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Hill v. Colorado: The Court Clarifies the Proper Review of Legislation Regulating Speech in the Forum Surrounding Health Care Facilities

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Case Note

HILL v. COLORADO: THE COURT CLARIFIES THE PROPER REVIEW OF LEGISLATION REGULATING SPEECH IN THE FORUM SURROUNDING HEALTH CARE FACILITIES

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I. INTRODUCTION

In 1993, the Colorado General Assembly enacted Colorado Revised Statute section 18-9-122 in response to concerns regarding open access to Colorado health care facilities for the purposes of medical counseling and treatment.[1] Balancing "a person's right to protest or counsel against certain medical procedures . . . against another person's right to obtain medical counseling and treatment in a unobstructed manner," the General Assembly declared it appropriate to regulate speech-related activities within 100 feet of the entrance to any health care facility.[2] Five months after the statute was enacted, several anti-abortion protestors brought an action in Colorado state court, seeking a declaratory judgment that the statute facially violated the First Amendment and a permanent injunction against its enforcement.[3] In 2000, the Supreme Court rendered its decision in *Hill v. Colorado*,[4] upholding the statute against the protestors' contentions, and clarifying the proper review of generally applicable legislation that regulates speech in the traditional public forum surrounding health care facilities.[5]

1. COLO. REV. STAT. § 18-9-122(1) (West 1993).
2. COLO. REV. STAT. § 18-9-122 (West 1993).
3. *See* Hill v. Lakewood, 911 P.2d 670, 670 (Colo. App. 1995).
4. 530 U.S. 703 (2000).
5. *See id.*

Part II of this case note summarizes the relevant background information regarding regulation of free speech in the public forum, particularly in the context of health care facilities. Part III provides the factual and legal background of the *Hill v. Colorado* decision. Part IV outlines in detail the Court's decision, including the separate opinions of the Justices. Part V concludes that *Hill v. Colorado* provides the framework the Court's majority will use in reviewing generally applicable legislation that regulates speech in public forum surrounding health care facilities.

II. BACKGROUND

A. *Freedom of Speech in Traditional Public Forum*

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[6] Although the language of the First Amendment provides no express conditions or exceptions, the Court has held that the First Amendment's protections of the freedom of speech are not "absolutes."[7] "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[8] However, the Court's "preferential treatment" of the First Amendment is exemplified in many of its analyses and standards of review.[9]

While there is debate in regard to the framers' precise intentions when drafting this provision of the First Amendment,[10] one prominent theory advanced is the necessity of preserving

6. U.S. CONST. amend. I. In full, the First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The First Amendment applies to all states via the Due Process Clause of the Fourteenth Amendment. *See* Burson v. Freeman, 504 U.S. 191, 196 (1992).

7. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961).

8. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981).

9. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7 (6th ed. 2000). These techniques include: application of a narrow presumption of constitutionality; strict construction of statutes to avoid limitation of First Amendment freedoms; restriction of prior restraint; relaxed requirements of standing to bring suit; and heightened standards of procedural due process. *See id.*

10. *See id.*

the market place of ideas from government suppression and censorship.[11] As interpreted by the Supreme Court, the First Amendment insists that "governments must not be allowed to choose 'which issues are worth discussing or debating.'"[12] This principle is most widely recognized in relation to the "quintessential public forum" of sidewalks and streets, as these places "'have immemorially been held in trust for the use of the public and . . . used for purposes of assembly, communicating of thoughts between citizens, and discussing public questions.'"[13]

B. *Regulation of Speech in Traditional Public Forum*

In determining what treatment to give a law that is claimed to constitute an unconstitutional restriction of the freedom of speech in the traditional public forum, a court must first determine whether the regulation is content-based or content neutral.[14] The analysis of content-neutrality is of threshold importance because the distinction between a content-neutral or content-based regulation is determinative of the level of scrutiny to which the court will subject the law.[15]

In determining content-neutrality, "[t]he government's purpose is the controlling consideration."[16] The principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[17] A law that regulates speech is content-neutral so long as it is "'justified without reference to the content of the regulated speech.'"[18] Additionally, a law that has an incidental effect on some speak-

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Other prominent theories include: prevention of human error through ignorance (derived from John Milton's "Areopagitica"); public enlightenment resulting from the free exchange of ideas (derived John Stuart Mill's "On Liberty"); and enhancement of individual self-fulfillment. *See* NOWAK & ROTUNDA, *supra* note 9 § 16.6.

12. Consol. Edison Co. of New York v. Public Service Comm'n, 447 U.S. 530, 538 (1980) (quoting Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 96 (1997)).

13. Perry Educ. Ass'n v. Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 490, 515 (1939)).

14. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

15. *See, e.g.*, Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976); Cohen v. California, 403 U.S. 15 (1971).

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

17. *Id.* (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

18. *Id.* at 791 (quoting *Clark*, 468 U.S. at 293).

ers and not others is content-neutral if the regulation serves purposes unrelated to the content of the expression.[19]

If the court finds the law regulates speech on the basis of content, it will subject the law to strict scrutiny, requiring the State to demonstrate that the law is narrowly tailored to serve a compelling state interest.[20] If the court determines that the law is content-neutral, it will analyze the law as a "time, place, and manner" restriction, requiring the State to demonstrate that the law is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.[21] Thus, a statute found to be content-based is subjected to more rigorous and exacting scrutiny than a content-neutral statute.

C. *Regulation of Speech Surrounding Health Care Facilities*

Since 1973, when *Roe v. Wade*[22] judicially legalized abortion, anti-abortion protestors have shifted their battle from the courtroom to the streets and sidewalks surrounding health care facilities.[23] Abortion opponents contend that the space outside health care facilities has become, by necessity, "a forum of last resort for those who oppose abortion"[24] and "the most effective place, if not the only place"[25] where persuasion against abortion procedures can effectively occur. Abortion opponents employ various media to convey their messages, including picketing, leafleting, displaying signs, and communicating verbally.[26]

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19. *See id.* at 791.

20. *See, e.g*, Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976); Cohen v. California, 403 U.S. 15 (1971).

21. *See Ward*, 491 U.S. at 791. Here, the Court stated "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" and "it need not be the least restrictive or least intrusive means of doing so." *Id.* at 798-99.

22. 410 U.S. 113 (1973).

23. *See* Kathryn D. Piele, Sabelko v. City of Phoenix*: Ninth Circuit Refuses to Burst "Bubble" Protecting Women Entering Health Care Facilities*, 75 OR. L. REV. 1297 (1996).

