

Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose

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INTRODUCTION

Overbreadth doctrine has long rested on the periphery of First Amendment law. The doctrine permits courts to invalidate laws that advance legitimate state interests, but also prohibit or inhibit significant portions of protected speech.¹ It is designed to ensure that lawmakers regulate speech-related activities with great precision. As it does in the context of other constitutional doctrines, this precision requirement can serve as a useful tool to test the legitimacy of lawmakers' motives; the closer the fit between the government's chosen means and its valid objectives, the more likely it is that lawmakers truly sought to fulfill those objectives. The contemporary understanding of overbreadth, however, pays insufficient attention to its precision function. As such, overbreadth doctrine as currently conceived inadequately accounts for the possibility that broadly worded laws may actually obscure improper government purposes in regulating expression.

This shortcoming is starkly illustrated by the United States Supreme Court's decision in *Hill v. Colorado*.² The Court's decision in *Hill*, condemned by progressive and conservative legal scholars alike,³ rejected a

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¹ See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

² 530 U.S. 703 (2000).

³ Compare Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 734–38 (2001) (critiquing the *Hill* majority's First Amendment analysis), and Colloquium, *Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 750 (2001) (quoting Laurence H. Tribe describing *Hill* as “slam-dunk simple and slam-dunk wrong”), with *id.* at 747–50 (quoting Michael W. McConnell's critique of *Hill*). But see *id.* at 752–53 (quoting Erwin Chemerinsky defending *Hill* as correctly decided but disputing the Court's rationale). Several organizations not related to the anti-abortion movement filed amicus briefs in the Supreme Court arguing that the law was unconstitutional. See, e.g., Brief for the American Federa-

First Amendment challenge to Colorado's "bubble law." The law forbids protestors located within 100 feet of the entrance to any health care facility to knowingly approach within eight feet of persons without their consent in order to display a sign, pass a leaflet or handbill, or engage in "oral protest, education, or counseling."⁴

On its surface, *Hill* appeared to resolve a fundamental contemporary debate concerning targeted, content-specific regulation of anti-abortion speech. The law had been challenged by a group of self-described "sidewalk counselors," whose primary goal was to persuade women not to undergo abortion procedures.⁵ Colorado was one of several jurisdictions that had adopted laws regulating protests at health care facilities.⁶ Anti-abortion groups had challenged many of those laws as well.⁷ Moreover, *Hill* came in the wake of two decisions addressing the constitutionality of injunctions specifically limiting anti-abortion protestors.⁸ In upholding the Colorado law, however, the Court emphasized that the law was not specifically aimed at anti-abortion speech, but was a viewpoint- and content-neutral statutory regulation of speech-related conduct.⁹ Accordingly, the Court upheld the bubble law as a reasonable regulation of the time, place, and manner of speech in a public forum.¹⁰

tion of Labor and Congress of Industrial Organization as Amicus Curiae in Support of Petitioners, *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856); Brief Amicus Curiae of People for the Ethical Treatment of Animals in Support Of Petitioners Leila Jeanne Hill, et al., *Hill* (No. 98-1856). Even organizations opposed to the anti-abortion movement filed amicus briefs arguing against the law. See, e.g., Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, *Hill* (No. 98-1856).

⁴ COLO. REV. STAT. § 18-9-122 (2002). Violation of section 122 can lead to both criminal penalties and to civil damages liability. See COLO. REV. STAT. § 18-1.3-501 (2002); COLO. REV. STAT. § 13-21-106.7 (2002).

⁵ *Hill*, 530 U.S. at 708, 722.

⁶ For examples of other bubble laws regulating speech outside health care facilities, see MASS. GEN. LAWS ch. 266, § 120E ½ (2000); PHOENIX, ARIZ., CITY CODE § 23-10.1 (2002), available at <http://livepublish.municode.com/LivePublish/newonlinecodes.asp?infobase=13485>; SANTA BARBARA, CAL., MUNICIPAL CODE 4812 ch. 9.99 (2002), available at http://ci.santa-barbara.ca.us/departments/administrative_services/city_clerk/municipal_code/; BOULDER, COLO., REV. CODE, 1981 § 5-3-10 (Supp. 2001), available at <http://www.ci.boulder.co.us/cao/brc/5-3.html>.

⁷ Lower court decisions had addressed the constitutionality of such statutes prior to the Court's decision in *Hill*. See *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999), *aff'd sub nom. Hill v. Colorado*, 530 U.S. 703 (2000); *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). Some jurisdictions have adopted laws restricting residential protests that may have targeted anti-abortion protestors. However, in the only case where the Court addressed such a law, it substantially narrowed the meaning of the statute. See *Frisby v. Schultz*, 487 U.S. 474 (1988). Residential picketing ordinances also advance a recognized privacy interest in one's home, which under existing precedent prior to *Hill*, was distinguishable from protecting unwilling listeners on a public sidewalk. *But see Owen M. Fiss, The Unruly Character of Politics*, 29 MCGEORGE L. REV. 1, 14 (1997) (arguing that the law in *Frisby* did not protect recognized privacy concerns).

⁸ See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

⁹ *Hill*, 530 U.S. at 719-20.

¹⁰ *Id.* at 725.

At the same time, the Court rejected the plaintiffs' claim that the bubble law was facially invalid under First Amendment overbreadth doctrine.¹¹ Under the majority's understanding of the doctrine, the bubble law was not overbroad for two reasons. First, the statute indiscriminately regulated all forms of speech outside health care facilities.¹² As a result, the Court viewed the law as a rule of general application subject only to relaxed judicial scrutiny.¹³ The Court also rejected the overbreadth claim because it concluded that the plaintiffs failed to show that the statute affected the conduct of other speakers differently from the way it regulated the plaintiffs' own speech.¹⁴ Both the plaintiffs' expression and the protected speech of others not before the Court were covered by the law and were equally constrained.¹⁵ Thus, a central theme of the Court's overbreadth analysis was that the statute's breadth was a *saving feature*.¹⁶

The Supreme Court's conclusion that the bubble law's breadth eliminated concerns that Colorado lawmakers were targeting anti-abortion speech on the basis of viewpoint or content is consistent with a dominant canon of constitutional analysis. The idea that laws are less suspect because they operate broadly is a pervasive theme of much constitutional doctrine, and particularly of First Amendment law.¹⁷ Broad regulations are said to ameliorate concerns that the government has engaged in presumptively unconstitutional viewpoint or content discrimination.¹⁸ Accordingly, judicial scrutiny of such laws is less stringent because the risk of legislative parochialism is supposedly lower.

¹¹ *Id.* at 730–31.

¹² *Id.* at 731.

¹³ *Id.*

¹⁴ *Id.* at 732.

¹⁵ *Id.*

¹⁶ *Id.* at 730–31 (“The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance.”). *But see id.* at 775 (Kennedy, J., dissenting) (“The Court is quite wrong. Overbreadth is a constitutional flaw, not a saving feature.”).

¹⁷ *See, e.g.,* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994). The theme emerges in other areas of constitutional doctrine as well, most notably the law of equal protection. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 246 (1976) (applying rational basis scrutiny in a case challenging a racially neutral regulation as a violation of the Equal Protection Clause). Indeed, the origins of the equality component of First Amendment doctrine lie in the Court's equal protection cases. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972). For an excellent account of the Court's development of equality as a theme in First Amendment doctrine, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

¹⁸ *Turner*, 512 U.S. at 643. *But see* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 137 (1981) (critiquing the emphasis on content discrimination on the grounds that more speech is suppressed where laws regulate expression in a content-neutral manner); Kathleen M. Sullivan, *Discrimination, Distribution, and City Regulation of Speech*, 25 HASTINGS CONST. L.Q. 209, 211 (1998) (observing the irony “that First Amendment law seems to prefer flat bans prohibiting more speech to selective bans prohibiting less speech”).

This Article challenges the notion that broad speech regulations necessarily diminish concerns about improper legislative purpose.¹⁹ It argues instead that constitutional analysis must account for the possibility that lawmakers may draft laws in broad terms precisely to *obscure* an illicit discriminatory legislative purpose. First Amendment doctrine should discourage this impulse. Courts and commentators can further this objective by reconceptualizing the conventional understanding of First Amendment overbreadth and its place in the arena of First Amendment doctrine. Overbreadth ought to stand as a complementary doctrine to the constitutional presumption against viewpoint and content discrimination.

Part I of this Article provides a brief overview of the structure of the Supreme Court's First Amendment analysis. The centerpiece of contemporary First Amendment doctrine is the rule that laws that discriminate against speech on the basis of viewpoint or content are presumptively unconstitutional and therefore subject to the most rigid form of judicial scrutiny.²⁰ In contrast, the Court has created distinct analytical categories for content-neutral laws that regulate the time, place, or manner of speech in public forums.²¹ Part I concludes with a detailed discussion of First Amendment overbreadth doctrine and the major critiques of its application.

Part II argues that, despite the normative desirability of the strict scrutiny standard for viewpoint- and content-discriminatory laws, the Court's free speech jurisprudence has been driven almost blindly by its emphasis on overt discrimination. Ironically, this has resulted in a First Amendment jurisprudence that does not adequately restrain sophisticated, covert forms of speech discrimination. To the contrary, the existing doctrinal structure creates tremendous pressure on the state to draft speech regulations broadly to avoid the appearance of discrimination.

Part II then shows that this pressure did in fact influence the political process that led to the enactment of Colorado's bubble law. Deliberation over the law related almost exclusively to concerns about anti-abortion protestors, and almost never dealt with other speakers who might protest near health care facilities.²² Yet in drafting the bill, the legislature neither identified abortion specifically nor explicitly distinguished between anti-abortion speakers and other types of speakers. The point of this discussion is not to provide definitive proof of illicit legislative behavior, but rather to show that the *risks* of covert discrimination were substantial and that current First Amendment doctrine does not sufficiently guard against

¹⁹ I use terms such as purpose, motive, and intent to convey similar concepts relating to the lawmakers' underlying objectives in adopting specific policies instead of alternative policies. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 n.40 (1996).

²⁰ See *Turner*, 512 U.S. at 641-42.

²¹ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

²² See *infra* notes 106-121 and accompanying text.

them. Part II concludes with a description and critique of the Court's decision in *Hill*.

Part III argues that such statutory speech bubbles should be invalidated under First Amendment overbreadth doctrine.²³ This Part details several reasons why the contemporary formulation of overbreadth doctrine has failed to quell the government's strong incentives to circumvent viewpoint and content discrimination analysis through broadly worded statutes. First, the Court appears to be transforming overbreadth law from a doctrine that ensures legislative precision into a guarantee of equal treatment.²⁴ Second, contemporary overbreadth analysis supposes that the doctrine is meant primarily to protect persons whose speech is not constitutionally protected.²⁵ Finally, overbreadth doctrine is currently limited by its emphasis on advancing a "speech-based" First Amendment theory²⁶ rather than on a "motive-based" approach.²⁷ These contemporary doctrinal and theoretical trends have undermined the capacity of overbreadth law to check illicit legislative purpose.

Part III further examines how the current understanding of First Amendment overbreadth doctrine enabled the Court's erroneous decision in *Hill*. Contrary to the Court's application of overbreadth doctrine in *Hill*, the doctrine can serve as a complement to the viewpoint and content discrimination rules. Namely, it can discourage lawmakers from evading strict scrutiny by drafting broadly worded laws that exceed the scope of legitimate legislative objectives.

Part IV argues that when applied to ensure legislative precision, overbreadth doctrine can provide an effective counterpoint to the rule against viewpoint and content discrimination. If lawmakers are forced to consider the potential overbreadth of speech regulations, they may be inhibited from disguising impermissible purposes with broad, neutrally worded laws that actually advance a discriminatory agenda. Enforcing constitutional guarantees of precision may also force lawmakers to express their true concerns, generating important discourse about difficult free speech issues such as abortion protest. Given the Court's traditional reluctance to inquire directly into legislative motives underlying laws that affect speech, overbreadth can serve an important role by allowing

²³ For pre-*Hill* commentary suggesting that bubble laws are unconstitutional under other First Amendment theories, see Alan E. Brownstein, *Rules of Engagement for the Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1190–91 (1996); James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 529–35 (1996).

²⁴ See *infra* notes 193–215 and accompanying text.

²⁵ See *infra* notes 216–239 and accompanying text.

²⁶ See Kagan, *supra* note 19, at 423–24 (discussing the "speaker-based" approach to First Amendment interpretation).

²⁷ *Id.* at 424–26. See *infra* notes 240–253 and accompanying text.

courts to inquire indirectly into such motives.²⁸ Ultimately, a reconceived overbreadth doctrine that focuses on legislative precision can serve as a powerful judicial tool far beyond the abortion protest context.²⁹

In earlier writing about overbreadth, several scholars, most notably Kenneth Karst, have implicitly suggested that overbreadth could play a limited role in checking illicit content or viewpoint discrimination.³⁰ Notwithstanding the value of Karst's initial insight, no commentator has yet fully developed the doctrinal and theoretical foundations of this function of overbreadth doctrine.³¹ This Article attempts to fill that gap.

Overbreadth law assumes that the government may permissibly draw distinctions among different categories of speech, but requires that such categories be drawn carefully to address the true object of the government's concern. Across all constitutional doctrines, legislative precision requirements, in turn, ensure the sincerity and legitimacy of governmental purpose.³² In recent years, legal scholars have begun to describe First Amendment theory and doctrine in terms of this function of distinguishing between legitimate governmental purposes and illicit (anti-speech) purposes.³³ Part IV connects overbreadth to this discourse and argues that it, too, operates as a doctrinal tool to help courts surface illicit government purposes. This makes sense because, as a doctrinal mechanism, overbreadth is more closely related to the idea of heightened fit between

²⁸ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986); *United States v. O'Brien*, 391 U.S. 367, 383–85 (1968). For an argument that the Court should adopt an “objective” approach to speech analysis that looks beyond the statute’s facial neutrality, see Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 216–20 (2001).

²⁹ Statutory bubbles exist in other contexts as well. See, e.g., *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999) (invalidating city ordinance prohibiting certain types of picketing in areas near places of worship). Moreover, the use of overbreadth doctrine to bring to the surface illicit motive also may apply to other forms of speech regulations. For example, in the recent case of *Watchtower Tract & Bible Society v. Village of Stratton*, 122 S. Ct. 2080 (2002), the Court examined a facially neutral ordinance requiring door-to-door solicitors to register with the government. The plaintiffs presented a strong case that although the law was drafted broadly, it was actually intended to target Jehovah’s Witness proselytizers. *Id.* at 2085. Nonetheless, the Court felt bound by the lower court’s rejection of the improper motive allegations. *Id.*

³⁰ See Karst, *supra* note 17, at 38–39; Redish, *supra* note 18, at 138 & n.150. The argument is made somewhat more obliquely in David S. Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 713 (1978), and Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 918–20 (1970).

³¹ The idea that overbreadth may be used to smoke out illicit legislative motivation should be distinguished from justifications for overbreadth that derive from concerns about discriminatory enforcement of overbroad statutes, which has often been described as a central issue addressed by current overbreadth doctrine. See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 868 n.4 (1991).

³² See Kagan, *supra* note 19, at 426; Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001). See also *infra* notes 283–293 and accompanying text.

³³ See Kagan, *supra* note 19; Rubenfeld, *supra* note 32.

legislative ends and means than to the concept of government neutrality. It is a type of less restrictive means test.³⁴

The Article concludes with a brief discussion of how overbreadth doctrine can be applied to check illicit motives where substantial reason exists to doubt the sincerity of the state's objectives in enacting a speech regulation. The conclusion further anticipates and responds to likely criticisms of this proposed approach to restructuring overbreadth.

I. OVERBREADTH AND THE STRUCTURE OF FIRST AMENDMENT ANALYSIS

A. Neutrality Versus Discrimination

Contemporary First Amendment doctrine establishes a bifurcated analytical framework that focuses initially on how a particular law regulates expression.³⁵ When government speech regulations are neutral, affecting expression without reference to the speaker's viewpoint or the content of her speech, courts subject the laws to various balancing tests.³⁶ Courts assessing the constitutionality of such laws weigh the government's interest against the speaker's interest under frameworks that vary depending upon the location where the speech takes place.

³⁴ See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1298–99 (14th ed. 2001) (asking whether overbreadth can be viewed as “simply one application of strict scrutiny”); Henry Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 37. *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-33, at 1037 (2d ed. 1988) (stating that “[i]n practice, the Court rarely rests a finding of overbreadth . . . upon its discovery of a genuinely ‘less restrictive alternative’”); Note, *supra* note 30, at 916–18.

³⁵ While this Article focuses on statutory and regulatory provisions, the First Amendment also applies to other forms of state action. Furthermore, because the First Amendment is not directly applicable to state or local laws, it is technically imprecise to discuss “First Amendment” doctrine or law in the context of such laws. It is only by incorporation through the Due Process Clause of the Fourteenth Amendment that the First Amendment's guarantees apply to state and local government action. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The convention of referring to the First Amendment only through incorporation, however, is rarely followed in constitutional law, and I will ignore it here as well.

³⁶ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) [hereinafter Stone, *Content Regulation*] (“The Supreme Court tests the constitutionality of content-neutral restrictions with an essentially open-ended form of balancing.”). The employment of concepts of viewpoint discrimination, content discrimination, and content neutrality, while widespread, is by no means uncontroversial. Legal scholars have produced some excellent work on the usefulness of these concepts as organizing principles for First Amendment analysis. See, e.g., Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002); Redish, *supra* note 18; Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

The most significant category of First Amendment analysis applied to content-neutral laws is the public forum doctrine. Where the government regulates speech in a traditional or designated public forum such as a public street or sidewalk it may impose reasonable, content-neutral restrictions on the time, place, or manner of the speech.³⁷ Thus, the government can place reasonable limits on, for example, picketing after midnight or demonstrations using bullhorns. In order to justify such regulations, however, the government must show that they are narrowly tailored to accomplish a significant government interest and that there are ample, alternative channels for communicating the speaker's message.³⁸

While "narrowly tailored" is a term associated with strict scrutiny in other areas of constitutional doctrine,³⁹ it has come to mean something much less in the context of public forum law. In *Ward v. Rock Against Racism*, the Court abandoned any notion that narrow tailoring requires the state to demonstrate that no less speech-restrictive alternative was available to accomplish its stated interests.⁴⁰ Rather, the test has been refined (and distinguished from other narrow tailoring requirements) to require only that the means chosen by the government are "not substantially broader than necessary" to achieve the government's interests.⁴¹ In other words, the state *may* regulate speech more broadly than necessary to further its interests and still survive First Amendment scrutiny in the public forum context. The relevant inquiry is merely one of degree.

