

Hill v. Colorado (2000)

530 U.S. 703

In 1993 Colorado enacted a statute that regulated speech-related conduct within one hundred feet of the entrance of any health-care facility. The statute made it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person without that person's consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." The statute affected abortion opponents, who previously had engaged in "sidewalk counseling" on the public ways and sidewalks outside facilities in which abortions were performed or abortion referrals occurred. The protesters sought to dissuade women from obtaining abortions through conversation, the display of signs, and the distribution of antiabortion literature. Hill and other abortion opponents filed suit in Colorado District Court, arguing that the statute restricted their First Amendment rights and seeking an injunction against its enforcement. The Colorado court dismissed their complaint, the Colorado Court of Appeals affirmed the decision, and the Colorado Supreme Court denied review. While Hill's petition for certiorari was pending before the Supreme Court, the Court decided Schenck v. Pro-Choice Network of Western New York (1997), striking down an injunction that created a speech-free "floating buffer zone" with a fifteen-foot radius. It then vacated the judgment of the Colorado Court of Appeals and remanded the case to that court for further consideration in light of Schenck. On remand, the Court of Appeals reinstated its judgment upholding the statute, and the Colorado Supreme Court affirmed the judgment. The US. Supreme Court then granted certiorari.

Opinion of the Court: Stevens, Rehnquist, O'Connor, Souter, Ginsburg, Breyer.

Concurring opinion: Souter, O'Connor, Ginsburg, Breyer.

Dissenting opinions: Scalia, Thomas; Kennedy.

JUSTICE STEVENS delivered the opinion of the Court.

The First Amendment interests of petitioners are clear and undisputed. As a preface to their legal challenge, petitioners emphasize three propositions. First, the areas protected by the statute encompass all the public ways within 100 feet of every entrance to every health care facility everywhere in the State of Colorado. There is no disagreement on this point, even though the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics. Second, their leafletting, sign displays, and oral communications are protected by the First Amendment. The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection. Third, the public sidewalks, streets, and ways affected by the statute are "quintessential" public forums for free speech. Finally, their ability to communicate effectively with persons in the regulated zones . . . unquestionably lessened by this statute.

On the other hand, petitioners do not challenge the legitimacy of the state interests that the statute is intended to serve. It is a traditional exercise of the States' "police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr* (1996). That interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. Moreover, as with every exercise of a State's

police powers, rules that provide specific guidance to enforcement authorities serve the interest in even-handed application of the law. Whether or not those interests justify the particular regulation at issue, they are unquestionably legitimate.

It is also important when conducting this interest analysis to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication. This statute deals only with the latter. The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. . . .

The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States* (1928) (Brandeis, J., dissenting). . . . The dissenters argue that we depart from precedent by recognizing a "right to avoid unpopular speech in a public forum." We, of course, are not addressing whether there is such a "right." Rather, we are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. Such cases demand delicate balancing." The dissenters, however, appear to consider recognizing any of the interests of unwilling listeners—let alone balancing those interests against the rights of speakers—to be unconstitutional. Our cases do not support this view.

All four of the state court opinions upholding the validity of this statute concluded that it is a content-neutral time, place, and manner regulation. Moreover, they all found support for their analysis in *Ward v. Rock Against Racism* (1989). As we explained in *Ward*: "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."

The Colorado statute passes that test for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech.

[T]he contention that a statute is "viewpoint based" simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support. The anti-picketing ordinance upheld in *Frisby v. Schultz* (1988), a decision in which both of today's dissenters joined, was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor to persuade him and others that they

viewed his practice of performing abortions to be murder. We nonetheless summarily concluded that the statute was content neutral.

We are likewise persuaded that the statute is "narrowly tailored" to serve [valid state] interests and that it leaves open ample alternative channels for communication. [W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.

The three types of communication regulated by [the law] are the display of signs, leafletting, and oral speech. The 8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators. In fact, the separation might actually aid the pedestrians' ability to see the signs by preventing others from surrounding them and impeding their view. Furthermore, the statute places no limitations on the number, size, text, or images of the placards. And, as with all of the restrictions, the 8-foot zone does not affect demonstrators with signs who remain in place.

With respect to oral statements, the distance certainly can make it more difficult for a speaker to be heard . . . [But] unlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a "normal conversational distance." Additionally, the statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute. . . .

The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients. The statute does not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept. And, as in all leafletting situations, pedestrians continue to be free to decline the tender. Finally, in determining whether a statute is narrowly tailored, we have noted that "[w]e must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary." States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places. For example, we have recognized the special governmental interests surrounding schools, courthouses, polling places, and private homes. Additionally, we previously have noted the unique concerns that surround health care facilities. Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.

The judgment of the Colorado Supreme Court is affirmed.

JUSTICE SOUTER, with whom JUSTICE O' CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring.