24. Hill v. Colorado, 530 U.S. at 763 (Scalia, J., dissenting).

25. *Id.*

26. *See* Amy E. Miller, *The Collapse and Fall of Floating Buffer Zones: The Court Clarifies Analysis of Reviewing Speech-Restrictive Injunctions in* Schenck v. Pro-Choice Network, 32 U. RICH. L. Rev. 275, 277-78 (1998).

Unfortunately, under some circumstances, various anti-abortion groups have resorted to physically and verbally abusive behavior in an attempt to discourage or impede both women's and physicians' access to health care facilities where abortions are performed.[27] While *Roe v. Wade* secured a woman's right to obtain abortion-related counseling and medical procedures, it did not assure safe and unimpeded access to medical facilities.[28] In two recent cases, the Court reviewed judicial injunctions that, in an attempt to alleviate tension, essentially created a zone of separation between anti-abortion protestors and citizens seeking access to health care facilities.[29]

In *Madsen v Women's Health Center, Inc.*,[30] the Court examined an injunction that was issued by a Florida state court after the court found that anti-abortion protestors had repeatedly impeded access to abortion clinics in violation of an existing injunction.[31] Such activities had discouraged patients from entering the clinic and had deleterious physical effects on the others.[32] The Supreme Court found the injunction to be content-neutral, stating that the court had imposed the restrictions on the protestors "incidental to their antiabortion message because they repeatedly violated the court's original order."[33] In examining the injunction, the Court found that a "more stringent" treatment of a content-neutral injunction was applicable and held that the proper inquiry was "whether the challenged provisions of the injunction burden[ed] no more speech than necessary to serve a significant government interest."[34]

Under the newly announced level of scrutiny, the Court struck down a provision of the injunction that prohibited protestors from physically approaching any person seeking services of the abortion clinic in an area within 300 feet of the clinic "unless such a person indicate[d] a desire to communicate."[35] The

27. *See id.*

28. *See Roe*, 410 U.S. 113.

29. *See* Schneck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

30. 512 U.S. 753 (1994).

31. *See id.* at 758-76.

32. *See id.* at 758.

33. *Id.* at 763.

34. *Id.* at 765.

35. *Madsen*, 512 U.S. at 773.

Court found that the "prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceable the contact may be" burdened more speech than necessary to serve the state interest of preventing intimidation and ensuring access to the clinic.[36] The Court also noted that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[37]

In *Schenck v. Pro-Choice Network of Western New York*,[38] the Court examined an injunction issued by a New York district court after that court found anti-abortion protestors had repeatedly impeded access and formed "constructive blockades" in violation of an existing restraining order.[39] Applying the standard announced in *Madsen*, the Court struck down a provision of the injunction that prohibited protestors from "demonstrating" within fifteen feet of any person or vehicle seeking access to the clinic.[40] The Court found that the provision "burden[ed] more speech than [was] necessary to serve the relevant governmental interests" in safeguarding the safety and health of clinic staff and patients, and maintaining traffic flow.[41] The Court also noted that "leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."[42] The Court, however, expressly declined to comment as to whether governmental interests could ever justify a zone of separation between individuals entering abortion clinics and protestors.[43]

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36. *Id.* at 774.

37. *Id.*

38. 519 U.S. 357 (1997).

39. *Id.* at 519 U.S. at 364-67.

40. *See id.* at 377.

41. *Id.* This provision of the injunction specifically enjoined the protestors from "demonstrating within fifteen feet of any person or vehicle seeking access to or leaving facilities." *Id.* at 367.

42. *Schenck*, 519 U.S. at 377.

43. *See id.*

III. FACTUAL AND LEGAL BACKGROUND OF THE *HILL v. COLORADO* DECISION

A. *Colorado Revised Statute Section 18-9-122*

In 1993, the Colorado General Assembly proposed to enact Colorado Revised Statute section 18-9-122 in response to concerns regarding open access to Colorado health care facilities for the purpose of medical counseling and treatment.[44] While the legislation was pending, the General Assembly held public hearings to determine the nature and extent of verbal and physical abuse to which citizens were subjected while seeking medical counseling and treatment at health care facilities.[45] At one of the hearings, testimony was presented concerning the harassing and obstructive conduct of some anti-abortion protestors directed at both patients and staff at various medical clinics.[46] The legislature also heard testimony that other types of protests, such as those made by animal rights activists, occurred at medical clinics where animal organ transplants were performed.[47] One witness indicated that protestors created a particular impediment of access to persons with physical disabilities who lack the physical capability to move through crowds.[48] In recognition that "access to health care facilities for the purpose of obtaining medical counseling and treatment" was imperative to the citizens of Colorado,[49] the General Assembly enacted Colorado Revised Statute section 18-9-122 to regulate speech-related activities within 100 feet of the entrance to any health care facility.

In subsection 18-9-122(1), the General Assembly set forth the public concerns that motivated that statute's enactment.[50] In an effort to balance "the exercise of a person's right to protest or counsel against certain medical procedures" and "another person's right to obtain medical counseling and treatment in an unobstructed manner," the General Assembly declared that "it is appropriate to enact legislation that prohibits a person from

44. *See* Hill v. Thomas, 973 P.2d 1246, 1250 (Colo. 1997).
45. *Id.* at 1249 (citations omitted).
46. *See* Hill v. Lakewood, 911 P.2d at 672 (citations omitted).
47. *See id.* (citations omitted).
48. *See id.* (citations omitted).
49. COLO. REV. STAT. §18-9-122(1).
50. *Id.*

knowingly obstructing another person's entry to or exit from a health care facility."[51] Subsection 18-9-122(3) sets forth the substantive restrictions embodied by the statute:

> No person shall knowingly approach another within eight feet of such person, unless such other person consents, for the purposes of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.[52]

In essence, subsection (3) creates a 100-foot regulated radius around Colorado health care facilities as a "fixed buffer zone."[53] Within that fixed buffer zone, an eight-foot regulated radius around each person exists, termed by the Supreme Court of Colorado as a "limited floating buffer zone."[54]

B. *Constitutional Challenge and District Court Decision*

Five months after the passage of the statute, plaintiffs Leila Hill, Audrey Himmelmann and Everitt Simpson (hereafter "plaintiffs") filed a complaint in the District Court for Jefferson County, Colorado, seeking a declaratory judgment that section 18-9-122(3) (hereafter "statute") facially violated the First Amendment and a permanent injunction against enforcement of the statute by the defendants, Thomas (as District Attorney), the City of Lakewood, Norton (as Attorney General) and the State of Colorado.[55] In their complaint and subsequent affidavits, the plaintiffs stated that they are "'sidewalk counselors' who offer abortion-bound women alternatives to that medical procedure."[56] They stated that, as part of their efforts, they display signs as well as distribute written materials, including

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51. *Id.*

52. COLO. REV. STAT. §18-9-122(3).

53. Hill v. Thomas, 973 P.2d at 1250.

54. *Id.*

55. *See* Hill v. Lakewood, 911 P.2d at 672.

