Free Speech vs Abortion

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- Why does the Supreme Court go gaga just about every time abortion comes before them.
- Coalition Life sued the city of Carbondale, Illinois, claiming a the city violated their rights protected by the First Amendment.
- This time, the Supreme Court wouldn't even take the case.

Free speech jurisprudence has rested on shaky ground for decades in this country. Looking back at cases like Hill v. Colorado, Austin v. Reagan National Advertising of Austin, and Dobbs v. Jackson Women's Health have left a confusing and contradictory morass of precedence, most if not all of it contradicting the Constitution of the United States. With the recent case Coalition Life v. City of Carbondale, Illinois, the court had the opportunity to set the record straight once and for all. Instead, the court whiffed, and declined to even hear the case.

Background

As always, the best place to start is at the beginning.

Petitioner Coalition Life is a Missouri nonprofit that organizes sidewalk counselors to counsel, educate, pray, display signs, and distribute literature outside abortion clinics. Their goal is to engage in "one-on-one conversation in a calm, intimate manner," as they find that approach most effective. Complaint in No. 3:23–cv–1651, p. 3, ¶10. The

organization prohibits its counselors from engaging in intimidating or threatening behavior.

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Sounds like a simple example of exercising the right to peaceably assemble to me, but if it were that simple, I wouldn't be writing about it here.

Until the passage of Ordinance No. 2023–03, Coalition Life counselors engaged in sidewalk counseling outside abortion facilities in Carbondale. But, the new ordinance "severely hinder[ed]" their ability to do so. Id., at 11, ¶48. The newly enacted 100-foot buffer zone meant that Coalition Life counselors were forced to stand far away from those with whom they wished to speak. In some cases, sidewalk counselors had nowhere to stand but in the middle of busy roads, rendering intimate counseling activities effectively impossible.

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Imagine being told that you cannot come within 100 feet of a location simply because you disagree with its stated purpose and wish to discuss that fact with their customers. Again, we aren't talking about intimidating behavior, that was prohibited by Coalition Life. And if someone prevented someone from entering said business, I believe that would be criminal as well. But according to the complaint, none of that ever happened with members of Coalition Life.

Coalition Life sued the city of Carbondale, alleging, among other things, that the ordinance violates the First Amendment.

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Problem number one for Coalition Life, is this ordinance cannot violate the First Amendment because it wasn't passed by Congress. The First Amendment reads…

Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,…

U.S. Constitution, Amendment I

Since Congress didn't make this law, it cannot violate the First Amendment, but that doesn't mean the act was constitutional.

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty;

Colo. Const. Art. II, Section 10

Since this is a violation of the state Constitution, it's not within the jurisdiction of the federal judiciary. However, that isn't the only violation of the United States Constitution.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV, Section 1

Since Colorado made and enforced a law that abridged the right of freedom of speech, and deprived people of the liberty to engage in conversation with others without due process, it is a clear violation of of the Fourteenth Amendment.

The complaint may have mentioned other violations, but it appears only the First Amendment question was brought to the court.

Needless to say, the city of Carbondale wanted this suit to go away.

When Carbondale moved to dismiss the suit under Hill, Coalition Life responded that over the years Hill has been eroded, but it nevertheless conceded that its claims were foreclosed insofar as Hill remains good law.

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When the city moved to dismiss the suit, they pointed to a Supreme Court decision known as Hill v. Colorado. This leads us to the second problem with for Coalition Life's case: The belief that the previous decision of the court is "law." It is not. Hill is precedent, showing how the court had previously decided a similar case. The importance of this will become evident as we get into the dissent.

The District Court dismissed the suit on the ground that Hill and binding Seventh Circuit precedent controlled. Coalition for Life St. Louis v. Carbondale, 2023 WL 4681685, *1 (SD Ill., July 6, 2023). The Seventh Circuit affirmed on the same ground, acknowledging the plaintiffs' assertion that Carbondale's buffer zone was "'modeled after and nearly identical'" to the one upheld in Hill. 2024 WL 1008591, *1 (Mar. 8, 2024). Because Hill was the exclusive basis for both decisions below, this case clearly and cleanly presents the question of Hill's viability.

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So this whole case was decided because it matched the case Hill v. Colorado, but was that case rightly decided?

Thomas Dissent

This history of this particular violation of people's rights goes back to the Hill case from the year 2000.

