SUPREME COURT OF THE UNITED STATES

No. 98–1856

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR., PETITIONERS *v.* COLORADO ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[June 28, 2000]

JUSTICE KENNEDY, dissenting.

The Court's holding contradicts more than a half century of well-established First Amendment principles. For the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum. In my view, JUSTICE SCALIA's First Amendment analysis is correct and mandates outright reversal. In addition to undermining established First Amendment principles, the Court's decision conflicts with the essence of the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). It seems appropriate in these circumstances to reinforce JUSTICE SCALIA's correct First Amendment conclusions and to set forth my own views.

I

The Court uses the framework of *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), for resolution of the case. The Court wields the categories of *Ward* so that what once were rules to protect speech now become rules to restrict

it. This is twice unfortunate. The rules of *Ward* are diminished in value for later cases; and the *Ward* analysis ought not have been undertaken at all. To employ *Ward*'s complete framework is a mistake at the outset, for *Ward* applies only if a statute is content neutral. Colorado's statute is a textbook example of a law which is content based.

A

The statute makes it a criminal offense to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility." Colo. Rev. Stat. §18–9–122(3) (1999). The law imposes content-based restrictions on speech by reason of the terms it uses, the categories it employs, and the conditions for its enforcement. It is content based, too, by its predictable and intended operation. Whether particular messages violate the statute is determined by their substance. The law is a prime example of a statute inviting screening and censoring of individual speech; and it is serious error to hold otherwise.

The Court errs in asserting the Colorado statute is no different from laws sustained as content neutral in earlier cases. The prohibitions against "picketing" and/or "leafleting" upheld in *Frisby* v. *Schultz*, 487 U. S. 474 (1988), *United States* v. *Grace*, 461 U. S. 171 (1983), and *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the Court says, see *ante*, at 17, and n. 30, are no different from the restrictions on "protest, education, or counseling" imposed by the Colorado statute. The parallel the Court sees does not exist. No examination of the content of a speaker's message is required to determine whether an individual is

picketing, or distributing a leaflet, or impeding free access to a building. Under the Colorado enactment, however, the State must review content to determine whether a person has engaged in criminal "protest, education, or counseling." When a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer's judgment, the speaker's words stray too far toward "protest, education, or counseling"— the boundaries of which are far from clear— the officer may decide the speech has moved from the permissible to the criminal. The First Amendment does not give the government such power.

The statute is content based for an additional reason: It restricts speech on particular topics. Of course, the enactment restricts "oral protest, education, or counseling" on any subject; but a statute of broad application is not content neutral if its terms control the substance of a speaker's message. If oral protest, education, or counseling on every subject within an 8-foot zone present a danger to the public, the statute should apply to every building entrance in the State. It does not. It applies only to a special class of locations: entrances to buildings with health care facilities. We would close our eyes to reality were we to deny that "oral protest, education, or counseling" outside the entrances to medical facilities concern a narrow range of topics— indeed, one topic in particular. By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content. See, *e.g.*, *United States* v. *Eichman*, 496 U. S. 310 (1990). If, just a few decades ago, a State with a history of enforcing racial discrimination had enacted a statute like this one, regulating "oral protest, education, or counseling" within 100 feet of the entrance to any lunch counter, our predecessors

would not have hesitated to hold it was content based or viewpoint based. It should be a profound disappointment to defenders of the First Amendment that the Court today refuses to apply the same structural analysis when the speech involved is less palatable to it.

The Court, in error and irony, validates the Colorado statute because it purports to restrict all of the proscribed expressive activity regardless of the subject. The even-handedness the Court finds so satisfying, however, is but a disguise for a glaring First Amendment violation. The Court, by citing the breadth of the statute, cannot escape the conclusion that its categories are nonetheless content based. The liberty of a society is measured in part by what its citizens are free to discuss among themselves. Colorado's scheme of disfavored-speech zones on public streets and sidewalks, and the Court's opinion validating them, are antithetical to our entire First Amendment tradition. To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment. For the majority to examine the statute under rules applicable to content-neutral regulations is an affront to First Amendment teachings.