56. *Id.* at 673. "'Sidewalk counseling' consists of efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversations and/or display of signs and/or distribution of literature.'" Hill v. Colorado, 530 U.S. 703, 708 (2000) (citations omitted).

leaflets and pamphlets.[57] Hill additionally stated she uses a fetal model in her counseling techniques.[58] The plaintiffs alleged that their counseling frequently entails being within eight feet of other persons and "their fear of prosecution under the new statute caused them 'to be chilled in the exercise of fundamental constitutional rights.'"[59]

The plaintiffs claimed that the statute was unconstitutional under the First Amendment of the federal Constitution for a multitude of reasons. Specifically, they argued that (1) the statute was a content-based restriction not justified by a compelling state interest; (2) the statutory consent requirement was invalid as a prior restraint on speech; and (3) the statute was void for vagueness and overbroad.[60] The defendants admitted to virtually all of the factual allegations in their answer and filed a motion for summary judgment supported by affidavits, including a transcript of the hearings that preceded the statute's enactment.[61]

The district court judge rejected the plaintiffs' overbreadth, vagueness and prior restraint arguments,[62] and found that, because the statute had not actually been enforced against them, the plaintiffs raised only a facial challenge.[63] In finding that the plaintiffs' "sidewalk counseling was conducted in a 'quintessential' public forum," the district court held that the "statute permissibly imposed content-neutral 'time, place, and manner restrictions' that were narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication."[64] The judge granted the defendants' motion and dismissed the plaintiffs' complaint.[65]

57. Hill v. Lakewood, 911 P.2d at 673.
58. *Id.*
59. Hill v. Colorado, 530 U.S. at 708-09 (citations omitted).
60. *See id.*
61. *See id.*
62. *Id.* at 710-11.
63. *See id.* at 710.
64. Hill v. Colorado, 530 U.S. at 710 (citations omitted).
65. *Id.*

C. *Decision of the Court of Appeals of Colorado (1995)*

The plaintiffs appealed the granting of summary judgment by the district court in the Colorado Court of Appeals.[66] The court of appeals first addressed the issue of whether the statute was content-based, as the plaintiffs contended.[67] Finding the Court's analysis in *Madsen v. Women's Health Center, Inc.* instructive, the appellate court reasoned that the statute at issue was content-neutral "because the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred."[68] The court of appeals then analyzed the statute under the criteria provided in *Ward v. Rock Against Racism,* and held that the restrictions imposed by the statute were "narrowly tailored" to serve a significant government interest—namely, to ensure the safe and unobstructed access to and from health care facilities for patients and staff and left open "ample alternative channels" for communication of the information.[69] After rejecting the plaintiffs' contentions that the statute was unconstitutionally vague or constituted an unconstitutional prior restraint on speech, the court of appeals affirmed the decision of the district court.[70]

D. *Supreme Court of Colorado Denial of Review (1996) and Writ to the Court*

In 1996, the Supreme Court of Colorado denied the plaintiffs' petition for review[71] and the plaintiffs sought *certiorari* from the United States Supreme Court.[72] In 1997, the Court granted the writ, vacated the judgment of the Colorado Court of Appeals and remanded the case to that court for further consideration in light of the Court's *Schenck v. Pro-Choice Network of Western New York* decision.[73]

66. Hill v. Lakewood, 911 P.2d. at 672.
67. *Id.* at 673.
68. *Id.*
69. *Id.* at 674.
70. *Id.* at 674-75.
71. Hill v. Thomas, No. 95SC593, 1996 Colo. LEXIS 136 (Colo. Feb. 26, 1996).
72. Hill v. Colorado, 530 U.S. at 712.
73. *See* Hill v. Colorado, 519 U.S. 1145 (1997).

E. *Court of Appeals of Colorado Decision on Remand (1997)*

On remand, the Colorado Court of Appeals rejected the plaintiffs' contention that the Court's holding in *Schenck* mandated that the statute be declared unconstitutional.[74] The court noted that the Court in *Schenck* had expressly declined to hold that a valid government interest ensuring access to health care facilities might never be sufficient to justify a zone of separation between individuals entering and leaving the facilities and protestors.[75] The court of appeals determined that, as a generally applicable content-neutral statute rather than an injunctive order, its constitutionality was properly assessed under the standard set forth in *Ward*.[76] Under the *Ward* standard, the court held that the statute's distance of eight feet (as compared to the 15-foot floating buffer zone struck down in *Schenck*) and consent requirement were "sufficient to protect that type of speech on a public sidewalk . . . ."[77] The court concluded that *Schenck* did not compel the conclusion that the statute violated the First Amendment and reinstated its judgment upholding the statute's constitutional validity.[78]

F. *Supreme Court of Colorado Decision (1999)*

In 1999 the Supreme Court of Colorado granted certiorari to determine whether the court of appeals erred in holding that section 18-19-122 was constitutional under the United States Supreme Court's remand to consider the statute under *Schenck*.[79] After reviewing the language and legislative history of the statute, the Supreme Court of Colorado began its analysis by discussing the plaintiffs' First Amendment rights and the "imperative" interests that the General Assembly enacted the statute to serve.[80] The court stated that the "First Amendment is not an absolute prohibition . . . especially . . . when the questioned government action results from a particularly difficult reconciliation or 'accommodation' of the right of free speech with

74. *See* Hill v. Lakewood, 949 P.2d. at 109.
75. *See id.*
76. *See id.*
77. *Id.* at 110.
78. *Id.*
79. 973 P.2d at 1248 n.1.
80. *See* Hill v. Thomas, 973 P.2d at 1251-53 (citations omitted).

another right fundamental in our constellation of rights."[81] The fundamental right balanced against the plaintiffs' First Amendment rights, the court concluded, was other individuals' right to privacy, represented in the right of access to "counseling and treatment" at Colorado health care facilities.[82]

The Supreme Court of Colorado next determined that the Court's constitutional analysis imposed in *Schenck* was inapplicable for two reasons.[83] First, *Schenck* involved an injunction, subjecting the regulation to "'a somewhat more stringent application of general First Amendment principles'"[84] than a generally applicable statute such as the one at issue.[85] Second, the statute was less restrictive than the *Schenck* injunction because it placed no duty upon the plaintiffs to withdrawal from within the eight-foot limited floating buffer zone.[86]

The court, noting that both lower courts had found the statute was content-neutral and the plaintiffs no longer contended otherwise, concluded that the proper analysis of the statute was under the "time, place, and manner" criteria announced in *Ward*.[87] Applying the *Ward* criteria, the Supreme Court of Colorado found that the statute was significantly tailored[88] to serve a significant government interest[89] and left open ample alternative channels of communication.[90] The court held that the statute was a valid time, place, and manner restriction and affirmed the judgment of the court of appeals.[91]

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81. *Id.* at 1252 (citations omitted).

