-Krishnas does not become content-based solely because its application is confined to airports."[181]

But the comparison is inapposite. First, the Court in *Lee* decided that the interior terminal area of an airport—the area subject to the regulation at issue—was a nonpublic forum.[182] Consequently, the majority opinion applied a mere reasonableness analysis, and, rightly or wrongly, therefore did not have to address the issue of content (as opposed to viewpoint) neutrality.[183] Second, the regulation did not affect in any way the ability of the Hare-Krishnas to solicit on the airport sidewalks outside the terminals that virtually all users of the interior terminals would have to use as well, a fact that the Court in *Lee* noted approvingly.[184] In addition, the opinion contains no factual information indicating that the Hare-Krishnas predominantly focused their solicitation activity inside airports. On the contrary, *Lee* suggests that they solicited in a variety of "public places."[185] Moreover, the Court, in a companion case, upheld the right of the Krishnas to conduct leafleting inside the airport.[186] Thus, the airport regulation

178. *See id.* (arguing that a regulation targeting poetry would be neither viewpoint nor subject matter-specific but would still be content-based).

179. *See id.* at 2517 (Kennedy, J., dissenting) ("[The statute] applies only to a special class of locations: entrances to buildings with health care facilities.").

180. 505 U.S. 672 (1992).

181. *Hill*, 120 S. Ct. at 2493-94.

182. *See Lee*, 505 U.S. at 680, 683 (explaining that airport terminals cannot be considered a public forum because their main purpose is to service air travelers and not serve as a center for the exchange of ideas).

183. *See id.* at 683-85 (arguing that because pedestrian congestion is a terminal problem it is reasonable for airport authorities to limit solicitations to sidewalk areas outside of terminals).

184. *See id.* at 684-85.

185. *Id.* at 674.

186. *See* Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830, 831 (1992) (holding that the Port Authority's ban on the distribution of leaflets in airport terminals was invalid under the First Amendment).

in *Lee* does not create the clear impression, as exists in *Hill*, that the whole purpose of the regulation was to restrict the speech activities of a particular group engaged in a particular kind of speech.

The Court's use of *Frisby v. Schultz*[187] to rebut Justice Kennedy's point that the purpose and design of Section 3 was to restrict only anti-abortion protesters[188] fares better, but the situations in *Frisby* and *Hill* remain distinguishable. *Frisby* concerned an ordinance prohibiting picketing in front of individual residences, and it did appear that the ordinance was prompted by anti-abortion protests in front of the home of a doctor.[189] But the Court there did not perform any kind of content neutrality analysis; rather, it accepted the state courts' findings of content neutrality without comment or question.[190] This inattention to content neutrality in *Frisby* makes some sense given the unique nature of the picketing site considered in that case. While the picketing undoubtedly took place in a public forum—streets and sidewalks—this part of the forum abutted individually targeted *private homes*.[191] Reflecting an acute sensitivity to this universally shared kind of space—everyone lives somewhere—the Court declared that the state's interest in protecting the tranquility and privacy of the home was of the "highest order"[192] and there was "no right to force speech into the *home* of an unwilling listener."[193] It also said that the speech activity was "narrowly directed at the household, not the public,"[194] and pointed out that all other areas of the public forum remained unrestricted.[195] Given the Court's strong language in favor of protecting the home and its emphasis on the limited communicative potential of the speech, it is virtually certain that the ordinance would have survived strict scrutiny had it been used. The Court seemed disinclined to carefully evaluate an issue that would have been immaterial to the outcome anyway.

187. 487 U.S. 474 (1988).

188. *See* Hill v. Colorado, 120 S. Ct. 2480, 2517 (2000) (Kennedy, J., dissenting) (arguing that the "purpose and design" of the statute is to restrict only anti-abortion protestors, as evidenced by the statute only applying to medical facilities).

189. *See Frisby*, 487 U.S. at 476 (noting that the ordinance was passed after residents complained about the picketing).

190. *See id.* at 482 (stating that the Court is following its "normal practice" of deferring to lower federal courts' construction of a state statute because they are in a better position to interpret the law of their respective jurisdictions).

191. *See id.* at 477 (determining that the ordinance was passed to protect private homes from picketing and disturbances).

192. *Id.* at 484 (quoting Carey v. Brown, 447 U.S. 445, 471 (1980)).

193. *Id.* at 485 (emphasis added).

194. *Id.* at 486.

195. *Frisby*, 487 U.S. at 483-84 (determining that only picketing focused on a particular residence is prohibited, and that alternatives such as marching through neighborhoods, going door-to-door, distributing literature, and contacting residents by telephone, still remain available).

Responding to Justice Kennedy, the majority pointed out that pro-choice activists (like anti-abortion activists) would have to seek permission for person-to-person approaches.[196] But the Court refused to consider the relative improbability of patients or staff persons entering a health care facility denying pro-choice activists the consent to approach, much less having them arrested or prosecuted for their speech activities. Even if a patient initially mistakes the pro-choice activist for an abortion opponent and denies permission to speak and approach, any interest in prosecution will vanish when it becomes clear that the approaching person is friend, not foe.

The perfectly predictable viewpoint-skewed nature of face-to-face contact in the new statutory regime tells us that there is something fundamentally wrong with this statute. No one who ventures into public space with a political message has a right to a friendly response from his individual targets, but one at least thought a political speaker would not face criminal prosecution for eliciting an unfriendly response.

C. An Unduly Narrow Definition of "Discrimination"

An even more profound concern arises from the Court's understanding of "discrimination," the other key component of the concept of content or viewpoint discrimination. "Discrimination" is a crucial conceptual yardstick for measuring the appropriateness of government action.[197] If the term is defined too narrowly, the speaker's burden of proving that a regulation is content or viewpoint-based increases substantially, and, in some cases, prohibitively.

In *Hill*, the Court appeared to use two definitions for discrimination. First, the Court said that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of *disagreement* with the message it conveys."[198] Second, the Court said that content neutrality is shown if the regulation is "*justified* without *reference* to the content of the regulated speech."[199] In applying at least the "justified without

196. *See* Hill v. Colorado, 120 S. Ct. 2480, 2494 (2000) (stating Justice Kennedy's argument that the statute would only apply to the anti-abortion protestor fails because the statute applies to all protestors and demonstrators, regardless of whether they support abortion or not, or whether their protest even concerns abortion).

197. *See* BLACK'S LAW DICTIONARY 479 (7th ed. 1999) (defining "discrimination" as "[t]he effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class . . . [d]ifferential treatment; esp., a failure to treat all persons equally especially when no reasonable distinction can be found between those favored and those not favored").

198. *See Hill*, 120 S. Ct. at 2491 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added)).

