CASE COMMENT

TAKE A STEP BACK: THE CONSTITUTIONALITY OF STRICTER FUNERAL-PICKETING REGULATIONS AFTER *SNYDER V. PHELPS*

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I. INTRODUCTION

The Westboro Baptist Church is a small, independent Baptist congregation headquartered in Topeka, Kansas.[1] Pastor Fred Phelps founded Westboro in 1955, and most of the church's congregation consists of Phelps' extended fami-

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[1] Katherine A. Ritts, Comment, *The Constitutionality of "Let Them Rest in Peace" Bills:*

ly, including his thirteen children, fifty-four grandchildren and seven great-grandchildren.[2] Westboro attained national notoriety about fifty years after the church was founded, when it began picketing funerals of members of the U.S. military who were killed on duty in Iraq and Afghanistan.[3] Both the Anti-Defamation League and the Southern Poverty Law Center currently monitor Westboro as an active United States hate group.[4]

Westboro uses its military funeral protests not as a way to target and criticize the fallen service member, but as a way to express its political opinions about the United States.[5] Westboro became famous for one of its more radical beliefs: God hates the United States because of its toleration of homosexuality, particularly in its military, and God punishes the United States by killing its soldiers in active duty.[6] Westboro pickets military funerals not because it believes the soldiers to be gay,[7] but because the soldiers "died serving a country that has incurred the wrath of God by accepting and tolerating homosexuality."[8] Thus,

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Can Governments Say "Not Today, Fred" to Demonstrations at Funeral Ceremonies?, 58 SYRACUSE L. REV. 137, 142 (2007).

[2] *Id.* (quoting Ed Lavandera, *Dodge City Showdown at Funeral*, CNN (Mar. 7, 2006, 9:48 AM), http://www.cnn.com/2006/US/03/06/btsc.lavandrera.funerals/index.html).

[3] Ian Cram, *Coercing Communities or Promoting Civilised Discourse? Funeral Protests and Comparative Hate Speech Jurisprudence*, 12 HUMAN RIGHTS L. REV. 455, 459 (2012). Before Westboro began picketing military funerals, it had picketed the funerals of famous Americans, such as Coretta Scott King, Ronald Reagan, Gerald Ford, and Chief Justice William Rehnquist, although Westboro went relatively unnoticed by the media until 2005. *Id.* Ritts, *supra* note 1, at 144.

[4] *Extremism in America, Westboro Baptist Church*, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/learn/ext_us/WBC/default.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=WBC (last visited Feb. 16, 2013); *Westboro Baptist Church*, SOUTHERN POVERTY LAW CTR., http://www.splcenter.org/get-informed/intelligence-files/groups/westboro-baptist-church (last visited Feb. 16, 2013); Ritts, *supra* note 1, at 144.

[5] *Why Do You Picket Soldiers' Funerals?*, GOD HATES FAGS, http://www.godhatesfags.com/faq.html#Soldier_Funeral (last visited Feb. 16, 2013) ("[Soldiers'] funerals are the forum of choice for delivering WBC's message of choice.").

[6] Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011); Ritts, *supra* note 1, at 144.

[7] Ritts, *supra* note 1, at 144. In addition to picketing the funerals of famous (heterosexual) Americans, Westboro has also picketed the funerals of homosexuals. Westboro members gained some notoriety for picketing the funeral of Matthew Shepard, a homosexual man who was brutally murdered because of his sexual orientation. Ritts, *supra* note 1, at 143. Outside of Shepard's funeral, Westboro members held up signs reading "No Fags in Heaven" and "God Hates Fags." Ritts, *supra* note 1, at 143.

[8] Ritts, *supra* note 1, at 143. Westboro often speaks out against homosexuality in its protests because it believes that homosexuality is a "particularly heinous sin." *Why Do You Focus on Homosexuals?*, GOD HATES FAGS, http://www.godhatesfags.com/faq.html#Focus (last visited Feb. 16, 2013) [hereinafter *Why Do You Focus on Homosexuals?*]. Instead of accepting homosexuals in American society, and especially in the military, Westboro believes that America should deny homosexuals all civil rights. *Id.* ("[Homosexuality] is the

Westboro pickets military funerals to spread its political and religious beliefs to a wide audience, rather than to specifically condemn a particular individual.

Snyder v. Phelps is a 2011 Supreme Court decision that shielded Westboro from tort liability resulting from its picketing of Marine Lance Corporal Matthew Snyder's funeral.[9] At Snyder's funeral, Westboro held up signs expressing its opinions on several political and social issues, which were arguably offensive to most viewers. These signs stated: "God Hates the USA/Thank God for 9/11," "American is Doomed," "Don't Pray for the U.S.A.," "Thank God for IEDs," "Thank God for Dead Soldiers," "God Hates Fags," "Priests Rape Boys," "Pope in Hell," "You're Going to Hell," and "God Hates You."[10]

These signs did not directly target Matthew Snyder but clearly expressed Westboro's views on issues such as the state of morality in America, homosexuality in the United States military, and scandals in the Roman Catholic Church. Although two signs, "You're Going to Hell" and "God Hates You," plausibly could be construed to refer specifically to Matthew Snyder,[11] this interpretation fails to understand Westboro's goals. Westboro pickets military funerals because it knows that doing so will afford it an opportunity to publicize its message to a large audience.[12] Although Westboro certainly does believe that God hates Matthew Snyder and that he is going to Hell, Westboro members did not choose Matthew Snyder's funeral to specifically direct its messages at him.[13] Therefore, these two signs may be directed at Matthew Sny-

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only sin to which America is seriously contemplating giving civil rights. Imagine if embezzlers, murderers or rapists demanded that they be given protection—not punishment—by law because of their wrongful deeds? You would gasp in amazement. Yet you embrace the notion that because someone engages in sex with a person of the same gender—and then chooses to broadcast that fact—they should be protected? Amazing!").

[9] 131 S. Ct. 1207 (2011). Matthew Snyder's father sued Westboro, Phelps, and his daughters in federal district court for "five state-law tort claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy." *Id.* at 1214. "A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages" (that were later reduced to $2.1 million). *Id.* The Court of Appeals for the Fourth Circuit reversed, holding that Westboro's speech was entitled to First Amendment protection. *Id.* at 1210. The Supreme Court agreed with the Fourth Circuit that the district court's judgment "wrongly attache[d] tort liability to constitutionally protected speech." *Id.* at 1219 (internal citations and quotations omitted).

[10] *Id.* at 1213.

[11] *Id.* at 1217.

[12] *See Why Do You Focus on Homosexuals?*, *supra* note 8.

[13] *See If God Hates Homosexuals as a Group, Why Do You Sometimes Aim Signs at Individual People, Not at the Group? How Can You Say That an Individual is in Hell?*, GOD HATES FAGS, http://www.godhatesfags.com/faq.html#Individuals (last visited Feb. 16, 2013) [hereinafter *How Can You Say That an Individual is in Hell?*]. Westboro acknowledges that it cannot know for certain whether particular individuals are going to Hell, but it believes

der in some sense, but only in the way that they are generally directed at almost everyone else in this country.

In *Snyder*,[14] whether Westboro's speech was protected by the First Amendment hinged on whether Westboro's speech was of public concern.[15] The Court emphasized that speech of public concern deserves greater First Amendment protection than speech of purely private significance because "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."[16] In holding that Westboro's speech was of public concern,[17] the Court noted that Westboro's picketing occurred on public land adjacent to a public street—a place that has a "special position in terms of First Amendment protection."[18] Although Westboro's speech was of public concern and occurred at a traditional public forum, the Court recognized that the freedom of speech is not an absolute right and that Westboro's "choice of where and when to conduct its picketing" is still subject to the government's reasonable time, place, and manner restrictions.[19]

When the picketing at issue in *Snyder* occurred, Maryland did not have a

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that it "can and should look at all of the available evidence . . . and make a reasonable assumption." *Id.* Referring to Matthew Shepard, a homosexual man whose funeral Westboro picketed, Westboro stated that "the evidence that Matthew Shepard is in hell is the fact that he was a practicing homosexual, who was trolling for anonymous perverted sex when he was killed. There is absolutely not one shred of evidence that he ever repented. We hope he did, as we hope everyone does, but there is no evidence." *See supra* text accompanying note 7.

[14] 131 S. Ct. 1207 (2011).

[15] *Id.* at 1215 ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (quoting Connick v. Myers, 461 U.S. 138, 145 (1983) (internal quotation marks omitted)).

[16] *Id.* at 1215. Restrictions on speech of purely private concern are more permissible than restrictions on speech of public concern because: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas;" and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import." *Id.* at 1215–16 (quoting Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 760 (1985) (internal quotation marks omitted)).

[17] *Id.* at 1216–17. The Court determined that Westboro's speech was of public concern, despite the fact that it occurred at Matthew Snyder's funeral and a few of its placards could be construed as directed at Snyder ("You're Going to Hell;" "God Hates You") because the "overall thrust and dominant theme of Westboro's demonstration spoke to broader social issues," such as "the political and moral conduct of the United States and its citizens, the fate of our nation, homosexuality in the military, and scandals involving the Catholic clergy." *Id.*

[18] *Id.* at 1209. Public streets are "the archetype of a traditional public forum," which have historically been used for public assembly and debate. *Id.* at 1218 (quoting Frisby v. Schultz, 487 U.S. 474, 480 (1988).

[19] *Id.* at 1218. "'[E]ven protected speech is not equally permissible in all places and at all times.'" *Id.* (citing *Frisby v. Schultz*, 473 U.S. 788, 799 (1985)).

time, place, and manner restriction on funeral picketing.[20] Therefore, the Court did not consider the constitutionality of funeral-picketing regulations.[21] The Court did seem to suggest, however, that content-neutral time, place, and manner laws could constitutionally prohibit funeral protests like those at issue in *Snyder*.[22] This Comment argues that, contrary to the Court's suggestion, funeral-picketing laws are never content neutral.