82. *See id.* at 1252-53.

83. *See id.* at 1254-55.

84. *Id.* at 1255 (quoting *Madsen*, 512 U.S. at 763).

85. Hill v. Thomas, 973 P.2d at 1255.

86. *See id.* at 1258.

87. *See id.* at 1256.

88. *See id.* at 1257. "[I]n any scenario, petitioners are free to attempt to speak with whomever they wish and they will not violate the statute," so long as they do not "knowingly approach" individuals within eight feet to do so. *Id.*

89. Hill v. Thomas, 973 P.2d at 1258. The statute was enacted by the General Assembly out of concern for "the safety of individuals seeking wide-ranging health care services, not merely abortion counseling and procedures." *Id.*

90. *See id.* "Petitioners, indeed, everyone, are still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion. They just cannot knowingly approach within eight feet of an individual who is within 100 feet of a health care facility entrance without that individual's consent." *Id.*

91. *See id.* at 1259.

IV. THE UNITED STATES SUPREME COURT DECISION

A. *The Majority Opinion*

The plaintiffs appealed the decision of the Supreme Court of Colorado and filed a petition for writ of certiorari with the United States Supreme Court. The Court granted the writ on September 28, 1999.[92] Justice Stevens delivered the opinion of the majority,[93] concluding that the statute met the content-neutrality standard in *Ward* and was a valid time, place, and manner regulation.[94] The Court affirmed the judgment of the Supreme Court of Colorado and upheld the constitutional validity of the statute.[95]

After examining the plaintiffs' First Amendment interests and Colorado's interest in protecting the privacy of its citizens,[96] the Court commented on the content-neutrality of the statute under *Ward*.[97] The Court concluded that the statute met the *Ward* standard for three independent reasons.[98] First, the statute was a regulation of "places where some speech may occur," rather than a "'regulation of speech.'"[99] Second, the statute "was not adopted 'because of disagreement with the message it conveys.'"[100] Finally, the statute was justified without reference to the content of regulated speech, as Colorado's "interests in protecting access and privacy, and providing the police with

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92. Hill v. Colorado, 527 U.S. 1068 (1999).

93. Justices Rehnquist, O'Connor, Souter, Ginsberg, and Breyer joined in the majority opinion. *See* Hill v. Colorado, 530 U.S. at 705.

94. *See* Hill v. Thomas, 973 P.2d at 1259.

95. *See* Hill v. Colorado, 530 U.S. at 735.

96. *See id.* at 713-20.

> The First Amendment interests of the petitioners are clear and undisputed . . . [o]n the other hand, petitioners do not challenge the legitimacy of the state interests . . . [t]hat interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.

Id. at 714-15. The Court noted that, while it did not address whether there is a "'right to avoid unpopular speech in a public forum,'" its prior cases "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Id.* at 718 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975)).

97. *See id.* at 718-20.

98. *See id.* at 719.

99. *See id.* at 719.

100. *See* Hill v. Colorado, 530 U.S. at 719.

clear guidelines are unrelated to the content of the demonstrators' speech."[101]

The plaintiffs argued that the statute was not "content-neutral insofar as it applie[d] to some oral communication."[102] Specifically, the plaintiffs argued that the statute was content-based because the content of oral statements made by an approaching speaker had to be examined in order to determine whether the knowing approach was "'for the purpose of . . . engaging in oral protest, education, or counseling'" and covered by the statute.[103] After commenting that this theory was not mentioned in any of the four Colorado opinions and had likely been waived, the Court stated that it had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."[104] With respect to conduct regulated under the statute, the Court determined that it was "unlikely that there would often be a need to know exactly what words were spoken in order to determine" if the statute applied.[105] Moreover, if theoretically a case arose in which it was necessary to review the content of speech to make such a determination, no more than a cursory examination would be required.[106] The Court concluded that the statute "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners,"[107] and was not motivated by a particular viewpoint, nor placed restrictions on a particular viewpoint.[108] The Court held that the Colorado courts had correctly concluded that the statute was content-neutral.[109]

Next, the Court analyzed the statute under the *Ward* criteria for time, place, and manner regulations.[110] Emphasizing that a content-neutral regulation that "does not entirely foreclose any means of communication, it may satisfy the tailoring

101. *Id.* at 719-20 (citations omitted).
102. *Id.* at 720.
103. *See id.*
104. *Id.* at 721.
105. Hill v. Colorado, 530 U.S. at 721.
106. *See id.*
107. *Id.* at 723.
108. *See id.*
109. *See id.* at 724.
110. *See* Hill v. Colorado, 530 U.S. at 725-30.

requirement even though it is not the least restrictive or least obtrusive means of serving the statutory goal,"[111] the Court examined each of the three types of communications regulated by the statute.[112] With respect to the display of signs, the Court said that "[t]he [eight]-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators."[113] With respect to oral communications, the Court found that statutory distance would "make it more difficult for the speaker to be heard," but allowed the speaker to communicate at a "'normal conversation distance.'"[114] Finally, with respect to leafleting, the Court found that it seemed possible that the eight-foot radius "could hinder the ability of a leafletter to deliver handbills to some unwilling recipients."[115] The Court concluded, however, that the statute did not prevent a leafletter from standing and proffering his or her material to oncoming pedestrians.[116]

After determining that each of the requirements did not entirely foreclose any means of communication, the Court turned its attention to the locations where the regulations were applicable.[117] In addition to a substantial state interest in controlling activity around certain public places,[118] the Court noted the "unique concerns that surround health care facilities."[119] The Court found that Colorado had responded to its substantial and legitimate interest in protecting persons attempting to enter

111. *Id.* at 726.

112. *See id.* at 725-30.

113. *Id.* at 726. The Court suggested that the separation might actually aid the audience's ability to see the signs. *Id.* It was also noted that the statute placed no limits on the number, size, text, or images of the signs. *Id.*

114. *Id.* at 726-27 (quoting *Schenck*, 519 U.S. at 377). The Court also noted that the statute placed no limitations "on the number of speakers or the noise level[.]" *Id.* at 726.

115. Hill v. Colorado, 530 U.S. at 727.

116. *Id.*

117. *Id.* at 728. The Court stated "in determining whether the statute is narrowly tailored, we have noted that '[w]e must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.'" *Id.* (alteration in original) (quoting *Madsen*, 512 U.S. at 772).