After the Court errs in finding the statute content neutral, it compounds the mistake by finding the law viewpoint neutral. Viewpoint-based rules are invidious speech restrictions, yet the Court approves this one. 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. The statute applies only to medical facilities, a convenient yet obvious mask for the legislature's true purpose and for the prohibition's true effect.

One need read no further than the statute's preamble to remove any doubt about the question. The Colorado Legislature sought to restrict "a person's right to protest or counsel against certain medical procedures." Colo. Rev. Stat. §18–9–122(1) (1999). The word "against" reveals the legislature's desire to restrict discourse on one side of the issue regarding "certain medical procedures." The testimony to the Colorado Legislature consisted, almost in its entirety, of debates and controversies with respect to abortion, a point the majority acknowledges. *Ante*, at 9. The legislature's purpose to restrict unpopular speech should be beyond dispute.

The statute's operation reflects its objective. Under the most reasonable interpretation of Colorado's law, if a speaker approaches a fellow citizen within any one of Colorado's thousands of disfavored-speech zones and chants in praise of the Supreme Court and its abortion decisions, I should think there is neither protest, nor education, nor counseling. If the opposite message is communicated, however, a prosecution to punish protest is warranted. The antispeech distinction also pertains if a citizen approaches a public official visiting a health care facility to make a point in favor of abortion rights. If she says, "Good job, Governor," there is no violation; if she says, "Shame on you, Governor," there is. Furthermore, if the speaker addresses a woman who is considering an abortion and says, "Please take just a moment to read these brochures and call our support line to talk with women who have been in your situation," the speaker would face criminal penalties for counseling. Yet if the speaker simply says, "We are for abortion rights," I should think this is neither education or counseling. Thus does the Court today ensure its own decisions can be praised but not condemned. Thus does it restrict speech designed to teach that the exercise of a constitutional right is not necessarily concomitant with making a sound moral

choice. Nothing in our law or our enviable free speech tradition sustains this self-serving rule. Colorado is now allowed to punish speech because of its content and viewpoint.

The Court time and again has held content-based or viewpoint-based regulations to be presumptively invalid. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 345–346 (1995); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991) ("'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment'" (quoting *Regan* v. *Time, Inc.*, 468 U. S. 641, 648–649 (1984))). Here the statute "suppresses expression out of concern for its likely communicative impact." *Eichman*, 496 U. S., at 317. Like the picketing statute struck down in *Boos* v. *Barry*, 485 U. S. 312 (1998), this prohibition seeks to eliminate public discourse on an entire subject and topic. The Court can cite not a single case where we sustained a law aimed at a broad class of topics on grounds that it is both content and viewpoint neutral. Cf. *McIntyre* v. *Ohio Elections Comm'n*, *supra*, at 345 ("[E]ven though this provision applies even-handedly to advocates of differing viewpoints, it is a direct regulation of the content of speech"); *Boos*, *supra*, at 319 ("[A] regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulations extends . . . to prohibition of public discussion of an entire topic'" (quoting *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980))); see also *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978) (invalidating statute which permitted corporations to speak on political issues decided by referenda, but not on other subjects). Statutes which impose content-based or viewpoint-based restrictions are subjected to exacting

scrutiny. The State has failed to sustain its burden of proving that its statute is content and viewpoint neutral. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. ___, ___ (2000) (slip op., at 12) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions"). The *Ward* time, place, and manner analysis is simply inapplicable to this law. I would hold the statute invalid from the very start.

B

In a further glaring departure from precedent we learn today that citizens have a right to avoid unpopular speech in a public forum. *Ante*, at 11–12. For reasons JUSTICE SCALIA explains in convincing fashion, neither Justice Brandeis' dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928), nor the Court's opinion in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), establishes a right to be free from unwelcome expression aired by a fellow citizen in a traditional public forum: "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Edwards* v. *South Carolina*, 372 U. S. 229, 237 (1963).