Seemingly as a direct result of Westboro's activities, at least forty-four states and the federal government have passed laws regulating funeral protests.[23] While the Supreme Court has not yet decided the constitutionality of funeral-picketing laws, several lower federal courts have addressed this issue. Currently, there is no consensus among these courts as to the constitutionality of these laws.[24] However, the trend has been for courts to uphold the constitutionality of laws regulating funeral protests. For example, a split between the Sixth and Eighth Circuit Courts of Appeal[25] was recently resolved after the Eight Circuit,

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[20] *Id.* at 1218. At the time the Court decided Snyder, Maryland, at least 43 other states, and the federal government had time, place, or manner restrictions on funeral protesting. *Id.*

[21] *Id.*

[22] *See id.* ("Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is 'subject to reasonable time, place, or manner restrictions' . . . . Maryland now has a law imposing restrictions on funeral picketing . . . as do 43 other States and the Federal Government. . . . To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case . . . . [H]owever, . . . we have no occasion to consider . . . whether [funeral-picketing] regulations are constitutional." (internal citations omitted) (emphasis added); Vikram David Amar & Alan E. Brownstein, *Assessing California's New Law (And Others Somewhat Like It) That Tries to Regulate Funeral Demonstrations Without Violating the First Amendment*, JUSTICIA (Sept. 28, 2012), http://verdict.justia.com/2012/09/28/assessing-californias-new-law-and-others-somewhat-like-it-that-tries-to-regulate-funeral-demonstrations-without-violating-the-first-amendment.

[23] *See, e.g.*, funeral-picketing statutes from Colorado, COLO. REV. STAT. ANN. § 13-21-126 (West 2006); Georgia, GA. CODE ANN. § 16-11-34.2 (West 2006); New Jersey, N.J. STAT. ANN. § 2C:33-8.1 (West 2006); Maryland, MD. CODE ANN., CRIM. LAW § 10-205 (West 2011).

[24] *See, e.g.*, Phelps-Roper v. Taft, 523 F. Supp. 2d 612 (N.D. Ohio 2007) (holding that a 300-foot buffer zone prohibiting funeral protests within one hour before and after a funeral is narrowly tailored to a significant government interest and is not substantially overbroad); McQueary v. Stumbo, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (granting protestors' request to enjoin enforcement of a funeral-picketing law against them because the law was not narrowly tailored to significant government interest).

[25] Previously, the Eighth Circuit struck down a state funeral-picketing ordinance because the "content-neutral" regulation did not serve a significant governmental interest, Phelps-Roper v. City of Manchester, 658 F.3d 813, 816–17 (8th Cir. 2011) [hereinafter *Manchester*], *vacated en banc*, 697 F.3d 678 (8th Cir. 2012) [hereinafter *Manchester II*], while the Sixth Circuit upheld the constitutionality of a similar "content-neutral," funeral-protest law because it served the state's significant interest in protecting mourners' privacy, Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008). Contrary to the Sixth and

sitting en banc, overruled its previous decision and held that a city ordinance regulating funeral protests did not violate the First Amendment.[26]

This Comment will identify state laws regulating funeral protests but will focus on a new federal law, the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 (HAVA).[27] HAVA was enacted in the wake of the *Snyder* decision and tightened the federal regulations on military funeral protests that had been in force since 2006.[28]

In 2006, within a year of Westboro's rise to national prominence,[29] Congress enacted the first federal funeral-picketing regulations,[30] which applied only to funerals of members or former members of the "Armed Forces."[31] The law prohibited any activity that took place within 150 feet of the funeral site during the hour before or after a funeral that: (1) includes an individual "willfully making or assisting in making any noise or diversion that is not part of such funeral," and (2) "tends to disturb the peace or good order of such funeral with the intent of disturbing the peace or good order of that funeral."[32] In 2012, one year after the Supreme Court's decision in *Snyder*,[33] Congress amended the federal funeral-picketing regulations when it enacted HAVA.[34] The activities prohibited by the 2006 law remain the same,[35] but the law as amended doubles the scope of the 2006 law's buffer zone, increasing the time period during which the restrictions apply from one hour before or after the funeral to two hours before or after the funeral, and increasing the area in which the restric-

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Eighth Circuit's recent decisions, this Comment will argue that the funeral-picketing regulations at issue in the above cases are content-based.

[26] *Manchester II*, 697 F.3d 678 (reversing its prior decision and holding that the city ordinance was (1) narrowly tailored to the government's significant interest; and (2) left open ample channels of communication).

[27] Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, 18 U.S.C.A. § 1388 (West 2012); 38 U.S.C.A. § 2413 (West 2012). President Obama signed the Act into law on August 6, 2012, eighteen months after the *Snyder* decision. *Id.* The funeral-picketing regulations codified at 38 U.S.C. § 2413 apply to military funerals that occur at cemeteries under the control of the National Cemetery Administration and at Arlington National Cemetery, while the regulations codified at 18 U.S.C. § 1388 apply to all other U.S. military funerals. Otherwise, the separately codified regulations are identical. *Id.*

[28] *Compare* 18 U.S.C.A. § 1388; 38 U.S.C.A. § 2413, *with* 18 U.S.C. § 1388 (2006). The amended regulations double: (1) the size of the buffer zones surrounding the funeral or burial site, and (2) the length of time during which the protest regulations apply.

[29] *See* Cram, *supra* note 3.

[30] 18 U.S.C. § 1388 (2006).

[31] "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. § 101.

[32] 18 U.S.C. § 1388. This section also has a provision prohibiting the willful obstruction of access to a funeral site within 300 feet of the funeral. *Id.*

[33] *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

[34] 18 U.S.C.A. § 1388; 38 U.S.C.A. § 2413.

[35] *See supra* note 28.

tions apply from 150 feet from the funeral to 300 feet from the funeral.[36] This Comment will argue that the funeral-protest regulations contained in HAVA are unconstitutional regulations that do not pass (1) the strict scrutiny often applied to content-based regulations, or (2) the intermediate judicial scrutiny applied to content-neutral regulations.

This Comment does not suggest that the government is powerless to regulate any aspects of funeral protests. Indeed, it seems clear that the government may constitutionally enact content-neutral laws to regulate many aspects of funeral protests, including "intrusive noise, impeding access, trespassing on private property, crowd size, and actual threats."[37] Less clear is to what extent the government may enact content-based laws to regulate, or fully prohibit, offensive speech in a particular setting.[38] Can the government create buffer zones that in effect keep protestors out of sight or "enforce laws so as to punish the critics of war and our soldiers while tolerating messages supporting war and our troops?"[39] The answer, as this Comment will argue, is no.

First, Part I of this Comment will discuss the legal background of content discrimination and content analysis in First Amendment cases decided by the Supreme Court. Next, Part II will discuss *Hill v. Colorado*,[40] a 2000 case in which the Supreme Court upheld a regulation that created a buffer zone around the entrance of healthcare facilities as a narrowly tailored, content-neutral time, place, and manner regulation. Part II will argue that *Hill* was wrongly decided and will compare the regulation at issue in *Hill* to the speech restrictions in HAVA. Next, Part III will discuss how lower federal courts have dealt with state-law funeral-picketing regulations and will explain why these courts have wrongly decided cases involving funeral-picketing laws. Part IV will address the Supreme Court's decision in *Snyder v. Phelps* and will discuss how the Court's opinion could influence a court evaluating the constitutionality of HAVA. Finally, Part V will argue that a court should apply strict scrutiny to the speech restrictions of HAVA, if the speech restrictions are challenged. This Comment will conclude by arguing in Part V that even if a court nonetheless insists on applying intermediate scrutiny to this content-based law, it still should be found unconstitutional for failure to pass even the relaxed scrutiny applied to content-neutral laws.

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[36] 18 U.S.C.A. § 1388. The 2012 law also created a new offense: During the two hours before or after a funeral, it is a crime to engage in an activity on or near the residence of a surviving member of the deceased's immediate family that involves "willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace of the persons" at such location and "with the intent of disturbing the peace." *Id.*

[37] Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 577 (2007).

[38] *Id.*

[39] *Id.*

[40] Hill v. Colorado, 530 U.S. 703 (2000).

II. LEGAL BACKGROUND

The First Amendment[41] has been criticized in the international community for placing too much emphasis upon individual freedoms and a "distrust of state power" while failing to encourage the "collective dimension of human existence and the rightful role of the state in promoting caring, empathetic communities."[42] This Comment argues, however, that American federal courts have recently placed too much emphasis on the "collective dimension of human existence"[43] while failing to sufficiently emphasize individual freedoms, particularly the right to freedom of speech. Although the United States may be more tolerant of speech than other countries, the First Amendment right to freedom of speech is not an absolute right, and the government can and does regulate even protected speech in certain situations.[44]

In evaluating a governmental regulation that restricts speech, the Court first performs a "content analysis" to determine whether the regulation is content neutral or content-based[45]—that is, whether the law restricts speech because of its communicative properties.[46] Determining whether a law is content-based is crucial because the content analysis usually determines which level of review the Court should apply to a regulation.[47] The Court often subjects content-based laws to strict scrutiny, which "nearly always proves fatal,"[48] while content-

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[41] U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[42] Cram, *supra* note 3, at 456.

[43] *Id.*

[44] This Comment will argue that, although there is no doubt that freedom of speech is and should be a conditional right, the government has improperly restricted speech by framing regulations as "content neutral" when they are actually an extreme form of content-based regulations designed to eliminate disfavored speech, like the buffer-zone regulation upheld in *Hill*.

[45] Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 232, 237 (2012).

[46] John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975). To illustrate the distinction between content-based and content-neutral laws, Ely uses as an example the black armbands children wore to school to demonstrate their opposition to the Vietnam War in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Id.* at 1498. The school enacted a rule against wearing black armbands because the school "feared the effect that the message those armbands conveyed would have on the other children." *Id.* at 1498. Therefore the rule was content-based because the rule restricted speech (here, the black armbands) because of the speech's communicative properties—"[had] the armbands lacked communicative significance, there would have been no way to defend or even account for the regulation." *Id.* at 1498.

[47] Kendrick, *supra* note 45, at 237.

[48] Kendrick, *supra* note 45, at 237. In cases where laws are not only content-based but also discriminate on the basis of a particular subject matter or viewpoint, the Court has held these laws to more rigorous standards than strict scrutiny. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that such a law criminalizing the advocacy of the use of force

neutral laws only undergo "intermediate scrutiny"—"a highly deferential form of review which virtually all laws pass."[49]

Although clear explanations of the structure of content analysis have rarely been articulated in the case law, most scholars agree that a law may be content-based either on its face or in its purpose.[50] As a corollary, "laws that employ neither a content-related classification nor a content-related justification are content neutral."[51] The two basic ideas underlying the content-discrimination principle are that (1) it is usually wrong for the government to regulate speech because it is speech, and (2) it is usually acceptable for the government to restrict speech for reasons other than its communicative properties.[52]

A. *Content-Neutral Regulations*

This section will first explain the criteria the Court uses when applying intermediate scrutiny to content-neutral speech restrictions, and will then introduce two forms of content discrimination that the Court has held to be content neutral: communication-related discrimination and message-related discrimination.[53]

Although content-neutral laws are not created to suppress speech because it is speech, these types of laws often create incidental burdens on the freedom of speech and freedom of expression.[54] These content-neutral regulations, if im-

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or of law violation was unconstitutional "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964) (holding that a public official cannot recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[49] Kendrick, *supra* note 45, at 237 (citing Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804–05 (1984)).