118. *Id.* at 728. The Court has recognized special government interests surrounding, schools, courthouses, polling places, and private homes. *Id.* (citations omitted).

119. *Id.* (citations omitted).

such facilities, who are "often in particularly vulnerable physical and emotional conditions" by enacting "an exceedingly modest restriction on the speakers' ability to approach."[120] The Court found that the statute's prophylactic approach "[might] be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."[121] Finally, the Court noted that the restriction applied only within 100 feet of health care facilities, interfering far less on a speaker's ability to communicate than restrictions that the Court had upheld in prior cases.[122] The statute, the Court concluded, was thus reasonable and narrowly tailored under the *Ward* criteria for time, place, and manner regulations.[123]

The Court next addressed the plaintiffs' overbreadth argument, rejecting both of the contentions raised.[124] The Court first rejected the plaintiffs' contentions that the statute was unconstitutional because its coverage extended beyond the specific concerns leading to its enactment. The Court found the statute's comprehensiveness was "a virtue, not a vice" and that there was evidence that the General Assembly did not aim to discriminate against particular speech.[125] The Court next rejected the plaintiffs' contention that the statute banned virtually all forms of protected expression, stating that the statute did not "ban" any speech, but that it "merely regulates the places where communications may occur."[126] The Court held that these arguments were not persuasive in demonstrating that the statute was overly broad within the meaning of the overbreadth doctrine.[127]

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120. Hill v. Colorado, 530 U.S. at 729.

121. *Id.*

122. *See id.* at 730; *see, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1998); Heffron v. Int'l Soc'y for the Krishna Consciousness, Inc., 452 U.S. 640 (1981).

123. *See* Hill v. Colorado, 530 U.S. at 730.

124. *See id.* at 731. The plaintiffs' overbreadth argument had two parts: (1) the statute protects too many people in too many places, as opposed to protecting patients at the facilities where confrontational speech had occurred and (2) it "bans" virtually the universe of protected expression, including displays of signs, distribution of literature, and mere verbal statements. *Id.*

125. *Id.* at 731.

126. *Id.* at 731.

127. *See id.* at 732. "[T]he overbreadth doctrine enables litigants 'to challenge a statute, not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause

Likewise, the Court was not persuaded by the plaintiffs' arguments[128] that the statute was unconstitutionally vague.[129] The Court found that, because the statute contained a scienter requirement of "knowingly," it seemed quite remote that people of ordinary intelligence would not understand what conduct it prohibited.[130] Moreover, speculation about possible vagueness in the hypothetical situations presented by the plaintiffs was insufficient to support their facial challenge, as the statute was "surely valid 'in the vast majority of its intended applications.'"[131] The Court similarly found that the specificity of the zones described by that statute gave adequate guidance and an acceptable degree of judgment to law enforcement authorities.[132]

Finally, the Court addressed the plaintiffs' claim that the statute's consent requirement imposed an unconstitutional "prior restraint" on protected speech.[133] In dismissing this argument, the Court determined that such reasoning had been addressed and rejected in both *Madsen* and *Schenck*, and here raised "an even lesser prior restraint concern" because no speaker was completely banned.[134] Furthermore, the Court reasoned, concerns about prior restraint relate only to restrictions imposed by official censorship, while the regulations in the present case "only appl[ied] if the pedestrian does not consent to the approach."[135]

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others not before the court to refrain from constitutionally protected speech or expression.'" *Id.* at 731 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)). Here, plaintiffs failed to persuade the Court that the statute's impact on other speakers would differ from its impact on their own practices. *Id.* at 732.

128. *See* Hill v. Colorado, 530 U.S. at 732. The plaintiffs challenged that the statute lacked requisite clarity in three parts of subsection (3): (1) "the meaning of 'protest, education, or counseling'"; (2) "the 'consent' requirement"; and (3) "the determination of whether one is 'approaching' within eight feet of another." *Id.*

129. *See id.* "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* (citing Chicago v. Morales, 527 U.S. 41 (1999)).

130. *See id.*

131. *Id.* at 733 (quoting United States v. Raines, 362 U.S. 17, 23 (1960)).

132. *See id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

133. *See* Hill v. Colorado, 530 U.S. at 733.

134. *Id.* at 733-34.

135. *Id.* at 734.

B. *The Concurring Opinion*

Justice Souter's concurrence[136] gave further support to the conclusion that the statute was a content-neutral regulation of speech, rather than a content-based discrimination against the discussion of particular subjects.[137] The permissibility of a time, place, or manner restriction, Souter asserted, "does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion."[138] Rather, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of a disagreement with the message it conveys . . . and not because of [the particular] behavior [or mode] identified with its delivery."[139] Souter found that the facts overwhelmingly demonstrated that the statute was a valid content-neutral regulation, imposed only to regulate the behavior of protestors, not the messages they conveyed.[140]

C. *The Dissenting Opinions*

In his dissenting opinion,[141] Justice Scalia began by stating

> the Court today continues and expands its assault upon [abortion opponents'] individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.[142]

In contrast with the majority, Justice Scalia found that the statute was content-based, and invalid under proper strict scrutiny treatment.[143]

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136. Justices O'Connor, Ginsburg, and Breyer joined in concurring. *Id.* at 735-41 (Souter, J., concurring).

137. *See id.*

138. Hill v. Colorado, 530 U.S. at 736 (Souter, J., concurring). Souter additionally stated, "There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy. But that does not mean that every regulation of such distinctive behavior is content based as First Amendment doctrine employs that term." *Id.* at 737.

139. *Id.* at 737 (citations omitted).

140. *See id.*

141. Justice Thomas joined Justice Scalia in dissenting. *See id.* at 741-65 (Scalia, J., dissenting).

142. *Id.* at 741-42.

143. *See* Hill v. Colorado, 530 U.S. at 741-65 (Scalia, J., dissenting).

In the first section of his opinion, Scalia asserted that, regardless of what might be found as to the other types of expression, the statute's regulation of oral "protest, education, or counseling" is obviously and undeniably content-based.[144] The content-based discrimination, he stated, was in regard to a speaker's purpose for approaching within eight feet of another person without first obtaining consent.[145] Scalia found that the regulation which operated only to restrict speech that communicated a message of protest, education, or counseling presented the risk that the legislation would lend itself to "'invidious, thought-control purposes'."[146] The purpose of the statute, as enacted and as realistically applied, he concluded, was to restrict the "'right to protest or counsel *against* certain medical procedures' on the sidewalks and streets surrounding health care facilities."[147] In regard to leafleting and picketing, Scalia found these actions so "intimately and unavoidably connected with traditional speech" that the statute was "a regulation of speech itself."[148] Oral communication, leafleting, and picketing can be regulated, he stated, but not on the basis of content without satisfying strict scrutiny analysis.[149] Under such an analysis, he stated, "if protecting people from unwelcome communications ([based on a state] interest [that] the Court posits) is a compelling state interest, the First Amendment is a dead letter."[150]

In the second part of his dissent, Scalia contended that the statute did not even meet *Ward*'s less exacting time, place, and manner criteria.[151] Scalia first addressed his belief that there

144. *Id.* at 742.