The Court's reliance on *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970), and *Erznoznik* v. *Jacksonville*, 422 U. S. 205 (1975), is inapt. *Rowan* involved a federal statute allowing individuals to remove their names from commercial mailing lists. Businesses contended the statute infringed upon their First Amendment right to communicate with private citizens. The Court rejected the challenge, reasoning that the First Amendment affords individuals some control over what, and how often, unwelcome commercial messages enter their private residences. *Id.*, at 736, 738. *Rowan* did not hold, contrary to statements in today's opinion, see *ante*, at 12–13, that the First Amendment permits the government to restrict private speech in a

public forum. Indeed, the Court in *Rowan* recognized what everyone, before today, understood to be true: "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound . . . ." 397 U. S., at 738.

In *Erznoznik*, the Court struck down a municipal ordinance prohibiting drive-in movie theaters visible from either a public street or a public place from showing films containing nudity. The ordinance, the Court concluded, imposed a content-based restriction upon speech and was both too broad and too narrow to serve the interests asserted by the municipality. 422 U. S., at 211–215. The law, moreover, was not analogous to the rare, "selective restrictions" on speech previously upheld to protect individual privacy. *Id.*, at 208–209 (citing and discussing *Rowan*, *supra*, and *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974)). The Court did not, contrary to the majority's assertions, suggest that government is free to enact categorical measures restricting traditional, peaceful communications among citizens in a public forum. Instead, the Court admonished that citizens usually bear the burden of disregarding unwelcome messages. 422 U. S., at 211 (citing *Cohen* v. *California*, 403 U. S. 15, 21 (1971)).

Today's decision is an unprecedented departure from this Court's teachings respecting unpopular speech in public fora.

II

The Colorado statute offends settled First Amendment principles in another fundamental respect. It violates the constitutional prohibitions against vague or overly broad criminal statutes regulating speech. The enactment's fatal ambiguities are multiple and interact to create further imprecisions. The result is a law more vague and overly broad than any criminal statute the Court has sustained as a permissible regulation of speech. The

statute's imprecisions are so evident that this, too, ought to have ended the case without further discussion.

The law makes it a criminal offense to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility." Colo. Rev. Stat. §18–9–122(3) (1999). The operative terms and phrases of the statute are not defined. The case comes to us from the state court system; and as the Colorado courts did not give the statute a sufficient narrowing construction, questions of vagueness and overbreadth should be addressed by this Court in the first instance. See *Coates* v. *Cincinnati,* 402 U. S. 611, 613–614 (1971).

In the context of a law imposing criminal penalties for pure speech, "protest" is an imprecise word; "counseling" is an imprecise word; "education" is an imprecise word. No custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech. I simply disagree with the majority's estimation that it is "quite remote" that "anyone would not understand any of those common words." *Ante*, at 28. The criminal statute is subject to manipulation by police, prosecutors, and juries. Its substantial imprecisions will chill speech, so the statute violates the First Amendment. Cf. *Kolender* v. *Lawson,* 461 U. S. 352, 358, 360 (1983); *Herndon* v. *Lowry,* 301 U. S. 242, 263–264 (1937).

In operation the statute's inevitable arbitrary effects create vagueness problems of their own. The 8-foot no-approach zone is so unworkable it will chill speech. Assume persons are about to enter a building from different points and a protestor is walking back and forth with a sign or attempting to hand out leaflets. If she stops to

create the 8-foot zone for one pedestrian, she cannot reach other persons with her message; yet if she moves to maintain the 8-foot zone while trying to talk to one patron she may move knowingly closer to a patron attempting to enter the facility from a different direction. In addition, the statute requires a citizen to give affirmative consent before the exhibitor of a sign or the bearer of a leaflet can approach. When dealing with strangers walking fast toward a building's entrance, there is a middle ground of ambiguous answers and mixed signals in which misinterpretation can subject a good-faith speaker to criminal liability. The mere failure to give a reaction, for instance, is a failure to give consent. These elements of ambiguity compound the others. Finally, as we all know, the identity or enterprise of the occupants of a building which fronts on a public street are not always known to the public. Health care providers may occupy but a single office in a large building. The Colorado citizen may walk from a disfavored-speech zone to a free zone with little or no ability to discern when one ends and the other begins. The statute's vagueness thus becomes as well one source of its overbreadth. The only sure way to avoid violating the law is to refrain from picketing, leafleting, or oral advocacy altogether. Scienter cannot save so vague a statute as this.