199. *Id.* (emphasis added).

reference" language, the Court, alluding to the text of the statute, stated that "[i]nstead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally" to any speaker within 100 feet of a health care facility, regardless of the content or viewpoint of their speech.[200] In addition, the Court suggested that if a state's expressed statutory objectives—such as protecting patients and their access to health care facilities—are facially unrelated to speech content, then the statute is justified without reference to the content of the regulated speech.[201] The Court thus assumed that, if the statutory text did not explicitly "draw[] distinctions," and if the state packaged the statute with facially benign justifications, then the statute remained content neutral.[202]

It is not clear from the opinion whether the majority believed that the "disagreement" definition requires an independent showing of literal disagreement, or invidious subjective purpose, behind the definition—the kind of showing the *Forbes* Court demanded of the plaintiff in order to prove viewpoint discrimination in the decision to exclude the Independent candidate in the race.[203] If the definition of discrimination does indeed require a showing of actual disagreement, then the burden on the speaker will, in many cases, as in *Forbes*, be an impossible one despite a perfectly clear content or viewpoint distinction in the statute.[204] Such a construction would also contradict existing precedent, which holds that in order to find content or viewpoint discrimination, a court does not require evidence that the legislature intended to suppress certain ideas because of its disagreement with them.[205]

200. *Id.* at 2493.

201. *Id.* at 2491 (determining the statute here passes this test for three reasons: first, it is a regulation of places where speech occurs, not a regulation of speech; second, it applies to all demonstrators, regardless of viewpoint; and third, the state's interest in protecting access and privacy in health care facilities is unrelated to the content of the speech).

202. *See id.* at 2493.

203. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (determining that due to the debate's status as a nonpublic forum, the AETC could exclude Forbes from the debate as long as it was not based on his viewpoint and it was reasonable in light of AETC's purpose).

204. *See id.* at 682 (agreeing with AETC's reasons for excluding Forbes and finding there was no viewpoint discrimination proven, and that Forbes was excluded because of his own objective lack of support as a candidate).

205. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116-17 (1991) (holding that a New York law intended to prevent criminals from profiting by selling the story of their crimes was an invalid content-based statute despite the fact that there was "no evidence of an improper censorial motive" by the legislature) (citation and internal quotation marks omitted); *see also* SMOLLA, *supra* note 100, § 3.02(2)(a)-(b) (discussing *Simon & Schuster* and arguing

Even if "disagreement" is wholly superfluous, however, the Court, in using a standard focused only on facially content-based statutes and justifications, again replicated its error in *Forbes*. There, the Court found that the exclusion of the Independent candidate from a televised, government-run election debate was not viewpoint discriminatory because it was not based on officially expressed animosity towards his views.[206] But the whole purpose and function of excluding an Independent is to block off a political viewpoint based on its perceived unpopularity. Surely a better understanding appeared in *Rosenberger v. Rectors and Visitors of the University of Virginia*,[207] where the Court found that the exclusion of religiously-oriented student publications from the University of Virginia's campus speech forum was, by definition, viewpoint discriminatory because it suppressed speech from a particular, that is to say religious, perspective.[208] The Court there never asked the plaintiff student religious groups to show that the University of Virginia was targeting them for unequal treatment because of disagreement with their message or animus toward them.[209] Indeed, there was no evidence that the university was anti-religious, and the university had proffered neutral justifications for the policy, such as avoiding Establishment Clause problems and prioritizing among scarce fiscal resources.[210] Yet the Court understood that the objective purpose and function of the policy was to discriminate against an entire perspective and viewpoint.[211]

Assuming that the *Hill* Court understood the two formulations (disagreement/justified without reference) to mean the same thing, the conflated definition requires at least a showing that the language of the statute clearly selects a type of content or viewpoint for disfavored treatment, or selects another for preferential treatment;[212]

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that the standard for content discrimination does not require a showing of an invidious motive to discriminate against certain types of speech).

206. *See Forbes*, 523 U.S. at 683 (holding that the station's decision to exclude Forbes from a candidate debate was "a reasonable, viewpoint neutral exercise of journalistic discretion" and within the bounds of acceptable regulation under the First Amendment).

207. 515 U.S. 819 (1995).

208. *See id.* at 831-32 (finding viewpoint discrimination was demonstrated in the university's policy of not banning religion as a subject matter in general, but refusing to pay for a student paper written from a religious perspective).

209. *See id.* at 840-42 (focusing instead on the university's overall treatment of all religious groups that are interested in student media funding).

210. *See id.* at 835-37.

211. *See id.* at 835, 845-46 (determining that viewpoint discrimination cannot be justified by economic scarcity, that scanning student articles for underlying religious beliefs is a denial of free speech, and it is not a violation of the Establishment Clause to uphold the Free Speech Clause).

212. It should be noted that the Court has not held that facial content

or that the state's expressed justification for the statute directly implicates the content of speech. Hence, a law banning the presentation of films that present certain sexual acts as acceptable or proper behavior, with the stated objective of protecting public morals from such material, would indicate government "disagreement"[213] with a particular viewpoint. A law expressly prohibiting labor picketing but not picketing on other subjects would be deemed content-based. But what if, as in *Hill*, the statutory text and the expressed justifications for it are not so explicit? What if attentive constitutional lawyers are drafting the laws? Does the government in that case have free reign?

The Court's definition was not unprecedented. In fact, the Court

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discrimination in the text of a statute or regulation always violates the First Amendment. In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court held that a zoning regulation expressly limiting the location of theaters showing sexually explicit adult films was not content-based because the stated purpose of the ordinance was to prevent crime and protect property values, not restrict speech content. *Id.* at 47-48. In other words, it was justified without reference to the content of speech. Although the *Renton* opinion suggested that its reasoning might only apply to sexually explicit speech of "lesser" import than political speech, *see id.* at 49 n.2 (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976)), the plurality opinion in *Boos v. Barry*, 485 U.S. 312 (1988), hinted that the government's justification rather than a facial content restriction might be the decisive factor in determining content neutrality for some regulations of political speech. *See id.* at 320-21. In *Ward*, the Court stated that the "government's purpose [for the regulation] is the controlling consideration." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Some scholars have interpreted the Court's standard as permitting a facially content-based speech restriction if it is accompanied by a facially neutral justification. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 762 (1997) (arguing that a facial content restriction in a statute creates a rebuttable presumption that the statute is content-based); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 633-35 (1991) (arguing that *Renton* and *Boos* suggest that a regulation is content discriminatory only if the government's purpose is related to speech content). Nevertheless, the Court in these cases did not definitively rule that a content-neutral justification will overcome facial content restrictions in a regulation of speech other than sexually explicit speech. The regulation in *Ward* did not contain a facial content restriction, so that case focused appropriately on the government's justification for the regulation. In a later case, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court held that a regulation restricting only newsracks for commercial handbills was content-based notwithstanding the government's expressed neutral purpose of protecting safety and esthetics. *See id.* at 428-30. Also, the Court in *Hill* itself cited as compelling evidence of content neutrality the Colorado courts' interpretation that the "statutory language makes no reference to the content of the speech." *See* Hill v. Colorado, 120 S. Ct. 2780, 2491 (2000) (footnote and internal quotation marks omitted). Later in the opinion, the majority stated that the law was content-neutral because, in its view, the statute "places no restrictions on . . . either a particular viewpoint or any subject matter." *Id.* at 2493. Consequently, we believe that under the standard applied in *Hill*, either a facially content-based restriction in the statute or a content-related government justification would trigger a finding of content discrimination. Of course, our central point is that reliance only on facial neutrality in the statute and its justification makes it much easier for governments to discriminate on the basis of content and viewpoint.