[50] Kendrick, *supra* note 45, at 238. A law is found content-based in its purpose most often because of "the justifications the government offers for [the law] in litigation." Kendrick, *supra* note 45, at 238.

[51] Kendrick, *supra* note 45, at 238.

[52] *See* Ely, *supra* note 46, at 1497–98. This Comment will illustrate through its discussion of Hill v. Colorado and lower federal court rulings on funeral-picketing laws, however, that unfortunately the two basic ideas underlying the content-discrimination principle in practice are that "it is usually wrong for the government to regulate speech because of what it is saying and that it is usually acceptable, as a First Amendment matter, for the government to regulate speech for reasons other than what it is saying." Kendrick, *supra* note 45, at 235.

[53] The Court has refused to hold that all message-related classifications are inherently suspect, but has recognized that at least two forms of message-related discrimination (subject matter and viewpoint discrimination) are inherently suspect. *Infra* notes 67–71.

[54] Michael Bakhama, Comment, *Building Picket Fences: Maryland's Funeral Picketing Law after* Snyder v. Phelps, 71 MARYLAND L. REV. 1231, 1241 (2012).

posed on speech or expression occurring in public fora like Westboro's speech in *Snyder v. Phelps*,[55] are subject to intermediate scrutiny and are constitutional only if they (1) serve a significant governmental interest, (2) are narrowly tailored to serving that interest, and (3) leave the speaker with ample alternative channels of communication.[56]

"Overt subject-matter and viewpoint discrimination," which are usually subject to strict scrutiny, are not the only forms of content discrimination.[57] Other categories of content discrimination exist, such as communication-related discrimination.[58] Communication-related discrimination arises in cases involving facial discrimination against either people who are communicating,[59] or particular communicative activities.[60] With few exceptions,[61] the Court has treated laws that involve speaker-based classifications as content-neutral.[62] For example, the Court has held that injunctions imposed upon abortion protestors were not content based because the injunctions singled out particular speakers.[63] The

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[55] 131 S. Ct. 1207 (2011).

[56] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Phelps-Roper v. Koster, 734 F. Supp. 2d 870, 878 (W.D. Mo. 2010) (finding that Missouri's law regulating funeral protesting is a content-neutral regulation subject to intermediate scrutiny); Bakhama, *supra* note 54.

[57] Kendrick, *supra* note 45, at 262. An example of overt subject-matter discrimination is a law banning the recitation of poetry. An example of overt viewpoint discrimination is a law banning the recitation of pro-war poetry.

[58] Kendrick, *supra* note 45, at 262.

[59] This category includes classifications by speaker or medium. Kendrick, *supra* note 45, at 263.

[60] Kendrick, *supra* note 45, at 262.

[61] Kendrick, *supra* note 45, at 267 ("[S]peaker- and media-based discrimination appears not to be suspect in itself. Only when a particular classification has a high correlation with subject-matter and viewpoint discrimination does the Court conclude that it should be treated with suspicion."). For example, in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, a state tax code exempted newspapers from the general sales tax but imposed a "use tax" on some of the ink and paper used in publishing the newspaper. 460 U.S. 575, 581 (1983). The Court held that the law was content-based, although there was no evidence of invidious legislative intent, because "facial discrimination against the press presents such a high risk of invidious intent that it is disallowed even when no evidence of such intent exists." Kendrick, *supra* note 45, at 264. For a more thorough discussion of the Court's treatment of speaker-based classifications, *see* Kendrick, *supra* note 45, at 262–67.

[62] Kendrick, *supra* note 45, at 262–67.

[63] Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., 512 U.S. 753 (1994); Kendrick, *supra* note 45, at 266–67.

Court has also treated laws that involve classifications by communicative activity as content neutral.[64] A classification by communicative activity is a regulation of a particular activity, such as picketing, protesting, leafleting, or solicitation.[65] Therefore, the Court treats communication-related discrimination as content neutral unless the Court decides that a law creates a risk of subject-matter or viewpoint discrimination.[66]

Another form of content discrimination is message-related discrimination.[67] Laws that contain message-related discrimination restrict speech because of its message-related characteristics.[68] This category of content discrimination contains the traditional, and inherently suspect, categories of viewpoint and subject-matter classifications, as well as "classifications that define expression according to . . . a particular . . . class of discourse."[69] A classification by a particular class of discourse is a regulation of a specific class of speech, such as advocacy, solicitation, education, oral protest, or picketing.[70] The Court has refused to acknowledge that all message-related classifications are inherently suspect and has considered regulations of solicitation, oral protest and picketing to be content-neutral.[71]

To illustrate each form of communication discrimination discussed in this section, it is helpful to think of a city noise ordinance. If a city enacted an ordinance limiting noise levels at outdoor concerts in a public park to preserve the character of the park and to avoid disrupting families in nearby residences, the ordinance would be considered a constitutional content-neutral regulation.[72] This ordinance is narrowly tailored to further the significant government interest in preserving the character of the park and the surrounding neighborhood and provides speakers with ample alternative channels of communication (speakers can still have concerts—they just cannot exceed certain volume

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[64] Kendrick, *supra* note 45, at 267–70 ("In case after case, the Court has almost universally treated such classifications as content neutral.").

[65] Kendrick, *supra* note 45, at 267.

[66] Kendrick, *supra* note 45, at 270. This Comment will argue that laws that discriminate based on communicative activity, such as picketing, should not be treated as content-neutral regulations.

[67] Kendrick, *supra* note 45, at 270.

[68] Kendrick, *supra* note 45, at 270.

[69] Kendrick, *supra* note 45, at 270.

[70] Kendrick, *supra* note 45, at 272–74.

[71] Hill v. Colorado, 530 U.S. 703, 724 (2000) (treating a ban against "oral protest, education, or counseling" as content-neutral); United States v. Kokinda, 497 U.S. 720, 722–23 (1990) (plurality opinion) (treating a solicitation ban as content-neutral); Kendrick, *supra* note 45, at 272–74. This Comment will discuss *Hill* and will argue that the "oral protest" regulation at issue in that case should have been treated as content-based. This Comment also argues that "'picketing,' a speech classification the Court has always treated as content-neutral," should also be treated as content-based.

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

levels). However, if the city ordinance were enacted for the purpose of suppressing speech because it is speech—that is, because of its communicative properties—then the ordinance should be subject to the more skeptical standard of review applied to content-based regulations.[73] And if the ordinance were enacted to suppress a particular speaker from performing,[74] a particular topic or viewpoint from being discussed,[75] or particular class of discourse,[76] then that is even more reason to apply strict scrutiny to the inherently suspect ordinance.

B. *Content-Based Regulations*

Whether a law is content-based hinges on whether the harm the state seeks to avoid either (1) arises because of the fact that the speaker is communicating, more particularly because "of the way people can be expected to react to his message," or (2) "would arise even if the [speaker's] conduct had no communicative significance whatever."[77] If the harm arises because of the fact that the speaker is communicating, then the law is content-based.[78] If the harm would arise regardless of the speech's communicative properties, then the law is not content-based.[79] However, this Comment will show that the Court[80] has not always followed this approach in evaluating whether a law is content-based or content-neutral, and will argue that the Court's failure to apply this approach has resulted in it wrongly deciding cases such as *Hill v. Colorado*.

Generally, content-based regulations are presumptively invalid and "the Government bears the burden to rebut that presumption."[81] Strict scrutiny re-

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[73] The hypothetical city noise ordinance enacted to restrict speech because it is speech is comparable to the content-based school rule against wearing armbands in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510 (1969), that was enacted to eliminate the communicative aspects of students' speech.

[74] This is an example of classification by speaker or medium (a form of communication-related discrimination).

[75] This is an example of classifications by subject matter or viewpoint, respectively (forms of message-related discrimination).

[76] This is an example of classifications by classification by a particular form of discourse, such as advocacy or picketing (a form of message related discrimination).

[77] Ely, *supra* note 46, at 1498; *see also Tinker*, 393 U.S. at 512–14 (holding that a school rule against wearing black armbands enacted to avoid the "harm" that would be caused by the armbands' communicative significance (opposition to the Vietnam War) is content-based).

[78] *See* Ely, *supra* note 46, at 1498.

[79] *Id.*

[80] Lower federal courts have also failed to follow this approach. *See, e.g.*, Phelps-Roper v. Strickland, 539 F.3d 356, 361 (6th Cir. 2008); Phelps-Roper v. City of Manchester, 697 F.3d 678, 688–89 (8th Cir. 2012).

[81] United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 817 (2000) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992)) (internal quotations omitted)).

quires that the content-based regulation be "narrowly tailored to promote a compelling Government interest," meaning that the regulation is the least restrictive alternative to further the government's compelling interest.[82] There are a few limited exceptions in which the First Amendment permits content-based regulations of more extreme form,[83] such as obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct."[84] These are especially dramatic exceptions[85] because these laws not only regulate speech because it is speech, but also involve viewpoint and subject-matter discrimination.

III. *HILL V. COLORADO*: A "CONTENT-NEUTRAL" REGULATION?

This Part will discuss the Court's decision in *Hill v. Colorado*[86] and analogize the regulation at issue in that case to the federal regulations of protesting military funerals in HAVA.

A. *The Court's Opinion*

In *Hill*, a group of anti-abortion "sidewalk counselors"[87] challenged a Colorado statute that regulated "speech-related conduct" within 100 feet of the entrance to any healthcare facility.[88] Within this area, individuals were prohibited from coming within eight feet of another person to "pass[ ] a leaflet or handbill to, display[ ] a sign to, or engag[e] in oral protest, education, or counseling" without that person's consent.[89] The sidewalk counselors, whose activities regularly involved approaching women entering healthcare facilities (mainly abortion clinics),[90] claimed that the statute was both a content-based and viewpoint-based regulation that impermissibly restricted their First Amendment right to

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[82] *Playboy Entm't Grp.*, 529 U.S. at 813 ("Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" (quoting Cohen v. California, 403 U.S. 15, 21 (1971))).

[83] *Stevens*, 130 S. Ct. at 1584.

[84] *Id.* (internal citations omitted).

[85] These are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[86] Hill v. Colorado, 530 U.S. 703, 703–05 (2000).

[87] Petitioners' activities as sidewalk counselors included handing out leaflets, exhibiting pictures, and attempting to converse with women heading into family planning clinics in order to persuade them not to have an abortion. *Id.* at 708.