It is important to recognize that the validity of punishing some expressive conduct, and the permissibility of a time, place, or manner restriction, does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion. Draft card burners disapprove of the draft, and abortion protesters believe abortion is morally wrong. . . . There is always a correlation with subject and viewpoint when the law regulates

conduct that has become the signature of one side of a controversy. But that does not mean that every regulation of such distinctive behavior is content based as First Amendment doctrine employs that term. The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech . . . and not because of offensive behavior identified with its delivery.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court today concludes that a regulation requiring speakers on the public thoroughfares bordering medical facilities to speak from a distance of eight feet is "not a 'regulation of speech,'" but "a regulation of the places where some speech may occur," and that a regulation directed to only certain categories of speech (protest, education, and counseling) is not "content based." For these reasons, it says, the regulation is immune from the exacting scrutiny we apply to content-based suppression of speech in the public forum. The Court then determines that the regulation survives the less rigorous scrutiny afforded content-neutral time, place, and manner restrictions because it is narrowly tailored to serve a government interest—protection of citizens' "right to be let alone"—that has explicitly been disclaimed by the State, probably for the reason that, as a basis for suppressing peaceful private expression, it is patently incompatible with the guarantees of the First Amendment.

None of these remarkable conclusions should come as a surprise. . . . [T]oday's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years. Today's distortions, however, are particularly blatant. Restrictive views of the First Amendment that have been in dissent since the 1930s suddenly find themselves in the majority. "Uninhibited, robust, and wide open" debate is replaced by the power of the state to protect an unheard of "right to be let alone" on the public streets. I dissent.

JUSTICE KENNEDY, dissenting.

The Court's holding contradicts more than a half century of well-established First Amendment principles. For the first time, the Court approves a law that bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum.

The Court errs in asserting the Colorado statute is no different from laws sustained as content neutral in earlier cases. No examination of the content of a speaker's message is required to determine whether an individual is picketing, or distributing a leaflet, or impeding free access to a building. Under the Colorado enactment, however, the State must review content to determine whether a person has engaged in criminal "protest, education, or counseling." When a citizen approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer's judgment, the speaker's words stray too far toward "protest, education, or counseling"—the boundaries of which are far from clear—the officer may decide the speech has moved from the permissible to the criminal. The First Amendment does not give the government such power.

The statute is content based for an additional reason: It restricts speech on particular topics. Of course, the enactment restricts "oral protest, education, or counseling" on any subject; but a statute of broad application is not content neutral if its terms control the substance of a speaker's

message. If oral protest, education, or counseling on every subject within an 8-foot zone present a danger to the public, the statute should apply to every building entrance in the State. It does not. It applies only to a special class of locations: entrances to buildings with health care facilities. We would close our eyes to reality were we to deny that "oral protest, education, or counseling" outside the entrances to medical facilities concern a narrow range of topics—indeed, one topic in particular. By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content. . . .

After the Court errs in finding the statute content neutral, it compounds the mistake by finding the law viewpoint neutral. Viewpoint-based rules are invidious speech restrictions, yet the Court approves this one. The purpose and design of the statute—as everyone ought to know and as its own defenders urge in attempted justification—are to restrict speakers on one side of the debate: those who protest abortions. The statute applies only to medical facilities, a convenient yet obvious mask for the legislature's true purpose and for the prohibition's true effect. One need read no further than the statute's preamble to remove any doubt about the question. The Colorado Legislature sought to restrict "a person's right to protest or counsel against certain medical procedures." The word "against" reveals the legislature's desire to restrict discourse on one side of the issue regarding "certain medical procedures." The testimony to the Colorado Legislature consisted, almost in its entirety, of debates and controversies with respect to abortion. . . . The legislature's purpose to restrict unpopular speech should be beyond dispute.

The Court's lack of concern with the statute's flaws is explained in part by its disregard of the importance of free discourse and the exchange of ideas in a traditional public forum. The Colorado law does not seek to protect private residences. Nor does the enactment impose a place restriction upon expressive activity undertaken on property, such as fairgrounds, designated for limited, special purposes. The statute applies to public streets and sidewalks, traditional public fora which "'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Given our traditions with respect to open discussion in public fora, this statute, which sweeps so largely on First Amendment freedoms, cannot be sustained.

Petitioners commenced the present suit to challenge a statute preventing them from expressing their views on abortion through the same peaceful and vital methods approved in [the Court's prior cases]. Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against. Absent the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause. In a free society, protest serves to produce stability, not to undermine it. The means of expression at stake here are of controlling importance. Citizens desiring to impart messages to women considering abortions likely do not have resources to use the mainstream media for their message, much less resources to locate women contemplating the option of abortion. Lacking the aid of the government or the media, they seek to resort to the time-honored method of leafleting and the display of signs. Nowhere is the speech more important than at the time and place where the act is about to occur. As the named plaintiff, Leila Jeanne Hill, explained, "I engage in a variety of activities designed to impart information to abortion-bound women and their friends and families. . . . In my many

years of sidewalk counseling I have seen a number of [these] women change their minds about aborting their unborn children as a result of my sidewalk counseling, and God's grace."

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