145. *See id.* Scalia stated:

> A speaker wishing to approach another for the purpose of communicating any message except one of protest, education, or counseling may do so without first securing the other's consent. Whether a speaker must first obtain permission before approaching within eight feet – and whether he will be sent to prison for doing so – depends entirely on *what he intends to say* when he gets there.

Id.

146. *Id.* at 743 (quoting *Masden*, 512 U.S. at 794 (Scalia, J., concurring in part, dissenting in part)).

147. *Id.* at 744 (alteration in original) (quoting COLO. REV. STAT. § 18-9-122(1) (1999)).

148. Hill v. Colorado, 530 U.S. at 745 (Scalia, J., dissenting).

149. *Id.*

150. *Id.* at 748-49.

151. *See id.* at 744-65.

was "a bit of disagreement" between the State of Colorado[152] and the Court[153] in construing the state interest sought to be advanced by the statute.[154] He next discussed the "obvious invalidity" of the statute, assuming first that the state interest was the one which the Court had "invented" and then the one which the State of Colorado had actually asserted.[155]

Scalia found that, assuming the state interest sought to be advanced by the statute was as construed by the Court, protection of the "right to be left alone" was "not an interest that [might] be legitimately weighed against the speakers' First Amendment rights . . . ."[156] In addition to attacking the majority's reliance on and misreading of Justice Brandeis' dissent in *Olmstead v. United States*,[157] Scalia pointed to the Court's own refusal in *Schenck* to acknowledge a "'right of the people approaching and entering the facilities to be left alone.'"[158] In contrast, he contended the Court has "consistently held that 'the

152. *Id.* at 749. Scalia stated:

> Colorado has identified in the text of the statute itself the interest it sought to advance: to ensure that the State's citizens may 'obtain medical counseling and treatment in an obstructed manner' by 'preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility.'

Id. (quoting COLO. REV. STAT. § 18-9-122(1)). He also found the State's interests were confirmed by the State's present brief, which identified that the statute was to address "conduct shown to impede access, endanger safety and health, and strangle effective law enforcement." *Id.* at 750 (quoting Brief for Respondents at 15).

153. *See* Hill v. Colorado, 530 U.S. 750 (Scalia, J., dissenting). Scalia stated "The Court nevertheless concludes that the Colorado provision is narrowly tailored to serve . . . *the State's interest in protecting its citizens' rights to be left alone from unwanted speech.*" *Id.*

154. *See id.* Scalia asserted that this was the first case in which the Supreme Court had relied on a state interest "not only unasserted by the State, but positively repudiated." *Id.*

155. *Id.*

156. *Id.* at 751 (citations omitted).

157. Olmstead v. United States, 277 U.S. 438 (1938). In dissenting, Brandeis "characterize[d] the 'unwilling listeners' interest in avoiding unwanted communication' as an 'aspect of the broader 'right to be left alone.'" Hill v. Colorado, 530 U.S. at 751 (quoting *Olmstead*, 277 U.S. at 478).

158. Hill v. Colorado, 530 U.S. at 750 (Scalia, J., dissenting) (quoting *Schenck*, 519 U.S. at 357). In *Schenck*, the Court stated "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* at 750, 752 (alteration in original) (quoting *Schenck*, 519 U.S. at 383).

Constitution does not *permit* the government to decide which types of otherwise protected speech are sufficiently offensive to require protection *for the unwilling listener or viewer.*'"[159] Scalia concluded that the state interest as construed by the Court was insufficient to justify the statute, as no constitutional principle could be derived from precedent either limiting speakers' rights to direct offensive messages against unwilling listeners or supporting citizens' "rights to be left alone" in the public forum.[160]

Scalia argued that, assuming the state interest sought to be advanced was as described by the State of Colorado, subsection (3) of the statute prohibited a vast amount of speech that did not correspond to any interest in the "preservation of unimpeded access to health care facilities."[161] He asserted that, rather than justifying the statute's violation of the narrow tailoring principle, the majority incorrectly construed *Ward* to imply that so long as "'a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement' . . . ."[162] Scalia argued that *Ward* only held "that narrow tailoring is not synonymous with 'least restrictive alternative,'" and neither it, nor any other case, suggested that the narrow tailoring requirement could be relaxed when other speech alternatives are available.[163] Scalia also criticized the majority's discussion of the means of communication left open by the statute as "willful ignorance."[164]

In contrast to the majority's conclusion that the statute's prophylactic approach was a virtue, Scalia found the prophylac-

159. *Id.* at 751-52 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975)).

160. *Id.* at 752-55.

161. *Id.* at 755. Scalia noted that the statute "attaches to *every* person" within the regulated zone, "regardless of whether that person is seeking to enter or exit [a health care] facility". *Id.* Additionally, the statute protects those entering or exiting the facilities not only from speech which is "so intimidating or threatening as to impede access" but also from "unconsented-to approaches for the purposes of [leafleting, picketing or] oral protest, education, or counseling." *Id.*

162. *Id.*

163. Hill v. Colorado, 530 U.S. at 756 (Scalia, J., dissenting) (citations omitted).

164. *Id.* Scalia found the majority's suggestion that the eight-foot zone along a public sidewalk allowed communication to take place at a normal conversational distance "absurd," particularly in the context of "counseling" or "educating." *Id.* Similarly, he found the statute's consent requirements rendered communicating by leafleting "utterly ineffectual." *Id.* at 757.

tic restriction impermissible, for it did not respond precisely to the "'substantive problem which legitimately concerns' the State."[165] There was, Scalia concluded, an "insufficient nexus" between assuring access to health care facilities and banning communication within eight feet.[166] Consequently, the regulation burdened substantially more speech than necessary to achieve the particular interest the State asserted.[167] Scalia contended "[this] is what the doctrine of overbreadth is all about"[168] and "[t]he First Amendment stands as a bar to exactly this type of prophylactic legislation."[169] Lastly, Scalia found that the majority's consideration of the location where the regulations were applicable was incomplete, as the location had become "by necessity . . . a forum of last resort for those who oppose abortion."[170]

In a separate dissent, Justice Kennedy voiced agreement with Justice Scalia's First Amendment analysis and additionally set forth his view that the Court's decision conflicted with the essence of *Planned Parenthood of Southeastern Pa. v. Casey*.[171] Kennedy first remarked that "[t]o employ *Ward*'s complete framework is a mistake at the outset, for *Ward* applies only if a statute is content-neutral."[172] This statute imposed content-based restrictions on speech, he found, by virtue of the terms used,[173] the categories employed,[174] and the conditions of

165. *Id.* at 759 (quoting Member of City Council of L.A. v. Taxpayers, 466 U.S. 789, 810 (1984)). "'Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* (quoting NAACP v. Burton, 371 U.S. 415, 438 (1963)).