In Hill v. Colorado, 530 U. S. 703 (2000), this Court upheld a state law restricting peaceful speech within 100 feet of abortion clinics.

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What made this law restricting free speech special? Why did the Hill court uphold the law?

Hill's abortion exceptionalism turned the First Amendment upside down. As Hill's author once explained, the First Amendment reflects a "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" NAACP v. Claiborne Hardware Co., 458 U. S. 886, 913 (1982) (majority opinion of Stevens, J.). That principle applies with perhaps its greatest force to speech that society finds "offensive" or "disagreeable." Texas v. Johnson, 491 U. S. 397, 414 (1989). Yet, Hill manipulated this Court's First Amendment jurisprudence precisely to disfavor "opponents of abortion" and their "right to persuade women contemplating abortion that what they are doing is wrong."

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Justice Thomas makes a couple of very important points. The court has used abortion as an excuse to ignore not only the First Amendment, but their oaths and duty as justices. As the author of the Hill opinion, Justice Stevens I believe, wrote, the First Amendment reflects a profound national commitment to debate on public issues. Yet the Hill court, along with the District and Circuit courts in this case, ignored that commitment, apparently for one reason and one reason only: To stifle debate about abortion.

To be sure, this Court has not uttered the phrase "we overrule Hill." For that reason, some lower courts have felt compelled to uphold Hill-like buffer zones around abortion clinics. See, e.g., Vitagliano v. County of Westchester, 71 F. 4th 130, 141 (CA2 2023). This case is another prime example of that trend, and "[o]ne can hardly blame [lower courts] for misunderstanding" when "[w]e [have] created . . .

confusion." Gee v. Planned Parenthood of Gulf Coast, Inc., 586 U. S. 1057, 1059 (2018) (THOMAS, J., dissenting from denial of certiorari). We are responsible for resolving that confusion, and we should have done so here.

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In 2000, the State of Colorado passed a law intentionally restricting speech. While this may seem to be an obvious constitutional violation, the Hill court got it wrong.

It was clear at the time that Hill's reasoning "contradict[ed] more than a half century of well-established First Amendment principles." Id., at 765 (Kennedy, J., dissenting); see also id., at 742 (Scalia, J., joined by THOMAS, J., dissenting). A number of us have since described the decision as an "absurd," "defunct," "erroneous," and "long-discredited" "aberration" from the rest of our First Amendment jurisprudence.

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However, it wasn't just the Hill court that got the First Amendment wrong, but Justice Thomas.

We have long stopped applying Hill. See, e.g., City of Austin, 596 U. S., at 76. And, a majority of this Court recently acknowledged that Hill "distorted [our] First Amendment doctrines." Dobbs v. Jackson Women's Health Organization, 597 U. S. 215, 287, and n. 65 (2022).

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It seems the court long ago saw a problem with their Hill precedent, specifically distorting their First Amendment doctrine. Did you notice that? Justice Thomas didn't say that Hill distorted the First Amendment, but the courts' doctrines did. That arrogance did not end there.

Following our repudiation in Dobbs, I do not see what is left

of Hill. Yet, lower courts continue to feel bound by it. The Court today declines an invitation to set the record straight on Hill's defunct status. I respectfully dissent.

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Don't get me wrong, I agree with Justice Thomas that the court should have taken the case, but not for the same reason. He appears to want to establish a new precedent, while I want to restore the Constitution to its rightful place as the supreme law of the land.

Thomas' Justification

When Coalition Life petitioned for their writ, the court declined to hear the case. Justice Alito said he would grant the petition, but Justice Thomas issued a dissent. Let's look at Thomas' view on Hill in more detail.

Hill involved a 1993 Colorado statute that established "buffer zones" around abortion clinics. The law made it a crime for any person, within 100 feet of any "health-care facility" entrance, to "knowingly approach" within 8 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." Colo. Rev. Stat. §18–9–122(3) (2024). Put another way, Colorado's law—still in effect today—prohibits unconsented "sidewalk counseling" within 100 feet of abortion clinics.

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Colorado enacted what is commonly called a "buffer-zone" law. Actually this is a double-buffer, since within the 100 ft buffer of a health-care facility you are not allowed within the eight foot buffer of someone else, but only if you wished to exchange information.

Shortly after the law's enactment, a group of self-described sidewalk counselors who sought to peacefully "educate" and "counsel" "passersby about abortion and abortion alternatives" challenged the law under the First Amendment. Hill, 530 U. S., at 708, 710 (internal quotation marks omitted). This Court upheld the law as a content-neutral time, place, and manner restriction.