A statute is vague when the conduct it forbids is not ascertainable. See *Chicago* v. *Morales*, 527 U. S. 41, 56 (1999). "[People] of common intelligence cannot be required to guess at the meaning of the enactment." *Winters* v. *New York*, 333 U. S. 507, 515 (1948). The terms "oral protest, education, or counseling" are at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades. In *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), the Court encountered little difficulty in striking down a municipal ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct

themselves in a manner annoying to persons passing by . . . ." *Ibid.* The Court held the ordinance to be unconstitutionally vague because "it subject[ed] the exercise of the right of assembly to an unascertainable standard, and [was] unconstitutionally broad because it authorize[d] the punishment of constitutionally protected conduct." *Id.*, at 614. Vagueness led to overbreadth as well in *Houston* v. *Hill*, 482 U. S. 451 (1987), where the Court invalidated an ordinance making it "unlawful for any person to . . . in any manner oppose . . . or interrupt any policeman in the execution of his duty." *Id.*, at 455. The "sweeping" restriction, the Court reasoned, placed citizens at risk of arrest for exercising their "freedom . . . to oppose or challenge police action," a right "by which we distinguish a free nation from a police state." *Id.*, at 462–463.

The requirement of specificity for statutes that impose criminal sanctions on public expression was established well before *Coates* and *Hill*, of course. In *Carlson* v. *California*, 310 U. S. 106 (1940), a unanimous Court invalidated an ordinance prohibiting individuals from carrying or displaying any sign or banner or from picketing near a place of business "for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment." *Id.*, at 109. The statute employed imprecise language, providing citizens with no guidance as to whether particular expressive activities fell within its reach. The Court found that the "sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence," a result at odds with the guarantees of the First Amendment. *Id.*, at 112.

Rather than adhere to this rule, the Court turns it on its head, stating the statute's overbreadth is "a virtue, not a vice." *Ante*, at 26. The Court goes even further, praising the statute's "prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet." *Ante*,

at 24. Indeed, in the Court's view, "bright-line prophylactic rule[s] may be the best way to provide protection" to those individuals unwilling to hear a fellow citizen's message in a public forum. *Ante*, at 25. The Court is quite wrong. Overbreadth 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. The Court, moreover, cannot meet the concern that the statute is vague; for neither the Colorado courts nor established legal principles offer satisfactory guidance in interpreting the statute's imprecisions.

III

Even aside from the erroneous, most disturbing assumptions that the statute is content neutral, viewpoint neutral, and neither vague nor overbroad, the Court falls into further serious error when it turns to the time, place, and manner rules set forth in *Ward*.

An essential requirement under *Ward* is that the regulation in question not "burden substantially more speech than necessary to further the government's legitimate interests." 491 U. S., at 799. As we have seen, however, Colorado and the Court attempt to justify the law on just the opposite assumption.

I have explained already how the statute is a failed attempt to make the enactment appear content neutral, a disguise for the real concern of the legislation. The legislature may as well have enacted a statute subjecting "oral protest, education, or counseling near abortion clinics" to criminal penalty. Both the State and the Court attempt to sidestep the enactment's obvious content-based restriction by praising the statute's breadth, by telling us all topics of conversation, not just discourse on abortion, are banned within the statutory proscription. The saving feature the Court tries to grasp simply creates additional free speech

infirmity. Our precedents do not permit content censoring to be cured by taking even more protected speech within a statute's reach. The statute before us, as construed by the majority, would do just that. If it indeed proscribes "oral protest, education, or counseling" on all subjects across the board, it by definition becomes "substantially broader than necessary to achieve the government's interest." *Id.*, at 800.