166. *Id.* at 759.

167. *Id.*

168. Hill v. Colorado, 530 U.S. at 760-61 (Scalia, J., dissenting).

169. *Id.* at 761.

170. *Id.* at 763.

171. *See id.* at 765-92.

172. *Id.* at 765-66.

173. Hill v. Colorado, 530 U.S. at 767 (Kennedy, J. dissenting). Kennedy found that the terms "oral protest, education, or counseling" in the context of conduct surrounding health care facilities "concern a narrow range of topics – indeed, one topic in particular." *Id.*

174. *Id.* at 768. Kennedy stated "[t]o say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse . . . is an astonishing view of the First Amendment." *Id.*

enforcement.[175] Kennedy contended the majority further compounded its mistake by finding that the regulation was viewpoint neutral, as the object of the statute was "to restrict speakers on one side of the debate: those who protest abortions"[176] and its operation reflected that objective.[177] The majority's holding, he concluded, allowed Colorado to "punish speech because of its content and viewpoint."[178] Like Scalia, Kennedy also attacked the majority's conclusion that precedent supported a right to be left alone in the public forum.[179] In contrast with the majority, he found that applicable precedent expressly denied that a right to be left alone existed in a public forum.[180]

Rejecting the majority's contention that the statute's prophylactic approach was a virtue, Kennedy found the statute to be invalid under the constitutional doctrines of overbreadth and vagueness.[181] In particular, he noted that "protesting, education, and counseling" were imprecise words and "[n]o custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech."[182] As such, Kennedy asserted, the statute's imprecision subjected it to potentially arbitrary enforcement and had a chilling effect on speech in violation of the Constitution.[183]

Kennedy also found the majority's application of the *Ward* time, place, and manner criteria erroneous, particularly in its

175. *Id.* at 766. Kennedy asserted "[w]hen a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says . . . the officer may decide the speech has moved from the permissible to the criminal. The First Amendment does not give the government such power." *Id.* at 766-67.

176. *Id.* at 768. In asserting this argument, Kennedy referred to the regulation's application only to medical facilities; the choice of the language "against" certain medical procedures in the statute's preamble; and the statute's legislative history. *Id.*

177. *Id.* at 769.

178. Hill v. Colorado, 530 U.S. at 769 (Kennedy, J., dissenting).

179. *See id.* at 771. Kennedy stated "Today's decision is an unprecedented departure from this Court's teachings respecting unpopular speech in public fora." *Id.* at 772.

180. *See id.*

181. *See id.* at 770-75. Kennedy found the statute's operative terms and phrases were not properly defined, as its words were imprecise and lacked requisite specificity. *See id.*

182. *Id.* at 773.

183. Hill v. Colorado, 530 U.S. at 773 (Kennedy, J., dissenting).

discussion of narrow tailoring.[184] He stated that an essential requirement under *Ward* was that the regulation in question does not "'burden substantially more speech than is necessary to further the government's legitimate interest.'"[185] Kennedy found that the statutory language of "oral protest, education, or counseling," construed by Colorado and the Court to restrict all topics of conversation within the statutory proscription, violated this requirement.[186] He reasoned that if the statute was enacted to respond to incidents of disorderly or unlawful conduct near health facilities, state criminal and tort law provided alternatives to restricting speech.[187] If the statute was enacted to "protect distraught women who are embarrassed, vexed, or harassed," Kennedy asserted that the majority improperly failed to explain why less restrictive means could not be employed to serve that interest.[188] Finally, in regard to narrow tailoring, Kennedy found that the majority's consideration of the place of regulation was flawed, as the statute applied to traditional public fora[189] which was likely the last, if not the only, place for protestors to communicate their message.[190]

Kennedy also concluded that the statute did not meet the *Ward* standard that ample alternative channels for communications be left open.[191] In regard to oral communication, he found that the inability to interact in person prevented protestors from "using speech in the time, place, and manner most vital to the protected expression."[192] He found that the statute foreclosed "peaceful leafleting, a mode of speech with deep roots in our Nation's history and traditions."[193] Emphasizing that "[t]he means of expression at stake here are of controlling importance,"[194] Kennedy concluded that the statutory regulations

184. *See id.* at 771-91.

185. *Id.* at 776 (quoting *Ward*, 491 U.S. at 799).

186. *Id.* (quoting *Ward*, 491 U.S. at 800).

187. *Id.* Kennedy specifically mentioned that shoving or hitting is a battery actionable in criminal law and offensive touching of the body or an object closely identified with the body is actionable in tort law. *See id.* at 777.

188. Hill v. Colorado, 530 U.S. at 777-78 (Kennedy, J., dissenting).

189. *See id.* at 779.

190. *See id.*

191. *Id.* at 780 (quoting *Ward*, 491 U.S. at 791).

192. *Id.*

193. Hill v. Colorado, 530 U.S. at 780-81 (Kennedy, J., dissenting).

194. *Id.* at 788. He later stated

burdened speech in the location where "the Court should expend its utmost effort to vindicate free speech . . . ."[195]

V. DISCUSSION

Prior to *Hill v. Colorado*, it remained unresolved what treatment the Court would give statutes regulating speech surrounding health care facilities in light of *Madsen* and *Schenck*.[196] In *Madsen*, the Court distinguished content-neutral, generally applicable statutes from content-neutral injunctions, finding the latter carried "'greater risks of censorship and discriminatory application' . . . ."[197] Correspondingly, the *Madsen* Court announced a "more stringent" standard of scrutiny applicable for content-neutral injunctions, holding that the proper inquiry was "whether the challenged provisions of the injunction burdened no more speech than necessary to serve a significant government interest."[198] In *Hill v. Colorado*, the Court expressly held that the *Madsen* standard of scrutiny does not apply to generally applicable statutes and such statutes are properly analyzed under the criteria announced in *Ward*.[199]

In addition to resolving the issue of treatment, *Hill v. Colorado* provides the framework that the majority of the Court will use in reviewing generally applicable legislation that regulates speech in the traditional public forum surrounding health care facilities.[200] The three principal components of this framework include: (1) content-neutrality, (2) narrow tailoring to serve significant government interests, and (3) ample alternative channels of communication.