In contrast with the analysis of content-neutral laws under the public forum doctrine, the First Amendment creates a categorical presumption against the constitutionality of governmental action that regulates speakers because of their viewpoint or the content of their speech.⁴² In order to

³⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Regulation of speech on public property that is not a public forum is subject to a more relaxed test—the government may regulate such speech so long as its regulation is reasonable and neutral as to viewpoint, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and content, *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981). Content-neutral regulations that regulate speech on private property are subject to a more general balancing test, though that does not mean the Court will uphold all such laws. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (invalidating a law banning the display of most signs on residential property); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating a law banning door-to-door leafletting).

³⁸ *Ward*, 491 U.S. at 791. An important limitation on this test, as discussed further below, is that the narrow tailoring requirement has been substantially diluted and no longer mandates that the government choose the least speech-restrictive means. *Id.* at 798.

³⁹ *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 907–08 (1996) (applying strict scrutiny under the Equal Protection Clause); *Perry Educ. Ass'n*, 460 U.S. at 45 (applying First Amendment strict scrutiny).

⁴⁰ *Ward*, 491 U.S. at 798.

⁴¹ *Id.* at 800.

⁴² *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994). The ideas of viewpoint and content discrimination are sometimes merged, but this merger does not accurately reflect the conceptual differences between the two. In fact, viewpoint discrimination is a subset of content discrimination. Thus, a law cannot be viewpoint-based without also being content-based, but a law can be content-based without being viewpoint-based.

overcome the presumption that state-imposed viewpoint or content discrimination violates the First Amendment, the government must demonstrate one of two things. First, it can argue that its regulation meets the strict scrutiny standard because it is necessary to serve a compelling interest and there are no less speech-restrictive alternatives.⁴³ Alternatively, the government may prevail if it successfully argues that the regulated category of speech is not protected by the First Amendment.⁴⁴ Several types of speech are categorically unprotected under current doctrine, including fighting words,⁴⁵ obscenity,⁴⁶ child pornography,⁴⁷ threats,⁴⁸ and copyright violations.⁴⁹ The Court has on occasion adopted this approach for other categories and has considered expanding the scope of unprotected speech.⁵⁰

B. Overbreadth Doctrine

First Amendment overbreadth analysis looks not at whether a law regulates viewpoint or content, but at the appropriate scope of the regulation.

An example of the latter would be a law that prohibited any expression about the topic of abortion from taking place in public. It would not matter whether one's view is pro-choice, anti-abortion, neutral, or even non-political (*e.g.*, scientific), as the topic is simply off limits. As the Court has explained, "[W]e have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'" *Boos v. Barry*, 485 U.S. 312, 319 (1988) (citing *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)). See generally ERWIN CHERNERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 759–60 (1997) ("The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject matter neutral.").

⁴³ *Perry Educ. Ass'n*, 460 U.S. at 45.

⁴⁴ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1112–13 (4th ed. 2001).

⁴⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁴⁶ See *Miller v. California*, 413 U.S. 15, 23 (1973).

⁴⁷ See *New York v. Ferber*, 458 U.S. 747, 764 (1982).

⁴⁸ For a general discussion of this category, see EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 204–21 (2001).

⁴⁹ See *Harper & Row Publishers. v. Nation Enters.*, 471 U.S. 539, 559–60 (1977).

⁵⁰ Depending upon the nature of the speech, some categories of speech, such as defamation, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), and incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), are unprotected in some contexts. The Court once regarded commercial speech as unprotected. Compare *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (suggesting that commercial speech is not protected by First Amendment), with *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (rejecting a commercial speech exception to First Amendment protection). The Court has also struggled with evaluating non-obscene, sexually explicit material. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). For an insightful criticism of the two-level approach to speech, see Larry Alexander, *Low Value Speech*, 83 *Nw. U. L. Rev.* 546 (1989). For general discussions of the unprotected categories of speech, see VOLOKH, *supra* note 48, at 3–232 (describing the categories in detail), and JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* 26–30 (1999) (asserting that the exclusion of some categories of speech, such as perjury and bribery, from First Amendment protection does not implicate any of the underlying purposes of free speech doctrine).

Overbreadth assumes that the government may draw distinctions among different types of speech and even legitimately proscribe some speech, but closely circumscribes that regulatory power.⁵¹ Although the government may legitimately prohibit or regulate both unprotected expression and protected speech whose suppression is justified by a compelling interest, the law of overbreadth forbids legislatures to draft laws so broadly that they also prohibit, or could prohibit, substantial amounts of constitutionally protected expression. Overbroad laws are facially invalid, even though their application to unprotected speech would be constitutional (i.e., they have at least some legitimate applications). *See* Diagram 1.



To illustrate the point with an exaggerated example, imagine the state adopts a law imposing fines on any news media company that publishes a story that damages the reputation of a public official. By its

⁵¹ There is a significant body of legal scholarship analyzing First Amendment overbreadth. *See* Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541 (1985); Bogen, *supra* note 30; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) [hereinafter Fallon, *As-Applied*]; Fallon, *supra* note 31; Fiss, *supra* note 7; Franklyn S. Haiman, *Comment on Martin Redish's The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1071 (1983); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); Monaghan, *supra* note 34; John Quigley & S. Adele Shank, *The Invalidity of an Overbroad Statute*, 40 U. KAN. L. REV. 45 (1991); Martin H. Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983); Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413 (1993); Jeffrey M. Shaman, *The First Amendment Rule Against Overbreadth*, 52 TEMP. L.Q. 259 (1979); J. W. Torke, *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974); Note, *supra* note 30. *See also* TRIBE, *supra* note 34, §§ 12-27 to 12-33, at 1022-39. This Article examines only *First Amendment* overbreadth and does not therefore discuss the broader discourse surrounding facial challenges to statutes based on other aspects of constitutional law. For in depth discussions of that debate, see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Fallon, *As-Applied*, *supra*, and Isserles, *supra*.

terms, the law affects both unprotected speech, defamation where the official can prove that the publisher distributed false, reputation-damaging information about an official with actual malice,⁵² as well as protected speech, including truthful statements, false statements published without actual malice, or opinions (“The President is a nincompoop”). Whether the law is overbroad depends on the *degree* of its impact on protected versus unprotected speech (the size of area C in Diagram 1).

A distinctive and controversial feature of First Amendment overbreadth doctrine is that it allows persons whose conduct is not privileged (those whose conduct falls within circle B in Diagram 1) to assert a facial invalidation claim and therefore to evade enforcement of the regulation against them.⁵³ Thus, a publisher of a false statement disseminated with actual malice could assert a facial overbreadth claim, even though she is one of the few speakers to whom the statute may be constitutionally applied. In contrast, the publisher of a true statement could not assert a facial overbreadth claim, though she could claim that the statute is unconstitutional as applied to her publication of the statement.

1. The Values of First Amendment Overbreadth

Though principles of judicial restraint disfavor facial challenges to statutes, overbreadth doctrine establishes an exception to these norms based on the speculation that as-applied litigation is inadequate to systematically protect important values underlying the First Amendment. The Supreme Court has recognized that speech-enhancing values are advanced by permitting facial, rather than as-applied, challenges to overbroad statutes by those whose speech is not protected. Both the Court and commentators have justified this approach on the grounds that permitting overbroad statutes to remain on the books may substantially chill those whose speech is protected because those individuals may fear the laws’ possible applications to their expression.⁵⁴ The mere *ex ante* anti-

⁵² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (noting that actual malice requires showing that a publisher acted knowing the falsity of the information or with reckless disregard for truth).

⁵³ This does not, however, appear to extend to claims on behalf of communicators of commercial speech, though the Court’s statements about overbreadth’s applicability to laws regulating commercial speech have been less than clear. Compare *S.F. Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 536 n.15 (1987) (calling the application of First Amendment overbreadth doctrine to commercial speech “highly questionable”), with *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (stating that “the overbreadth doctrine does not apply to commercial speech”). While there is little doubt that commercial speakers may not invoke overbreadth in an anticipatory challenge, there remains some question whether the commercial speech exception to overbreadth would apply if a commercial entity were prosecuted under an overbroad law and attempted to raise overbreadth as a defense. See *TRIBE, supra* note 34, § 12-28, at 1026, n.19.

⁵⁴ See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

pation of an as-applied challenge may be insufficient to alleviate concerns about speakers' self-censorship.⁵⁵ Furthermore, if overbroad laws deter individuals from engaging in protected speech, those speakers cannot bring as-applied challenges against the laws since, by definition, those laws will not be applied to those individuals. Indeed, it may be more likely that a person whose speech is *not* protected will have an opportunity to challenge the constitutionality of an overbroad statute, either as a defense to criminal prosecution or in an anticipatory civil action for injunctive and declaratory relief invalidating the statute.⁵⁶ In terms of theoretical justifications, then, the primary rationales for overbreadth are speech-based—overbreadth law maximizes opportunities for individual speakers to engage in expression and facilitates a higher quality of discourse by protecting wide ranges of speech.

Overbreadth doctrine is also said to minimize concerns about selective enforcement of statutes by government officials.⁵⁷ If the Constitution permits broadly worded statutes that sweep a great deal of protected speech within their provisions, officials have unbridled discretion to arrest and prosecute speakers based on the government's disagreement with their messages or content.⁵⁸ This rationale, which focuses on ad hoc rather than legislative discrimination, also furthers speech- and discourse-enhancing goals. Selective enforcement of overbroad statutes diminishes the quantity of speech, at least for those who are selectively discriminated against. Ad hoc discriminatory enforcement also distorts the quality of public discourse by discouraging the expression of particular viewpoints and discussion of particular subjects.

Overbreadth doctrine serves the related function of providing an incentive to legislatures to draft laws that may affect First Amendment activity with as much precision as practicable.⁵⁹ One commentator describes overbreadth as an illustration of the "precision principle,"⁶⁰ the notion that the Constitution requires that laws that regulate speech must be more precisely articulated than in other areas of law in order to avoid

⁵⁵ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (stating that a person whose protected speech could conceivably be regulated by statute "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged").

⁵⁶ See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (stating that speakers whose expression is not protected may seek facial invalidation of an overbroad statute "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression").

⁵⁷ See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 466–67 (1987); *NAACP v. Button*, 371 U.S. 415, 433 (1963). See also *Karst*, *supra* note 17, at 38; *Fallon*, *supra* note 31, at 884.

⁵⁸ This rationale also underlies the doctrine of First Amendment vagueness. See *Fallon*, *supra* note 31, at 904.

⁵⁹ See *Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part and dissenting in part). See also *Fallon*, *supra* note 31, at 888; *Isserles*, *supra* note 51, at 369 n.41 (calling this a "subsidiary" purpose of overbreadth doctrine).

⁶⁰ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 51 (1992).

the self-censorship associated with uncertainty.⁶¹ Understood in this manner, the precision requirement is also related to speech-based theories of free speech.⁶² Greater precision lowers the chances of self-censorship. Less self-censorship, in turn, promotes the quantity and quality of discourse. This aspect of precision is, therefore, somewhat distinct from the requirement that there be a close relationship between the government's means of regulating a social problem and the ends it seeks to fulfill.⁶³ Notwithstanding its protection of important First Amendment values, however, facial invalidation of overbroad statutes remains highly controversial.

2. *The Critiques of First Amendment Overbreadth*

To its champions, the First Amendment overbreadth doctrine is a powerful tool to cure the ills of broadly worded legislation that inhibits substantial amounts of constitutionally protected expression. To its detractors, overbreadth is “strong medicine,”⁶⁴ that should be used only sparingly and with caution.

Federal courts have established a strong preference for entertaining as-applied challenges rather than facial challenges in constitutional litigation.⁶⁵ Facial invalidation sharply conflicts with traditional understandings of constitutional adjudication. Ordinarily, the fact that a law has some unconstitutional applications would alone be insufficient to justify its invalidation.⁶⁶ Instead, a person whose activity is constitutionally protected should theoretically obtain a suitable remedy only through the invalidation of the law as applied to his or her conduct.

The critiques of overbreadth arise primarily from related constitutional and prudential concerns about the power of federal courts. The principal attacks suggest that when federal courts employ overbreadth to facially invalidate statutes, they may exceed their constitutional authority by allowing facial challenges by parties not directly affected by the statute, unnecessarily decide constitutional questions, compromise federalism principles, violate the separation of powers, and interfere with the prerogatives of policymakers to address important social problems.

⁶¹ *Id.* This use of the term “precision” suggests a goal of clarity, and, as such, is closely related to the vagueness doctrine, which requires legal regulations to be drafted in a manner so that reasonable persons may be able to distinguish lawful from unlawful conduct. *See, e.g.,* *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974).

⁶² *See infra* notes 277–283 and accompanying text.

⁶³ *See infra* notes 254–320 and accompanying text.

⁶⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

⁶⁵ Fallon, *As-Applied*, *supra* note 51, at 1321.

⁶⁶ *TRIBE*, *supra* note 34, § 12-27, at 1023; Fallon, *As-Applied*, *supra* note 51, at 1321. *But see* Adler, *supra* note 51, at 157–58 (arguing that all constitutional challenges are facial challenges, but that courts nonetheless permit exceptions to facial invalidation in order to promote certain social interests).

First, some doubt remains regarding the Article III power of federal courts to entertain facial overbreadth challenges, even in the First Amendment context. In non-First Amendment constitutional challenges, parties not directly affected by the challenged statute generally may not assert facial invalidation claims because of the rule against third-party standing.⁶⁷ Facial challenges brought by individuals who have no constitutional rights at stake raise doubts about the existence of an actual case or controversy, since such individuals are in essence asserting the rights of third parties not before the court. What is more, such claims are based on somewhat abstract speculation about potential applications of the statute, which diminishes the concrete nature of the dispute.⁶⁸

This “valid rule” requirement can be construed as a way around third-party standing concerns. Depending on whose account one favors, permitting individuals whose speech is unprotected to pursue facial overbreadth claims is either a relaxation of, or exception to, traditional standing principles, at least in federal courts, or an invocation of the rule that all persons are entitled to be judged by a constitutionally valid rule of law.⁶⁹ Under this rule, an overbroad law, one that has some unconstitutional applications and some constitutional applications, is void and cannot be enforced against any person, even one who was not engaged in constitutionally privileged conduct.⁷⁰ This means that such a person has standing to challenge the rule.

The Supreme Court, however, has developed a device to limit application of the valid rule requirement. Under the presumption of severability, federal courts assume that if a state tries to enforce the challenged law against persons who enjoy a valid constitutional privilege, the state court can invalidate the law as applied to those individuals and sever those applications from the statute.⁷¹ If the presumption of severability is followed, there is no reason to relax the general rule against third-party standing.

Second, overbreadth challenges are disfavored because of the conventional wisdom that federal courts should refrain from making constitutional decisions if they can avoid doing so,⁷² and should render a nar-

⁶⁷ *United States v. Raines*, 362 U.S. 17, 21 (1960); *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912). *See also* *New York v. Ferber*, 458 U.S. 747, 767 (1982). For a more detailed explanation of the third-party standing rule, see Isserles, *supra* note 51, at 366–67.

⁶⁸ *See* Fallon, *supra* note 31, at 861 (citing *Raines*, 362 U.S. at 22).

⁶⁹ *Yazoo*, 226 U.S. at 219. *See also* TRIBE, *supra* note 34, § 12-27, at 1023–24; Isserles, *supra* note 51, at 369 n.40 (calling this dispute “the most important controversy” surrounding the theoretical justifications for overbreadth); Monaghan, *supra* note 34, at 3.

⁷⁰ *Yazoo*, 226 U.S. at 219.

⁷¹ *Id.* at 219–20. The presumption of severability is not applied where the party challenging the law shows that the enacting legislature intended for the law to be inseparable. Isserles, *supra* note 51, at 368–69 & n.34.

⁷² The most often cited authority for this proposition is Justice Brandeis’s concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., con-

rower rather than broader constitutional decision where the constitutional issue is unavoidable.⁷³ Piecemeal, as-applied adjudication thus advances principles of judicial restraint by encouraging avoidance of unnecessary constitutional decisionmaking.⁷⁴

Third, critics of facial overbreadth claims assert federalism concerns. Where invoked by federal courts to examine state or local laws, overbreadth broadens the federal judiciary's role in micromanaging the powers of state and local governments. It permits courts to impose sweeping remedies that completely invalidate laws that, at least in some applications, may serve important social interests.⁷⁵ Moreover, to the extent that overbreadth leads federal courts to speculate about the potential applications of state or local statutes, the federal courts are also said to be interfering with state prerogatives.⁷⁶ State courts are presumptively capable of paring down their legislatures' statutes in a conscientious and responsible manner that respects federal constitutional principles.⁷⁷ The federal courts' facial invalidation of state laws for overbreadth takes that function away from state courts.

Fourth, whenever a federal court invalidates a federal statute on overbreadth grounds, separation of powers concerns arise.⁷⁸ Federal courts are said to overreach when they unnecessarily invalidate measures adopted by Congress.

Finally, critics of overbreadth argue that facial invalidation of statutes may compromise the government's ability to address social problems relating to conduct that is not constitutionally protected. Assuming that an overbroad statute has some legitimate applications, a court's invalidation of the entire statute interferes with the state's ability to regulate conduct that it has a legitimate interest in addressing. A series of as-applied challenges might have the effect of more precisely tailoring the statute to its constitutional applications while excluding those whose speech is constitutionally protected.

curing). For interesting discussions of the avoidance doctrine, see Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (labeling the avoidance concept as the "last resort" rule), and Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (describing the avoidance canon as comprising related, but distinct, concepts). For a critical evaluation of the costs of the avoidance doctrine, see Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71.

⁷³ See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). One scholar has labeled this aspect of the avoidance doctrine the "rule of measured steps." See Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 298 (1996).

⁷⁴ See *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring).

⁷⁵ Fallon, *supra* note 31, at 890.

⁷⁶ *Id.* at 861.

⁷⁷ *Brockett*, 472 U.S. at 510 (O'Connor, J., concurring).

⁷⁸ *TRIBE*, *supra* note 34, § 12-30, at 1032. Parallel state separation of powers concerns might arise in the case of a state court that adjudicates a claim of facial overbreadth with regard to a state or local statute. That is, concerns about judicial interference with legislative choice exist in state court overbreadth challenges as well.

The most interesting aspect of critiques of the overbreadth doctrine is that they principally relate to the remedial authority of the federal courts and not to the doctrine's effects on speech or speakers. As Richard Fallon has observed, "[a]lthough overbreadth doctrine rises to prominence in the heady garden of constitutional law, the roots that define its strength lie in the rocky and mysterious soil of federal courts doctrines."⁷⁹ In other words, overbreadth doctrine has been attacked mainly because of its role in empowering federal courts, with much less attention paid to the First Amendment values the doctrine was originally designed to advance. Perhaps most significantly, the debate over overbreadth has ignored one of its most important free speech functions, the ability to surface illegitimate government motives.