213. *See supra* text accompanying notes 194-99.

borrowed the language from *Ward* and other cases.[214] But the highly problematic nature of its exclusive reliance on, and narrow interpretation of, the discrimination definition shows up far more glaringly in *Hill*. The regulation in *Ward*, for example, a case involving volume restrictions for outdoor concerts, was unambiguously directed at noise, not at any particular performer or genre, and indeed noise at the periphery of the event, not at its very heart.[215] There was, however, abundant evidence in *Hill* that, despite the facially neutral language of Section 3 and its purported justification,[216] the complete text, operation, and discriminatory function of the statute revealed an intent to restrict one particular kind of speech, namely anti-abortion speech.[217]

D. Unwillingness to Scratch the Surface

One of the major frustrations of the dissenters in *Hill* was that the majority ignored or dismissed a variety of obvious signs that there was more to this statute than simply a desire to protect all health care

214. *See, e.g.*, *Ward*, 491 U.S. at 791 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 295 (1984)) (determining that even in a public forum the government may impose restrictions on the time, place, or manner of protected speech, provided that they are narrowly tailored to serve a significant government interest, and then leave open areas for communication of information); Boos v. Barry, 485 U.S. 312, 320 (1988) (describing content-neutral speech as those restrictions that "are justified without reference to the content of the regulated speech") (citing Va. Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.).

215. *See Ward*, 491 U.S. at 792. The respondents in *Ward*, concert promoters, claimed that the ordinance regulated "sound quality" not noise, and thus it was a restriction on artistic content. The Court responded rightly that the ordinance regulated only excessive volume, not sound mixes or other elements of sound quality that might reasonably be deemed to relate to artistic content. *See id.* at 792-93. Also, there was no persuasive evidence presented that the city's rules inhibited delivery of the respondent's message in any way, or that the respondents relied on the outdoor facilities more extensively than many other groups subject to the regulation.

216. Actually, the plain language of Section 3 was not completely neutral. *See* discussion *supra* Part II.C.

217. In *Madsen v. Women's Health Center., Inc.*, 512 U.S. 753 (1994), and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the Court upheld parts of injunctions which restricted the speech activities of only certain anti-abortion protesters, finding that the injunctions were not content or viewpoint-based. These holdings on content and viewpoint neutrality are inapposite to *Hill*, however, because *Madsen* and *Schenck* applied strictly to injunctions against parties previously adjudged to have engaged in wrongful conduct. The statute in *Hill* applies to persons irrespective of previous wrongful conduct. As the court in *Madsen* stated:

> An injunction . . . applies only to a particular group . . . and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions . . . [T]he court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

Id. at 762.

The court also correctly observed that to "accept petitioners' claim would be to classify virtually every injunction as content or viewpoint-based. *Id.*

patients across the state of Colorado.[218] Indeed, there were many such signs, but the majority nevertheless held to its view that if the statute made no explicit textual distinctions between types of content or viewpoints, and if the stated justification for the law was not expressly related to the content and viewpoint of speech, the law was then content and viewpoint neutral.[219] Close scrutiny of some of the evidence of content and viewpoint discrimination calls into question the majority's analysis on this point.

As Justice Kennedy observed, the plain language of the overall statute itself provides compelling evidence that the legislature was focused on anti-abortion protests.[220] Section 1 of the statute, which expresses the legislature's purpose, states 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."[221] This is the only reference in the statute to any specific kind of protest, and it can only be rationally interpreted as a reference to anti-abortion protests. Pro-choice advocates do not protest against medical procedures. Striking nurses do not protest against medical procedures. It is hard to think of anyone else who does. And while animal rights activists may protest against experimentation on animals at medical research facilities,[222] they generally do not protest at clinics or hospitals against medical procedures for human beings.

The statute's operation strongly suggests a purpose to curb anti-abortion speech. As discussed above, Section 2 already directly addresses the non-speech conduct that the law was ostensibly

218. *See* Hill v. Colorado, 120 S. Ct. 2480, 2510 (2000) (Scalia, J., dissenting) (arguing that if the real purpose of the statute was to protect all health care patients, then all the statute would need is a narrowly tailored provision such as that in subsection (2) of the statute, which subjects those who knowingly prevent entry or exit from a health care facility to criminal and civil liability).

219. *See id.* at 2491 (stating that the statute's restrictions apply to all demonstrators, regardless of viewpoint, and that government regulation of expressive activity is content and viewpoint neutral if justified without making distinctions between content of regulated speech).

220. *See id.* at 2517 (Kennedy, J., dissenting) (arguing the preamble to the statute, which restricts "a person's right to protest or counsel against certain medical procedures, "demonstrates the legislature's intent to only restrict speech of abortion protestors, and concluding that the "certain medical procedures" language obviously refers to abortions, as evidenced by testimony recorded before the Colorado legislature).

221. COLO. REV. STAT. § 18-9-122(1) (2000) (emphasis added).

222. *See* Brief of Amicus Curiae People for the Ethical Treatment of Animals at *1-*2, Hill v. Colorado, 120 S. Ct. 2480 (2000), 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Nov. 12, 1999) (expressing concern that the statute could affect its protests against animal research conducted in a "health care facility"). Revealingly, PETA also felt the need to emphasize that the organization "takes no view whatever on the issue of abortion." *See id.* at *2.

intended to address: obstructing, detaining, hindering, impeding, or blocking entry or exits to facilities.[223] Moreover, other generally applicable Colorado statutes address harassment, intimidation, and obstruction.[224] Section 3 addresses pure speech activities such as leafleting, displaying a sign, or oral protest, education, or counseling,[225] and only pure speech activities around "health care facilities."[226]

The phrase "health care facilities" obviously includes abortion clinics, which are well-known as the primary site of protest for anti-abortion demonstrators.[227] The legislature was acutely aware of this fact as well. The state's brief is full of excerpts from testimony to the legislature describing very aggressive anti-abortion protests.[228] Although the state, in describing these events, refers carefully to protests occurring at "health care facilities," abundant factual details such as the content of signs or the words uttered by the protesters, indicate unmistakably that all of the events described were anti-abortion protests at abortion clinics.[229]

Despite the insistence by the state and its amici that the law was equally intended to protect patients at facilities that do not perform abortions, the record in support of that argument is paper-thin.[230]

223. *See* COLO. REV. STAT. § 18-9-122(2) (2000) (declaring it to be a Class 3 misdemeanor if a person uses the means to prevent a person from entering or exiting a health care facility).