> No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur.

Id. at 792.

195. *Id.* at 789.

196. *See supra* notes 34-37 and accompanying text.

197. *Madsen*, 512 U.S. at 764. However, the Court was cognizant that injunctions may carry some advantages over generally applicable statutes "in that they can be narrowly tailored by a trial judge to afford more precise relief than a statute." *Id.* at 765.

198. *Id.* at 765; *see also supra* notes 30-43 and accompanying text.

199. *See* Hill v. Colorado, 530 U.S. at 718.

200. *See id.*

A. *Determination of Content-Neutrality*

The principal issue dividing the *Hill v. Colorado* Court was whether the statute's regulations, particularly in regard to "oral protest, education and counseling," were facially content-neutral or content-based.[201] As discussed in Part II, content-neutrality is a threshold consideration because the distinction between content-neutral and content-based regulations is determinative of the level of scrutiny to which the court will subject the statute.[202] In *Hill v. Colorado,* the majority of the Court held that the principal inquiry as to content-neutrality was "'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'"[203]

The majority's opinion provided three independent reasons for why it found the Colorado statute content-neutral under this inquiry.[204] The first of these reasons suggests that, for the purpose of determining content-neutrality, the majority of the Court considers regulations of speech-related conduct outside of health care facilities a "regulation of the places where some speech may occur" and "not a 'regulation of speech.'"[205] Additionally, each of these reasons demonstrates that the majority of the Court will interpret statutory language such as "oral protest, education, or counseling" broadly, and not limit its construction to the speech-related conduct that motivated its enactment.[206] Finally, the majority's statement that it is not "improper to look at the content of an oral or written statement" in order to determine if the statute applies to particular speech indicates that challenges based upon hypothetical situations will not be sufficient to sustain a facial challenge of similar statutes.[207]

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201. *See id.* at 719.

202. *See supra* notes 14-21 and accompanying text.

203. Hill v. Colorado, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791).

204. *See id.* These reasons were (1) the statute was not a "regulation of speech," it was a regulation of the places where some speech may occur; (2) the statute's language makes no reference to content of speech and its restriction apply equally to all demonstrators, regardless of their viewpoint; and (3) the State's interests in enacting the statute were unrelated to the content of the demonstrators' speech. *See id.*

205. Hill v. Colorado, 530 U.S. at 719.

206. *See id.* at 720-25.

207. *Id.* at 721.

B. *Narrow Tailoring to Serve Significant Government Interests*

Finding the statute content-neutral, the *Hill v. Colorado* Court analyzed the statute using the *Ward* "time, place, and manner" criteria.[208] The majority's discussion in *Hill* gives further clarification of the criteria's application and indicates how the criteria are properly satisfied in the context of regulation of speech surrounding health care facilities.[209]

The majority recognized two types of state interests that were sufficient to satisfy the requirement of "significant state interest" in regulating speech and speech-related conduct surrounding health care facilities.[210] The first was the State's interest in using its police powers to "protect the health and safety of [its] citizens," which may legitimately justify a focus on protecting "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontation protests."[211] This type of state interest was previously recognized as sufficient in both *Madsen* and *Schenck*.[212] The second type of state interest the Court recognized was the State's interest in protecting unwilling listeners' "interest in avoiding unwanted communication," which the Court characterized as part of broader "right to be let alone."[213]

In determining that the statute was narrowly tailored to serve these state interests, the Court emphasized, "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."[214] The majority's approach indicates that the Court adheres to this emphasis very literally, and will uphold regulations that burden communication through va-

208. *See id.* at 725. These criteria, as stated in *Ward*, require that a content-neutral, generally applicable statute is "'narrowly tailored to serve [a] significant government interest, and [that it] leave[s] open ample alternative channels of communication for communication of the information.'" 491 U.S. at 791 (citations omitted).

209. *See* Hill v. Colorado, 530 U.S. at 714-20.

210. *See id.* at 715.

211. *Id.* (citations omitted).

212. *See supra* notes 34-43 and accompanying text.

213. Hill v. Colorado, 530 U.S. at 716 (citations omitted).

214. *Id.* at 726.

rious speech media as long as each of the media are not completely foreclosed.[215]

Also, the Court found three features possessed by the Colorado statute that distinguished it from the "floating buffer zone" struck down in *Schenck*.[216] First, unlike the fifteen-foot zone in *Schenck*, the statute's eight-foot zone "allows the speaker to communicate at a 'normal conversational distance.'"[217] Second, the statute's "approach" requirement allows protestors to remain in one place and allow individuals to pass them within eight feet without causing the protestor to violate the statute.[218] Third, the statute's "knowingly" requirement protected protestors from inadvertently violating the statute.[219] These careful distinctions made by the Court seem to suggest three pertinent statutory conditions that a statute regulating speech-related conduct surrounding health care facilities must possess to withstand judicial scrutiny. Finally, the Court's praise of the statute's prophylactic approach indicates that the Court may favor, rather than disapprove of, bright-line prophylactic rules in the regulation of speech in these circumstances.[220]

C. *Ample Alternative Channels of Communication*

Concluding that the statute was narrowly tailored to serve a significant government interest, the Court found the eight-foot zone of separation left open "ample room to communicate a message through speech" and that "[s]igns, pictures, and voice itself can cross an 8-foot gap with ease."[221] This reasoning by the Court closely parallels its finding that the statute was narrowly tailored and indicates that so long as a regulation does not foreclose an entire medium or method of speech, the statute will meet this final requirement.[222]

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215. *See id.* at 726-31.

216. *See id.* at 712.

217. *Id.* at 726 (quoting *Schenk*, 519 U.S. at 377).

218. *See* Hill v. Colorado, 530 U.S. at 713.

219. *See id.*

220. *See id.* at 729.

221. *Id.*

222. *See id.* at 725-26.

V. CONCLUSION

Prior to *Hill* v. *Colorado*, it remained unresolved what treatment the Court would give legislation regulating speech surrounding health care facilities in light of *Madsen* and *Schenck*. In *Hill v. Colorado*, the Court expressly held that the *Madsen* standard of scrutiny does not apply to generally applicable statutes and such statutes are properly analyzed under the criteria announced in *Ward v. Rock Against Racism*. In addition to resolving the issue of treatment, *Hill v. Colorado* provided the framework the majority of the Court will use in reviewing generally applicable legislation that regulates speech in the traditional public forum surrounding health care facilities.