II. *HILL v. COLORADO*

As described in Part IV, some scholars have recently begun to view the structure of First Amendment doctrine as a tool for surfacing illicit government motives.⁸⁰ In its present form, however, the doctrine focuses only on overt forms of speech discrimination. The Supreme Court, for example, has rejected the idea of engaging in direct inquiries into improper legislative motive in free speech cases.⁸¹ Furthermore, while the rules against viewpoint and content discrimination serve important normative values, they have come to dominate First Amendment practice and discourse. The irony of this emphasis is that because the present doctrine so strongly disfavors explicit discrimination, it creates powerful incentives for government actors to obscure such purposes.⁸² Legislators surely understand that whether sincerely motivated by concern for a social problem or secretly harboring antagonism toward specific types of speech, they must draft laws that regulate expression in a facially neutral manner in order to avoid the presumption against viewpoint and content discrimination.⁸³ If lawmakers wish to regulate a particular type of constitutionally protected speech or speech-related conduct, they cannot openly

⁷⁹ Fallon, *supra* note 31, at 856.

⁸⁰ See Kagan, *supra* note 19; Rubinfeld, *supra* note 32.

⁸¹ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986); *United States v. O'Brien*, 391 U.S. 367, 383–85 (1968). Direct inquiry into governmental purpose is central to other areas of constitutional law, such as equal protection doctrine, *Washington v. Davis*, 426 U.S. 229, 239 (1976), and Free Exercise Clause jurisprudence, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

⁸² See Raskin & LeBlanc, *supra* note 28, at 182 (stating that, in *Hill*, “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”).

⁸³ For an extensive argument that legislators have a constitutional duty to consider ex ante the constitutionality of laws they enact, see Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

identify the object of their concern in the statute's language.⁸⁴ In this Part, I examine how those incentives may have operated in the political process that led to the enactment of Colorado's bubble law.

Since the Supreme Court's initial declaration of a limited constitutional guarantee against state interference with a woman's decision to obtain an abortion in *Roe v. Wade*,⁸⁵ advocates and opponents of abortion have taken to the streets in a classic political struggle. Far from ending the abortion debate, *Roe* and its succeeding cases have generated a strident, aggressive, and sometimes even tragically violent battle over this issue.⁸⁶ This has provoked a parallel constitutional dilemma regarding the scope of anti-abortion protestors' First Amendment rights, particularly in highly confrontational public demonstrations at facilities where abortions are performed and in residential neighborhoods where people who work at abortion clinics live.⁸⁷

The conflict has played out in two major ways. First, some pro-choice organizations and abortion clinics have sought injunctive relief against certain aspects of anti-abortion protest activities. Focusing on specific clinics with a substantial history of past disruption associated with anti-abortion protests, these injunctions were directed at groups allegedly engaged in past misconduct. By and large, efforts by abortion providers to seek judicial relief have been successful. Injunctions have been validated in part by the Supreme Court in *Schenck v. Pro-Choice Network*⁸⁸ and *Madsen v. Women's Health Center, Inc.*⁸⁹ In *Madsen*, the Court articulated a new First Amendment standard unique to reviewing what it called "content neutral" injunctions that affect speech. The Court announced that such an injunction's provisions must "burden no more speech than necessary to serve a significant government interest."⁹⁰

⁸⁴ See Raskin & LeBlanc, *supra* note 28, at 211 (observing that the Court's exclusive focus on facial neutrality may be a problem if "attentive constitutional lawyers are drafting the laws").

⁸⁵ 410 U.S. 113 (1973).

⁸⁶ See, e.g., *Violence at Abortion Clinics*, USA TODAY, Jan. 30, 1998, at 10A (summarizing major incidents of violence directed at abortion clinics and staff). See generally LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

⁸⁷ See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 778 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988). The federal government has also adopted the Freedom of Access to Clinics Entrances Act of 1994, a law designed to ensure women's access to abortion facilities. 18 U.S.C. § 248 (2000) (prohibiting injury of, intimidation of, or interference with persons entering a reproductive health facility).

⁸⁸ 519 U.S. 357 (1997).

⁸⁹ 512 U.S. 753 (1994).

⁹⁰ *Id.* at 765. In adopting this new standard, the Court stated that judicial review must focus "close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech." *Id.* This makes the standard slightly more stringent than that imposed on content-neutral *statutory* regulations of the time, place, or manner of speech. *Id.* (stating that the standard time, place, or manner analysis was not "sufficiently rigorous"). In dissent, Justice Scalia disparaged this as "intermediate-intermediate scrutiny." *Id.* at 791 (Scalia, J., dissenting).

Second, arguing that the state has a legitimate interest in specifically protecting the constitutional rights of individuals seeking abortion services, as well as in generally protecting personal autonomy, legislators have targeted protest activity in the areas surrounding abortion facilities. Several state and local legislatures have now adopted statutes that limit the physical space in which speakers near such facilities may locate themselves for the purpose of engaging in First Amendment activity.⁹¹

For at least two reasons, however, these laws have been drafted to avoid specific reference to abortion protest or facilities where abortions are performed. First, as stated above, the incentive structure established by modern First Amendment doctrine places tremendous pressure on lawmakers to avoid engaging in express viewpoint or content discrimination in their efforts to regulate these spaces. Second, lawmakers may have been responding to Justice Stevens's separate opinion in *Madsen*, which anticipated and discussed the possibility of legislative efforts to regulate speech at abortion clinics. The majority in *Madsen* argued that injunctions regulating speech present a greater risk of censorship than general legislation, which "represent[s] a legislative choice regarding the promotion of particular societal interests."⁹² Justice Stevens's opinion expressed his concern that broad statutes regulating abortion protest created greater First Amendment risks than narrowly targeted injunctions.⁹³ He wrote that "legislation is imposed on an entire community regardless of individual culpability . . . a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment."⁹⁴ Perhaps in response to these pressures, bubble laws have been carefully drafted to avoid specific references to abortion.⁹⁵

A. *The Colorado Bubble Law*

1. *Statutory Language*

In 1993, the Colorado legislature enacted a law that created criminal penalties for persons who interfered with another person's entry to or exit from any health care facility.⁹⁶ The statute defines at least two types of

⁹¹ See *supra* note 7.

⁹² *Madsen*, 512 U.S. at 764.

⁹³ *Id.* at 778 (Stevens, J., concurring in part and dissenting in part).

⁹⁴ *Id.*

⁹⁵ See *supra* note 7.

⁹⁶ COLO. REV. STAT. § 18-9-122 (2002). The entire statute reads:

Preventing passage to and from a health care facility—engaging in prohibited activities near facility.

(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against

violations. First, it establishes a criminal law violation for anyone who “knowingly obstructs, detains, hinders, impedes, or blocks another person’s entry to or exit from a health care facility.”⁹⁷ At least to the extent that this part of the law prohibits expressive conduct (and cannot be applied to acts of pure speech) to further an interest not related to the speech, it is likely that it would be upheld under the standards established in *United States v. O’Brien*.⁹⁸ The plaintiffs in *Hill* did not seek invalidation of this section.⁹⁹

Second, the statute forbids a person to:

certain medical procedures must be balanced against another person’s right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person’s access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person’s entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person’s entry to or exit from a health care facility.

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

(4) For the purposes of this section, “health care facility” means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

Id.

⁹⁷ *Id.* § 18-9-122(2).

⁹⁸ 391 U.S. 367, 377 (1968). *O’Brien* established a four-part test for evaluating whether a neutral law regulating conduct with both expressive and non-expressive components violates the First Amendment. The court must ask whether: (1) the law is designed to serve an end within the government’s power; (2) the law furthers an important or substantial government interest; (3) the government’s interest is unrelated to the suppression of expression; and (4) the restriction is no greater than necessary to further the government’s interest. *Id.* The bubble law does not define what conduct may constitute obstructing, detaining, hindering, impeding, or blocking. Therefore, it is conceivable that a person could violate section 122(2) either physically, as in tackling someone trying to enter a facility, or by other means. For example, certain forms of speech might “impede” a person from entering or exiting a facility. If the latter were true, *O’Brien* would not apply.

⁹⁹ See Joint Appendix at JA-14, *Hill v. Colorado*, 530 U.S. 703 (2000) (No. 98-1856) (Plaintiff’s Verified Complaint).

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.¹⁰⁰

A violation of either provision is a class 3 misdemeanor.¹⁰¹ In addition to criminal penalties, the law creates a cause of action for damages and injunctive relief against any person who commits or incites others to commit the offense defined in the criminal portion of the statute.¹⁰²

The Colorado legislature expressed its intentions in the law's preamble, which states that "access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state."¹⁰³ Expressly acknowledging the potential competing interests at stake, it went on to state that "the exercise of a person's *right to protest or counsel against certain medical procedures* must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner."¹⁰⁴ The preamble also asserted that preventing willful obstruction of a person's access to counseling and treatment at a facility was a matter of "statewide concern" and that it was appropriate to enact legislation to prohibit a person from "knowingly obstructing another person's entry to or exit from a health care facility."¹⁰⁵

¹⁰⁰ COLO. REV. STAT. § 18-9-122(3) (2002). The Colorado bubble bill was modeled in part on local ordinances enacted in Boulder and Denver. BOULDER, COLO., REV. CODE, 1981 § 5-3-10 (Supp. 2001), *available at* <http://www.ci.boulder.co.us/cao/brc/5-3.html>; DENVER COLO., REV. MUNICIPAL CODE, § 38-114 (2002), *available at* <http://livepublish.municode.com/LivePublish/newonlinecodes.asp?infobase=10257>. For an early analysis of the First Amendment implications of the Boulder ordinance, see Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856 (1988) (arguing that the Boulder ordinance may be construed as a reasonable time, place, and manner restriction that does not violate the First Amendment rights of protestors).

¹⁰¹ COLO. REV. STAT. §§ 18-9-122(2) to 18-9-122(3) (2002). Under Colorado law, the punishment for class 3 misdemeanors ranges from a minimum of a \$50 fine to the maximum of six months imprisonment and a \$750 fine. *See* COLO. REV. STAT. § 18-1.3-501 (2002).

¹⁰² COLO. REV. STAT. § 13-21-106.7(1) (2002) (establishing a civil cause of action for damages and injunctive relief for violations of section 18-9-122). A person suing under the civil action portion of the law need not show that the civil defendant has been convicted under the criminal provision. COLO. REV. STAT. § 13-21-106.7(2) (2002).

¹⁰³ COLO. REV. STAT. § 18-9-122(1) (2002).

¹⁰⁴ *Id.* (emphasis added). While a woman's right to choose to terminate her pregnancy is constitutionally protected against state intrusion, there is no constitutional right protecting a woman from private actors' interference with her ability to exercise that right. Her interests vis-à-vis private individuals must derive from other sources of law.

¹⁰⁵ *Id.*

2. Legislative History

As the Supreme Court readily conceded, “the legislative history makes it clear that [the Colorado bubble law’s] . . . enactment was primarily motivated by activities in the vicinity of abortion clinics.”¹⁰⁶ Indeed, the law’s sponsor, Diana DeGette, introduced the first Colorado House hearings on the proposed law by saying that “[a]ll Colorado women have the right to reproductive choice, and they exercise that right in a variety of different ways.”¹⁰⁷ She then observed that “[a]nti-abortion groups are picketing women’s health clinics across the state and are trying to intimidate or physically block all people’s entry into these clinics without regard to the reasons they are entering the clinics.”¹⁰⁸ When the bill was signed into law, DeGette referred to it as “the only significant pro-choice bill to pass in Colorado since 1967.”¹⁰⁹ Likewise, when Colorado’s governor signed the bill into law, he stated that “[t]his bill prevents the harassment of someone entering an abortion clinic.”¹¹⁰

In an apparent attempt to make the bubble law appear to address more than abortion, DeGette and other supporters continually referred to women’s access to other health services throughout the hearings. Those references, however, merely indicated that anti-abortion protestors sometimes interfered with the access of women seeking non-abortion health services at facilities that also provided abortions.¹¹¹ In other words, though not all of the patients the legislature aimed to protect were women seeking abortions, the sole concern of the legislation was the activity of anti-abortion protestors.¹¹²

¹⁰⁶ Hill v. Colorado, 530 U.S. 703, 715 (2000). For a similar discussion of the bubble law’s legislative history, see Raskin & LeBlanc, *supra* note 28, at 215–16.

¹⁰⁷ Joint Appendix at JA-59, Hill (No. 98-1856) (Colo. H.B. 1209-93 Hearings, statement of Rep. Diana DeGette).

¹⁰⁸ *Id.*

¹⁰⁹ *Abortion Clinic “Bubble” Bill Signed*, COLO. SPRINGS GAZETTE TELEGRAPH, Apr. 20, 1993, at B4.

¹¹⁰ Steve Lipsher, *Romer Signs Abortion Clinics “Bubble Bill,”* DENVER POST, Apr. 20, 1993, at 4B.

¹¹¹ See, e.g., Joint Appendix at JA-62, Hill (No. 98-1856) (Colo. H.B. 1209-93 Hearings, testimony of Gary Jamieson, Associate Director and Controller for Planned Parenthood of the Rocky Mountains); *id.* at JA-65 (Colo. H.B. 1209-93 Hearings, testimony of Susan Parks, office administrator for Mayfair Women’s Center).

¹¹² Much of the anti-abortion activity described in the hearings was already independently criminalized by other Colorado laws or covered by the bill’s provisions prohibiting the knowing obstruction of another person’s access to a health care facility. See, e.g., *id.* at JA-63 to JA-64 (Colo. H.B. 1209-93 Hearings, testimony of Susan Parks, office administrator for Mayfair Women’s Center, indicating that her clinic had been subject to vandalism, including the pouring of acid on the lobby floor); *id.* at JA-93 to JA-94 (Colo. H.B. 1209-93 Hearings, testimony of Diane Dillingham, a volunteer escort at the Vine Street Clinic in 1988, describing anti-abortion protestors’ conduct in pushing, shoving, and blocking access to a driveway, and also indicating that “[m]ost of those protestors were arrested for trespassing”).

The only references to protestors other than anti-abortion protestors came from a disability rights advocate, who provided anecdotal information about two incidents near health care facilities.¹¹³ First, he reported that a man receiving a baboon liver transplant in Pittsburgh was “beset” by animal rights protestors.¹¹⁴ In the other reported incident, the witness asserted that a man was knocked out of his wheelchair by anti-Medicaid protestors in Florida.¹¹⁵ Based on these two incidents, he maintained that disabled people might have problems gaining access to health care facilities.¹¹⁶

Opponents of the bill tried to force the legislature to confront the fact that it seemed to be targeting anti-abortion protest. As one witness noted, “I think we all know that we’re talking about abortion here, so let’s get to that.”¹¹⁷ Some lawmakers were more candid than others regarding the singular focus of the bill. When an anti-abortion witness asked a legislator if he would “introduce a bill doing the same thing for animal rights protestors,”¹¹⁸ he responded, “That’s irrelevant.”¹¹⁹

The Colorado legislature’s effort to appear viewpoint- and content-neutral reflects the doctrinal pressure described earlier. Though the legislature’s concern related almost exclusively to anti-abortion protest, the bill’s sponsor argued that the bill’s restrictions would be analyzed under the time, place, or manner analysis, which applies only to content-neutral laws.¹²⁰ She noted that:

[T]he testimony has primarily focused on family planning clinics. However, I think it’s important to realize the overall purpose

¹¹³ *Id.* at JA-107 to JA-108, JA-155 (Colo. H.B. 1209-93 Hearings, testimony of Mark Simon, disability rights advocate, describing anecdotes).

¹¹⁴ *Id.* at JA-155 (Colo. H.B. 1209-93 Hearings, testimony of Mark Simon, disability rights advocate). The author was able to verify this incident, but press accounts indicate that it involved only fifteen protestors holding signs and chanting outside of the hospital. See *Surgeon Defends Baboon-Liver Transplant* (Harrisburg, Pa., Evening News television broadcast, July 1, 1992).

¹¹⁵ Joint Appendix at JA-155, *Hill* (No. 98-1856) (Colo. H.B. 1209-93 Hearings, testimony of Mark Simon, disability rights advocate). The author was unable to verify this incident through any press accounts.

¹¹⁶ *Id.* at JA-155 to JA-156 (Colo. H.B. 1209-93 Hearings, testimony of Mark Simon, disability rights advocate). Interestingly, however insubstantial this information was, it found its way into the Supreme Court’s decision in *Hill*. *Hill v. Colorado*, 530 U.S. 703, 709 n.6 (2000).

¹¹⁷ Joint Appendix at JA-160, *Hill* (No. 98-1856) (Colo. H.B. 1209-93 Hearings, testimony of Jeannie Hill, anti-abortion advocate and subsequent plaintiff in *Hill v. Colorado*). See also *id.* at JA-74, JA-166, JA-184 (No. 98-1856) (Colo. H.B. 1209-93 Hearings, testimony of anti-abortion advocates Philip Faustin of Operation Rescue Colorado, Michelle Rader, and Phil Harrison).

¹¹⁸ *Id.* at JA-78 (Colo. H.B. 1209-93 Hearings, testimony of anti-abortion advocate Philip Faustin of Operation Rescue Colorado).

¹¹⁹ *Id.*

¹²⁰ *Id.* at JA-114 to JA-116 (No. 98-1856) (Colo. H.B. 1209-93 Hearings, statement of Rep. Diana DeGette).

of this Bill, which is not directed solely toward those types of clinics, but, rather, towards the right of any patient to seek the medical treatment they [sic] need. And I was very grateful for the witness who testified that protest can take other forms of expression: anti-Medicaid, anti-animal experimentation, and so on.¹²¹

Notwithstanding this statement, the legislature undertook no meaningful effort to determine whether there existed a widespread problem of interference with access to health care facilities by any types of speakers other than anti-abortion protestors.

B. *The Supreme Court's Decision*

The plaintiffs in *Hill v. Colorado* described themselves as “sidewalk counselors,” a term used within the anti-abortion movement to describe individuals who attempt to dissuade women seeking abortions from having the procedure performed.¹²² The plaintiffs alleged that their activities included attempts “to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives” through verbal or written communication, including conversation and display of signs and distribution of literature.¹²³ They alleged that these activities frequently involved coming within eight feet of other persons.¹²⁴ Soon after the state enacted the statute, the plaintiffs sued to have the bubble law invalidated and to en-

¹²¹ *Id.* at JA-113 (No. 98-1856) (Colo. H.B. 1209-93 Hearings, statement of Rep. Diana DeGette).