The whimsical, arbitrary nature of the statute's operation is further demonstration of a restriction upon more speech than necessary. The happenstance of a dental office being located in a building brings the restricted-speech zone into play. If the same building also houses an organization dedicated, say, to environmental issues, a protest against the group's policies would be barred. Yet if, on the next block there were a public interest enterprise in a building with no health care facility, the speech would be unrestricted. The statute is a classic example of a proscription not narrowly tailored and resulting in restrictions of far more speech than necessary to achieve the legislature's object. The first time, place, and manner requirement of *Ward* cannot be satisfied.

Assuming Colorado enacted the statute to respond to incidents of disorderly and unlawful conduct near abortion clinics, there were alternatives to restricting speech. It is beyond dispute that pinching or shoving or hitting is a battery actionable under the criminal law and punishable as a crime. State courts have also found an actionable tort when there is a touching, done in an offensive manner, of an object closely identified with the body, even if it is not clothing or the body itself. See, *e.g.*, *Fisher* v. *Carrousel Motor Hotel, Inc.*, 424 S. W. 2d 627, 630 (Tex. 1967) ("Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting" (citing Prosser, Insult & Out-

rage, 44 Calif. L. Rev. 40 (1956))). The very statute before us, in its other parts, includes a provision aimed at ensuring access to health care facilities. The law imposes criminal sanctions upon any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility." Colo. Rev. Stat. §18–9–122(2) (1999). With these means available to ensure access, the statute's overreaching in the regulation of speech becomes again apparent.

The majority insists the statute aims to protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics. If these are punishable acts, they should be prohibited in those terms. In the course of praising Colorado's approach, the majority does not pause to tell us why, in its view, substantially less restrictive means cannot be employed to ensure citizens access to health care facilities or to prevent physical contact between citizens. The Court's approach is at odds with the rigor demanded by *Ward*. See 491 U. S., at 799 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals").

There are further errors in the Court's novel, prophylactic analysis. The prophylactic theory seems to be based on a supposition that most citizens approaching a health care facility are unwilling to listen to a fellow citizen's message and that face-to-face communications will lead to lawless behavior within the power of the State to punish. These premises have no support in law or in fact. And even when there is authority to adopt preventive measures, of course, the First Amendment does not allow a speech prohibition in an imprecise or overly broad statute. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940) ("The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear

and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter"). The Court places our free speech traditions in grave jeopardy by licensing legislatures to adopt "bright-line prophylactic rule[s] . . . to provide protection" to unwilling listeners in a quintessential public forum. *Ante*, at 25.

The Court's lack of concern with the statute's flaws is explained in part by its disregard of the importance of free discourse and the exchange of ideas in a traditional public forum. Our precedents have considered the level of protection afforded speech in specific locations, but the rules formulated in those decisions are not followed today. "To ascertain what limits, if any, may be placed on protected speech," our precedents instruct "we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ. The standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue.'" *Frisby* v. *Schultz*, 487 U. S., at 479 (quoting *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983)). The quoted language was part of our holding in an important free speech case; and it is a holding the majority disregards.

Frisby upheld a municipal ordinance restricting targeted picketing in residential areas. The primary purpose of the ordinance, and a reason the Court sustained it, was to protect and preserve the tranquility of private homes. The private location at which respondents sought to engage in their expressive activities was stressed throughout the Court's opinion. See 487 U. S., at 483 ("[W]e construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited"). "Although in many locations," the Court reasoned,

"we expect individuals to avoid speech they do not want to hear, the home is different. 'That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.'" *Id.*, at 484 (quoting *Rowan* v. *Post Office Dept.*, 397 U. S., at 738).

The Colorado law does not seek to protect private residences. Nor does the enactment impose a place restriction upon expressive activity undertaken on property, such as fairgrounds, designated for limited, special purposes. See, *e.g.*, *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 655 (1981). The statute applies to public streets and sidewalks, traditional public fora which "'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" See *Boos*, 485 U. S., at 318 (quoting *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.)). Given our traditions with respect to open discussion in public fora, this statute, which sweeps so largely on First Amendment freedoms, cannot be sustained.