[88] *Id.* at 707.

[89] *Id.* at 766 (internal quotation marks omitted).

[90] *Id.* at 708. Petitioners claimed that prohibiting them from approaching within eight feet of the women they wished to talk to would "chill[ ] . . . the exercise of [their] fundamental constitutional rights." *Id.* at 709.

speak in a traditional public forum.[91] The Court, in a six to three decision, rejected the counselors' arguments and upheld the statute.[92]

The Court began its analysis by considering the "legitimate and important concerns" on each side of the dispute:[93] (1) the counselors' "First Amendment interests" in continuing to distribute leaflets in "quintessential" public forums for free speech;[94] and (2) the state's interest in protecting the "health and safety of [its] citizens," and "[t]he unwilling listener's interest in avoiding unwanted communication."[95] The Court proceeded to suggest that the people entering healthcare facilities, particularly women seeking abortions, were a captive audience whose inability to avoid unsolicited advice could justify more speech-restrictive regulations than would otherwise be permissible.[96]

Prior to *Hill*, the Court had only recognized a special state interest in protecting people from unwanted speech directed at a person in her own home, in the area immediately surrounding her home, or in other places where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[97] However, the *Hill* Court decided to expand the state's power to protect people's right to avoid unwelcome speech in other "confrontational settings."[98]

In upholding the statute, the Court justified the regulation as "a minor place restriction on an extremely broad category of communications with unwilling listeners", which is content-neutral and does not discriminate based on viewpoint.[99] In addition to serving a significant government interest, the Court held that the statute was narrowly tailored and left open ample channels of communication.[100] The Court noted that the sidewalk counselors' audience would still

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[91] *Id.* at 709. Petitioners contended that the statute was content-based because "[t]he content of the speech must be examined to determine whether it constitutes oral protest, counseling and education; and that [the statute] is viewpoint-based because the statute makes it likely that prosecution will occur based on displeasure with the position taken by the speaker" (internal quotation marks omitted). *Id.*

[92] *Id.*

[93] *Id.* at 714.

[94] *Id.* at 714–715. The Court acknowledged that "[t]he fact that the messages conveyed by [Petitioner's leaflets] may be offensive to their recipients does not deprive [the leaflets] of constitutional protection." *Id.* at 715.

[95] *Id.* at 715–16 (internal citations omitted).

[96] *See id.* at 716–17 ("[T]he [First Amendment] protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.") (citing Frisby v. Schultz, 487 U.S. 474, 487 (1988)); Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 55 (2003).

[97] Chen, *supra* note 96, at 54 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975)).

[98] *Hill*, 530 U.S. at 717; Chen, *supra* note 96, at 54–55.

[99] *Hill*, 530 U.S. at 723.

[100] *Id.* at 725–26

be able to read signs from eight feet away, and would still be able to have their voices heard because the statute did not regulate the use of amplification equipment or limit the number of speakers.[101] When determining that ample alternative channels of communication remained available for sidewalk counselors to disseminate their messages, the Court seemed to forget the fact that the sidewalk counselors sought to communicate and distribute leaflets in a personal manner with the women entering clinics, which would be impossible from eight feet away.[102]

B. *Why* Hill *was wrongly decided*

The content-based Colorado statute at issue in *Hill* is similar to the funeral picketing restrictions in HAVA. Thus, it is important to explore why *Hill* was wrongly decided, and to consider the *Hill* Court's mistakes in analyzing the Colorado statute when determining how a court should analyze HAVA. *Hill* was wrongly decided because the Court improperly classified a facially content-based statute[103] as "content-neutral."

First, the Court began its constitutionality analysis of the Colorado statute by determining that the law is "not a regulation of speech" but a "regulation of the places where some speech may occur."[104] The Court found that the statute did not violate the First Amendment because it passed the intermediate scrutiny required for content-neutral speech regulations.[105] However, the Court should have applied strict scrutiny because this statute is a facially content-based regulation of speech.[106] Even though the Court insisted on applying intermediate scrutiny to a law that is facially content-based, the Court still should have found the law unconstitutional for failure to pass even intermediate scrutiny.

The relevant part of the Colorado statute reads:

> 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,

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[101] *Id.* at 726.

[102] *Id.* at 727. The Court did, however, note that an eight-foot buffer zone would allow the sidewalk counselors to communicate at a "normal conversational distance," *Id.* at 726–27 (quoting Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 377 (1997)), which seems implausible.

[103] COLO. REV. STAT. ANN. § 18-9-122(3) (LexisNexis 2013); *Hill*, 530 U.S. at 703.

[104] *Hill*, 530 U.S. at 719 (internal quotations omitted).

[105] *See id.* at 725–26.

[106] *Id.* at 742 (Scalia, J., dissenting) ("Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content-based . . . . Whether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—*depends entirely* on *what he intends to say* when he gets there.") (first emphasis added); *Id.* at 766 (Kennedy, J., dissenting) ("Colorado's statute is a textbook example of a law which is content-based.").

> 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.[107]

The provision of the Colorado statute prohibiting "oral protest, education, or counseling," is clearly content-based because it is a regulation that restricts speech because of its communicative properties.[108] The harms the government sought to avoid by enacting this law[109] directly stem from the fact that the sidewalk counselors were communicating, and the way people can be expected to react to the sidewalk counselors' speech.[110] The harms would not arise if the sidewalk counselors' speech had no communicative significance.[111]

The Colorado statute is not only content-based, but is also an extreme form of content discrimination. The statute regulates speech not only because it is speech, but also regulates speech because of its message-related characteristics (here, by discriminating based on particular types of discourse). As Justice Scalia noted in his dissent, the statute's restriction of "oral protest, education, or counseling" is clearly a content-based regulation that turns on the specific content of a speaker's message.[112] Under the Colorado statute, a speaker would not be prohibited from approaching a woman entering a family planning clinic, without her consent, and telling her that "abortion is legal in Colorado."[113] This statement would be permissible under the statute because reaffirming the woman's knowledge that abortion is legal, while it may give the woman some comfort, neither constitutes "protest, education, or counseling." On the same facts, if the speaker approached the woman and told her "your baby's heart starts beating eighteen days after conception,"[114] the speaker has violated the law by engaging in oral "education" and could face criminal penalties. Only

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[107] COLO. REV. STAT. ANN. § 18-9-122(3) (LexisNexis 2013).

[108] *See* Ely, *supra* note 46, at 1497–98.

[109] The Court recognized several government interests in which the statute was enacted to protect: (1) the "unwilling listener's interest in avoiding unwanted communication"; (2) the state's interest in "protect[ing] the health and safety of [its] citizens"; and (3) the state's interest in avoiding "potential trauma to patients associated with confrontational protests." Hill, 530 U.S. at 715-17 (internal citations omitted).

[110] *See* Ely, *supra* note 46, at 1498.

[111] Ely, *supra* note 46, at 1498. For example, if the sidewalk counselors engaged in "oral protest, education, or counseling" in a language that none of the people entering or exiting healthcare facilities could understand, then the harms the government sought to avoid would not arise. The harm is contingent upon the communicative aspects of the speech. Therefore, the regulations are content-based.

[112] *Hill*, 530 U.S. at 742–43 (Scalia, J., dissenting).

[113] This hypothetical assumes that the woman entering the clinic already knew the almost universally known fact that abortion is legal in Colorado and throughout the United States.

[114] This hypothetical assumes the speaker is trying to educate the woman entering the clinic about a lesser-known fact about pregnancy.

one of these two speakers, who both engage in the same type of activity and approach women without their consent, will be punished. The reason that speaker will be punished is solely because of the content of the message. This statute, which (1) restricts speech because it is speech and (2) criminalizes conduct solely on the basis of what a particular speaker is saying, is an extreme content-based regulation that warrants strict scrutiny analysis.[115]

The Court attempted to justify its determination that the Colorado statute was content-neutral by stating that the law did not (1) discriminate based on viewpoint; or (2) place restrictions on "any subject matter that may be discussed by a speaker."[116] The Court claimed that the statute was, in fact, content-neutral because it applied to a speaker who wishes to engage in "oral protest, education, or counseling" no matter what subjects he would like to discuss, and regardless of if he is an anti-abortion activist, "car salesm[a]n, animal rights activist[ ], fundraiser[ ], environmentalist[ ], [or] missionar[y]."[117]

Although the Court is right about the statute's universal applicability to activities involving "protest, education, and counseling,"[118] it does not follow that the statute is content-neutral. To prove the point, Justice Scalia, in his dissent, compares the Colorado law to a hypothetical regulation banning "the writing or recitation of poetry."[119] Neither the Colorado statute nor the hypothetical law restricting the writing or recitation of poetry discriminates based on viewpoint. For example, both pro-choice and pro-life poetry would equally be banned by the anti-poetry law, just like how both pro-choice and pro-life "protest, education, and counseling" are banned by the Colorado statute. The anti-poetry law and the Colorado statute also do not discriminate based on subject matter because, under the anti-poetry law, all poetry is banned regardless of whether the poetry in question is about abortion or about motorcycles. Similarly, under the Colorado statute, all "protest, education, and counseling" is banned regardless of the particular subject over which the speakers want to engage in protest, education, or counseling. However, the Court, according to Justice Scalia, would "[s]urely" consider the anti-poetry law to be a content-based regulation.[120] The Court therefore erred in holding that the Colorado statute was a content-neutral regulation subject only to intermediate scrutiny.[121]

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[115] See Ely, *supra* note 46, at 1498; Kendrick, *supra* note 45, at 237.

[116] *Hill*, 530 U.S. at 723. *But see id.* at 742-43 (Scalia, J., dissenting) ("But we have never held that the universe of content-based regulations is limited to those two categories, and such a holding would be absurd.").

[117] *Hill*, 530 U.S. at 723.

[118] *Id.*

[119] *Id.* at 742 (Scalia, J., dissenting).

[120] *Id.*

[121] Another example to illustrate the content-based nature of the Colorado statute prohibiting "protest, education, and counseling" is to consider a statute restricting "political speech." *See* Kendrick, *supra* note 45, at 238 ("[F]or example, a law that on its face bans 'political speech' is content-based. A law that bans sound trucks because they are used to

C. *The Colorado Statute and HAVA*

This Section will discuss the similarities between HAVA and the Colorado statute at issue in *Hill*[122] and will argue that HAVA, if challenged, should be treated as a content-based regulation subject to strict scrutiny.