¹²² 530 U.S. at 708, 721. A number of commentators have published discussions of *Hill*. See, e.g., Kristen G. Cowan, *The Tailoring of Statutory Bubble Zones: Balancing Free Speech and Patients' Rights*, 91 J. CRIM. L. & CRIMINOLOGY 385 (2001); William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387 (2002); Stephan L. Oestreicher, Jr., *Effectual Interpretation and the Content-Neutrality Inquiry: On Justice Scalia and Hill v. Colorado*, 12 GEO. MASON U. CIV. RTS. L.J. 1 (2001); David G. Pettinari, *Hill v. Colorado—The United States Supreme Court Squares off with Colorado over the First Amendment Rights of Abortion Protesters*, 77 U. DET. MERCY L. REV. 803 (2000); Raskin & LeBlanc, *supra* note 28; Allison Lange, Casenote, *Hill v. Colorado*, 120 S. Ct. 2480 (2000), 11 SETON HALL CONST. L.J. 429 (2001); Jennifer L. Maffett, Note, *Balancing Freedom of Speech Against the Rights of Unwilling Listeners: The Attack on the First Amendment in Hill v. Colorado*, 26 U. DAYTON L. REV. 327 (2001); Taylor C. Mascovitz, Case Comment, *Hill v. Colorado*, 530 U.S. 703 (2000), 35 SUFFOLK U. L. REV. 231 (2001); Brian W. Oberst, Case Note, *Buffering Free Speech: An Examination of the Impact of Colorado's Buffer Zone Law on Protected Speech after Hill v. Colorado*, 120 S.Ct. 2480 (2000), 24 HAMLINE L. REV. 89 (2000); Mark Villanueva, Note, *Hill v. Colorado: The Supreme Court's Deviation from Traditional First Amendment Jurisprudence to Silence the Message of Abortion Protestors*, 51 CATH. U. L. REV. 371 (2001); Christy E. Wilhelm, Note, *If You Can't Say Something Nice, Don't Say Anything at All: Hill v. Colorado and the Antiabortion Protest Controversy*, 23 CAMPBELL L. REV. 117 (2000); James J. Zych, Note, *Hill v. Colorado and the Evolving Rights of the Unwilling Listener*, 45 ST. LOUIS U. L.J. 1281 (2001).

¹²³ *Hill*, 530 U.S. at 708.

¹²⁴ *Id.*

join its enforcement, claiming that they feared prosecution under the law.¹²⁵ The plaintiffs' claimed primarily that the bubble law was facially unconstitutional under the First Amendment because it operated as a prior restraint, was a content-based regulation not justified by sufficient state interests, was facially overbroad and impermissibly vague.¹²⁶

The Court's analysis of the statute commenced with a recognition that the case involved legitimate, competing interests. The Court acknowledged, for example, that the bubble law had a negative impact on forms of expression traditionally protected by the First Amendment and exercised in "quintessential" public forums.¹²⁷ On the other hand, the Court noted that the state's interests in health and safety might "justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."¹²⁸

While noting that the state may not legitimately curtail speech simply because of its offensiveness to others, the Court asserted that First Amendment protection does not extend to speech that is "so intrusive that the unwilling audience cannot avoid it."¹²⁹ In past cases, the Court has maintained that listeners to offensive or otherwise unwanted speech could avert their eyes or ears while in public places.¹³⁰ Under the captive audience rule, however, the Court has recognized that special state interests attach where unwanted speech is directed at a person in her own home,¹³¹ in the vicinity immediately outside of her home,¹³² or in other places where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."¹³³ In *Hill*, without citing any authority, the Court extended the state's interest in protecting persons

¹²⁵ See Joint Appendix at JA-18 to JA-19, *Hill* (No. 98-1856) (Plaintiff's Verified Complaint). The lower Colorado courts had upheld the law, and the state supreme court denied discretionary review. See *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), cert. denied No. 95SC593, 1996 Colo. LEXIS 136 (Colo. Feb. 26, 1996). Subsequently, the United States Supreme Court decided *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), in which it invalidated substantial parts of an injunction against abortion protest. The plaintiffs in *Hill* petitioned for certiorari, and the case was vacated and remanded by the United States Supreme Court for the state courts to reconsider their decisions in light of *Schenck*. *Hill v. Colorado*, 519 U.S. 1145 (1997) (order vacating and remanding for reconsideration). Thereafter, the Colorado appellate court and the Colorado Supreme Court again rejected the plaintiffs' constitutional challenge, *Hill v. City of Lakewood*, 949 P.2d 107 (Colo. Ct. App. 1997), aff'd sub nom. *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999), after which the United States Supreme Court granted certiorari. *Hill v. Colorado*, 527 U.S. 1068 (1999).

¹²⁶ See Joint Appendix at JA-24 to JA-26, *Hill* (No. 98-1956) (Plaintiff's Verified Complaint).

¹²⁷ *Hill*, 530 U.S. at 714-15.

¹²⁸ *Id.* at 715.

¹²⁹ *Id.* at 716.

¹³⁰ See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975).

¹³¹ *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

¹³² *Frisby v. Schultz*, 487 U.S. 474 (1988).

¹³³ *Erznoznik*, 422 U.S. at 209.

from unwanted speech to other “confrontational settings.”¹³⁴ Interestingly, however, earlier in its opinion, the Court acknowledged that “[t]here was no evidence . . . that the ‘sidewalk counseling’ conducted by petitioners in this case was ever abusive or confrontational.”¹³⁵

I. Viewpoint and Content Neutrality

Significantly, the Court in *Hill* held that the bubble law was viewpoint- and content-neutral. The fundamental analysis of this question, it stated, turned on whether the state adopted the speech regulation because of disagreement with its message.¹³⁶ In concluding that the bubble law was content-neutral, the Court first pointed out that the law regulated not speech, but the places where some speech may occur.¹³⁷ Second, the Court noted that the Colorado legislature did not adopt the law because of its disagreement with the message of the anti-abortion protestors’ speech.¹³⁸ Third, the Court found that the state’s interests in protecting access and privacy and in providing police with clear guidelines were unrelated to the content of the protestors’ speech.¹³⁹

The *Hill* majority also rejected other viewpoint and content arguments, one raised by the plaintiffs and two by Justice Kennedy’s dissent. First, the Court rejected the plaintiffs’ claim that the law was content-based because it criminalized statements constituting “oral protest, education, or counseling” but not other oral communications.¹⁴⁰ The plaintiffs argued that this provision would require a court to make distinctions between protestors whose statements constituted protest, education, or counseling and persons who engaged in other forms of oral communication. The Court rejected this claim, observing that the law often requires courts to examine the content of a speaker’s message to determine her purpose, such as in cases involving whether statements constitute threats or blackmail.¹⁴¹ The Court similarly rejected Justice Kennedy’s argument that the law was viewpoint-based because it applied to speech in a specific location and because its enactment was motivated by the conduct of partisans on one side of a debate.¹⁴²

On the surface, the Court’s conclusions are plausible. The bubble law could be viewed as viewpoint- and content-neutral. The law does not,

¹³⁴ *Hill*, 530 U.S. at 717. For a critical analysis of the Court’s extension of the captive audience doctrine to anti-abortion protests on public sidewalks, see Lee, *supra* note 122, at 404–09; Raskin & LeBlanc, *supra* note 28, at 201.

¹³⁵ *Hill*, 530 U.S. at 710.

¹³⁶ *Id.* at 719 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹³⁷ *Id.* at 719.

¹³⁸ *Id.*

¹³⁹ *Id.* at 719–20.

¹⁴⁰ *Id.* at 720.

¹⁴¹ *Id.* at 721.

¹⁴² *Id.* at 724–25.

for example, formally distinguish between a protestor who distributes an anti-abortion manifesto and a person handing out sample menus from a fast food chain. The display of any sign, without regard to its contents, is prohibited. And the subject of one's oral protest, education, or counseling is likewise unaddressed by the statute. Similarly, the law could be construed as viewpoint-neutral. If the challenged speech involved protests around a health care facility that was alleged to have overcharged its patients for services, the regulations would constrain the speech of both pro- and anti-bilking forces inside the bubble zone.

Each of the arguments claiming that the law is facially viewpoint- and content-neutral, however, is seriously flawed.¹⁴³ Indeed, there is powerful evidence that the legislature's principal or only concern was anti-abortion protestors. If traditional content- and viewpoint-analysis fails to recognize such apparent illicit motives, other doctrinal mechanisms for flushing them out must be applied.

2. *Time, Place, or Manner Analysis*

The Court next concluded that the bubble law's restrictions were narrowly tailored to serve significant state interests in promoting unimpeded access to health care facilities, preventing potential trauma to patients related to "confrontational protests," and protecting unwilling listeners from communication in a captive audience setting.¹⁴⁴ The Court emphasized that the narrow tailoring requirement of the time, place, or

¹⁴³ An extensive discussion of the flaws in the majority's content and viewpoint analysis is beyond the scope of this Article and is worthy of its own essay. For example, that the regulation affected speech in a particular location is not tantamount to the conclusion that it is content-neutral. See David B. Cruz, "Just Don't Call it Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 993 n.361 (2001) ("The majority's test would be an adequate reason for inferring content neutrality only if a law's content neutrality and its being a time-place-manner regulation were equivalent. But, as the dissent properly notes, they are not."). In addition, the Court's focus on only the statute's language ignored its fairly transparent purpose. See Raskin & LeBlanc, *supra* note 28, at 182, 216; Sullivan, *supra* note 3, at 737 ("Hill showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."). Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding that, under the First Amendment's Free Exercise Clause, the Court could look beyond a law's facial neutrality to examine the discriminatory purpose of the law). Even looking only to the language, moreover, the Court ignored the discriminatory implications of regulating speech involving protest. Colloquium, *supra* note 3, at 749. Furthermore, the Court's discussion is incomplete, as it appears to limit its analysis to the concepts of viewpoint or subject matter discrimination. *Hill*, 530 U.S. at 723 (stating that Colorado's bubble law "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker"). Viewpoint and subject matter discrimination, however, are but two of the subsets of content discrimination. *But see id.* at 737 (Souter, J., concurring) (distinguishing between laws that regulate because of content and laws that regulate "offensive behavior identified with its delivery"). For a fairly extensive critique of the Court's viewpoint and content analysis, see Raskin & LeBlanc, *supra* note 28, at 194–216.

¹⁴⁴ *Hill*, 530 U.S. at 725–30.

manner analysis does not require that the government achieve its goals with means that are either the least restrictive of or intrusive on speech.¹⁴⁵

The Court maintained that the eight-foot bubble would not interfere with protestors' ability to display signs to their intended audience.¹⁴⁶ Furthermore, while conceding that the bubble would make it more difficult to communicate oral messages, the Court concluded that this was a minimal concern because the law did not regulate the number of speakers or their noise level.¹⁴⁷ It also held that, unlike the fifteen-foot bubble invalidated in *Schenck*, the eight-foot zone allowed people to communicate at a "normal conversational distance."¹⁴⁸ Though the Court recognized that the bubble presented a serious impediment to leafletters, its concerns were partially alleviated by the fact that the law only burdened protestors' ability to communicate with unwilling listeners.¹⁴⁹ Finally, with respect to all three of these expressive media, the Court observed that the law permitted protestors to stand still and await the approach of persons to whom they wanted to communicate, thereby avoiding the restrictions of the eight-foot zone.¹⁵⁰ Thus, it was important to the Court that protestors retained the ability to communicate their message to people entering or exiting health care facilities.

As some commentators have observed, the central flaw in this part of the Court's analysis is that it conflated consideration of the statute's narrow tailoring with its examination of whether the law permitted protestors "ample alternative channels of communication" to convey their message.¹⁵¹ Narrow tailoring analysis is meant to focus on the fit between the state's regulatory means and its objectives.¹⁵² Rather than analyzing whether the bubble law was sufficiently tailored to the state's asserted objectives, the Court's analysis instead focused on whether, in spite of the law's restrictions, speakers could still engage in some forms of communication.¹⁵³ That analysis, however, properly falls under the third part of the *Ward* test, which examines whether the law left "ample room to

¹⁴⁵ *Id.* at 726 & n.32 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

¹⁴⁶ *Id.* at 726. The Court also observed that the law did not limit the number, size, text, or images on any signs and even argued that the bubble might relieve congestion, thereby making it easier to read signs. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 726–27 (quoting *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997)).

¹⁴⁹ *Id.* at 727–28.

¹⁵⁰ *Id.* at 726–27. The statute's scienter requirement also protected speakers from inadvertent violations of the law. *Id.* at 727.

¹⁵¹ See Cowan, *supra* note 122, at 421 (saying that the Court collapsed its analysis of these two issues); Note, *The Supreme Court 1999 Term: Leading Cases*, 114 HARV. L. REV. 179, 294–95 (2000) (describing *Hill*'s application of *Ward* as "toothless").

¹⁵² *Ward v. Rock Against Racism*, 491 U.S. 781, 796–802 (1989) (analyzing the fit between the government's regulation and its asserted interests).

¹⁵³ *Hill*, 530 U.S. at 725–27.

communicate a message through speech.”¹⁵⁴ Thus, the Court effectively bypassed the narrow tailoring requirement.

The next part of the Court’s analysis was similarly anemic. There the Court emphasized the special concerns associated with speech activity surrounding health care facilities. The Court asserted that the state had a legitimate interest in protecting those who wish to enter health care facilities from “close physical approaches,” particularly because “[p]ersons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions.”¹⁵⁵ The Court concluded that the state could legitimately take a prophylactic approach to advance these interests, even though such a rule “will sometimes inhibit a demonstrator whose approach in fact would have proved harmless.”¹⁵⁶ The Court said that this broader approach was justified because of the difficulty in protecting, for example, a pregnant woman from actual physical harassment by rules that focused on the individual impact of each protestor’s act.¹⁵⁷

As Justice Scalia’s dissent pointed out, however, “[p]rophylaxis is the antithesis of narrow tailoring.”¹⁵⁸ Indeed, the Court’s argument here is at odds with the concept of precision that underlies much First Amendment doctrine.¹⁵⁹

3. *Overbreadth*

The Court quickly dismissed the plaintiffs’ contention that the bubble law was unconstitutionally overbroad. Moreover, the ironic theme that emerges from the Court’s overbreadth analysis is that the breadth of the statute was in fact a saving feature.¹⁶⁰

As characterized by the Court, the plaintiffs asserted two overbreadth theories. First, plaintiffs claimed that the statute was overbroad because it “protects too many people in too many places, rather than just the patients at the facilities where confrontational speech had occurred” and also burdens all speakers without regard to whether they have engaged in past misconduct.¹⁶¹ In other words, the plaintiffs complained about the bubble law’s lack of precision in relation to the state’s legiti-

¹⁵⁴ *Id.* at 729. Indeed, the Court’s analysis of ample alternatives referred back to its discussion of narrow tailoring and its conclusion that speakers retained the ability to communicate within the constraints of the bubble law. *Id.* at 729–30.

¹⁵⁵ *Id.* at 729.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 762. *See also* Note, *supra* note 151, at 296 (“A state can always characterize an overrestrictive regulation of speech as prophylactic; indeed, the more overrestrictive the regulation, the more plausible the claim.”).

¹⁵⁹ *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 438 (1963).

¹⁶⁰ The majority opinion touched upon vagueness and prior restraint theories, but treated them with dispatch. *Id.* at 732–35.

¹⁶¹ *Hill*, 530 U.S. at 730.

mate interests. Second, plaintiffs argued that the law was overbroad because it “bans virtually the universe of protected expression.”¹⁶²

In response, the Court maintained the broad coverage of the statute was constitutionally insignificant.¹⁶³ What was important, rather, was that the statute advanced the common interest of all persons trying to gain access to health care facilities.¹⁶⁴ The Court emphasized that “[i]t is precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in *Ward* rather than a more strict standard.”¹⁶⁵ It also distinguished other overbreadth cases, noting that “[i]n this case, it is not disputed that the regulation affects protected speech activity; the question is thus whether it is a ‘reasonable restrictio[n] on the time, place, or manner of protected speech.’”¹⁶⁶ Thus, the Court concluded, “the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.”¹⁶⁷

In rejecting the plaintiffs’ second claim—that the law was overbroad because it banned too much expression—the Court stated that the plaintiffs both misread the statute and incorrectly understood overbreadth doctrine.¹⁶⁸ First, the Court said that the law does not ban speech, but only regulates the places where speech may occur.¹⁶⁹ Second, the Court maintained that overbreadth doctrine’s fundamental function is to permit litigants to facially attack a statute not because of the law’s impact on their own speech, but on the speculation that the law’s very existence will deter those whose speech is protected from expressing themselves.¹⁷⁰

¹⁶² *Id.*

¹⁶³ *Id.* at 730–31.

¹⁶⁴ *Id.* at 731.

¹⁶⁵ *Id.* (citation omitted). The stricter standard referred to was the requirement in *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 765 (1994), that content-neutral injunctions “burden no more speech than necessary to serve a significant government interest.”

¹⁶⁶ *Hill*, 530 U.S. at 731 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁶⁷ *Id.* The Colorado Supreme Court had made a similar argument. That court observed:

The fact that the statute may apply to persons entering health care facilities beyond those providing abortion counseling does not render the statute overly restrictive of speech. Rather, simply and purposefully, that fact renders the statute comprehensive. Indeed, the applicability of the statute to situations other than anti-abortion protesting is one reason we conclude that the statute is content-neutral. *And we decline any invitation on this record to conclude that a facet of a statute that renders it content-neutral necessarily renders it overly broad.*

Hill v. Thomas, 973 P.2d 1246, 1258 (Colo. 1999) (emphasis added), *aff’d sub nom.* *Hill v. Colorado*, 530 U.S. 703 (2000).

¹⁶⁸ *Hill*, 530 U.S. at 731.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 731–32. The Court also invoked *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), concluding that the law had to be substantially overbroad in order to justify facial invalidation. *Hill*, 530 U.S. at 732.