The statute fails a further test under *Ward*, for it does not "'leave open ample alternative channels for communication of the information.'" 491 U. S., at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)). *Frisby* again instructs us. A second reason we sustained the ordinance banning targeted residential picketing was because "ample alternativ[e]" avenues for communication remained open:

> "'Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching . . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone,

> short of harassment.'" 487 U. S., at 483–484 (quoting Brief for Appellants in No. 87–168, O. T. 1987, pp. 41–42).

The residential picketing ordinance, the Court concluded, "permit[ted] the more general dissemination of a message" to the targeted audience. 487 U. S., at 483.

The same conclusion cannot be reached here. Door-to-door distributions or mass mailing or telephone campaigns are not effective alternative avenues of communication for petitioners. They want to engage in peaceful face-to-face communication with individuals the petitioners believe are about to commit a profound moral wrong. Without the ability to interact in person, however momentarily, with a clinic patron near the very place where a woman might elect to receive an abortion, the statute strips petitioners of using speech in the time, place, and manner most vital to the protected expression.

In addition to leaving petitioners without adequate means of communication, the law forecloses peaceful leafleting, a mode of speech with deep roots in our Nation's history and traditions. In an age when vast resources and talents are commanded by a sophisticated media to shape opinions on limitless subjects and ideas, the distribution of leaflets on a sidewalk may seem a bit antiquated. This case proves the necessity for the traditional mode of speech. It must be remembered that the whole course of our free speech jurisprudence, sustaining the idea of open public discourse which is the hallmark of the American constitutional system, rests to a significant extent on cases involving picketing and leafleting. Our foundational First Amendment cases are based on the recognition that citizens, subject to rare exceptions, must be able to discuss issues, great or small, through the means of expression they deem best suited to their purpose. It is for the speaker, not the government, to choose

the best means of expressing a message. "The First Amendment," our cases illustrate, "protects [citizens'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant,* 486 U. S. 414, 424 (1988). The Court's conclusion that Colorado's 8-foot no-approach zone protects citizens' ability to leaflet or otherwise engage in peaceful protest is untenable.

Given the Court's holding, it is necessary to recall our cases protecting the right to protest and hand out leaflets. In *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938), the Court invalidated an ordinance forbidding the distribution of literature of any kind without the written permission of a city official. "The liberty of the press," the Court explained, "is not confined to newspapers and periodicals." *Id.*, at 452. "It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Ibid.*

In *Schneider* v. *State (Town of Irvington),* 308 U. S. 147 (1939), reinforcing *Lovell*, the Court struck down a series of municipal ordinances prohibiting the distribution of handbills on public streets on the rationale of preventing littering. *Schneider* made clear that while citizens may not enjoy a right to force an unwilling person to accept a leaflet, they do have a protected right to tender it. The Court stressed a basic First Amendment precept: "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may exercised in some other place." 308 U. S., at 163. The words of the Court more than a half century ago demonstrate the necessity to

adhere to those principles today:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.
>
> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be as-

> tute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." 308 U. S., at 160–161 (footnote omitted).

After *Lovell* and *Schneider* the Court gave continued, explicit definition to our custom and practice of free and open discourse by picketing and leafleting. In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), the Court considered a First Amendment challenge to a statute prohibiting "[l]oitering or picketing" near "the premises or place of business of any . . . firm, corporation, or association of people, engaged in a lawful business." *Id.*, at 91. Petitioner was arrested, charged, and convicted of violating the statute by engaging in peaceful picketing in front of a manufacturing plant. *Id.*, at 94–95. The Court invalidated the Alabama statute. The breadth of Alabama's speech restriction was one reason for ruling it invalid on its face, just as it should be for the statute we consider today:

> "[Alabama Code §] 3448 has been applied by the state courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise cus-

> tomers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 98–99 (footnote omitted).

The statute, in short, prohibited "whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise . . . so long as it occurs in the vicinity of the scene of the dispute." *Id.*, at 101.

The Court followed these observations with an explication of fundamental free speech principles I would have thought controlling in the present case:

> "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.
>
> "The range of activities proscribed by §3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested– including the employees directly affected– may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in

> society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.*, at 104.