The relevant portion of HAVA states:

> For any funeral of a member or former member of the Armed Forces that is not located at a cemetery under the control of the National Cemetery Administration or part of Arlington National Cemetery, it shall be unlawful for any person to engage in an activity during the period beginning 120 minutes before and ending 120 minutes after such funeral, any part of which activity—
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> (1)(A) takes place within the boundaries of the location of such funeral or takes place within 300 feet of the point of the intersection between—
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> (i) the boundary of the location of such funeral; and
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> (ii) a road, pathway, or other route of ingress to or egress from the location of such funeral; and
>
> (B) includes any individual willfully making or assisting in the making of any noise or diversion—
>
> (i) that is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral; and
>
> (ii) with the intent of disturbing the peace or good order of such funeral . . . .[123]

The funeral-picketing restrictions in HAVA, like the oral-communication restrictions in the Colorado statute in *Hill*,[124] should be considered content-based regulations. Like the provisions in the Colorado statute prohibiting only speech involving "protest, education, or counseling,"[125] the provisions in HAVA criminalize communicative conduct on the basis of the particular type of message the conduct conveys. Instead of being labeled communication involving "protest, education, or counseling," however, the communication restricted by HAVA is defined as any activity that "tends to disturb the peace or good or-

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disseminate political messages is also content-based. And a law that bans sound trucks because they are noisy is content neutral."). The Colorado law is akin to the law restricting "political speech," and therefore should also be considered content-based.

[122] *Hill*, 530 U.S. at 703.

[123] 13 U.S.C.A. § 1388 (West 2012). This Comment will focus on the portion of HAVA codified at § 1388, which applies to military funerals that do not occur at Arlington National Cemetery or cemeteries under control of the National Cemetery Administration. The portion of HAVA codified at 38 U.S.C. § 2413 is identical to the previously mentioned portion except it applies only to funerals that occur at Arlington National Cemetery or cemeteries under control of the National Cemetery Administration. *Supra* text accompanying note 27.

[124] *Hill*, 530 U.S. at 703.

[125] COLO. REV. STAT. ANN.§ 18-9-122(3) (LexisNexis 2013).

der"[126] of a funeral.

Like the Colorado statute's restriction, the HAVA funeral-picketing restriction is subject-matter-neutral and viewpoint-independent.[127] The Act's restrictions are content-based, however, because they regulate, albeit indirectly,[128] speech because of the speech's communicative properties. Like the statute in *Hill*,[129] the funeral-picketing restriction in HAVA is an extreme form of content discrimination because it also turns precisely on the content of a particular speaker's specific message. As the above analysis of the *Hill* restrictions show,[130] a regulation is a presumptively impermissible content-based speech restriction when two speakers, who are engaging in the same type of speech activity, are treated differently under the law because of the content of their particular messages.[131]

HAVA prohibits any activity that "tends to disturb the peace or good order" of a funeral.[132] In the case that the potentially disruptive "activity" is speech, the content of a speaker's message is the only reason why he would be subject to criminal penalties under HAVA.[133] For example, at a hypothetical funeral of a former member of the military, there are two speakers standing within the 300-foot buffer zone that restricts speech "tend[ing] to disturb the peace or good order"[134] of the funeral. One speaker, dressed head-to-toe in red, white and blue, holds up a sign stating "God Bless Our Fallen Soldiers." The other speaker holds up a sign stating "God Hates American Soldiers." Both speakers are silent and simply stand on a public sidewalk holding their signs. The speech of the patriotic speaker holding the "God Bless Our Fallen Soldiers" sign would

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[126] 13 U.S.C.A. § 1388.

[127] This Comment will assume that the restrictions in HAVA are viewpoint-independent, although there is the argument that the provision restricting speech that "tends to disturb the peace or good order," § 1388, of a funeral will be enforced only to curb speech of a certain viewpoint, like the one held by Westboro.

[128] HAVA prohibits any "activity . . . that disturbs or tends to disturb the peace or good order" of a military funeral. 13 U.S.C.A. § 1388. The Act does not specifically mention "speech." *Id.*

[129] COLO. REV. STAT. ANN. § 18-9-122(3); *Hill*, 530 U.S. at 703.

[130] *Hill*, 530 U.S. at 703.

[131] *See supra* Part II.B.

[132] 13 U.S.C.A. § 1388. By taking even a cursory look behind the text of the statute, it is clear that this Act was enacted to prevent Westboro and similar groups from displaying hurtful or offensive messages near the location of military funerals. The original federal funeral-picketing regulations were enacted in 2006, less than one year after Westboro began picketing the funerals of soldiers killed in Iraq and Afghanistan. The restrictions were tightened, through HAVA, about one year after the Supreme Court's decision in Snyder v. Phelps, which shielded Westboro from tort liability resulting from one of its funeral protests. Considering this information, it is clear that both the initial 2006 funeral-picketing regulations and the 2012 amendment in HAVA were enacted to curb Westboro's activities

[133] The regulations in HAVA also have an intent requirement. *See infra* note 133.

[134] 13 U.S.C. § 1388.

not be restricted under HAVA because the content of this speech does not "tend to disturb the peace or good order"[135] of the funeral. However, the speaker with the "God Hates American Soldiers" sign could face criminal penalties simply because the content of his speech could "tend to disturb the peace or good order" of the funeral.[136]

This unjust outcome is the same that resulted from the restriction at issue in *Hill v. Colorado*[137]: one speaker may say "abortion is legal" but another speaker can face criminal penalties for saying "your baby's heart starts beating eighteen days after conception."[138] Each speaker engages in the same type of conduct, yet the content of the speech determines whether that speaker violates the law. Thus, HAVA, like the Colorado statute in *Hill*,[139] contains an extreme form of content-based restrictions[140] because, as the Court noted more than thirty years ago, a regulation is undeniably content-based when "the content of the speech . . . determines whether it is within or without [a] statute's blunt prohibition."[141]

IV. THE TREATMENT OF FUNERAL-PICKETING LAWS BY LOWER FEDERAL COURTS

A. *The Approaches of the Sixth and Eighth Circuit Courts of Appeal*

This section will compare the different approaches taken by the Sixth and Eighth Circuit Courts of Appeal when considering challenges that Westboro has brought against state funeral-protesting laws. Initially these two Circuits came to different conclusions as to the status of these nearly identical state funeral-protesting laws,[142] with the Sixth Circuit upholding the constitutionality of the laws[143] and the Eighth Circuit finding the laws unconstitutional.[144] How-

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[135] *Id.*

[136] In order to satisfy the requirements of HAVA, the speaker holding the "God Hates American Troops" sign must also intend to disturb the peace or good order of the funeral. 13 U.S.C.A. § 1388.

[137] Hill v. Colorado, 530 U.S. 703 (2000).

[138] *Id.* at 741 (Scalia, J., dissenting). *See supra* notes114–15.

[139] *Hill*, 530 U.S. at 703.

[140] The Act's provisions are not only content-based, because they restrict speech because of its communicative properties, they also restrict speech because of the particular message the speaker communicates, and therefore constitute message-related discrimination.

[141] Carey v. Brown, 447 U.S. 455, 462 (1980). *See also Hill*, 530 U.S. at 742–43 (Scalia, J., dissenting) (noting that the Colorado statute was a content-based regulation and commenting on the Court's proclivity to find regulations to be content-neutral when those regulations restrict speech that the Court disfavors).

[142] *See infra* note 189.

[143] Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008) (upholding a state funeral-picketing law as a content-neutral regulation narrowly tailored to serve the state's significant interest in protecting mourner's privacy interest, while leaving open to protestors ample alternative channels of speech).

ever, the Eighth Circuit, sitting en banc, recently resolved this circuit split by reversing its prior ruling and upholding the constitutionality of a funeral-picketing regulation.[145]

1. The Sixth Circuit's Approach

Although some district courts within the Sixth Circuit have decided cases in a manner favorable to funeral protesters,[146] the Sixth Circuit Court of Appeals, in *Phelps-Roper v. Strickland*,[147] ruled against Westboro and upheld the constitutionality of an Ohio funeral-picketing law.[148]

The relevant part of the Ohio statute challenged by Westboro in *Strickland*[149] reads:

> Every citizen may freely speak, write, and publish the person's sentiments on all subjects, being responsible for the abuse of the right, but no person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place . . . .
>
> As used in this section, 'other protest activities' means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.[150]

The Sixth Circuit affirmed the district court's decision, finding the Ohio statute's fixed buffer zone provision constitutional[151] and holding that the fixed

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[144] Phelps-Roper v. City of Manchester, 658 F.3d 813, 816–17 (8th Cir. 2011), *vacated en banc*, 697 F.3d 678 (8th Cir. 2012) (striking down a state ordinance banning picketing within 300 feet of a funeral's location, during the one hour before through one hour after the funeral service, because the regulation did not serve a significant governmental interest).

[145] *Manchester II*, 697 F.3d at 683 (reversing its prior decision and holding that the city ordinance was narrowly tailored to the government's significant interest and left open ample channels of communication).

[146] *See, e.g.*, Lowden v. Clare Cnty., 2011 WL 3958488 (E.D. Mich. 2011) (holding that language in Michigan's funeral-protest statute prohibiting speech that would "adversely affect a funeral" was unconstitutional); McQueary v. Stumbo, 453 F. Supp. 2d 975, 992–97 (E.D. Ky. 2006) (holding that Kentucky statute's provision creating a 300-foot buffer zone between funeral attendees and protesters was not narrowly tailored to a significant state interest).

[147] 539 F.3d at 356.

[148] *Id.* at 358.

[149] *Id.* at 356.

[150] OHIO REV. CODE ANN. § 3767.30 (West 2012). This statute is facially content-based because it clearly regulates speech ("picketing or other protest activities") because of the speech's communicative aspects (its tendency to "disrupt or disturb a funeral").

[151] Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 620–21 (N.D. Ohio 2007) (holding that

buffer zone provision of the challenged statute satisfied the intermediate scrutiny applied to content-neutral speech restrictions.[152]

In determining whether the Ohio statute was content-neutral, the court relied on the Supreme Court's reasoning in *Hill v. Colorado*.[153] Like the *Hill* Court reasoned regarding restrictions on "protest, education, or counseling" near the entrances of healthcare facilities,[154] the Sixth Circuit determined that the provision restricting picketing or "other protest activities" within 300 feet of a funeral was not a "regulation of speech."[155] The court stated that the "principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys."[156] Applying this test for evaluating content neutrality, the court found that the speech restrictions in the statute "apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech," and the Ohio statute was therefore not enacted because of disagreement with the message conveyed by funeral protestors' speech.[157] The court also noted that the state's interest in protecting funeral attendees from "disruption during events associated with a funeral" was unrelated to the content of the funeral protestors' speech.[158]

After determining that the statute was content-neutral, the court applied the

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the fixed buffer zone provision was constitutional while the floating buffer zone provision, which prohibited picketing or "other protest activities" within 300 feet of a funeral procession, was unconstitutional because it burdened substantially more speech than was necessary).