4. *The Dissents*

Justices Scalia and Kennedy each wrote sharp dissents. Justice Scalia disputed the majority's characterization of the bubble law as content-neutral, pointing out that its analysis improperly limited its consideration to subject matter and viewpoint restrictions, though not all content restrictions are based on subject matter or viewpoint.¹⁷¹

Even assuming that the Court correctly analyzed the case under the time, place, or manner analysis, Justice Scalia argued that what the Court found to be a significant state interest—protecting the right of persons approaching health facilities to be left alone—was neither asserted by the State nor supported by the Court's "captive audience" precedents.¹⁷² The latter point was unquestionably true. The notion that the government has an interest in protecting people from unwanted communications had never before been extended to speech on public sidewalks.¹⁷³ With respect to the State's asserted interest in protecting access to health care facilities, Justice Scalia claimed that the law was not sufficiently narrowly tailored.¹⁷⁴

Finally, Justice Scalia argued that the Court's overbreadth analysis was flawed. The majority had claimed that the law's breadth was not problematic because a law may be "broader than the specific concern that led to its enactment."¹⁷⁵ As Justice Scalia pointed out, this is true in most contexts, but not in the context of speech regulations.¹⁷⁶ Distinguishing a broad, prophylactic statute from the injunction upheld in *Schenck*, Justice Scalia emphasized that while injunctions might properly be based on the inability of a particular group to separate its speech from unlawful behavior, statutes cannot constitutionally assume that all persons engaged in protest outside of health care facilities will engage in obstructive conduct.¹⁷⁷

¹⁷¹ *Hill*, 530 U.S. at 742–48 (Scalia, J., dissenting). As stated earlier, viewpoint and subject matter restrictions are but two types of content discrimination. *See supra* note 143. As Justice Scalia observed, a regulation banning speech of a particular demeanor (*e.g.*, happy speech or sad speech) or mode of delivery (*e.g.*, poetry) would discriminate on the basis of content but would constitute neither viewpoint nor subject matter discrimination. *Hill*, 530 U.S. at 743 (Scalia, J., dissenting). *See also* Raskin & LeBlanc, *supra* note 28, at 206 (describing other examples of content regulation pertaining to neither viewpoint nor subject matter).

¹⁷² *Hill*, 530 U.S. at 750–54 (Scalia, J., dissenting).

¹⁷³ *Id.* at 752–53 (Scalia, J., dissenting). *See also* Raskin & LeBlanc, *supra* note 28, at 201.

¹⁷⁴ *Hill*, 530 U.S. at 754–59 (Scalia, J., dissenting). *See also id.* at 749 (Scalia, J., dissenting) (“[I]f . . . forbidding peaceful, nonthreatening, but uninvited speech from a distance closer than eight feet is a ‘narrowly tailored’ means of preventing the obstruction of entrance to medical facilities . . . narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker.”).

¹⁷⁵ *Id.* at 730–31.

¹⁷⁶ *Id.* at 760 (Scalia, J., dissenting).

¹⁷⁷ *Id.* at 761 (Scalia, J., dissenting). Justice Stevens, the author of the majority opin-

Like Justice Scalia, Justice Kennedy focused his dissent on his conclusion that the bubble law effectuated content, and even viewpoint, discrimination.¹⁷⁸ Justice Kennedy echoed Justice Scalia's concerns that the Court had never before upheld a speech restriction on the basis of the state's interest in protecting persons from unwelcome speech in a public forum.¹⁷⁹ Addressing the statute's language, Justice Kennedy also maintained that the law was invalid under the Court's doctrines of First Amendment vagueness and overbreadth.¹⁸⁰ Finally, Justice Kennedy asserted that the Court did not properly apply the controlling precedent with respect to its time, place, or manner analysis.¹⁸¹

III. MISUNDERSTANDING OVERBREADTH

In this Part, I explore how statutory speech bubbles of the type approved in *Hill v. Colorado* are facially overbroad. Section A describes how the bubble law implicates many of the theoretical concerns that justify the overbreadth doctrine. Section B then explains how the current understanding of overbreadth as articulated in *Hill* not only led to a highly doubtful result in the case, but also perpetuated a misunderstanding of the purposes, application, and underlying theory of overbreadth law. Properly understood, overbreadth doctrine should be conceived of and applied as a doctrinal tool to smoke out illicit legislative purpose in certain types of speech regulation cases. This benefit has been previously underemphasized or ignored by both courts and academic commentators.

A. Facial Overbreadth of Statutory Speech Bubbles

The Court's cursory rejection of the plaintiffs' overbreadth claim in *Hill* was puzzling because the bubble law evokes many of the concerns overbreadth law attempts to address. *Hill* fails to account for the vast amount of speech governed by the statute that is unrelated to the government's interests in regulating the areas outside of health care facilities. But, almost no one suggested that any form of speech other than anti-abortion protest presented risks of interfering with any legitimate state interest. First Amendment overbreadth responds to concerns regarding the use of legislative power to regulate substantial amounts of pro-

ion, had actually made this same point in *Madsen*. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 778 (1994) (Stevens, J., concurring in part and dissenting in part) (“[I]njunctive relief should be judged by a more lenient standard than legislation [L]egislation is imposed on an entire community . . . regardless of individual culpability [A] statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment.”).

¹⁷⁸ *Hill*, 530 U.S. at 766–70 (Kennedy, J., dissenting).

¹⁷⁹ *Id.* at 771–72 (Kennedy, J., dissenting).

¹⁸⁰ *Id.* at 772–75 (Kennedy, J., dissenting).

¹⁸¹ *Id.* at 776–91 (Kennedy, J., dissenting).

tected speech where there is insufficient attention paid to precision. In this section, I begin with a description of two different aspects of overbreadth and then argue that the Colorado bubble law and similar restrictions are facially overbroad, and therefore invalid under the First Amendment.

1. *Quantitative Overbreadth, Qualitative Overbreadth*

Problems associated with overbroad statutes implicate two different types of breadth, which I will call “quantitative overbreadth” and “qualitative overbreadth.” In examining how the bubble law affects protected speech, I first describe these distinct, but related, concepts.

Quantitative overbreadth arises when a law that regulates a particular classification or category of unprotected speech sweeps in much more of that particular kind of speech than is constitutionally permissible. For example, suppose that a law regulates all expression involving explicit depictions of certain sexual acts but does not make exceptions for sexually explicit speech that has literary, artistic, political, or scientific value. The law sweeps within its scope not only unprotected obscenity, but also constitutionally protected sexually explicit speech.¹⁸² In that case, the law can be said to be quantitatively overbroad; it regulates too much of a particular *kind* of speech.

Broadrick v. Oklahoma involved such a law.¹⁸³ There, the state proscribed certain types of partisan political activities by government employees that raised concerns regarding the abuse of officials’ supervisory powers to use taxpayer-funded resources for their own political gain.¹⁸⁴ But in proscribing all partisan political activities by government employees, the law encompassed a larger quantity of speech than was the source of any government concern. For example, soliciting campaign contributions at the office water cooler or wearing a Nader for President button are quantitatively similar First Amendment activities (partisan campaigning), both prohibited under the law. *Broadrick* addressed whether the law proscribed too much of that type of activity. The Court concluded it did not.¹⁸⁵

In contrast, a law may implicate *qualitative* overbreadth if it regulates a particular type of expressive conduct that is the primary object of the legislature’s concern, but because of the broad language used to describe the regulated conduct, it also encompasses other types of qualita-

¹⁸² See *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁸³ *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹⁸⁴ See *id.* at 609–10.

¹⁸⁵ *Id.* at 618. Notwithstanding the Court’s conclusion, it could certainly be argued that the law actually did reach a significant amount of speech that did not implicate the government’s legitimate concerns.

tively different speech.¹⁸⁶ Suppose that the state law upheld in *Burson v. Freeman*¹⁸⁷ restricted all speakers from coming within 100 feet of a polling place, but that the state's express interest was limited to inhibiting undue pressure on voters within the area surrounding voting booths. Consider a demonstrator who happened to be protesting building code violations at the school where a polling place was located, but there were no issues relating to the building code on the ballot. To the extent that the law forbids speakers from speaking on non-electoral issues within that zone, the law would implicate qualitatively distinct interests from those that concerned the legislature.

Both types of overbreadth raise concerns traditionally addressed by the doctrine: they both prohibit or deter too much protected speech. Quantitatively overbroad laws are less likely to provoke concerns about hidden legislative purposes because the legislature has openly identified the type of speech that is regulated, even if it reaches too much of it. Qualitatively overbroad laws, however, may indicate that the legislature attempted to obscure its discriminatory intent or agenda with content- and viewpoint-neutral language.

2. *Overbreadth Implications of Bubble Laws*

The Colorado bubble law could be construed as either quantitatively overbroad, qualitatively overbroad, or both. The bubble law could be characterized as quantitatively overbroad if we view the legislature's purpose as banning all conduct, by all types of protestors, that intimidates entrants, increases patients' stress levels, or interferes with ingress and egress to health care facilities.¹⁸⁸ The overbreadth problem would be that the law as written reaches conduct that does not intimidate, increase stress, or interfere with ingress and egress to a health care facility. Peaceful, silent protestors, for example, are forbidden from engaging in protected conduct that fails to implicate the state's interests. They could claim that the law was quantitatively overbroad—it reaches too much of the same type of protest activity (all political speech outside health care facilities).

¹⁸⁶ Jeffrey Shaman has pointed out to me that if a law is qualitatively overbroad, it is not clear that the degree of overbreadth is relevant, since the different types of speech covered may be entitled to full First Amendment protection. I leave further discussion of this point for another day.

¹⁸⁷ 504 U.S. 191 (1992). The actual restriction only prohibited “the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question” *Id.* at 193–94 (citing TENN. CODE ANN. § 2-7-111(b) (Supp. 1991)).

¹⁸⁸ These were the non-speech related interests that the state could legitimately address. Another quantitative overbreadth argument might address the physical breadth of the restrictions. For a brief discussion of this concept, see Note, *supra* note 100, at 1875 n.116.

The bubble law is also qualitatively overbroad, however, because it categorically targets conduct without regard to the government's identified interests. The law reaches not only the type of speech that the government (at least arguably) may regulate, but also other types of speech and, indeed, other classifications of speakers. As just one example, the law would prohibit a protestor who was located within the bubble zone from approaching a person to distribute a leaflet detailing a physician's history of sexually assaulting his patients. Many other types of demonstrators may have good reason to engage in conduct prohibited by the bubble law, including labor demonstrators, animal rights protestors, advocates of managed care reform, opponents of Medicare fraud, speakers discussing experimental medical procedures, and even flat earth society advocates. The bubble law, however, criminalizes all such conduct without regard to whether these qualitatively different types of speech cause or are likely to cause the specific harms that the state meant to prevent.

Even if one takes the legislature at its word that the bubble law was meant to target more than anti-abortion protest, the law is qualitatively overbroad. The law's preamble states that the legislature was attempting to balance the interests of persons accessing medical facilities for treatment and counseling against "the exercise of a person's right to protest or counsel against certain medical procedures."¹⁸⁹ The types of protests that could conceivably take place in the area immediately surrounding health care facilities exceed by significant measure protests "against certain medical procedures." Labor protests, protests involving health care costs or the ability to obtain certain procedures under managed care systems, and demonstrations about a hospital's systemic sex discrimination, to name just a few, all fall outside of the purview of the legislature's stated purpose.

In addition to these constraints, the bubble law creates the same sort of uncertainty regarding compliance as did the floating buffer zone invalidated in *Schenck*.¹⁹⁰ Although the Colorado law does not punish or prohibit inadvertent violations of the eight-foot bubble, this limitation might not be sufficient to diminish the law's potential chilling effect. Given both the quantitative and qualitative overbreadth of the law, individuals may quite literally "steer far wider of the unlawful zone"¹⁹¹ where their speech is entitled to full First Amendment protection, thereby diminishing the amount and quality of expression taking place surrounding health care facilities.

¹⁸⁹ COLO. REV. STAT. § 18-9-122(1) (2002).

¹⁹⁰ See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 378 (1997) (holding that a floating fifteen-foot bubble created difficulties with compliance that would risk speakers censoring themselves because of the uncertainty).

¹⁹¹ *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

A narrowing construction cannot save the Colorado bubble law from overbreadth. Short of totally rewriting the statute, there is little a court could do to reconstruct these fairly clear provisions to cure the restrictions on speech. Moreover, the Court has repeatedly emphasized that a court trying to find a saving construction may not go to extremes to do so.¹⁹² Even if a court were to attempt a narrowing construction, it is likely that the statute would end up prohibiting only conduct that is already prohibited by other criminal laws in Colorado.

Given these clear overbreadth concerns, how could the Supreme Court conclude that the bubble law was not overbroad? In the following sections, I explain how the doctrine has come to be understood in ways that made the *Hill* decision possible.

B. Contemporary Understandings of Overbreadth

1. Neutrality over Precision

Contemporary First Amendment doctrine prohibits legislatures from drafting laws that are either too broad or too narrow. On one hand, the First Amendment prohibits statutory overbreadth. On the other hand, the First Amendment prohibits overly narrow laws by establishing strong legal presumptions against viewpoint- or content-discriminatory laws. At times, however, these principles can make drafting legislation difficult.

The doctrinal tension between the First Amendment's constraints on viewpoint and content discrimination and on overbroad laws is not a new phenomenon. Constitutional scholars have long argued that the doctrinal incentives for lawmakers to draft speech regulations broadly generates a significant internal paradox in free speech doctrine.¹⁹³ As Martin Redish and others have maintained, more broadly drafted speech regulations tend to reduce the dissemination of greater amounts and types of speech than do viewpoint- and content-discriminatory laws.¹⁹⁴ Clumsy, blunder-

¹⁹² See, e.g., *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 397 (1988) (“[W]e will not rewrite a state law to conform it to constitutional requirements.”). See also *TRIBE*, *supra* note 34, § 12-30, at 1032. A court's effort to so dramatically change a statute would also raise substantial federalism concerns.

¹⁹³ See, e.g., Sullivan, *supra* note 18, at 211.

¹⁹⁴ See Redish, *supra* note 18, at 128.

The most puzzling aspect of the distinction between content-based and content-neutral restrictions is that either restriction reduces the sum total of information or opinion disseminated. That governmental regulation impedes all forms of speech, rather than only selected viewpoints or subjects, does not alter the fact that the regulation impairs the free flow of expression. Whatever rationale one adopts for the constitutional protection of speech, the goals behind that rationale are undermined by *any* limitation on expression, content-based or not.

Id.

buss speech restrictions sacrifice the totality of extant speech on the mantle of state neutrality. After all, nothing could be less discriminatory than a complete ban on all speech.

Perhaps to accommodate this tension, the Court has, over time, signaled that it may be transforming overbreadth from a doctrine of precision to a guarantee of equal treatment.¹⁹⁵ In the Court's early overbreadth decisions and in earlier overbreadth scholarship,¹⁹⁶ overbreadth law was viewed as a tool for guaranteeing legislative precision. The precision requirement, in turn, was designed to ensure that when the government legitimately exercised its police powers it did not also inhibit speech protected by the First Amendment—to make sure it did not forbid more conduct than necessary.

In the Court's first overbreadth decision, *Thornhill v. Alabama*, the petitioner challenged his conviction under an ordinance that forbade going near a place of business for the purpose of influencing or inducing other persons not to do business with that firm, or picketing for the purpose of interfering with such a business.¹⁹⁷ In allowing a facial challenge to the statute, the Court emphasized that the threat to free speech stemmed from the statute's imprecision. The law not only prohibited activities within the government's police powers, but also activities that were protected by the First Amendment.¹⁹⁸ In other words, the Court in *Thornhill* acknowledged that although the law treated speakers equally, it did so in a way that was constitutionally imprecise.

Similarly, in *NAACP v. Button*, the Supreme Court invalidated a broad Virginia statute prohibiting improper solicitation of legal services.¹⁹⁹ The Court concluded that NAACP lawyers' conduct in meeting with and organizing potential plaintiffs for a school desegregation case was protected by the right of association embodied in the First Amendment.²⁰⁰ Despite the state's legitimate interest in regulating the ethics and professionalism of the legal profession, the Court found the regulation

¹⁹⁵ It is conceivable that what I argue is a subtle transformation is not, in fact, a fundamental change but rather an aberration from conventional understandings of overbreadth. It may be useful, however, to consider the possibility that the Court may be inclined to move overbreadth in this direction precisely because legislators are responding to the strong doctrinal incentives to draft laws broadly and neutrally. *Hill v. Colorado*, 530 U.S. 703 (2000), is likely to give support to lower courts' decisions to adopt this misguided approach to overbreadth.

¹⁹⁶ See, e.g., SMOLLA, *supra* note 61, at 51–52 (describing overbreadth as fulfilling the First Amendment's "precision principle"); Monaghan, *supra* note 34, at 37.

¹⁹⁷ 310 U.S. 88, 91–92 (1940).

¹⁹⁸ *Id.* at 97. See also *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (explaining the overbreadth doctrine's requirement that statutes "be carefully drawn or be authoritatively construed to punish only unprotected speech . . .").

¹⁹⁹ 371 U.S. 415, 428–29 (1963).

²⁰⁰ *Id.* at 421, 428.

invalid because it was insufficiently precise for a law affecting protected speech.²⁰¹

Earlier overbreadth scholarship, too, emphasized the precision-enforcing function of overbreadth. In Henry Monaghan's important treatment of overbreadth, he concludes that "the dominant idea [overbreadth] evokes is serious means scrutiny. Wherever that law mandates strict or intermediate scrutiny, a requirement of regulatory precision is involved; a substantial congruence must exist between the regulatory means (the statute, as construed) and valid legislative ends."²⁰²

As demonstrated in *Hill*, however, the Court may be moving toward an understanding of overbreadth that focuses not on precision, but on the challenged law's equal treatment (or mistreatment) of different types of speakers. *Hill*'s overbreadth analysis is incomplete because it conflates two distinct conceptions of breadth. The Court's rejection of the plaintiffs' overbreadth claims was based in part on its analysis connecting the law's breadth to its political neutrality and equal treatment of all speakers. As characterized by the Court, an important part of the plaintiffs' overbreadth claim was the assertion that the law indiscriminately burdened too many speakers.²⁰³ In response, the Court replied that "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance."²⁰⁴ Instead, the Court concluded that the comprehensiveness of the statute was a good thing because it suggested that there was no discriminatory governmental motive at work.²⁰⁵

Thus, the Court rejected the plaintiffs' overbreadth claim because it believed that the bubble law's comprehensiveness (treating all speech equally) suggested that the state's purposes were legitimate. But this was simply another way of stating that the law was viewpoint and content neutral.²⁰⁶ Overbreadth law's precision requirement, however, *requires* that laws discriminate by ensuring that lawmakers address the state's legitimate interests and no (or little) more, without sweeping in protected speech.

The *Hill* majority confused two independent types of statutory breadth. As the Court used it, breadth meant equality and neutrality. But in describing a speech regulation, a different type of breadth can also result where the law's means are not precisely tailored to the state's objectives. Equality is not tantamount to precision; it is the antithesis of

²⁰¹ *Id.* at 423, 438. As the Court observed, "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438.