224. *See, e.g.*, *id.* § 18-9-111 (2000) (establishing a criminal violation for following a person in or about a public place "with intent to harass, annoy, or alarm"); *id.* § 18-9-107(a) (making it an offense to knowingly or recklessly obstruct a street, sidewalk, or building entrance).

225. *See id.* § 18-9-122(3).

226. *Id.* (stating that a person may not engage in listed activities within one hundred feet of any entrance to a health care facility).

227. *Id.* § 18-9-122(3) (defining "health care facility" as "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment").

228. *See* Brief for Respondents at *1-3, *19, Hill v. Colorado, 120 S. Ct. 2480 (2000) (No. 98-1856) (providing examples of legislative debate and testimony).

229. *See id.* at *19 (describing patients being called "murderer" and "baby-killing bitch" by protestors); *id.* at *2 (referring to the activities of Operation Rescue).

230. *See, e.g.*, *id.* at *18 n.13 (arguing that the statute is aimed at all conduct and demonstrators, and that this is supported by the amicus briefs from the People for the Ethical Treatment of Animals and the AFL-CIO for the petitioners); Brief of Amici Curiae State of New York at *4-*6, Hill v. Colorado, 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Dec. 3, 1999) (providing only examples of violent conduct outside health care facilities that provide abortions); Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association at *2-*5, Hill v. Colorado, 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Dec. 3, 1999) (focusing entirely on the effects of protests outside health care facilities that provide abortions); Brief United States as Amicus Curiae Supporting Respondents at *14-*15, Hill v. Colorado, 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Dec. 16, 1999) (detailing dramatic encounters with protests outside abortion clinics, but only two non-abortion protests); s*ee also supra* notes 217, 221 and accompanying text (delineating the dearth of evidence in the record supporting the conclusion that the

The only witness for this proposition cited in any of the briefs was a representative of a disabled citizens group who apparently did not testify about any protests in Colorado that affected the disabled, but who said he had heard of problems with an animal rights protest in Pittsburgh and an anti-Medicaid protest in Florida.[231] Moreover, the statute does not even apply to the offices of dentists, optometrists, and chiropractors,[232] despite the fact that protests outside these facilities could theoretically discourage patients from entering or elevate their stress levels. But, of course, abortions are never performed at these facilities. The conclusion that the statute was designed to and would function to stifle anti-abortion protest is inescapable based on the following: the thinly-veiled reference to anti-abortion protests in Section 1 of the statute; the existence of other laws (including Section 2) addressing the conduct ostensibly targeted by the state; the overwhelming focus of the legislative history on anti-abortion demonstrations; the application of the statute to a limited universe of facilities that includes the central locus of anti-abortion protests; all combined with the unlikelihood that permission to approach will be refused to the friends of clinic patients and staff.

But if that were not enough, the record also provides explicit evidence that many members of the legislature itself objected to the content of the protestors' speech. The legislature "heard descriptions of demonstrations that were highly offensive in both their content and in their location . . . ."[233] During debate, members of the legislature discussed the "extremely offensive terms" used by anti-abortion demonstrators.[234] Legislators listened to testimony about protestors "flashing their bloody fetus signs," and yelling "you are killing your baby."[235] Some members of the Colorado Senate committee considering the bill "expressed disgust at photographs distributed by one opponent of the bill."[236]

The Court's majority briefly recognized that "the enactment was

statute is intended to protect patients at facilities other than abortion clinics).

231. *See* Amici Brief for City of Boulder and the City and County of Denver at *18, Hill v. Colorado, 1998 LEXIS U.S. Briefs 1856 (No. 98-1856) (Dec. 13, 1999) (testifying about a protest in Pittsburgh by animal rights activists over the transplant of a baboon liver into a patient dying of hepatitis, and an anti-Medicaid protest in Florida in which a disabled person was knocked out of his wheelchair).

232. *See* Brief for Respondents at *11 n.9, Hill v. Colorado (No. 98-1856) (citing COLO. REV. STAT. § 12-36-106 (1999)).

233. *Id.* at *24.

234. *Id.* at *19.

235. *See* Hill v. Thomas, 973 P.2d 1246, 1250 (Colo. 1999) (reviewing the legislative hearing record).

236. Jennifer Gavin, *Abortion Clinics Zone OK; Senate Panel Passes Bill Despite Protests*, DENV. POST, Mar. 4, 1993, at 4B.

primarily motivated by activities in the vicinity of abortion clinics."[237] But, despite all of this vivid evidence, the Court found no basis for concern that the enactment might be content or viewpoint-based because Section 3 of the statute did not on its face distinguish abortion speech from other kinds of speech and the state offered some expressly speech-neutral justifications for Section 3. The legislative history and the fact that there is no other plausible way of understanding the statute should have alerted the majority to the overwhelming prospect that this is a statute whose entire purpose and function are targeted at a particular category of political speech and protest. This case is, in fact, the speech equivalent of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[238] The *Lukumi Babalu* case was a free exercise-of-religion issue in which, despite a superficially neutral text and justification, the statute's context left only one plausible conclusion: that the whole purpose of the enactment was to stifle the religious free exercise of one group. Unlike *Lukumi Babalu*, however, the suddenly credulous *Hill* Court refused to look beyond facial neutrality.[239]

IV. THE NEED FOR AN OBJECTIVE APPROACH TO DISCRIMINATION ANALYSIS

Justice Scalia responded to the Court's argument that "justified by reference to content"[240] meant that the text of the statute had to explicitly make content or viewpoint-based distinctions or that the purported rationale for the statute had to be expressly content-based by noting that this particular phrase originated from the Court's decision in *Police Department of the City of Chicago v. Mosley*.[241] The *Mosley* Court's statement entailed two parts: "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[242] Justice Scalia's perceptive point here was that while the principal inquiry for content and viewpoint discrimination may be to look for express legislative