[152] Phelps-Roper v. Strickland, 539 F.3d 356, 360 (6th Cir. 2008). The Respondents did not cross-appeal the district court's ruling on the unconstitutionality of the floating buffer zone provision; thus, on appeal, the Sixth Circuit only considered the constitutionality of the fixed buffer zone provision. *Id.*

[153] 530 U.S. 703 (2000).

[154] *Id.* at 719.

[155] *Strickland*, 539 F.3d at 361. The court noted, like the Hill Court, that the Ohio statute was rather "a regulation of the places where some speech may occur." *Id.* (quoting *Hill*, 530 U.S. at 719).

[156] *Hill,* 530 U.S. at 719 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (emphasis added). The court erred by applying the wrong test for evaluating the statute's content neutrality. A law that restricts a particular kind of speech should not be considered content-neutral unless the law was enacted "because of disagreement with the message it conveys." That law is indeed content-based but it is an extreme form of content discrimination (a content-based law with message-related classifications). Rather, the law should be considered content-based merely because it is enacted to restrict speech because it is speech. *See* Ely, *supra* note 46. If the law contains further discriminatory aspects, such as the Ohio statute at issue in Strickland, then there is even more reason to apply a skeptical standard of review.

[157] *Strickland*, 539 F.3d at 361 (quoting *Hill*, 530 U.S. at 719).

[158] *Id.* at 361.

intermediate scrutiny test[159] and determined that the statute's funeral-protest provision served a significant government interest,[160] was narrowly tailored to that interest,[161] and left open ample channels of communication.[162]

The Sixth Circuit found that the first part of the intermediate scrutiny test had been met by determining that the state had a significant interest in protecting funeral attendees because mourners have a privacy right "in the character and memory of the deceased."[163] In reaching this decision, the court compared the case at issue to *Frisby v. Schultz*[164] and *Hill*,[165] cases in which the Court held that government policies that restricted speech were constitutional because the First Amendment rights of certain speakers were outweighed by the privacy rights of members of a captive audience.[166] The Sixth Circuit also mentioned the cultural importance of burial rites throughout history as another reason why funeral attendees should have privacy rights similar to residents in their homes and patients entering or exiting a healthcare facility, and thus should not be expected to avert their eyes or refrain from attending their loved ones' funerals.[167]

Next, the court determined that the second part of the intermediate scrutiny test had been met by finding that the law was narrowly tailored to the state's

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[159] *Id.* at 361–62 ("Under this test, the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions: (1) 'serve a significant governmental interest;' (2) 'are narrowly tailored;' and (3) 'leave open ample alternative channels for communication of the information.'") (quoting *Ward*, 491 U.S. at 791.)

[160] *Strickland*, 539 F.3d at 362–66.

[161] *Id.* at 366–72.

[162] *Id.* at 372–73.

[163] *Id.* at 366 (citation omitted).

[164] 487 U.S. 474 (1988). The ordinance at issue in Frisby prohibited picketing before or about a person's residence or dwelling. *Id.* at 474. The Court found that the ordinance survived intermediate scrutiny, relying heavily on the captive audience doctrine and affirming that the government may protect individuals' rights to be let alone in their own homes. Id. at 484–85. *See infra* note 167.

[165] Hill v. Colorado, 530 U.S. 703 (2000).

[166] *Strickland*, 539 F.3d at 363 ("The Supreme Court has held that the State is warranted in protecting individuals from unwanted communication that implicates certain privacy interests when the listener is somehow 'captive' to the message.") (citation omitted). In Frisby, the Court upheld a city ordinance prohibiting all forms of residential picketing because (1) people were members of a "captive audience" within their own homes; and (2) the city had significant government interest in protecting resident's privacy. *Id.* The Sixth Circuit also relied on the Hill Court's holding that a state law restricting the First Amendment rights of some anti-abortion activists was justified because medical patients entering or exiting healthcare facilities were a captive audience and were often emotionally vulnerable. *Id.* at 363–64.

[167] *Id.* at 365–66.

significant interest in protecting the privacy of funeral attendees.[168] The court held that the law was narrowly tailored[169] because it only limited speech directed at a particular time and place,[170] did not discriminate based on subject matter,[171] and did not create an excessively large buffer zone.[172] In finding acceptable the 300-foot buffer zone at issue in *Strickland*, the Sixth Circuit compared the provisions of the Ohio law to the provisions of the Colorado law at issue in *Hill*.[173] The Colorado law, which restricted the speech of certain speakers within 100 feet of entrances to healthcare facilities,[174] as well as the Ohio law in *Strickland*, which restricted speech within 300 feet of funeral services,[175] do not have limits on the number of speakers or signs, the size of text or images, the level of noise, or the use of amplification equipment.[176] The Sixth Circuit, relying on *Hill*'s holding that the Colorado law did not place an undue burden on speakers' ability to communicate,[177] held that the Ohio law's buffer zone was acceptable because it was less restrictive than the Colorado law's buffer zone.[178] The Ohio law's buffer zone, according to the Sixth Circuit, was less

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[168] *Id.* at 372. The court also refers to the state's "legitimate interest in protecting funeral attendees from unwanted communication." *Id.*

[169] *Id.* at 368 (citing *Frisby*, 487 U.S. at 482 ("In Frisby, the Court found that the use of the singular form to designate the place from which picketing was proscribed 'suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence.'").

[170] The law only restricts speech that: (1) occurs within 300 feet of a funeral ceremony; (2) is directed at the funeral; and (3) occurs within the time period beginning one hour before and ending one hour after the funeral service. *Id.*; OHIO REV. CODE ANN. § 3767.30 (West 2012).

[171] *Strickland*, 539 F.3d at 368 ("[T]he subject matter of the sign is irrelevant given that the statute does not regulate speech based on its content.") (citing Hill v. Colorado, 530 U.S. 703, 716 (2000)).

[172] *Strickland*, 539 F.3d at 371 ("Given that numerous mourners usually attend a funeral or burial service, the size of a buffer zone necessary to protect the privacy of an entire funeral gathering can be expected to be larger than that necessary to protect the privacy of a single residence, or a single individual entering a medical clinic. Moreover, a 300-foot buffer zone takes account of the logistical problems associated with moving large numbers of people from the site of a funeral to the burial site.").

[173] *Id.* at 369–70.

[174] COLO. REV. STAT. ANN. § 18-9-122(3). Within the 100-foot buffer zone surrounding the entrances of healthcare facilities, speakers wishing to engage in "oral protest, education, or counseling" could not approach within eight feet of another person without that person's consent. *Id.*

[175] OHIO REV. CODE ANN. § 3767.30 (West 2012).

[176] *Strickland*, 539 F.3d at 369–70.

[177] *Id.* at 369 ("The Court noted that the restriction providing for the eight-foot separation between the speaker and the audience 'should not have any adverse impact on the readers' ability to read signs displayed by demonstrators.'") (quoting *Hill*, 530 U.S. at 726).

[178] *Id.* at 370.

restrictive than the Colorado law's buffer zone, and thus constitutionally permissible, because it was only in effect for a limited time, despite the fact that it restricted speech in a physically larger area.[179]

The Sixth Circuit concluded its intermediate scrutiny analysis of the Ohio law by finding that the law left open ample alternative channels of communication for funeral protestors.[180] Westboro, according to the court, could still spread its message by marching through neighborhoods, door-to-door proselytizing, sending literature through the mail, making phone calls to individual residences, posting on the Church's website, picketing the funeral site outside of the buffer zone's time and place requirements,[181] or protesting the funeral directly at a location more than 300 feet away from the service.[182]

2. The Eighth Circuit's Approach

Initially the Eighth Circuit appeared to be a friendly environment for Westboro. In 2008, the Eighth Circuit reversed a district court's dismissal of a Westboro challenge to a Missouri funeral-picketing statute,[183] and held that it was "likely" that Westboro would prevail on claims that (1) Westboro's First Amendment rights outweighed the state's interest in protecting funeral attendees; (2) the statute was not narrowly tailored; and (3) the statute did not leave open ample and adequate alternative channels of communication.[184] The speech-protective trend continued into 2011, when the Eighth Circuit, in *Phelps-Roper v. City of Manchester*,[185] again ruled in favor of Westboro, and held that a Missouri funeral-picketing ordinance[186] was not narrowly tailored to

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[179] *Id.*

[180] *Id.* at 372.

[181] The Sixth Circuit also noted that speakers are not entitled to their "best means of communication," although Phelps-Roper, the plaintiff, did not claim that picketing funerals was her best method of communicating Westboro's message. *Id.* Phelps-Roper did, however, state that a funeral was "the occasion of her speech, not its audience." *Id.*

[182] *Id.* at 372–73.

[183] Westboro challenged the validity of two sections of the Missouri funeral-picketing statute: Section 578.501 prohibited "picketing or other protest activities in front or about any location where a funeral is held" within one hour before or after the funeral service; Section 578.502 stated that, if § 578.501 is declared unconstitutional, the buffer zone in which funeral picketing is prohibited shall be 300 feet from the funeral location. Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008), *overruled by* Phelps-Roper v. City of Manchester, 697 F.3d 678 (8th Cir. 2012); MO. ANN. STAT. §§ 578.501, 578.502 (West 2006).

[184] Nixon, 545 F.3d at 692–94, *overruled by Manchester II*, 697 F.3d 678.

[185] Phelps-Roper v. City of Manchester, 658 F.3d 813 (8th Cir. 2011), *vacated en banc*, 697 F.3d 678 (8th Cir. 2012).