²⁰² Monaghan, *supra* note 34, at 37. *See also* Note, *supra* note 30, at 845.

²⁰³ *Hill*, 530 U.S. at 730.

²⁰⁴ *Id.* at 730–31.

²⁰⁵ *Id.* at 731.

²⁰⁶ As Professor Redish has observed, "The goals furthered by principles of equality . . . sometimes actually conflict with first amendment principles." Redish, *supra* note 18, at 136.

precision. As Justice Scalia observed in his dissent, broad, prophylactic laws of general applicability are by definition not very precise, even though they may be viewpoint and content neutral.²⁰⁷ As Justice Kennedy pointed out in dissent, “[o]verbreadth is a constitutional flaw, not a saving feature. Sweeping within its ambit even more protected speech does not save a criminal statute invalid in its essential reach and design.”²⁰⁸ Thus, in the overbreadth context, dismissing a claim of statutory imprecision on the grounds that the law applies equally to everyone is simply a non sequitur.

Hints of the *Hill* majority’s equality-based approach to overbreadth have emerged in other cases. In *City Council v. Taxpayers for Vincent*, the Court considered an overbreadth challenge to a law forbidding the posting of signs on public property.²⁰⁹ The law, intended to minimize clutter and visual blight, applied to all signs, both political and nonpolitical.²¹⁰ In rejecting the plaintiffs’ claims that the law was overbroad because it swept too broadly, the Court suggested that because the law treated all postings equally, overbreadth was not an appropriate claim.²¹¹ It noted that there was nothing in the record to indicate that the law would affect other speech interests any differently than it would affect the plaintiffs’ speech.²¹²

It is perhaps this same confusion between breadth as equality and breadth as imprecision that fostered the state’s misguided claim in *Hill* that overbreadth doctrine does not apply to time, place, or manner regulations.²¹³ This argument simply had no basis in law.²¹⁴ The Court has never hinted that overbreadth is not applicable to time, place, or manner regulations, much less given a plausible reason why that should be the case. Indeed, it has applied overbreadth to such regulations in several cases, including *Thornhill v. Alabama*, considered the genesis of the First Amendment overbreadth doctrine.²¹⁵

²⁰⁷ *Hill*, 530 U.S. at 759 (Scalia, J., dissenting) (“[P]rophylactic restrictions in the First Amendment context—even when they are content-neutral—are not permissible.”).

²⁰⁸ *Id.* at 775 (Kennedy, J., dissenting).

²⁰⁹ 466 U.S. 789, 791 (1984).

²¹⁰ *Id.* at 794.

²¹¹ *See id.* at 801.

²¹² *Id.*

²¹³ Brief on the Merits for Respondents at 35, *Hill* (No. 98-1856). While the Court did not address this argument directly, it did indicate that the statute’s breadth, and therefore neutrality, entitled it to analysis under the *Ward* time, place, or manner test. *Hill*, 530 U.S. at 731.

²¹⁴ *Hill*, 530 U.S. at 760 (Scalia, J., dissenting) (“I know of no precedent for the proposition that time, place, and manner restrictions are not subject to the doctrine of overbreadth.”).

²¹⁵ 310 U.S. 88 (1940). For examples of other cases where the Court has applied overbreadth analysis to time, place, or manner regulations, see *Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973) (“Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct . . .”) (citations omitted).

The Court's confusion of these two distinct ways of describing breadth led it to dismiss the *Hill* plaintiffs' legitimate concerns about the bubble law's scope. Viewed as serving a precision function, however, overbreadth should be the antithesis of equal treatment; it encourages lawmakers to discriminate by ensuring that laws regulating speech are carefully tailored only to reach the government's legitimate interests.

2. Procedure over Substance

Another misconception that allowed the Court to so easily dismiss the plaintiffs' overbreadth claims relates to the contemporary focus on what I will call the "otherness" of overbreadth. Since its inception, an important component of First Amendment overbreadth has been the notion that parties whose speech is unprotected may nonetheless facially challenge overbroad statutes, even though their conduct would be sanctionable under a properly drawn statute.²¹⁶ As described in Part I, this rule is driven by a concern that overbroad laws may chill third parties from engaging in protected speech.²¹⁷ Since if those speakers are chilled, they will not likely be in a position to raise a challenge on their own behalf, traditional overbreadth doctrine has allowed unprotected speakers to bring facial challenges to statutory speech restrictions under which they might be charged.

But the Court has taken what began as a prudential rule meant to ensure the effectiveness of overbreadth to such extremes that it now significantly impedes the application of overbreadth principles. Under current understanding, the rule has been converted from one that *permits* unprotected speakers to raise facial challenges to one that essentially *limits* the availability of overbreadth claims to those engaged in unprotected speech.

Hill's analysis of the plaintiffs' overbreadth claims illustrates this understanding. The Court described the plaintiffs' overbreadth claims as having two elements. The first was that the law regulated all speakers without regard to their location or their past conduct.²¹⁸ The Court responded that this restriction did not raise a constitutional concern because the law applied to all forms of protected speech within the statutory bubble.²¹⁹ The overbreadth precedents cited by the plaintiffs were therefore irrelevant.²²⁰ Those cases, the Court noted, involved laws that restricted unprotected speech, but also swept in protected speech.²²¹ Here, however, the plaintiffs' speech was clearly protected as well, so the Court

²¹⁶ See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

²¹⁷ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977).

²¹⁸ *Hill*, 530 U.S. at 730.

²¹⁹ *Id.*

²²⁰ *Id.* at 731.

²²¹ *Id.*

said that it was subject to time, place, or manner analysis rather than overbreadth analysis.²²²

Second, the Court said that the plaintiffs' overbreadth claim was also based on the argument that the law banned all forms of protected expression.²²³ It observed that the plaintiffs' theory on this claim represented an "incorrect understanding of the overbreadth doctrine."²²⁴ Overbreadth, the Court claimed, enables parties to challenge a statute on its face not because their own speech rights are violated, but in order to allow the courts to protect the rights of other protected non-party speakers to whom the law might be applied.²²⁵ The plaintiffs, the Court concluded, "have not persuaded us that the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling."²²⁶ Ironically, this allowed the Court to deny claims about the statute's breadth *because* of its breadth.

The Court's analysis was drawn in part from *Taxpayers for Vincent*.²²⁷ In that case, the Court rejected the claim that a law forbidding the posting of all signs on public property was unconstitutionally overbroad.²²⁸ The court of appeals had invalidated the law for overbreadth on the ground that the law was not sufficiently tailored to address the city's traffic concerns and was not the least drastic means available to serve that interest.²²⁹ The Court dismissed this analysis, arguing that it was based on impermissible speculation about the law's effect on third parties.²³⁰ The plaintiffs could not, it said, invoke overbreadth because there was no evidence that the law would affect them differently from any third parties' speech interests.²³¹ Furthermore, the Court said, the plaintiffs were unable to show that the law applied to conduct "*more likely to be protected* by the First Amendment than their own"²³² What this, and the analysis in *Hill*, boil down to is the conclusion that persons whose speech is protected on an equal footing with other third parties may not assert facial overbreadth claims.

In both *Hill* and *Vincent*, the Court required the plaintiffs to demonstrate that their speech was qualitatively different from the protected speech of absent third parties. There must, according to the Court, be some dichotomy; the plaintiffs had to show that their speech was unpro-

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 731–32.

²²⁶ *Id.* at 732.

²²⁷ *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

²²⁸ *Id.* at 801–02.

²²⁹ *Id.* at 801.

²³⁰ *Id.* at 801–02.

²³¹ *Id.*

²³² *Id.* at 802 (emphasis added). The Court concluded that the plaintiffs' overbreadth claim was therefore indistinguishable from an as-applied challenge. *Id.*

tected but others' speech was protected, or it had to show that the law affected the conduct of other speakers in a different way than it affected the plaintiffs' speech.²³³ In a sense, then, the otherness concept of overbreadth turns out to be much like the equality component. To the extent that the law treats speech equally, even if it is all protected speech, the law cannot be overbroad.

The *Hill* Court's analysis of this aspect of the law's equal treatment closely relates to another rule that the Court has applied in its overbreadth cases. On several occasions, the Court has implied that a person whose speech is constitutionally protected can never assert a facial overbreadth challenge.²³⁴ The justification for this limitation on overbreadth was expressed most clearly in *Brockett v. Spokane Arcades, Inc.*:

[W]here the parties challenging the statute . . . desire to engage in protected speech that the overbroad statute purports to punish, or who seek to publish both protected and unprotected material . . . [t]here is . . . no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.²³⁵

The anti-abortion protestors in *Hill* were therefore disadvantaged by the fact that their own speech was constitutionally protected and that the

²³³ *Hill*, 530 U.S. at 731–32; *Vincent*, 466 U.S. at 801–02.

²³⁴ See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). The point is implicit in *Vincent* as well. *Vincent*, 466 U.S. at 801–02. The Court did not expressly invoke this rule in *Hill*, but it seems implicitly to underlie its otherness analysis. Professor Fallon reads *Brockett* more narrowly than I do, concluding that the Court's decision simply requires a party whose speech is protected to first assert an as-applied challenge but permits a facial overbreadth claim to be pursued if the as-applied challenge is unsuccessful. See Fallon, *As-Applied*, *supra* note 51, at 1350 n.150. *But cf.* *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute [as overbroad] *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 others not before the court to refrain from constitutionally protected speech or expression.") (emphasis added). He has suggested to me that *Hill* may therefore represent a misapplication of *Brockett* rather than the validation of a general rule barring protected speakers from asserting overbreadth claims. Even under Professor Fallon's interpretation of *Brockett*, however, the Court's emphasis on as-applied challenges over facial challenges may undermine the precision function of overbreadth, though perhaps to a lesser degree than I claim. Speakers whose speech is otherwise protected must essentially exhaust their as-applied claims before the courts will entertain their overbreadth claims, whereas speakers whose speech is decidedly unprotected can immediately pursue facial overbreadth challenges. This still distracts courts from the precision requirement in favor of a focus on the procedural aspects of overbreadth. This seems all the more futile since, as I argue in the text, it is difficult to imagine after *Hill* how persons whose speech is protected could ever mount a successful as-applied challenge in the absence of a discriminatory enforcement claim. See *infra* text accompanying notes 237–238.

²³⁵ 472 U.S. at 504.

speech of others not before the Court was equally protected. This is a perverse result. It effectively means that since the plaintiffs' speech was protected by the First Amendment, they were worse off under the law of overbreadth.²³⁶ This outcome surely has nothing to do with the precision principle underlying the overbreadth doctrine.

The result is even more troubling if one closely examines the reason for the requirement that the claimant's speech be unprotected. As stated in *Brockett*, the policy underlying this rule is that a person whose speech is protected may raise an as-applied challenge to an otherwise overbroad statute, and therefore does not need the benefit of the facial overbreadth doctrine.²³⁷ After *Hill*, however, it is difficult to see how a protected speaker could mount a successful as-applied attack on the law. The Court's own analysis ensures that the plaintiffs could not succeed in an as-applied challenge because the Court viewed the law as viewpoint- and content-neutral.²³⁸ Thus, with the exception of a discriminatory *enforcement* claim, the plaintiffs' likelihood of success in an as-applied challenge is minimal at best.

Similarly, the anti-abortion camp could hardly sit by and await the statute's invalidation by other protected speakers whose speech was regulated by the bubble law. Consider the case of an opponent of managed health care who wished to pass out leaflets outside a hospital. She, too, would be unable to raise a facial overbreadth claim because her speech is as protected as the speech of other third parties not before the court. Moreover, it is equally difficult to anticipate how she could assert an as-applied challenge in the wake of *Hill*. So long as the law applies to all speakers, the Court's decision essentially forecloses any conceivable challenge to the unconstitutional application of the law to non-abortion related speakers.²³⁹ Again, unless there is evidence the law is discriminatorily enforced against only one type of speaker based on the content or viewpoint of her speech, there seems to be no recourse for those speakers whose interests the legislature failed to consider.

The Court's analysis in *Hill* illustrates how far the Court has allowed overbreadth to drift from its central premises. While allowing persons whose speech is unprotected to raise facial overbreadth claims is an important piece of overbreadth law, it serves only part of the function of overbreadth and surely should not be the driving force underlying the doctrine. Rather, First Amendment overbreadth is equally designed to

²³⁶ See Rohr, *supra* note 51, at 426 ("Why leave the ordinance standing, simply because those who challenged it had been in the strongest position to do so?").

²³⁷ See *Brockett*, 472 U.S. at 503-04.

²³⁸ *Hill*, 530 U.S. at 719-25.

²³⁹ Furthermore, the only group that *could* bring a facial overbreadth claim would be the narrow class of persons covered by the statute whose speech reaches the level at which it is no longer constitutionally protected, as with the most unlawful of anti-abortion protestors.

promote free speech by ensuring legislative precision. The latter function can be served whether or not the party asserting a law's overbreadth is engaged in protected speech.

3. *Speech-Based First Amendment Theory over Motive-Based First Amendment Theory*

Understanding of overbreadth doctrine has further been limited by its traditional theoretical justifications. Like much of First Amendment doctrine, overbreadth doctrine has developed based on theories of free expression that aspire to maximize the opportunities for individual speakers to express themselves and/or to enhance the quality of discourse produced by a system of free speech.²⁴⁰ These theories, which I will collectively call "speech-based" approaches, emphasize and examine the effects of government regulations of expression on speakers and audiences. Overbreadth, however, may be better understood as advancing a "motive-based" First Amendment theory, which focuses not only on the effects of a regulation, but also on whether the government's purposes were legitimate or designed to censor speech.²⁴¹

Overbreadth analysis advances speech-based interests because it has traditionally depended on the assumption that a speech restriction may inhibit protected speech.²⁴² The degree to which this is true and the manner of measuring statutes' impact on speech have been central controversies within the overbreadth debate.²⁴³ Critics of overbreadth doctrine have expressed skepticism about whether, and how much, broadly worded laws actually deter protected speakers.²⁴⁴ These critiques led the Court to adopt the substantial overbreadth requirement. In *Broadrick v. Oklahoma*,²⁴⁵ state employees sued to invalidate a state civil service statute

²⁴⁰ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (discussing how government suppression of speech may "drive certain ideas or viewpoints from the marketplace" (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))). Professor Kagan labels these "speaker-based" and "audience-based" approaches. Kagan, *supra* note 19, at 423–24; see also *infra* notes 277–283 and accompanying text. Others may disagree that the Court's free speech jurisprudence is driven primarily by constitutional theory, arguing instead that the Justices' politics may be more important in how they approach their decisionmaking. See, e.g., Raskin & LeBlanc, *supra* note 28, at 220–26 (arguing that the First Amendment needs to be rescued from the Court's "abortion politics"). While this is a valid critique of the Court's work here, a full discussion of these concerns is beyond the scope of this Article. For an extensive treatment of the idea that politics and other forces external to legal doctrine help shape that doctrine, see STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 246–82 (1997) (arguing that religion, culture, and politics shape the Supreme Court's Religion Clause decisions).

²⁴¹ See Kagan, *supra* note 19, at 425–26.

²⁴² See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

²⁴³ See *TRIBE*, *supra* note 34, § 12-28, at 1026.

²⁴⁴ See *id.* (observing that several members of the Supreme Court are skeptical about the chilling effect of broad laws).

²⁴⁵ 413 U.S. 601 (1973).

forbidding state employees from engaging in certain types of partisan political activity. As interpreted by state officials, the statute covered overt partisan activity such as campaigning and fundraising in the state workplace, but also forbade more modest forms of speech, such as wearing political buttons or posting campaign stickers at one's work station.²⁴⁶ While the Court conceded that the statute reached some forms of protected speech, it held that for the statute to be invalidated, its overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."²⁴⁷ This established a sort of proportionality component to overbreadth analysis, requiring courts to examine the ratio of protected to unprotected speech regulated by a statute.²⁴⁸

There was a compelling argument that the bubble law challenged in *Hill* was "substantially" overbroad. There is little guessing associated with a proposed demonstrator's assessment of whether her conduct will transgress (literally and figuratively) the line between lawful and unlawful conduct. As such, the law clearly reaches and is likely to deter a significant amount of protected speech. With both criminal penalties and civil liability available to punish the speaker, the chill is palpable.

In *Hill*, however, the Court's reasoning was driven by its implicit conclusion that the bubble law was not substantially overbroad in relation to its legitimate applications.²⁴⁹ The Court dismissed overbreadth concerns in part because the plaintiffs could not demonstrate that the bubble law would deter a substantial amount of protected speech.²⁵⁰ There was little evidence to support this conclusion. Moreover, as Professor Tribe has argued in reference to *Broadrick*,

[T]he plain effect of the Burger Court's reluctance to assume the existence of a significant chilling effect of protected speech is to lift from government the traditionally heavy burden of proving that first amendment rights are not being infringed. Despite a facial appearance of infringement, the upshot is a mounting burden on the *individual* to show that the apparent inhibition of

²⁴⁶ *Id.* at 609–10.

²⁴⁷ *Id.* at 615. *See also* Gooding v. Wilson, 405 U.S. 518, 530–31 (1972) (Burger, J., dissenting) (stating that overbreadth doctrine allows courts to invalidate laws where the statutory language poses "a significant likelihood of deterring important First Amendment speech").

²⁴⁸ After *Broadrick* was decided, some doubt remained regarding whether the Court would extend the substantial overbreadth requirement to statutes that regulated pure speech, as opposed to conduct that may or may not be expressive. While the Court hinted that it might subject statutes regulating pure speech to more searching scrutiny, *Broadrick*, 413 U.S. at 615, the Court has since clarified that it will apply the substantiality requirement to statutes that regulate pure speech. *See* Osborne v. Ohio, 495 U.S. 103, 112–13 (1990); New York v. Ferber, 458 U.S. 747, 771 (1982). *See also* TRIBE, *supra* note 34, § 12-28, at 1025 n.9.

²⁴⁹ *See* Hill v. Colorado, 530 U.S. 703, 729, 732 (2000).

²⁵⁰ *Id.*

protected expression is in fact highly probable and socially significant.²⁵¹

Both the discourse and doctrine of overbreadth have been driven by a speech-based approach to First Amendment theory. As I argue below, however, while a revival of the emphasis on the precision component of overbreadth is consistent with these theoretical approaches to speech, it also links the doctrine to an additional theoretical justification. Overbreadth may serve a critical function as a way to advance a “motive-based” First Amendment theory.²⁵² Under this theoretical approach, First Amendment doctrine ought to limit laws that the government enacts for illegitimate reasons, regardless of (or in addition to) their effects on speakers and speech.²⁵³ Interpreting overbreadth law in light of its precision component would accommodate these types of concerns as well.