237. *See* Hill v. Colorado, 120 S. Ct. 2480, 2488 (2000).
238. 508 U.S. 520 (1993).
239. *Id.* (determining that the facial neutrality of an ordinance governing the killing of animals was in reality a gerrymander of the ordinance to prohibit the religious killings of animals by practioners of the Santeria religion).
240. *Hill*, 120 S. Ct. at 2506 (Scalia, J., dissenting).
241. *See* Hill v. Colorado, 120 S. Ct. 2480, 2506 (2000) (Scalia, J., dissenting) (arguing that "justified by reference to content" is a prohibition in addition to, not to be used in the place of, the prohibition against facially content-based restrictions); *see also* Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).
242. Mosley, 408 U.S. at 96.

disagreement with the message of the speech at issue,[243] this is not the only method of inquiry available to the Court.[244] *Mosley* itself actually created two possible tests, applying the "not based on content alone"[245] test to explicit content-based distinctions, and using the "justified by reference to content" test[246] to permit the Court to look past the face of the statute and the objectives proffered by the state.[247] To take the next step of constitutional analysis was good advice, and the majority should have followed this advice, but unfortunately there is no existing doctrinal formula for analysis where the next step should lead us.

Hill is thus a case that begs for the development of an objective content and viewpoint discrimination analysis under the First Amendment's Free Speech Clause. This analysis should look not only at the facial character of a statute and its stated purpose, but the substantive character in social, historical, and political context as well. Under this analysis, a court would first look to the text of the statutory or regulatory enactment and its expressed rationale for any indications of explicit content or viewpoint discrimination. If none is apparent or the expressed rationale appears pretextual or mere camouflage, the Court would then assess, among other things, the actual operation and social function of the statute[248] and "the specific series of events leading to the enactment or official policy in

243. *See Hill*, 120 S. Ct. at 2491 (majority opinion) (examining legislative disagreement with the speech to determine whether there is content and viewpoint discrimination).

244. *See id.* at 2506 (Scalia, J., dissenting) (stating that it is "not the *only* inquiry").

245. *Mosley*, 408 U.S. at 96.

246. *Id.*; *see also Hill*, 120 S. Ct. at 2491 (2000).

247. *See id.* (Scalia, J., dissenting) (contending that the "justified by reference to content" language from *Mosley* was "a prohibition *in addition to*, rather than in place of, the prohibition of facially content-based restrictions" embodied by the "not based on content" language). Justice Scalia also provided two illuminating examples of how the "justified without reference to content" standard should be more properly understood. First, an ordinance aimed at reducing noise but applicable only to sound trucks delivering messages of "protest" cannot reasonably be said to be "justified without reference" to the content of speech, despite the fact that noise reduction, standing alone, is a governmental justification unrelated to content. *See id.* "Even a law that has as its [stated] purpose something unrelated to the suppression of particular content cannot irrationally single out that content for its prohibition." *Id.* Second, Justice Scalia pointed out that the approach of even a peaceful "sidewalk counselor" may result in the "secondary effect" of deeply upsetting a woman planning an abortion. *See id.* "But that is not an effect which occurs 'without reference to the content' of the speech." *Id.* (emphasis omitted).

248. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534-35 (1993) (stating that the Court in Free Exercise cases should look beyond facial neutrality and proceed to examine the operation of the ordinance at issue); *cf.* Karst, *supra* note 7, at 37. Karst coined the phrase "de facto content discrimination" to refer to situations where a facially content neutral statute resulted in differential impacts on various groups along content lines.

question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[249] Bringing all of these factors together in the final analysis, the court employing the objective content and viewpoint discrimination analysis would ask this decisive question:

> Given all that we know about the historical, legal, and social context of this enactment or policy, what is the most plausible understanding of its purpose and function as they relate to the content and viewpoint of speech to be affected?

First Amendment analysis, under this theory, would invalidate statutes and regulations "whose social meaning renders them abridgements of speech," in Professor Tribe's excellent phrase, and would consider "any evident pattern of official action that a reasonably well-informed observer would interpret as suppressing a particular point of view."[250]

The purpose of formalizing an objective content and viewpoint analysis is to prevent government from dressing up speech-discriminatory regulations in the clothing of official neutrality, as the Colorado legislature so clearly did with Section 3 and as the Arkansas Educational Television Commission did in the *Forbes* case. The test should be used only to determine whether a statute is content or viewpoint-based, not to determine the whole validity of the statute. If, after applying the test, a court finds objective speech discrimination, then the enactment would still be subject to further review under strict scrutiny.[251] In *Hill*, if the Court had pierced the veil of textual and purposive "neutrality" and found that the only plausible purpose and function of the Colorado statute were to impose content and viewpoint discrimination, it would have proceeded to determine whether the statute was narrowly tailored to a compelling interest.[252] If there were truly a medical necessity for banning approaches to people near abortion clinics, then by all means, let us consider the evidence for it within the appropriate analytical framework. It is plausible to imagine that legitimate medical necessity could outweigh

249. *Id.* at 540.

250. *See* TRIBE, *supra* note 24, at 820.

251. *See* Williams, *supra* note 212, at 700 (arguing that a free speech analytical methodology based on an objective assessment of either legislative motive or government purpose should not result in automatic invalidation of a statute or regulation but instead should lead to further analysis under strict scrutiny).

252. Thus, a court in this situation might find that protecting women in the exercise of their right to abortion from anti-abortion speech is a compelling interest and that banning approaches outside clinics is the least restrictive alternative. We do not know whether this is the case, and we have our doubts, but surely this would be a more intellectually honest and speech-friendly approach to the problem.

the constitutional injuries caused by this kind of content and viewpoint discrimination. The case, however, must be made under strict scrutiny to ensure that fundamental constitutional rights receive appropriate weight in the analysis and that the least burdensome means of addressing the problem are selected.

Requiring a court to look beyond the facial characteristics of a statute and its formal justifications to its substance, effect, and meaning is hardly a radical proposition in the constitutional realm.[253] Courts utilize this technique to screen improper motives and purposes, be they invidious or paternalistic,[254] in a variety of contexts, including the Equal Protection Clause,[255] the Free Exercise Clause,[256] and the Establishment Clause.[257] A reluctance to permit the same kind of analysis under the Free Speech Clause stems from *United States v. O'Brien*,[258] a thoroughly dubious decision in which the Court said that it would "not strike down an otherwise constitutional statute on the basis of alleged illicit legislative motive."[259] The Court stated that "inquiries into [Congressional] motives or purposes are a hazardous matter . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[260]

But this fear of compiling a variety of individual motivations is misplaced since objective First Amendment analysis invites us to focus

253. *See* Williams, *supra* note 212, at 698-99 & n.312 (supporting an objective government purpose analysis to determine content discrimination and identifying some other scholars who support this kind of approach); TRIBE, *supra* note 24, at 820 (pointing out that the ruling in *United States v. O'Brien*, 391 U.S. 367 (1968), "failed to acknowledge, let alone account for, the many cases in which [legislative motive] has been the focus of constitutional adjudication").

254. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 228-29 (1983) (noting that paternalistic motivations for speech restrictions, such as protecting citizens from the effects of offensive speech, are "constitutionally disfavored").

255. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .").

256. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.").

257. *See id.*; *see also* Jamin B. Raskin, *Polling Establishment: Judicial Review, Democracy and the Endorsement Theory of the Establishment Clause*, 60 MD. L. REV. 761 (2001).

258. 391 U.S. 367 (1968).

259. *Id.* at 383; *see also* Williams, *supra* note 212, at 697-98 (noting the *O'Brien* Court's concerns about assessing actual legislative motives in enacting a statute); TRIBE, *supra* note 24, at 820 (noting that even though the *O'Brien* Court expressed reservations about making determination of legislative intent, it nevertheless concluded "that O'Brien had not proven the impermissible [legislative] motive that he alleged").

260. *O'Brien*, 391 U.S. at 383-84.

on the broader purpose and function of having a particular statutory enactment rather than the motivations of individual legislators in supporting it.[261] The analysis that we and others[262] have proposed is not an attempt at subjective mind-reading or legislative psychoanalysis. Rather, it is an objective "totality of the circumstances" test[263] that examines in an anthropological way the purpose, meaning and function of a speech regulation. In any event, the concerns outlined by the *O'Brien* Court, if valid, could be employed to undermine the purpose-based objective tests the Court has already embraced in the religion and equal protection contexts.[264] If an objective, purpose-based test had been applied by the *Hill* Court, rather than its absurdly myopic and tendentious reading of the statute, the outcome of the content and viewpoint neutrality analysis—and ultimately the case itself—would have been radically different. The Court would have been drawn to Justice Kennedy's conclusion that "[t]he purpose and design of the statute—as everyone ought to know and as its own defenders urge in attempted justification—are to restrict speakers on one side of the debate: those who protest abortions."[265]

V. RESCUING THE FIRST AMENDMENT FROM ABORTION POLITICS

The driving subtext of both the majority and dissenting opinions in *Hill* is the politics of abortion and the organizing image on both sides is the aggressive tactics of the anti-abortion forces outside abortion clinics. The majority emphasizes the state's interest in assuring "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational

261. A recent example can be seen in the majority opinion in *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000). The Court said that "when a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one." *Id.* at 2278 (citation and internal quotation marks omitted).

262. *See* Williams, *supra* note 212, at 698 n.312 (citing A. BICKEL, THE LEAST DANGEROUS BRANCH 209 (1962); Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CAL. L. REV. 104, 115-16 (1961); MacCullum, *Legislative Intent*, 75 YALE L.J. 754, 756-57 (1966); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091 (1969)).

263. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993) (explaining that to detect content and viewpoint discrimination "[t]he Court must survey meticulously the circumstances of governmental categories") (citation and internal quotation marks omitted).

264. *See* Washington v. Davis, 426 U.S. 229, 245 (1976) (inquiring into the purpose of the statute for the purpose of equal protection analysis); TRIBE, *supra* note 24, at 1204 (explaining that the establishment clause requires "secular purpose, secular effect, and no excessive entanglement").

265. Hill v. Colorado, 120 S. Ct. 2480, 2517 (2000) (Kennedy, J., dissenting).

protests."[266] Justice Stevens, writing for the majority, suggests that anti-abortion counselors will still be able to get their message out since "the statute places no limitation on the number of speakers or the noise level, including the use of amplification equipment . . . ."[267] Implicit in such arguments is a kind of swift denigration of the paradigmatic speech encounter the statute's authors seem to have targeted for regulation: the direct, uninvited approach of an anti-abortion protestor to a woman entering an abortion clinic to persuade her to "reconsider" her decision or "think about giving your baby up for adoption" or not "murder your child."[268] The majority obviously considers such an exchange of so little value that normal First Amendment analysis need not apply.

For their part, the dissenters repeatedly charge the liberals in the majority with hypocrisy in pursuit of an abortion-rights Constitution. Justice Scalia writes: "[t]here is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents."[269] He further charges: "[t]he Court today elevates the abortion clinic to the status of the home."[270] Justice Kennedy speculates that "our predecessors would not have hesitated" to invalidate a statute regulating "oral protest, education or counseling" within 100 feet of "the entrance to any lunch counter,"[271] an effective rhetorical thrust (but an ambiguous one since it is unclear to which "predecessors" he is referring). He continues: "It should be a profound disappointment to defenders of the First Amendment that the Court today refuses to apply the same structural analysis when the speech involved is less palatable to it."[272]

And so it is a disappointment. But it must also be said that the conservative dissenting Justices have displayed egregious viewpoint-blindness of their own. After all, it was Justice Kennedy himself who authored the majority decision in *Forbes* upholding Arkansas' exclusion of an Independent congressional candidate from a state-

266. *Id.* at 2489 (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) and NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979)).
267. *Id.* at 2495.
268. *See id.* (Scalia, J., dissenting) (arguing that opponents of abortion have the "right to persuade women contemplating abortion that what they are doing is wrong"); *see also* Operation Rescue v. Planned Parenthood, 975 S.W.2d 546, 550 (Tex. 1998) (describing the activities of the abortion protestors as ranging from "peaceful efforts to convey information" to more aggressive, "confrontational" tactics).
269. *Id.* at 2509 (Scalia, J., dissenting).
270. *Id.*
271. Hill v. Colorado, 120 S. Ct. 2480, 2517 (2000) (Kennedy, J., dissenting).
272. *Id.*

managed television channel's candidate debate between his Democratic and Republican rivals.[273] The Court's blithe acceptance of "viability" as the basis for rejecting a politically conservative Independent candidate's participation in such a government-sponsored debate may have reflected the Republican Party's concern about the political impact of Ross Perot and other Independent candidates on the electoral prospects of Republicans.[274] More to the point, while Justices Kennedy, Rehnquist and Scalia are free-speech zealots when it comes to unsolicited counseling speech *outside* abortion clinics, they all voted to uphold federal regulations forbidding doctors *inside* Title X-funded medical clinics to counsel their pregnant patients about abortion in *Rust v. Sullivan*.[275] Surely that decision was a massive defeat for free speech, dressed up though it was as a decision about permissible conditions on government funding.