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This is one of the free speech violations that courts have adopted. As I pointed out, the Constitution of Colorado protects freedom of speech. Yes, you can be held accountable for the abuse of that right, but how is approaching someone to engage in that right abuse? The real question that should be asked is: Who has the responsibility to stop someone's speech? Imagine if freedom of speech everywhere was treated the same way as Colorado treats it around health-care facilities. "Excuse me, is it OK if I wave and say hello to you?" "Do I have your permission to return the set of keys you just dropped?" "I'm sorry, is it OK if I drive past you with a sign on my truck?" But the court claimed that the state could abridge the freedom of speech as long as it wasn't based on the content of that speech.

Hill's errors were numerous. Whether Colorado's law applies to a given speaker undeniably turns on "what he intends to say." Id., at 742 (Scalia, J., dissenting) (emphasis in original). "A speaker wishing to approach another for the purpose of communicating any message except one of protest, education, or counseling may do so without first securing the other's consent." Ibid. Nevertheless, the Court deemed the law content neutral on the theory that it does not prohibit a particular viewpoint or a particular subject matter. Id., at 723. But, this Court had never—and since Hill, has never—taken such a narrow view of content-based speech restrictions. Buffer zones like the one at issue in Hill are "obviously and undeniably content based." Id., at 742 (Scalia, J.,

dissenting); accord, id., at 767 (Kennedy, J., dissenting).

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Which brings us to the idea of content based discrimination. It's one thing to establish rules for conduct in public areas that are content neutral. The use of bullhorns or demonstrations that obstruct traffic, for example, but that is not what the Colorado law did. Rather, it determined that if the content was "oral protest, education, or counseling" and if that content was expressed outside of a "healthcare facility," that speech was restricted.

Justice Scalia could identify only one explanation for the majority's anomalous decision: "[T]he jurisprudence of this Court has a way of changing when abortion is involved." Id., at 742. Hill reflects "the 'ad hoc nullification machine'" that this Court "set[s] in motion to push aside whatever doctrines" happen to "stand in the way" of abortion.

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Yes, this was content-based restrictions on free speech. If the content was pro-abortion, no problem, but if it was anti-abortion, Colorado wanted to censor it, at least outside "health-care facilities," which was generally used as a euphemism for abortions clinics.

Conclusion

As Justice Thomas noted, at the court things change when abortion is in the mix. What we have here is another case of courts placing their opinions above the supreme law of the land.

This Court has received a number of invitations to make clear that Hill lacks continuing force. Some of those invitations have arisen in cases with thorny preliminary issues or other obstacles to our review. See, e.g., Bruni, 592 U. S. ___

(opinion of THOMAS, J.). But, no such obstacles are present here. It is undisputed that Carbondale's ordinance is identical to Colorado's law in all material respects. It is likewise undisputed that both the District Court and the Seventh Circuit dismissed Coalition Life's suit exclusively on the ground that those courts felt bound by Hill. This case would have allowed us to provide needed clarity to lower courts.

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I guess I'd call that a swing and a miss. Once again the court had a chance to fix a mistake from a previous court and didn't. In Dobbs they fixed their decision in Roe, but here they failed to fix their mistake in Hill.

Hill has been seriously undermined, if not completely eroded, and our refusal to provide clarity is an abdication of our judicial duty. "We are responsible for the confusion among the lower courts, and it is our job to fix it." Gee, 586 U. S., at 1059 (opinion of THOMAS, J.). I would have taken this opportunity to explicitly overrule Hill. For now, we leave lower courts to sort out what, if anything, is left of Hill's reasoning, all while constitutional rights hang in the balance. I respectfully dissent.

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Yes, the Supreme Court has failed to "provide clarity" in regard to their previous decision, but the fault is not all theirs. After all, the judges in the District and Circuit courts took oaths to support and defend the Constitution of the United States, not the opinions of other judges. If either of those courts in this case had bothered to look beyond precedent, they may have seen the Fourteenth Amendment violation. Since our law schools apparently do not teach the Constitution, placing precedent as their primary concern, it's not really a surprise that the product of their education is

so flawed. Perhaps one day we'll find someone who will bring a truly constitutional argument to a case like this. Who knows, maybe such a well founded argument could even turn the heads of the justices of the Supreme Court. We can always hope and work toward that day.

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