Carlson v. *California*, 310 U. S. 106 (1940), is in accord. In the course of reversing Carlson's conviction for engaging in a peaceful protest near a construction project in Shasta County, California, the Court declared that a citizen's right to "publiciz[e] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by [the First Amendment through] the Fourteenth Amendment against abridgment by a State." *Id.*, at 113.

The principles explained in *Thornhill* and *Carlson* were reaffirmed a few years later in the context of speech on religious matters when an individual sought to advertise a meeting of the Jehovah's Witnesses by engaging in a door-to-door distribution of leaflets. *Martin* v. *City of Struthers*, 319 U. S. 141 (1943). The petitioner was convicted under a city ordinance which prohibited individuals from "distributing handbills, circulars or other advertisements" to private residences. *Id.*, at 142. The Court invalidated the ordinance, reinforcing the vital idea today's Court ignores:

> "While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. 'Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most

> effective way of bringing them to the notice of individuals is their distribution at the homes of the people.'" *Id.*, at 145 (quoting *Schneider*, 308 U. S., at 164).

The Court's more recent precedents honor the same principles: Government cannot foreclose a traditional medium of expression. In *City of Ladue* v. *Gilleo*, 512 U. S. 43 (1994), we considered a challenge to a municipal ordinance prohibiting, *inter alia*, "such absolutely pivotal speech as [the display of] a sign protesting an imminent governmental decision to go to war." *Id.*, at 54. Respondent had placed a sign in a window of her home calling "For Peace in the Gulf." *Id.*, at 46. We invalidated the ordinance, finding that the local government "ha[d] almost completely foreclosed a venerable means of communication that is both unique and important." *Id.*, at 54. The opinion, which drew upon *Lovell*, *Martin*, and *Schneider*, was also careful to note the importance of the restriction on place imposed by the ordinance in question: "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." 512 U. S., at 56. So, too, did we stress the importance of preserving the means citizens use to express messages bearing on important public debates. See *id.*, at 57 ("Residential signs are an unusually cheap and convenient form of communication[,] [e]specially for persons of modest means or limited mobility . . .").

A year later in *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995), we once more confirmed the privileged status peaceful leafleting enjoys in our free speech tradition. Ohio prohibited anonymous leafleting in connection with election campaigns. Invalidating the law, we observed as follows: "'Anonymous pamphlets, leaflets, brochures and even books have played an important role in

the progress of mankind.'" *Id.*, at 341 (quoting *Talley* v. *California*, 362 U. S. 60, 64 (1960)). We rejected the State's claim that the restriction was needed to prevent fraud and libel in its election processes. Ohio had other laws in place to achieve these objectives. 514 U. S., at 350. The case, we concluded, rested upon fundamental free speech principles:

> "Indeed, the speech in which Mrs. McIntyre engaged— handing out leaflets in the advocacy of a politically controversial viewpoint— is the essence of First Amendment expression. That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id.*, at 347 (citations omitted).

Petitioners commenced the present suit to challenge a statute preventing them from expressing their views on abortion through the same peaceful and vital methods approved in *Lovell*, *Schneider*, *Thornhill*, *Carlson*, and *McIntyre*. Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against. We must remember that, by decree of this Court in discharging our duty to interpret the Constitution, any plea to the government to outlaw some abortions will be to no effect. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). Absent the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause. In a free society protest serves to produce stability, not to undermine it. "The right

to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). As Justice Brandeis observed: "[The framers] recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law— the argument of force in its worst form." *Whitney* v. *California*, 274 U. S. 357, 375–376 (1927) (concurring opinion).

The means of expression at stake here are of controlling importance. Citizens desiring to impart messages to women considering abortions likely do not have resources to use the mainstream media for their message, much less resources to locate women contemplating the option of abortion. Lacking the aid of the government or the media, they seek to resort to the time honored method of leafleting and the display of signs. Nowhere is the speech more important than at the time and place where the act is about to occur. As the named plaintiff, Leila Jeanne Hill, explained, "I engage in a variety of activities designed to impart information to abortion-bound women and their friends and families. . . ." App. 49. "In my many years of sidewalk counseling I have seen a number of [these] women change their minds about aborting their unborn children as a result of my sidewalk counseling, and God's grace." *Id.*, at 51.