For citizens who defend both the hard-won right of women to choose an abortion, now protected in the *Casey v. Planned Parenthood*[276] decision, and the right of women and men to engage in political free expression, there is a dilemma. Should the *Hill* decision be quietly indulged as a necessary minor sacrifice of free speech principles for the greater cause of the right to reproductive privacy? Or is there an approach to *Hill* that rejects the majority's embarrassing First Amendment contortions yet remains steadfast in support of the right of reproductive autonomy and choice?

We contend that there is such a position. In 1994, Congress passed the Freedom of Access to Clinic Entrances Act (FACE),[277] which provides for both criminal and civil penalties against persons who use force, the threat of force, physical obstruction or property damage to interfere with persons obtaining or providing reproductive health services, including abortion.[278] FACE is an excellent statute that has resulted in the prosecution of numerous persons for violent crimes at

273. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998).

274. The *Forbes* majority consisted of all of the Republican-appointed Justices except Justice Souter, and one Justice (Breyer) appointed by a Democrat. *See id.* at 668.

275. 500 U.S. 173, 203 (1991) ("The Secretary's regulations are a permissible construction of Title X and do not violate either the First or Fifth Amendments to the Constitution.").

276. 510 U.S. 1309 (1994).

277. Pub. L. No. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248).

278. *See id.* (indicating that the statute's goals are to "protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services").

clinics, including murder, arson, destruction of property, and so on.[279] Progressive champions of the First Amendment have no problem supporting vigorous prosecution of people who violate this statute. Here, the crime is actual physical obstruction of, and violence against, women exercising their constitutional rights as well as physicians and other medical personnel engaged in the lawful provision of medical services. There is no constitutional or moral reason why people should not go to jail for the bombing or vandalism of clinics or for participating in physical blockades of clinics when women are trying to enter.

But the anti-abortion speech regulated by Section 3 of the Colorado statute, unpleasant or undesirable though it may be, does not reflect the conduct-based approach of the federal statute. It is Section 2 of Colorado's law that mirrors the federal approach. Section 3 simply targets unwanted expression, disfavored speech about favored rights. When the point at which anti-abortion expression (or any other kind) reaches a degree of relentless personal harassment that is unacceptable within a civilized society, we should call it stalking. At that point, the First Amendment would lose any power over it. But, short of that kind of conduct, we must tolerate speech that is offensive to us in order to have a democracy where the government cannot gerrymander the processes of political discourse and thinking.

Yet, perhaps we are wrong, it may be suggested, and the majority is right to diminish and dismiss the value of such anti-choice sidewalk expression. After all, what use is it concretely under our First Amendment? Perhaps this is the case that teaches us that political speech does *not* necessarily have intrinsic value.

Yet here is where we must grab the bull by the horns. The First Amendment tolerates absolutist beliefs among citizens, but it does not and cannot legislate them. Thus, both the anti-abortion protesters and the abortion clinic escorts who have organized against them can engage in passionate street debate, with one side yelling that abortion is murder and the other that women should have an unrestricted right to abortion. The state nevertheless cannot declare

279. *See, e.g.,* United States v. Soderna, 82 F.3d 1370, 1379 (7th Cir. 1996) (affirming conviction for violating the Freedom of Access to Clinic Entrances Act ("FACE")); United States v. Dinwiddie, 76 F.3d 913, 928-29 (8th Cir. 1996) (affirming a criminal conviction under FACE); Milwaukee Women's Med. Servs., Inc. v. Brock, 2 F. Supp.2d 1172, 1179 (E.D. Wis. 1998) (granting civil damages against defendants who had been criminally convicted for violating FACE); Greenhut v. Hand, 996 F. Supp. 372, 374, 379 (D.N.J. 1998) (imposing civil liability for statutory damages on a defendant who had pled guilty to criminal violation of FACE).

one side right and the other side wrong in a public forum by banning expressions of dissent from the official orthodoxy. Regardless of what the law is on abortion, from a First Amendment perspective all sides are deemed to have viewpoints of equal plausibility and validity. One side cannot be favored over all others by making it impossible for dissenting views to be expressed.

This principle is rooted in the very idea of the democratic sovereignty of the people. The state cannot interfere in free social communication to suppress or magnify particular ideological viewpoints in the public. Sometimes this idea is expressed as the need of the people to have a "marketplace of ideas"[280] to sort out truth and falsehood. Sometimes it is expressed more directly as a requirement of democracy.[281] Sometimes it is expressed as preserving a space for individual self-expression.[282] Regardless of the precise theory of the First Amendment chosen, it is fundamental that the state itself cannot dictate the terms of political dialogue in public places.

This is not a difficult principle. What is difficult about *Hill* is simply that different citizens are using the street and sidewalk for different purposes. The anti-abortion protestors are using the sidewalks for political exhortation and persuasion while women entering clinics are using the sidewalks for safe passage, to walk on as they meet a physician for a lawful medical procedure. Undoubtedly, the vast majority of such patients would prefer not to be bothered by the anti-abortion "counselors,"[283] although Justice Kennedy does cite the case of one woman who testified before the Colorado Senate that a sidewalk counselor actually dissuaded her from having an

280. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that "the ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market").

281. *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a dedication from the basic American agreement that public issues shall be decided by universal suffrage."); Steven G. Gray, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 230 (1996) (describing free speech as "the essential democratic precept that everyone in society has the right to disagree—verbally, loudly and even obnoxiously—with even the most fundamental values represented by the political majority and its government").

282. *See generally* EDWIN C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (claiming that "the liberty theory"—unlike the "marketplace of ideas theory"—"provides the most coherent understanding of the first amendment").

283. Hill v. Colorado, 120 S. Ct. 2480, 2501 (2000) (Souter, J., concurring) (using the terms "protestor, counselor, educator" to refer to abortion opponents who want to convey their view to people entering abortion clinics).

abortion.[284] If this testimony is accurate, it demonstrates not that the speech was "correct" but simply that it can affect the unfolding course of human events, which is all constitutional democracy requires.[285] In general, though, most would agree that the speech, however well-intended, is unwelcome. The question then becomes whether the state can declare the use of the public forum off-limits in particular ways to provide for a stress-free passage through it.

So we return to the central idea of the public forum. Streets, sidewalks and parks all have uses such as transportation, pedestrian traffic, recreation—that can be considered primary, depending on the time and place.[286] The public forum idea would be ruined, however, if free speech gave way each time persons engaged in non-communicative purposes were somehow made to feel uncomfortable or distressed by the presence of citizens speaking to them on a political topic. The ultimate precariousness of the public forum requires the government to show a compelling interest to overcome speech rights. The desire of some listeners to avoid certain speech does not constitute a compelling interest.