IV. OVERBREADTH AND THE ROLE OF ILLICIT GOVERNMENT PURPOSE IN FIRST AMENDMENT DOCTRINE AND THEORY

In this Part, I argue that the contemporary understanding of overbreadth should reflect the doctrine’s critical precision functions, which serve as a doctrinal means of smoking out illicit government motives. First, I describe why First Amendment doctrine presently provides insufficient tools to pierce through facially neutral laws and discern improper government purposes. Second, I examine the reasons courts have been reluctant to engage in purpose scrutiny in First Amendment law and discuss the recent observations of some scholars who seek to rejuvenate a sort of indirect analysis of illicit government purposes. I conclude by exploring how overbreadth could be applied to counteract existing incentives to obscure illicit legislative motive and then address potential critiques of my proposed approach.

A. Illicit Purposes Under Existing First Amendment Doctrine

The existing structure of First Amendment doctrine is not adequate to uncover or check the hidden forms of viewpoint or content discrimination that were the likely underpinnings of the bubble law at issue in *Hill*. After all, the Court upheld the law even though almost everyone in Colorado knew that the state adopted the bubble law solely to restrict anti-abortion protestors.²⁵⁴ Despite the bubble law’s formal neutrality, as dis-

²⁵¹ TRIBE, *supra* note 34, § 12-28, at 1026.

²⁵² See Kagan, *supra* note 19, at 425–26.

²⁵³ See *id.*

²⁵⁴ Cf. Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 95 (“Almost everyone in Jackson, Mississippi, knew that the city closed its public swimming pools solely to avoid integration.”).

cussed earlier, there was strong reason to doubt the sincerity of the legislature's stated purposes.²⁵⁵

Although the core doctrinal structure creating strong, catechism-like presumptions against viewpoint and content discrimination is deeply entrenched in our constitutional culture, that structure does not sufficiently account for the possibility of illicit discrimination. First, the concepts of viewpoint and content discrimination are not always easy to apply. The *Hill* majority articulated plausible, if not necessarily correct, arguments about the Colorado bubble law's facial neutrality.²⁵⁶ More importantly, demanding facial neutrality does not necessarily make the illicit purpose problem go away. The Colorado law could have been redrafted even more neutrally, yet there might still be a concern that the legislature was secretly targeting anti-abortion speech.

Second, the Court has repeatedly rejected direct judicial inquiries into legislative motive, even where there is substantial evidence that a facially neutral law might have been adopted for speech-restrictive reasons.²⁵⁷ Because of the Court's express and continued disregard for direct purpose scrutiny, First Amendment law has tended to focus judicial examination on the phrasing of speech regulations. Only if the language of the law itself reflects the viewpoint- or content-discriminatory reasons underlying its enactment does the Court apply heightened scrutiny.²⁵⁸ Such an emphasis, however, leaves substantial room for legislatures to engage in illicit discrimination against certain forms of speech through facially neutral regulations.

Third, heavy presumptions against viewpoint- or content-based laws create tremendous incentives for legislators to draft laws neutrally, and therefore broadly, to mask their true objectives. The general rule against speech discrimination is, or should be, widely understood by most legislative bodies. Accordingly, we see few "easy" First Amendment cases where a statute overtly discriminates on the basis of a speaker's viewpoint or the content of her speech. A legislative body has little to gain by adopting a law overtly punishing speech antithetical to its views given the power of the presumption against such discrimination. This pressure was clearly at work in *Hill*. In their effort to remain viewpoint- and con-

My reference to Paul Brest's seminal work in the area of unconstitutional motivation is intended to place *Hill* in the broader landscape of constitutional theory. *See also Hill*, 530 U.S. at 768 (Kennedy, J., dissenting) ("The 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.").

²⁵⁵ *See supra* notes 106–121 and accompanying text.

²⁵⁶ *See supra* notes 136–143 and accompanying text.

²⁵⁷ *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986); *United States v. O'Brien*, 391 U.S. 367, 382–84 (1968).

²⁵⁸ *See, e.g., Texas v. Johnson*, 491 U.S. 397, 411–12 (1989) (applying strict scrutiny to a state law forbidding flag burning because violation of the law was dependent on the communicative impact of the act).

tent-neutral, Colorado lawmakers strained mightily to define the location of the regulated speech without reference to the type of speaker or audience involved. The existing doctrinal framework of the First Amendment gave incentives to the Colorado legislature to draft broadly, and draft broadly they did.

Fourth, as currently applied, existing time, place, or manner analysis does not adequately address concerns regarding illicit legislative motive. In *Ward v. Rock Against Racism*, the Court held that content-neutral regulations of the time, place, or manner of speech in public forums should be upheld if they are “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication of the information.”²⁵⁹ Because the application of time, place, or manner analysis is contingent upon a finding that the challenged law is both viewpoint- and content-neutral, the same problems associated with the general rule against viewpoint and content discrimination emerge. A law that is intentionally drafted broadly to circumvent the presumption against viewpoint and content discrimination may also escape serious judicial scrutiny because it will be examined under *Ward*.

Moreover, the Supreme Court has formally and informally eviscerated *Ward*'s narrow tailoring requirements. As described earlier, the Court has abandoned any requirement that such regulations be the least speech-restrictive alternative available, and instead requires only that the means chosen by the government be “not substantially broader than necessary to achieve the government’s” interests.²⁶⁰ As Justice Marshall warned in his dissent in *Ward*, this test “requires only that government show that its interest cannot be served as effectively without the challenged restriction It will be enough, therefore, that the challenged regulation advances the government’s interest only in the slightest”²⁶¹

In addition to this formal relaxation of the narrow tailoring test, Justice Marshall’s predictions have been borne out by some of the Court’s post-*Ward* decisions.²⁶² In *United States v. Kokinda*,²⁶³ a plurality of the Court rejected a First Amendment challenge to a federal postal regulation prohibiting certain forms of solicitation on the sidewalks outside of post

²⁵⁹ 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²⁶⁰ *Id.* at 800.

²⁶¹ *Id.* at 806 (Marshall, J., dissenting) (further stating that “the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase”).

²⁶² *See, e.g., Hill v. Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting) (“The Court wields the categories of *Ward* so that what once were rules to protect speech now become rules to restrict it The rules of *Ward* are diminished in value for later cases . . .”).

²⁶³ 497 U.S. 720 (1990).

offices.²⁶⁴ The Court concluded that such sidewalks were not public forums.²⁶⁵ In dissent, however, Justice Brennan argued that time, place, or manner analysis should apply and that the law was not narrowly tailored because the government had not offered a justification for excluding solicitation from postal property, including sidewalks.²⁶⁶ The plurality upheld the law, he noted, based on “speculation regarding the possibility of disruption that is both inappropriate and unsupported.”²⁶⁷ The Court’s decision in *Hill* suffers from this same deferential First Amendment analysis and underscores the need for another doctrinal tool to ensure legislative precision.²⁶⁸

Some excellent scholarly commentary has observed that the *Ward* test has resulted, at best, in inconsistency and incoherence.²⁶⁹ Harsher critics argue that the Court has diluted the time, place, or manner analysis to the functional equivalent of rationality review.²⁷⁰ In any case, the *Ward* test is not an adequate tool to uncover illicit legislative motives that may lurk beneath broadly drafted statutes.

*B. First Amendment Doctrine and Theory, and the Role of
Illicit Government Purpose*

Purpose scrutiny has been eschewed in First Amendment analysis for many of the same reasons that it has been disfavored in other constitutional doctrines. First, there is an epistemological problem—it may be difficult or impossible for a court to ascertain the precise motive or purpose of a government action, particularly an action taken by a collective body of decisionmakers.²⁷¹ In addition to the obvious evidentiary problems, there may, in fact, have been no actual central legislative purpose.²⁷² Second, there is a futility problem: if the government may engage in the exact same action so long as it is undergirded by a legitimate purpose, invalidating laws based on illicit purpose is a useless enterprise.²⁷³ In such circumstances, invalidation will lead only to the state’s reenactment of the law with an expressly “legitimate” justification. Third, in-

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 727.

²⁶⁶ *Id.* at 758 (Brennan, J., dissenting).

²⁶⁷ *Id.*

²⁶⁸ See *supra* notes 144–159 and accompanying text.

²⁶⁹ See, e.g., Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260–70 (1995); Williams, *supra* note 36, at 641–44.

²⁷⁰ See DANIEL A. FARBER, *THE FIRST AMENDMENT 176–77* (1998); G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1548–49 (1993); David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 149 (1992); Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 475 (1999). But see STONE ET AL., *supra* note 44, at 1112–13 (describing the *Ward* test as a form of intermediate scrutiny).

²⁷¹ See *United States v. O’Brien*, 391 U.S. 367, 384 (1968).

²⁷² See *id.*

²⁷³ See *id.*; see also Brest, *supra* note 254, at 125–27.

validation of laws based on lawmakers' illicit purpose may interfere with the advancement of legitimate social interests furthered by the law.²⁷⁴ Finally, judicial evaluation of government purpose is said to generate separation of powers and federalism concerns by assigning an activist role to the courts vis-a-vis politically accountable federal, state, and local officials.²⁷⁵ Critics of purpose inquiry argue that judicial inquiry into legislative motive is both an undesirable intrusion into the political process and conveys a lack of proper respect for the democratic branches of government.²⁷⁶

As a result of doubts about the legitimacy of purpose inquiry, much of modern First Amendment doctrine is instead based not on concerns about illicit government motivation, but on the impact of governmental regulations on speech and speakers (i.e., speech-based concerns).²⁷⁷ Similarly, the two primary theoretical justifications offered to support a broader understanding of free speech doctrines are speech-based.²⁷⁸

One major school of thought proposes that First Amendment principles are best advanced by focusing on the effects of governmental regulation on speakers' opportunities to engage in expression.²⁷⁹ Under this theory, the level of First Amendment concern is directly related to the extent to which the government's regulation constrains speech. More speech is good; less speech is bad.²⁸⁰

A different theoretical perspective, also based on the effects of the government's regulations on speech, evaluates free speech doctrine by looking at the discourse that a system of free expression produces.²⁸¹ This approach is collectivist and therefore measures First Amendment law by

²⁷⁴ Brest, *supra* note 254, at 127–28.

²⁷⁵ *Id.* at 128–30.

²⁷⁶ *Id.*

²⁷⁷ See *supra* note 240 and accompanying text. For excellent accounts of the different theoretical approaches to free speech, see Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785–86 (1987); Kagan, *supra* note 19, at 423–27.

²⁷⁸ *Id.*

²⁷⁹ For examples of commentators who have advanced theories consistent with this model, see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47–69 (1989); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Maximizing the opportunities of speakers to express themselves, in turn, serves other goals that relate to enhancing speakers' autonomy and self-fulfillment. See generally Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213–18 (1972).

²⁸⁰ One version of this concern is expressed by Professor Redish, who has argued that content-neutral laws are extraordinarily problematic to the extent that they suppress greater quantities of speech, albeit without discriminating. Redish, *supra* note 18, at 137.

²⁸¹ See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 19–28 (1960). For an interesting variation on this theme, tying together the First Amendment's speech and religion components, see William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 4 (1995) (arguing that the First Amendment promotes not “the possible attainment of truth, but rather . . . the existential value of the search itself.”).

how well it enhances the quality of the overall discourse rather than the speech of any individual or group of individuals.²⁸²

Both of these speech-based theories avoid the problems commonly associated with a motive-based examination of government speech regulations. Under these theories, free speech law can better advance the purposes of enhancing the quantity or quality of discourse if the doctrines are articulated in ways that invalidate government acts on the basis of their effects on speech.

Contemporary First Amendment scholars, however, have recently returned to a closer examination of the role of illicit government motive as part of a larger renaissance of “purpose” analysis. Some legal scholars have observed that the Court’s disclaimer of motive inquiry obscures the actual function that its doctrinal tests serve. The First Amendment, they argue, can be better understood as creating an analytical structure that enables *indirect* inquiry into the government’s purposes.²⁸³

Elena Kagan comprehensively identifies how the basic core of First Amendment doctrine implicitly tests suspicions about illicit government purposes.²⁸⁴ She observes that both strict scrutiny analysis and balancing tests under First Amendment doctrine act as surrogates for direct inquiries into governmental purpose.²⁸⁵ Recognizing the imprecision involved in categorizing statutes as content- or viewpoint-discriminatory or content-neutral, Kagan notes that the relevant level of judicial scrutiny serves as an evidentiary device that implicitly operates to flush out illicit government purposes.²⁸⁶ The more compelling the government’s purpose in enacting the legislation, the less likely it is that lawmakers targeted the

²⁸² Kagan, *supra* note 19, at 424 (describing this as an “‘audience-based’ model . . . [that] focuses on the quality of the expressive arena”).

²⁸³ *Id.* at 414 (articulating as a descriptive matter the ways in which First Amendment doctrine acts to smoke out illicit government purposes); Rubinfeld, *supra* note 32, at 817–22 (describing as a normative matter how First Amendment theory and doctrine is driven by purpose inquiry). These discussions are part of a larger scholarly movement that appears to signal a renaissance in the discourse on purpose inquiry across all constitutional doctrine. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 90–102 (1997); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998). For earlier attempts to explain some aspects of constitutional doctrine as tools for smoking out illicit government purposes, see DAVID S. BOGEN, *BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT* (1984); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 145–48 (1980).

²⁸⁴ Kagan, *supra* note 19.

²⁸⁵ *Id.* at 453–55. As Professor Kagan notes, a few legal scholars have proposed that First Amendment speech doctrine ought to be driven at least in part by examination of illicit government motives. *Id.* at 425 n.39. She cites the work of Frederick Schauer, Cass Sunstein, and Geoffrey Stone as examples. *See* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80–86 (1982); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 154–59 (1993); Stone, *Content Regulation*, *supra* note 36, at 227–33.

²⁸⁶ Kagan, *supra* note 19, at 453.

affected speech for its viewpoint or content. Similarly, requiring that laws be narrowly tailored serves to satisfy the courts' suspicion that a law might not be directed to accomplish the government's express purpose. As Kagan writes:

If a restriction applies to more speech than necessary to achieve the interest asserted, the suspicion deepens that the government is attempting to quash ideas as ideas rather than to promote a legitimate interest. And if a restriction applies to less speech than implicates the asserted interest, so too the concern grows that the interest asserted is a pretext. But if a restriction fits along both dimensions—if it applies to all and also to *only* the speech that threatens the asserted interest—then there is an assurance that the government has acted for proper reasons.²⁸⁷

Indeed, purpose inquiry is embedded in the foundations of First Amendment doctrine. The very presumption against viewpoint or content discrimination, which triggers strict scrutiny, relies on the premise that laws targeting speech because of the speaker's viewpoint or the content of the speech are highly suspect.²⁸⁸

For content-neutral laws, Kagan observes that the same principles operate in the opposite direction. Even if content-neutral laws are less suspicious than content- or viewpoint-based ones, the confidence in the government's assertion of legitimate interests is diminished if the government's stated interests are not very important or if the connection between the legislative means and those stated ends is extremely loose.²⁸⁹

Kagan's work examines First Amendment purpose inquiry as a descriptive matter and does not claim that the doctrine's development in this manner is either conscious or even desired by the Court.²⁹⁰ Jed Rubenfeld has made a broader normative argument regarding unconstitutional purpose and the First Amendment. In a recent article, he argues that many doctrinal problems could be resolved by directing First Amendment inquiries toward the government's purpose rather than toward the cost-benefit analysis inevitably conducted under most balancing tests.²⁹¹ He asserts that an explicit purposivist approach to First Amend-

²⁸⁷ *Id.* at 453–54 (emphasis added). See also Brest, *supra* note 254, at 122.

²⁸⁸ The Court's own test for analyzing laws implies a form of purpose inquiry. As the Court observed in *Hill*, the main inquiry in determining if a law is content-neutral is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

²⁸⁹ Kagan, *supra* note 19, at 454–55.

²⁹⁰ *Id.* at 415.

²⁹¹ Rubenfeld, *supra* note 32, at 817–22. For a critique of Rubenfeld's work and his response, see Richard Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 *STAN. L. REV.* 737 (2002), and Jed Rubenfeld, *A Reply to Posner*, 54 *STAN. L. REV.* 753 (2002).

ment analysis is normatively desirable because it advances what he calls the “anti-orthodoxy principle.”²⁹²

Neither Kagan’s nor Rubinfeld’s article extends this analysis to the so-called “ancillary” First Amendment doctrines.²⁹³ In the following section, I analyze whether a motive-based analysis could provide a critical underpinning to overbreadth doctrine. I argue that this smoking-out function, as much as other functions overbreadth is more commonly thought to promote, places overbreadth doctrine and theory more centrally into the framework of First Amendment law, a framework correctly understood as being as concerned with illicit government purposes as it is with effects.

C. *Reviving the Precision and Smoking-out Functions of Overbreadth*

Although overbreadth promotes critical free speech principles, discourse about overbreadth has drifted far from its original moorings in First Amendment theory and doctrine. As a result of concern regarding the facial invalidation of statutes, overbreadth now occupies an important, but uncomfortable, space in First Amendment doctrine. A doctrinal outlier, overbreadth is most often referred to as a “procedural” or “ancillary” First Amendment doctrine or as an element of First Amendment “due process.”²⁹⁴ The dominant taxonomy suggests that overbreadth is not fully integrated into the central substantive First Amendment principles. Nonetheless, overbreadth can be drawn back into the First Amendment fold if it is viewed in light of its ability to smoke out improperly motivated government regulation of speech.

As stated earlier, contemporary First Amendment law relies heavily on the presumptions against overt viewpoint and content discrimination to guard against governmental efforts to distort public discourse. One might infer that a judicial inquiry into governmental purposes would be an essential component of a doctrinal structure that relies on the distinc-

²⁹² Rubinfeld, *supra* note 32, at 818.

The principle takes shape from the basic intuition that individuals have the “right to their opinion,” that they cannot be punished for having or for expressing a particular opinion, regardless of the topic, regardless of how foolish or trivial their opinion may be, and regardless even of how unpleasant or dangerous state actors might think it.

Id.

²⁹³ A standard description of ancillary or procedural doctrines would include the doctrines of prior restraint, overbreadth, and vagueness. *See, e.g.*, STONE ET AL., *supra* note 44, at 1091–1112. *But see* Bogen, *supra* note 30 (adding constitutional avoidance, preemption, and equal protection to the conventional description of ancillary First Amendment doctrines).