[186] The ordinance prohibited picketing or other protest activities within 300 feet of any "residence, cemetery, funeral home, church, synagogue, or other establishment during or within one (1) hour before or one (1) hour after the conducting of any actual funeral or burial service at that place." *Manchester*, 658 F.3d at 815.

serve a significant government interest.[187] The court noted that the ordinance at issue in Manchester closely resembled the statute upheld by the Sixth Circuit in *Strickland*,[188] but declined to follow the Sixth Circuit's approach.[189]

The Eighth Circuit's speech-protective streak ended in 2012, when on rehearing en banc, the Eighth Circuit vacated and reversed its decision in *Manchester*[190] and upheld the constitutionality of the Missouri funeral-picketing ordinance.[191] In *Manchester II*, the Eighth Circuit reaffirmed its prior finding that the Missouri ordinance was a content-neutral regulation[192] but reversed its prior decision in *Manchester* by holding that the ordinance survived intermediate scrutiny analysis.[193]

The ordinance at issue in *Manchester II*, as amended, prohibited picketing and "other protest activities" within 300 feet of a funeral or burial site during the hour before or after the funeral service.[194] The statute defines "other protest activities" as "any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service."[195] In deciding whether the ordinance is content-neutral or content-based, the Eighth Circuit looked to both the Supreme Court's approach to the Colorado law in *Hill*[196] and the Sixth Circuit's approach to the Ohio law in *Strickland*.[197] Westboro argued that the ordinance was content-based because it only applied to speech that was intended to disrupt or disturb the funeral.[198] The Eighth Circuit rejected Westboro's argument and instead applied the *Hill* Court's reasoning that the ordinance was content-neutral because (1) it was not a regulation of speech but a regulation of the places in which certain speech may occur; and (2) it did not refer to the content of the

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[187] *Id.* at 816–17.

[188] Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008).

[189] *Manchester*, 658 F.3d at 816–17, *vacated en banc*, 697 F.3d 678 (8th Cir. 2012). Although the court did not uphold the funeral-picketing law, like the Sixth Circuit did in *Strickland*, the Eighth Circuit Court of Appeals acted less favorably to Westboro than the district court did by declining to agree with the district court's finding that the ordinance was content-based. *Id.* at 816. The Eighth Circuit instead decided the case by affirming the district court's holding that the government does not have a significant interest in protecting funeral attendees from unwanted communication. *Id.*

[190] To avoid confusion, this Comment will refer to the Eighth Circuit's 2011 decision finding the Missouri ordinance unconstitutional as Manchester and will refer to the Eighth Circuit's 2012 decision upholding the constitutionality of the Missouri ordinance as Manchester II.

[191] *Manchester II*, 697 F.3d at 683.

[192] *Manchester*, 658 F.3d at 816–17, *vacated en banc*, 697 F.3d 678 (8th Cir. 2012). *See supra* text accompanying note 189.

[193] *Manchester II*, 697 F.3d at 695.

[194] *Id.* at 683.

[195] *Id.*

[196] Hill v. Colorado, 530 U.S. 703 (2000).

[197] Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008).

[198] *Manchester II*, 697 F.3d at 688–689.

speech.[199]

After determining that the Missouri ordinance was content-neutral, the Eighth Circuit applied the intermediate scrutiny test for content-neutral regulations of speech.[200] During the first step of the intermediate scrutiny test, the court, in its first major digression from its decision in *Manchester*,[201] decided that the Missouri ordinance served a significant government interest.[202] In so deciding, the Eighth Circuit broke with its precedent[203] and instead sided with the Sixth Circuit,[204] holding that the captive audience doctrine should be extended to protect funeral attendees, and that the government had a significant interest in protecting the "peace and privacy of funeral attendees for a short time and in a limited space."[205]

The Eighth Circuit also found that the second step of intermediate scrutiny analysis had been met because the Missouri ordinance was narrowly tailored to serve the government's significant interest, much like the ordinance in *Strickland*.[206] Specifically, the Missouri ordinance (1) only restricted picketing or other protest activities directed at the funeral, and (2) only applied to a limited category of speech occurring within a limited time period and in a limited area.[207]

The Eighth Circuit also found that the final step of intermediate scrutiny analysis had been met because the Missouri ordinance left open ample alternative channels of communication for speakers to spread their message.[208] The Eighth Circuit listed the alternative channels suggested by the Sixth Circuit in *Strickland*[209] and ultimately held that ample alternative channels of communication existed because "[s]peakers retain great latitude to express any viewpoint or discuss any topic at nearly any location and nearly any time in the city of

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[199] *Id.*

[200] *Id.* at 689.

[201] Phelps-Roper v. City of Manchester, 658 F.3d 813, 816 (8th Cir. 2011), *vacated en banc*, 697 F.3d 678 (8th Cir. 2012) ("Manchester had no significant interest 'in protecting funeral attendees from unwanted communication.'") (internal citations omitted).

[202] *Manchester II*, 697 F.3d at 692.

[203] In *Manchester*, the Eighth Circuit affirmed its circuit's precedent that, although the government has a significant interest in protecting the privacy rights of unwilling listeners within their own homes, this "captive audience" doctrine should not be extended to other situations—even churches or funeral sites. *Manchester*, 658 F.3d at 816 ("[T]he home is different, and, in our view, unique and therefore other locations, even churches, [cannot] claim the same level of constitutionally protected privacy.") (internal quotations and citations omitted).

[204] *See supra* notes 164–68.

[205] *Manchester II*, 697 F.3d at 693 ("During that window the mourners are 'captive to their overwhelming human need to memorialize and grieve for their dead.'").

[206] Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008).

[207] *Manchester II*, 697 F.3d at 695.

[208] *Id.*

[209] *See Strickland*, 539 F.3d at 372–73.

Manchester."[210]

B. *Why the Sixth and Eighth Circuits are Wrong*

The Sixth Circuit in *Strickland*[211] and the Eighth Circuit in *Manchester II*[212] erred by dismissing Westboro's challenges to the constitutionality of state and local funeral-protest regulations.

The Sixth and Eighth Circuits erred by applying the Supreme Court's reasoning in *Hill* that a law prohibiting protest, education or counseling within a buffer zone around the entrance to healthcare facilities is not a regulation of speech, but rather a content-neutral regulation of the places in which certain speech may occur.[213] As Justice Scalia emphasized in his dissent in *Hill*, a law is "obviously and undeniably content based" when culpability for a crime is entirely contingent upon the message a speaker wishes to communicate."[214] Culpability for the activities prohibited by the laws at issue in *Strickland* and *Manchester II* depend entirely on the content of an individual's speech.[215] If two speakers are standing 100 feet away from the funeral site and one holds a sign stating "God Loves You" and the other speaker holding a sign stating "God Hates You," only the second speaker has violated the law, solely because of the content of his message.[216] Instead of treating the challenged funeral-protest regulations as content-neutral regulations subject to intermediate scrutiny, as the *Hill* Court did, the Sixth and Eighth Circuits should have treated the regulations for what they are: content-based speech restrictions that are subject to strict scrutiny.[217] The funeral-protest laws challenged in *Strickland* and *Manchester II* would fail

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[210] *Manchester II*, 697 F.3d at 695.

[211] *Strickland*, 539 F.3d at 360 (holding that an Ohio statute prohibiting picketing or "other protest activities" within 300 feet of a funeral or burial service within one hour before or after the funeral or burial service was a content-neutral regulation that survived intermediate scrutiny). *Supra* Part III.A.1.

[212] *Manchester II*, 697 F.3d at 692 (reversing its prior decision holding that a local funeral-picketing ordinance was an unconstitutional content-based speech restriction, and holding that the ordinance, which was virtually identical to the law at issue in *Strickland*, was content neutral and survived intermediate scrutiny). *See supra* Part III.A.2.

[213] Hill v. Colorado, 530 U.S. 703, 719 (2000); *See supra* Part II.B.

[214] *Hill*, 530 U.S. at 742 (Scalia, J., dissenting).

[215] OHIO REV. CODE ANN. § 3767.30 (West 2012). This law is an extreme form of a content-based regulation because it bans speech based on its particular content, regardless of whether the speech actually causes a disruption of the funeral. Id. (banning speech that is "disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession."); *Manchester II*, 697 F.3d at 683.

[216] The second speaker has violated the law because he presumably held up his "God Hates You" sign to "disturb" the funeral service, regardless of whether any disruption actually occurred as a result of him holding the sign. The first speaker would not have violated the law because the content of his message is not "disturbing."

[217] *Hill*, 530 U.S. at 720; *supra* Part II.B.

strict scrutiny analysis because the government could not prove that these laws are narrowly tailored[218] to a compelling government interest. These laws cannot survive strict scrutiny because: (1) the government does not have a compelling interest in protecting the privacy of funeral attendees;[219] and (2) even if the government did have a compelling interest in protecting the privacy of funeral attendees, these laws are not narrowly tailored because there are less speech restrictive ways of furthering that interest, such as shrinking the size of the buffer zone and shortening the time period in which the speech restrictions apply.

V. *SNYDER V. PHELPS* AND HAVA

In *Snyder*,[220] the Supreme Court did not answer the question of whether state or federal funeral-picketing laws were content neutral or even constitutional.[221] The Court noted that its holding was "narrow" and confined to the facts of the singular instance of Westboro members picketing Matthew Snyder's funeral.[222] However, certain aspects of the Court's decision, such as declining to extend the captive audience doctrine[223] and focusing on the lack of disruption caused by the picketing,[224] may become relevant to a constitutional challenge of HAVA or any other funeral-protest law.

The captive audience doctrine states that, in most situations, the government may not decide "which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener."[225] Rather, the unwilling listener bears the burden to avoid "further bombardment of [his] sensibilities simply by averting [his] eyes."[226] Contrary to the Sixth and Eighth Circuits, which both extended the captive audience doctrine to protect the privacy rights of funeral attendees,[227] the *Snyder* Court declined to extend the captive audi-

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[218] The regulation must be the least restrictive means of the government accomplishing its compelling objective.

[219] The Comment also argues that (1) the government does not have a "significant interest" in protecting the privacy of funeral attendees, and (2) the captive audience doctrine should not be extended to protect funeral attendees.

[220] 131 S. Ct. 1207 (2011).

[221] *Id.* at 1218. The Court did not have an opportunity to address the constitutionality of funeral-picketing laws because (1) the underlying causes of action in Snyder were all tort claims against Westboro, and (2) Maryland did not have such a funeral-picketing law in place at the time Westboro picketed Matthew Snyder's funeral. *Id.*

[222] *Id.* at 1220.

[223] *Id.*

[224] *Id.* at 1218–20.

[225] *Id.* at 1220 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975)).

[226] *Id.* at 1220.

[227] Phelps-Roper v. Strickland, 539 F.3d 356, 364–65 (6th Cir. 2008) ("Individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility."); *Manchester II*, 697 F.3d 678, 692 (8th Cir.

ence doctrine, at least on the specific facts at issue in that case.[228] In explaining its decision not to extend the captive audience doctrine to protect funeral attendees, the Court noted that it has "applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech."[229] The Court concluded that, although it has applied the doctrine to "restrict the delivery of offensive mail"[230] and to allow an ordinance "prohibiting picketing 'before or about' any individual's residence,"[231] the captive audience doctrine should not be applied to Mr. Snyder, who bore the burden of looking away.[232] The Court's decision not to extend the captive audience doctrine to funeral attendees, at least under the facts at issue in *Snyder*, suggests that, on a challenge to HAVA[233] or another funeral-picketing law, the Court may not accept a captive audience argument as a justification for the government's restriction of speech.