It is no doubt unpleasant for most women en route to an abortion clinic to endure the unsought advice, education, heckling, or condemnation of self-appointed sidewalk counselors. The First Amendment nevertheless protects the right to disagree with other people's lawful actions and also to give offense—which is why citizens can wear jackets in a courthouse that say "Fuck the Draft"[287] or burn American flags in a public plaza to show opposition to the government.[288] If the state could show that the kind of offense given

284. *See id.* at 2529 (Kennedy, J., dissenting). According to Justice Kennedy's excerpt of the testimony, the woman said in part:

> The people supplying the pamphlet helped me make my choice. I got an informed decision, I got information from both sides, and I made an informed decision that my son and I could both live with. Because of this picture I was given, right there, this little boy got a chance at life that he never would have had.

Id.

285. Similarly, the exclusion of a third-party candidate from a state-run candidate debate can and often will change the outcome of the election. *See* Raskin, *supra* note 14, at 1998-99 (arguing that changes in the "dynamics" of political campaigns that follow public debates should result from "dialogue among the candidates" and not the unconstitutional practice of viewpoint discrimination by government sponsors who exclude certain candidates).

286. *See* TRIBE, *supra* note 24, at 987 ("The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication—such as . . . streets, sidewalks, and parks—especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels.").

287. Cohen v. California, 403 U.S. 15, 16 (1971).

288. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) (finding that "the state's

by anti-choice activists to women walking into an abortion clinic rises to the level of a health threat, then the state could have a sufficiently compelling interest to justify a Colorado-style regulation, assuming the regulation is the least burdensome means of addressing the threat. The state and its amici did provide some evidence of health risks, such as elevated stress levels before treatment. Such showings are precisely the evidence that should have been at the heart of a strict scrutiny analysis. Short of credible evidence of authentic health risks, pro-choice Americans should continue to support the abortion clinic escort groups that stand with women as they walk into clinics,[289] counter anti-abortion speech in public places with pro-choice speech, and push for aggressive investigation and prosecution of anti-abortion terrorists, while standing by the First Amendment rights of all citizens in public places.

CONCLUSION

Hill provides governments with an astoundingly simple blueprint for restricting and chilling political speech whenever the targeted speakers need access to a specific part of the public forum. All the state need do is identify the preferred speech locations of the offending speakers; then identify a slightly larger class of similar areas or establishments of which such locales are a subset; design a regulation that restricts the speech of *any* person present in the public forum near the covered class of areas; and provide a facially neutral state interest or objective as a justification for speech regulations in this class of areas, a task made easier by the development of a constitutionally acceptable "interest" that citizens have in being left alone by political speakers.

Thus, if a state is vexed by protests outside lunch counters that refuse to serve racial minorities, it can enact a regulation limiting unconsented approaches for speech purposes by any person (not just opponents of segregation) within 100 feet of the entrance of food service establishments. As a justification, the state would cite the legitimate content-neutral interests of protecting ingress and egress

interest in preserving the flag as a symbol of nationhood and national unity [does not] justify [a] criminal conviction for engaging in political expression").

289. *See* Sarah Milstein, *Clinic Escorts Stand for Choice*, *at* www.plannedparenthood.com/articles/escort.html (last visited Dec. 5, 2001) ("Being a clinic escort is empowering because the need for it is very real, and being confronted by anti-choice protestors is very challenging."); Letter from an Abortion Clinic Patient Escort, *at* http://www.refuseandresist.org/ab/112700escort.html (last visited Dec. 5, 2001) ("The impact of volunteer escorting on the entering patients is immediately apparent . . . It also gives a needed calming physical presence in support of choice, in answer to the oppressive physical presence of the protesters.").

to eating establishments, maintaining the interest diners have in being left alone, preserving the free flow of commerce, and ensuring that citizens can eat the foods they deem most nutritious and satisfying without disruption. Lest anyone think this concern hyperbolic, the majority in *Hill* itself said that a statute making it a crime "to sit at a lunch counter for an hour without ordering food would . . . not be 'content-based' even if it were enacted by a racist legislature that hated civil rights protesters . . . ."[290] While the majority did say that such a statute might raise concerns about the state's legitimate interest at issue, it is hard to see how the majority would ever even arrive at a serious examination of that issue given the ready availability of neutral-sounding justifications. Given that the men, women and children of the modern civil rights movement endured vicious verbal abuse by racist whites in the South in public places without even proposing to dismantle their First Amendment rights, it does seem a bit ironic that many of today's progressives are so quick to cut into essential free speech liberties.

Similarly, if a state is opposed to gay rights activists leafleting on Sundays near the churches of conservative religious congregations that oppose homosexuality, it can enact a criminal law banning unconsented approaches by any person within 100 feet of the entrance of all houses of worship. The justification for the statute would be to protect citizens from harassment and intimidation, following and dogging, as they attempt to freely exercise their First Amendment rights to practice their faiths. A legislature in a right-to-work state perturbed by union picketing outside paper mills can pass a law that prohibits unconsented approaches by any person within 100 feet of the entrance of all industrial facilities for the stated purpose of ensuring the free flow of commerce, securing the right to contract, and protecting employees from stresses that diminish worker safety and productivity. In each of these cases, the statutes would be facially content and viewpoint neutral under the reasoning of *Hill* since they apply to any person regardless of the content or viewpoint of their speech, and are "justified without reference to the content of regulated speech."[291]

This string of not-so-hypothetical hypotheticals shows the massive potential damage lurking within the *Hill* decision. If left unchecked, *Hill* will enable new schemes of "neutral" censorship, with disparate and substantial impact on those who have the least access to alternative media of communication. The result will be a discretely

290. Hill v. Colorado, 120 S. Ct. 2480, 2494 (2000).
291. *Id.* at 2491.

sanitized marketplace of ideas, one partially cleansed of challenges to reigning official orthodoxies. Some of the expressive dissonance that has propelled, and continues to propel, society on its search for a more perfect liberty will be filtered away.

The *Hill* template will achieve this result directly by hamstringing those who wish to speak in public and restricting the available instruments of communication. With the danger of criminal penalties looming for political speech in the wrong place at the wrong time, it may discourage some citizens from communicating altogether. The *Hill* template could also achieve this result indirectly by stigmatizing the groups or individuals targeted by these speech regulations, suggesting to the public at large that they are too surly and extreme in their views for serious consideration by a civilized polity, and thereby reducing the potential effectiveness of any speech they are able to get past the new regulatory roadblocks.

To be an American today is to believe that the sidewalks, streets, and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[292] The traditional public forum is too central a medium of social and political communication to permit this kind of piecemeal erosion whenever some form of political incorrectness is being purged from the public square. Now is the time for true champions of the First Amendment to rescue the vanishing public forum.

292. Hague v. CIO, 307 U.S. 496, 515 (1939).