²⁹⁴ *See, e.g.*, Bogen, *supra* note 30; Henry Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518 (1970); Rohr, *supra* note 51, at 415.

tion between content-neutral laws and laws that target speech on the basis of viewpoint or content. The Supreme Court, however, has consistently emphasized that direct inquiry into government purpose is not permissible.²⁹⁵

As described in Part III, the Court's treatment of the overbreadth doctrine in *Hill* was based on fundamental misconceptions about the purpose and meaning of overbreadth. The Court's decision is problematic not only because it reached the wrong outcome, but also because of the doctrinal course on which it has set overbreadth. Contrary to the Court's analysis, overbreadth can serve a crucial function if applied to broadly drafted laws that may conceal illicit government purposes.

Twenty-five years ago, in a little-noticed section of an otherwise seminal article on First Amendment doctrine, Kenneth Karst suggested that a properly crafted overbreadth doctrine could play an important role in checking what he called "hidden inequalities" in facially neutral regulations of speech.²⁹⁶ Karst's initial insight was important, but no one has since elaborated how overbreadth might be applied to serve this purpose.

The key to understanding overbreadth's role here is to recognize that, like other doctrines requiring a close fit between means and ends, overbreadth mandates precision. Precision, in turn, is a requirement that generates a derivative legislative motive inquiry. The more imprecise the law, the greater the chance that the law was adopted for purposes other than those the legislature expressed.²⁹⁷

The *Hill* majority was unconcerned about the possibility that improper purposes underlay the enactment of the broad, but imprecise, bubble law.²⁹⁸ It reflexively invoked Justice Jackson's well-known *Railway Express* concurrence, stating the conventional wisdom that the primary safeguard against laws that affect speakers of wide-ranging ideologies is the assumption that lawmakers representing the interests of affected groups will protect their interests.²⁹⁹ If the legal system can rely on po-

²⁹⁵ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986); *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968).

²⁹⁶ Karst, *supra* note 17, at 38–39.

²⁹⁷ See Kagan, *supra* note 20, at 453–4 (arguing that, in checking for illicit legislative motive, a statute's level of precision serves as a guide for assessing the appropriate level of suspicion).

²⁹⁸ *Hill v. Colorado*, 530 U.S. 703, 731 (2000).

²⁹⁹ *Id.* (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.” (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring))). Christina Wells makes a similar point:

A facially-neutral statute with objective justifications unrelated to the speaker's message raises fewer worries regarding illegitimate motive precisely because it potentially applies to so many different viewpoints. That statutes result from political wrangling between numerous political interests reinforces this point; presumably, opposing legislators will at least cry foul if they believe a content-

litical checks to inhibit the enactment of such laws, judicial review need not be rigorous.

Moreover, as Professor Kagan has observed:

So long as a content-neutral law has differential effects on particular ideas—even assuming those effects are widely dispersed—it may bear the taint of improper motive. *Officials may care so much about suppressing a particular idea affected by a content-neutral law as to disregard or tolerate the law's other consequences.*³⁰⁰

A law with differential effects might further diminish the likelihood that other groups would organize political opposition to such a law.

Such a situation arose in Colorado. No parties other than anti-abortion activists emerged to lobby against the Colorado law. Perhaps no such groups recognized any danger since the legislative debate focused so exclusively on anti-abortion protestors. Despite the bubble law's neutral language, the political process was dominated by discourse about abortion protest. Most press accounts, and even the legislative sponsor's own public statements, suggested that this was a bill addressing abortion protestors.³⁰¹ To the extent that other speakers might have had a stake in this legislative debate, it was not readily apparent. Indeed, no one other than anti-abortion activists even testified in opposition to the bill.

Thus, the supporters of the bubble law had it both ways. They did not have to respond to claims by speakers other than abortion protestors in defending the law in the legislative process, but when subject to judicial review they could disclaim discriminatory purpose by pointing to the neutrality of the law's language.³⁰² To the extent that *Hill* enables lawmakers to engage in illicit content discrimination by drafting similar laws applying to other speech contexts, the absence of overbreadth as a meaningful constraint is even more troublesome.³⁰³

neutral law is motivated by a desire to suppress a specific viewpoint.

Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 32 (2000).

³⁰⁰ Kagan, *supra* note 19, at 454 (emphasis added).

³⁰¹ See *supra* notes 107–110 and accompanying text.

³⁰² One commentator described the case in a manner that underscores this internal conflict: "On its face the ban was neutral and extremely overbroad, but in its application it was particular because it was arguably passed for the purpose of protecting abortion clinics specifically, and that was what the issue was about in *Hill*." Joel M. Gora, *The Storm Arrives: The First Amendment Cases in the Supreme Court's 1999-2000 Term*, 17 *TOURO L. REV.* 203, 224 (2000).

³⁰³ Legislatures have adopted laws imposing similar restrictions surrounding, among other things, polling places, *Burson v. Freeman*, 504 U.S. 191 (1992), and places of worship, *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999) (invalidating a city ordinance prohibiting certain types of picketing in areas near religious premises). Thus, the use of overbreadth to check neutral laws masking discriminatory intent may provide significant

First Amendment overbreadth law, rigorously applied, can serve the function of smoking out illicit government purposes and perhaps deter lawmakers from engaging in the sort of covert speech discrimination that happened in Colorado. As Kathleen Sullivan has observed, “*Hill* was notable for the Court’s unwillingness to pierce the veil of the law’s apparent facial content-neutrality.”³⁰⁴ Overbreadth should always be available as a check against hidden legislative motives, but overbreadth scrutiny should be particularly vigilant where, as in *Hill*, there is substantial reason to doubt the sincerity of the state’s objectives in enacting a speech regulation. Such substantial reasons can be inferred from close examinations of legislative histories or from viewpoint- or content-differential effects of particular speech regulations.

It may be that overbreadth motive inquiry will be more critical when the law is qualitatively overbroad—i.e., when it applies to, and sweeps in, many other forms of speech than the legislature initially targeted. This contrasts with quantitative overbreadth cases, where the Court addresses the degree to which the regulation exceeds its legitimate, content-focused scope. That is, in quantitative overbreadth cases, the state has not hidden its attempt to regulate particular content, but simply regulated it clumsily. If a law is qualitatively overbroad, however, the underlying legislative motives may be harder to discern. Accordingly, close attention should be paid to the precision between the means the state has chosen and the legitimate ends it seeks to advance.

In order to apply overbreadth’s precision requirement as a check on illicit motive, the Court would first need to abandon its rule prohibiting protected speakers from asserting facial overbreadth claims.³⁰⁵ The rule itself is based on the policy of judicial restraint and constitutional avoid-

protection to demonstrators of all ideologies. See also Raskin & LeBlanc, *supra* note 28, at 226–28 (describing other types of statutory speech bubbles that could be upheld under *Hill*). Similarly, James Weinstein writes:

[O]ne can easily imagine that others will want similar measures when facilities they own or support are besieged by demonstrators. For example, operators of nuclear power plants and logging operations will want such protection from environmental activists; owners of supermarkets will want their bubble ordinance the next time their [*sic*] is a concerted effort by the Farmworkers Union to persuade customers not to buy certain agricultural products; owners of fur stores will be interested in some sort of “back off” provisions to keep animal rights protestors from engaging their customers in unwanted face-to-face confrontations; and the federal government will want to impose bubble ordinances around military recruiting centers if the United States were again to engage in an unpopular war.

Weinstein, *supra* note 23, at 525.

³⁰⁴ Sullivan, *supra* note 3, at 737. See also *Hill*, 530 U.S. at 767 (“Clever content-based restrictions are no less offensive than censoring on the basis of content.”) (Kennedy, J., dissenting).

³⁰⁵ See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801–02 (1984).

ance, and has little or nothing to do with the protection of speech.³⁰⁶ The rule stems from the Court's belief that it is better for courts to perform minor surgery and excise unconstitutional applications of a law than to declare it facially invalid.³⁰⁷ But if protected speakers to whom a law's differential effects fall are not allowed to challenge it on its face, and if other speakers will likely fail to recognize the law's impact on their own speech, overbreadth claims may not be brought at all. And as discussed earlier, protected speakers are unlikely to be able to mount successful as-applied challenges.³⁰⁸

An expanded understanding of overbreadth is justifiable on theoretical grounds as well. Presently, the Court views overbreadth as a tool for ensuring that speech regulations do not overdeter speech. As a result, the Court applies the doctrine only when it recognizes an empirical basis for believing that the law will chill "substantial" amounts of expression. This justification for overbreadth comes from traditional speech-based theories of First Amendment doctrine.³⁰⁹ Given this, one might reasonably ask why illicit legislative motives raise constitutional concerns. If the law does not substantially impact animal rights activists or managed care demonstrators, why should courts intervene at all?

First, justified by a motive-based theory of free speech, overbreadth analysis can use a legislature's lack of precision in drafting a speech regulation as a surrogate for ascertaining the government's actual purpose. Although like other motive-based First Amendment theories,³¹⁰ this one relies on a nonconsequentialist justification for overbreadth, a motive-based theory provides a complementary justification for overbreadth that does not rely on the vagaries of unprovable empirical assumptions that a speech-based approach requires.

What is more, motive-based theories aside, lawmakers should be prevented from masking their discriminatory intent with broadly worded laws. Without regard to the real consequences for other non-abortion related speakers, there is a danger that the structure of First Amendment doctrine will systemically discourage candor in democratic governance. Invalidating illicitly motivated laws may deter this tendency.³¹¹ Finally, speech-based theory also suggests that hidden motives yield negative consequences. If indeed anti-abortion protestors engage in uniquely harmful speech, substantive discourse would benefit from open debate

³⁰⁶ See, e.g., *Brockett*, 472 U.S. at 503–04.

³⁰⁷ *Id.*

³⁰⁸ See *supra* notes 237–239 and accompanying text.

³⁰⁹ See Kagan, *supra* note 19, at 423–27.

³¹⁰ See Kagan, *supra* note 19, at 426.

³¹¹ *But see* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 24–26 (identifying problems associated with a deterrent-based approach to invalidating laws based on improper government purposes).

about the subject. Other speakers would not, then, be inadvertently banned by unnecessarily broad speech regulations.

D. Advantages and Critiques

As discussed earlier, disputes over the value of overbreadth doctrine seem intractable. Comprehensive analysis of overbreadth doctrine tends to rely to a large extent on unprovable empirical assumptions regarding the effect of broadly drafted laws on potential speakers and value-laden cost-benefit analyses concerning the role of federal courts and the importance of legislative autonomy. While the current Court clings to the doctrine and invokes it to invalidate statutes on a semi-regular basis, the doctrine's future remains uncertain. In essence, overbreadth doctrine's survival seems dependent on a balancing of these competing interests. Thus, if provided with additional reasons to advance the doctrine, courts may be able to justify more rigorous application of overbreadth law.

Shifting the doctrinal focus of overbreadth analysis to an emphasis on the precision with which a law advances the state's interests provides several benefits. First, a revived understanding of overbreadth as a doctrinal tool to flush out illicit legislative motive situates overbreadth more firmly in the milieu of the broader structure of First Amendment law. While commentators and courts have tended to view overbreadth in isolation, overbreadth makes more analytical sense when it is understood not as an outlier, but as an important complement to the rules against overt viewpoint and content discrimination.³¹²

Furthermore, imposing a more rigorous review of broad speech regulations may result in more honest and detailed discourse about truly troublesome areas of free speech law. If (as I advocate) overbreadth doctrine had been employed to invalidate the Colorado bubble law on the grounds that it was not sufficiently precise in serving the state's interests, both lawmakers and courts would be forced to discuss whether anti-abortion speech is so qualitatively different from other types of speech that it deserves special treatment. That treatment, of course, would have to be justified by a compelling state interest and narrowly tailored to serve that interest. First Amendment doctrine should promote more serious and candid government assessment of the social consequences of speech and speech regulations.

Granted, this proposal may be controversial. Accordingly, I will anticipate and address some possible criticisms of this proposal. One possible concern arising from the expansive reading of overbreadth I advocate is that the increased pressure to examine laws under a precision require-

³¹² Indeed, the precision requirement can be viewed as an organizing principle for all of First Amendment analysis, with overbreadth being viewed as one of several doctrinal components that can be employed to check the risk of covert speech discrimination.

ment akin to strict scrutiny might lead to the dilution of strict scrutiny itself.³¹³ Pressure to do the type of balancing that strict scrutiny entails might lead courts to more readily find a compelling interest that overrides the problem of a content- or viewpoint-based speech restriction. While I acknowledge this possibility, I think it is remote. There is nothing currently stopping courts from diluting the compelling interest standard, yet it has consistently retained its potency; it is exceedingly rare for courts to uphold laws under the standard. It is doubtful that a marginal increase in strict scrutiny associated with more rigorous application of overbreadth law will yield significant changes in other First Amendment doctrines.

Moreover, even if it is true that courts will struggle more often with whether speech regulations may be justified by particularized government interests, at least courts will be engaging in a more honest inquiry than they presently do. Allowing overbreadth to peel away pretenses of legislative neutrality will force policymakers and courts to deliberate about and resolve such conflicts in a more concrete manner. For example, by treating the Tennessee law restricting campaign speech near polling places as content-based in *Burson v. Freeman*, the Court approached its analysis with greater honesty. As the plurality opinion observed, invoking strict scrutiny “does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings.”³¹⁴ In *Burson*, the Court acknowledged the state’s compelling interests in protecting citizens’ right to vote and to conduct an election with integrity and reliability.³¹⁵ The Court went on to examine in great detail the delicate balance of constitutional rights relevant to that particular controversy, ultimately upholding the Tennessee law even under the Court’s most exacting First Amendment scrutiny.³¹⁶ Whatever one thinks of the Court’s conclusion, it surely exposed its reasoning to public scrutiny and future deliberation.

Similarly, invalidation of laws such as the Colorado bubble law will promote a more honest discourse about the fundamental constitutional conflicts that confront contemporary society. Courts and lawmakers should openly and explicitly deliberate about whether anti-abortion speech truly constitutes a special class of speech. Debate might more closely examine techniques commonly employed by the anti-abortion

³¹³ I am grateful to William Marshall for pointing out this potential concern to me. For a similar argument in another context, see David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 248 (1997) (arguing that the application of a compelling interest test to generally applicable laws burdening religion might dilute the effectiveness of strict scrutiny).

³¹⁴ *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

³¹⁵ *Id.* at 198–99.

³¹⁶ *Id.* at 199–211.

movement and the effect of those tactics on the health of women seeking abortions and on abortion access in general. Substantial systemic benefits may thereby accrue from the application of facial overbreadth analysis to broad speech regulations that may obscure a hidden purpose.

Another critique of revived overbreadth is that a stronger application of overbreadth doctrine to smoke out illicit government purposes may compromise the federalism and separation of powers principles at the root of much of the existing criticism of the doctrine. One version of this critique might stem from the possibility that more aggressive application of overbreadth might handcuff lawmakers sincerely trying to address social policy concerns. Legislators may find themselves in a difficult position between the “rock” of strict scrutiny and the “hard place” of overbreadth. Drafters of statutory speech bubbles may be especially confined by this dilemma. Such laws may be inextricably caught between the doctrine of substantial overbreadth and the doctrine of content neutrality. If such laws are to be truly viewpoint- and content-neutral, they must apply to a broad range of expression that is clearly protected by the First Amendment, but is unrelated to the government’s interest. On the other hand, if such laws are read more narrowly to encompass only the state’s primary interest in protecting women’s access to abortion clinics, they may be invalidated because they are discriminatory.³¹⁷

While it is true that the revived precision-based approach to overbreadth will likely result in more judicial intrusion into the legislative process, it will not undermine legitimate legislative policymaking. First, there is still ample room under the Constitution for lawmakers to directly regulate the non-expressive elements of conduct that may otherwise be protected. Indeed, much of the conduct that led to the enactment of the bubble law was already prohibited by other criminal law provisions.³¹⁸ Second, judicial intrusion is called for when the democratic process is skewed by government actors bent on obscuring their true motives. Democratically elected decisionmakers deserve deference because of their direct accountability and their institutional capacity for legislative fact-finding. Dishonest legislators, however, do not deserve the same deference. Moreover, accountability depends on the ability of the public to know what the government is doing. A doctrinal structure that encourages illicit speech discrimination therefore does not promote accountability.

Finally, it is possible that the proposed revival of overbreadth is simply unnecessary. One could argue that *Hill*’s overbreadth analysis was faulty not because it insufficiently accounted for illicit motives, but because it did not consider the actual deterrent impact the bubble law

³¹⁷ *But see* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (holding an injunction directed specifically against abortion protestors to be content-neutral).

³¹⁸ *See supra* note 112 and accompanying text.

would have on other non-abortion speakers. Under this argument, the existing understanding of overbreadth, properly applied, would have addressed the problem of illicit motive. In other words, if the law is substantially overbroad because it sweeps in protected speech that was not the intended object of the government's concern, it would be invalidated regardless. What work does the motive-identification function of overbreadth do if the law was already overbroad in conventional terms?

One response is that the Court has narrowed the application of overbreadth with its "substantial" overbreadth requirement. By requiring a quasi-empirical showing of a law's chilling effect and by viewing claims of deterrence with great skepticism,³¹⁹ the Court has made it difficult for speakers to successfully claim overbreadth. Furthermore, because the Court does not presently believe that neutrally regulating laws implicate overbreadth concerns, under the current doctrine the amount of speech regulated by a statute will not alone provide courts with a reason to invalidate the law.³²⁰

V. CONCLUSION

Covert discrimination evades close judicial scrutiny, yet is as detrimental to free speech values as explicit discrimination. First Amendment overbreadth law can be revived to serve important speech-protecting functions that are unserved or underserved by existing free speech law. By returning to the doctrine's functional origin—ensuring legislative precision—the overbreadth doctrine can create disincentives for lawmakers seeking to hide viewpoint and content discrimination behind broadly worded statutes. Continuing First Amendment doctrine on its current path will inevitably lead to more superficially neutral attempts to target speech regulations.³²¹

Moreover, this understanding of overbreadth allows us to see how overbreadth law fits more integrally into the structure of First Amendment doctrine and theory. It may also lead to greater candor, both in the legislative and judicial arenas.

³¹⁹ See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

³²⁰ See *Hill v. Colorado*, 530 U.S. 703, 730–32 (2000).

³²¹ See, e.g., *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 122 S. Ct. 2080 (2002); *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999) (invalidating a city ordinance prohibiting certain types of picketing in areas near religious premises). See also Raskin & LeBlanc, *supra* note 28, at 226–28.