When a person is walking at a hurried pace to enter a building, a solicitor who must stand still eight feet away

cannot know whether the person can be persuaded to accept the leaflet or not. Merely viewing a picture or brief message on the outside of the leaflet might be critical in the choice to receive it. To solicit by pamphlet is to tender it to the person. The statute ignores this fact. What the statute restricts is one person trying to communicate to another, which ought to be the heart of civilized discourse.

Colorado's excuse, and the Court's excuse, for the serious burden imposed upon the right to leaflet or to discuss is that it occurs at the wrong place. Again, Colorado and the Court have it just backwards. For these protestors the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it.

Perhaps the leaflet will contain a picture of an unborn child, a picture the speaker thinks vital to the message. One of the arguments by the proponents of abortion, I had thought, was that a young woman might have been so uninformed that she did not know how to avoid pregnancy. The speakers in this case seek to ask the same uninformed woman, or indeed any woman who is considering an abortion, to understand and to contemplate the nature of the life she carries within her. To restrict the right of the speaker to hand her a leaflet, to hold a sign, or to speak quietly is for the Court to deny the neutrality that must be the first principle of the First Amendment. In this respect I am in full agreement with JUSTICE SCALIA's explanation of the insult the Court gives when it tells us these grave moral matters can be discussed just as well through a bullhorn. It would be remiss, moreover, not to observe the profound difference a leaflet can have in a woman's decisionmaking process. Consider the account of one young woman who testified before the Colorado Senate:

> "Abortion is a major decision. Unfortunately, most women have to make this decision alone. I did and I know that I am not the only one. As soon as I said the word 'pregnant,' he was history, never to be heard of, from again. I was scared and all alone. I was too embarrassed to ask for help. If this law had been in effect then, I would not have got any information at all and gone through with my abortion because the only people that were on my side were the people at the abortion clinic. They knew exactly how I was feeling and what to say to make it all better. In my heart, I knew abortion was wrong, but it didn't matter. I had never taken responsibility for my actions so why start then. One of the major reasons I did not go through with my scheduled abortion was the picture I was given while I was pregnant. This was the first time I had ever seen the other side of the story. I think I speak for a lot of women, myself included, when I say abortion is the only way out because of *[sic]* it's all I knew. In Sex Education, I was not taught about adoption or the fetus or anything like that. All I learned about was venereal diseases and abortion. The people supplying the pamphlet helped me make my choice. I got an informed decision, I got information from both sides, and I made an informed decision that my son and I could both live with. Because of this picture I was given, right there, this little boy got a chance at life that he would never have had." *Id.*, at 167–168.

There are, no doubt, women who would testify that abortion was necessary and unregretted. The point here is simply that speech makes a difference, as it must when acts of lasting significance and profound moral consequence are being contemplated. The majority reaches a contrary conclusion only by disregarding settled free speech principles. In doing so it delivers a grave wound to

the First Amendment as well as to the essential reasoning in the joint opinion in *Casey*, a concern to which I now turn.

IV

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, the Court reaffirmed its prior holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages. The joint opinion in *Casey* considered the woman's liberty interest and principles of *stare decisis*, but took care to recognize the gravity of the personal decision: "[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted." 505 U. S., at 852.

The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the joint opinion in *Casey*. The vital principle of the opinion was that in defined instances the woman's decision whether to abort her child was in its essence a moral one, a choice the State could not dictate. Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet. The lack of care with which the Court sustains the Colorado statute reflects a most troubling abdication of our responsibility to enforce the First Amendment.

There runs through our First Amendment theory a concept of immediacy, the idea that thoughts and pleas and petitions must not be lost with the passage of time. In a fleeting existence we have but little time to find truth through discourse. No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur. The Court tears away from the protesters the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.

I dissent.