The *Snyder* Court also based its decision to shield Westboro's speech from tort liability on its finding that, while the speech did inflict great pain on Mr. Snyder, the speech "did not itself disrupt" the funeral.[234] Westboro's protest was peaceful, although the messages it displayed on its signs undoubtedly were offensive to most viewers. The protest did not involve shouting, profanity or violence.[235] In fact, as the Court noted, "any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself."[236] That the *Snyder* Court placed great weight on the facts that the picketing itself did not disrupt the funeral, and any "disruption" caused was a result of an individual's reaction to the content of Westboro's message, suggests that the Court may be inclined to find that HAVA[237] is an unconstitutional restriction of speech. After noting that Westboro's speech did not disrupt the funeral, the Court emphasized that speech at a public place on a matter of public concern is entitled to special First

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2012) (holding that funeral attendees have same privacy rights as individuals in their homes and patients entering a medical facility).

[228] *Snyder*, 131 S. Ct. at 1219–20 (noting that Matthew Snyder's father was not a member of a captive audience at his son's funeral). In *Snyder*, Westboro members were picketing at a public area 1,000 feet away from the funeral location, and Mr. Snyder did not see more than the tops of the picketers' signs on his way to the funeral. *Id.* at 1220.

[229] *Id.*

[230] *Id.* (citing Rowan v. Post Office Dep't, 397 U.S. 728, 736–38 (1970)).

[231] *Snyder*, 131 S. Ct. at 1220 (citing Frisby v. Schultz, 487 U.S. 474, 484-85 (1988)).

[232] *Id.* at 1219–20.

[233] 18 U.S.C.A. § 1388 (West 2012); 38 U.S.C.A. § 2413 (West 2012).

[234] *Snyder*, 131 S. Ct. at 1220.

[235] *Id.* at 1218–19.

[236] *Id.* at 1219. To further illustrate its point that Westboro had been punished because of the content of its message, the Court noted that a "group of parishioners standing at the very spot where Westboro stood, holding signs that said 'God Bless America' and 'God Loves You,' would not have been subjected to liability," although Westboro would have. *Id.*

[237] 18 U.S.C. §§ 1388, 2413.

Amendment protection and cannot be restricted "simply because it is upsetting or arouses contempt."[238] The *Snyder* Court's recognition that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful" indicates that the Court could be persuaded that HAVA is an unconstitutional law designed to prohibit disfavored speech.[239]

VI. How Courts Should Analyze the Constitutionality of Funeral-Picketing Regulations

This Part will also offer suggestions for how a court should approach a challenge to HAVA, first by describing an ideal approach to evaluate the constitutionality of HAVA (with the court applying strict scrutiny and holding the funeral-picketing provisions unconstitutional), and second by explaining why, even if a court insists on applying intermediate scrutiny, the court should still find the law unconstitutional.

A. *How a Court Should Evaluate the Constitutionality of HAVA*

The Supreme Court should apply strict scrutiny to the funeral-protest provisions of HAVA[240] because the provisions are content-based speech restrictions. This section will then go through the steps of strict scrutiny, arguing why the funeral-protest restrictions should fail each step.

On a constitutional challenge to these provisions, a court should find that the law is content based and subject to strict scrutiny. The relevant funeral-protest provisions of HAVA are clearly content based because, like the laws at issue in *Strickland*,[241] *Manchester II*,[242] and *Hill*,[243] the law not only restricts speech because of its communicative properties;[244] but also applies selectively based

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[238] *Snyder*, 131 S. Ct. at 1219 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[239] *Id.* at 1219 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 574 (1995)).

[240] 18 U.S.C.A. § 1388. HAVA doubled the strength of the original federal funeral-protest law enacted in 2006. *See* 18 U.S.C. § 1388 (2006). The new funeral-protest restrictions prohibit speech that disturbs or tends to disturb "the peace or good order" of a military funeral during the time period beginning two hours before and ending two hours after the funeral and within the area 300 feet from the funeral. 18 U.S.C.A. § 1388.

[241] Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008); Ohio Rev. Code Ann. § 3767.30 (West 2012); *supra* Parts III.A.I and III.B.

[242] *Manchester II*, 697 F.3d 678, 683 (8th Cir. 2012); Mo. Ann. Stat. §§ 578.501, 578.502 (West 2006).

[243] Hill v. Colorado, 530 U.S. 703, 719 (2000); Colo. Rev. Stat. Ann. § 18-9-122(3) (West 2012).

[244] Ely, *supra* note 46, at 1497 (stating that in determining the content neutrality of a law,

on the particular message a speaker is trying to communicate.[245] Here, the law regulates speech because of its communicative properties, and the "harm" the government sought to protect by enacting HAVA (protecting mourners from offensive messages) would not arise but for the communicative value of Westboro's speech. If the signs Westboro displayed at its funeral protests had no communicative significance—for example, if Westboro members held up signs that were blank or written in an unidentifiable language—then the feared harm would not arise. Therefore, HAVA's funeral-picketing provision is content based. It is also a more extreme form of content discrimination because HAVA imposes criminal penalties on a speaker solely based on the particular content of his speech.[246] Under HAVA, a speaker intends his speech to disturb the "peace or good order" of a funeral, regardless of whether any disruption actually occurs.[247] Such a law, as the dissenters in *Hill* note,[248] criminalizes speech on the basis of its message and therefore is content based. Recogning that Westboro was being punished solely for the content of its message, the *Snyder* Court held that Westboro members could not be subject to tort liability under the circumstances.[249]

After finding that the funeral-protest regulation in HAVA[250] is content based, a court should test whether the law survives strict scrutiny analysis.[251] The court should find that the law does not survive strict scrutiny because the government does not have a "compelling interest" in protecting the privacy rights of funeral attendees. In virtually every situation, the Constitution does not permit the government to decide "which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener."[252] Rather, it is the unwilling listener or viewer's duty to avert his eyes.[253] The court, in determining the constitutionality of HAVA,[254] should follow the Supreme

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"[t]he critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.").

[245] *Supra* notes 216–19.

[246] *See Hill*, 530 U.S. at 742 (Scalia, J., dissenting) (A law is content-based when it is "the content of the speech that determines whether it is within or without the statute's blunt protection.").

[247] 18 U.S.C.A. § 1388 (West 2012).

[248] *See supra* text accompanying note 107.

[249] *See supra* Part IV.

[250] 18 U.S.C.A. § 1388.

[251] *See supra* Part I.B.

[252] Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975)).

[253] *Id.*

[254] 18 U.S.C.A. § 1388 (West 2012).

Court's example in *Snyder*[255] by declining to extend the captive audience doctrine to protect funeral attendees. Instead of adopting the most recent approaches taken by the Sixth and Eighth Circuits, the court should follow both the Supreme Court's precedent in *Frisby*, which emphasizes the special nature of the home,[256] and the District Court for the Eastern District of Missouri's approach in *Phelps-Roper v. Manchester*, which refused to recognize even a "significant" government interest in protecting funeral attendees from unwanted communication.[257] By failing to find even a significant government interest in protecting funeral attendees from unwanted communication in a public forum, the court should find the law unconstitutional because it fails to pass strict scrutiny analysis.

B. *A Secondary Approach to Evaluating the Constitutionality of HAVA*

Even if a court insists on applying intermediate scrutiny to this content-based law, the court should still find that the law is not narrowly tailored to a significant governmental interest.

If a court wrongly classifies the funeral-protest provisions of HAVA as content neutral, or insists on applying intermediate scrutiny to this content-based law, the court should still find the law unconstitutional because it fails to pass intermediate scrutiny. First, the court should follow *Snyder* and choose not to extend the captive audience doctrine to the funeral context. Second, the court should find, as the district court did in *Phelps-Roper v. Manchester*,[258] that the government does not have even a significant interest in protecting the funeral attendees from unwanted communication.[259]

Furthermore, even if the court improperly determines that the government does have a significant interest in protecting funeral attendees from unwanted communication, the law still would fail intermediate scrutiny because the law is not narrowly tailored to that "significant" government interest. The amended funeral-protest provisions in HAVA extend the buffer zone created by the 2006 version of the law from 150-feet away from the funeral service to 300-feet

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[255] *Snyder*, 131 S.Ct. at 1219–20 .

[256] Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different.") (internal citations omitted). For more discussion of Frisby, *see supra* text accompanying notes 165 and 167.

[257] Phelps-Roper v. City of Manchester, 738 F. Supp. 2d 947, 957–58 (E.D. Mo. 2010).

[258] *Id.*

[259] This does not mean that the government has no interest in protecting funeral attendees. Surely the government should be able to stop direct interferences with funeral or burial services, such as excessive noise, during or immediately before the service, or physical interruption of the service. However, the government does not have a significant interest in protecting funeral attendees to the extent that it can criminalize, through laws like HAVA, peaceful and quiet speech about a public concern directed at the funeral, the content of which could upset funeral attendees.

away from the service, and extend the time period during which the restrictions apply from the hour before and after the service to the two hours before and after the service.[260] The analysis should stop here because the 2006 version of the law is itself more speech protective and more narrowly tailored to the government's interest.[261]

VII. CONCLUSION

First Amendment jurisprudence is fragmented and often difficult to understand. Accordingly, it can be hard for speakers to know whether their speech will be protected or put them at risk for civil or criminal liability. If the Supreme Court addresses the constitutionality of funeral-picketing laws, the Court could use this opportunity to clarify this area of the law, not just in funeral-picketing cases. Adopting Ely's criteria for determining whether a law is content neutral or content based would put an end to courts divided over the content analysis of a particular law, such as the Court in *Hill v. Colorado*. If a law regulates speech because of its communicative properties, then it is clearly content based, and the court may proceed to apply the appropriate standard of review. This added clarity would improve the consistency of decisions in all cases in which speech-restrictive laws are evaluated.

The Court would also clarify the state of the law by explicitly declining to further extend the captive audience doctrine. Speakers of all varieties could speak more freely knowing exactly in which specific fora their audience would be considered "captive."

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[260] *Compare* 18 U.S.C.A. § 1388 (West 2012), with 18 U.S.C. § 1388 (2006).

[261] The Court's analysis should stop at this stage of the intermediate scrutiny review unless the government can prove that the stricter provisions in HAVA serve the government's interest substantially better than the provisions from 2006.